In the Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

JOHN PIRTLE, *Respondent, et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may grant habeas corpus relief to a state prisoner based on its view that the state court erred in applying the state-law standard of evidentiary sufficiency governing state parole decisions.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, James Hartley, the Warden at Avenal State Prison, has custody over respondent Anthony Sneed and replaces the prior warden who had custody of Sneed and who was an appellee in the court of appeals.

Robert Johnson, Anthony Sneed, and Ron Mosley were appellants in the court of appeals.

Michael Slater was an appellee in the court of appeals.

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Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, and James Hartley, the Warden at Avenal State Prison, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.[1]

OPINIONS AND JUDGMENTS BELOW

1. The opinion of the Ninth Circuit Court of Appeals, affirming the grant of habeas relief to respondent John Pirtle and requiring the California Board of Prison Terms[2] to set a parole date, is reported as *Pirtle* v. *California Board of Prison Terms*, 611 F.3d 1015 (9th Cir. 2010). The decision of the United States District Court for the Eastern District of California, granting habeas corpus relief, is unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Board's denial of parole, are unreported.

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[1] Respondents Pirtle, Johnson, and Mosley are currently in Secretary Cate's constructive custody. Therefore, Secretary Cate, rather than the wardens who had custody during the pendency of the underlying litigation, is named as a petitioner.

Respondent Slater, as a result of this litigation, is no longer in the physical or constructive custody of the California Department of Corrections and Rehabilitation; Secretary Cate, however, is the state official serving as a petitioner in this matter.

Respondent Sneed is in Warden Hartley's custody. Therefore, Warden Hartley, rather than the warden who had custody during the underlying proceedings, is named as a petitioner.

[2] In 2005, the Board of Prison Terms was renamed the Board of Parole Hearings. Cal. Penal Code § 5075(a).

2. The memorandum decision of the Ninth Circuit Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Robert Johnson the writ of habeas corpus, is unreported. The decision of the United States District Court for the Eastern District of California, denying habeas corpus relief, is also unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Governor's denial of parole, are unreported.

3. The memorandum decision of the Ninth Circuit Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Anthony Sneed the writ of habeas corpus, is unreported. The decision of the United States District Court for the Northern District of California, denying habeas corpus relief, is also unreported. The ruling of the California Supreme Court, denying state habeas corpus relief and upholding the Governor's denial of parole, is unreported.

4. The memorandum decision of the Ninth Circuit Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Ron Mosley the writ of habeas corpus, is unreported. The decision of the United States District Court for the Northern District of California, denying habeas corpus relief, is also unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Governor's denial of parole, are unreported.

5. The memorandum decision of the Ninth Circuit Court of Appeals, affirming the judgment of the district court granting respondent Michael Slater the writ of habeas corpus, is unreported. The decision of the United States District Court for the Eastern District of California is also unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Board's denial of parole, are unreported.

6. Each is reproduced in the Appendix. App. 1a, 21a-23a, 35a, 84a, 92a, 108a, 110a, 145a-146a, 149a, 164a, 167a, 183a, 195a, 202a, 218a-221a, 240a, 257a, 298a-302a.

STATEMENT OF JURISDICTION

1. As to respondent Pirtle, the court of appeals filed its opinion on July 12, 2010, and simultaneously issued the mandate. App. 1a, 26a. On October 20, 2010, the court denied the State's timely petition for rehearing and rehearing en banc. App. 27a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

2. As to respondent Johnson, the judgment of the court of appeals was filed on September 3, 2010. App. 92a. On October 20, 2010, the court denied the State's timely petition for rehearing and rehearing en banc. App. 90a-91a. The court issued its mandate on December 20, 2010. App. 87a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

3. As to respondent Sneed, the judgment of the court of appeals was filed on August 2, 2010. App. 164a. On November 12, 2010, the court denied the State's timely petition for rehearing and rehearing en

banc. App. 163a. The court issued its mandate on November 22, 2010. App. 162a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

4. As to respondent Mosley, the judgment of the court of appeals was filed on November 24, 2010. App. 195a. The court granted the State's request to stay the mandate to allow the filing of a petition for writ of certiorari. App. 191a-192a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

5. As to respondent Slater, the judgment of the court of appeals was filed on October 20, 2010. App. 240a. The court issued its mandate on November 12, 2010. App. 239a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of

the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Introduction

In the five cases involved in this consolidated petition, the Ninth Circuit found insufficient evidence of current dangerousness, under the state-law sufficiency-of-evidence standard, to support the denial of parole to the five respondents. Accordingly, the question presented in this consolidated petition is the same, and arises in the same kind of circumstances, as that raised by the State in the pending consolidated petition for writ of certiorari in *Swarthout* v. *Cooke* and *Cate* v. *Clay*, No. 10-333. That petition was originally scheduled for this Court's conference on December 10, 2010, and has not yet been relisted for another conference. The State's arguments for granting certiorari in this case largely track the State's arguments as presented in the *Cooke* and *Clay* briefing.

Legal Background

In *In re Rosenkrantz*, 29 Cal. 4th 616 (2002), and *In re Dannenberg*, 34 Cal. 4th 1061 (2005), the California Supreme Court held, as a matter of state law, that state courts may review, for "some evidence," decisions rendered by the Governor or the Board denying parole to state prisoners sentenced to prison for life. Later, in *In re Lawrence*, 44 Cal. 4th 1181 (2008), and *In re Shaputis*, 44 Cal. 4th 1241 (2008), the California Supreme Court further explained, again under state law, that "the standard of review properly is characterized as whether 'some

evidence' supports the conclusion that the inmate is unsuitable for parole because *he or she currently is dangerous*." 44 Cal. 4th at 1191 (emphasis added); see also 44 Cal. 4th at 1254. Next, in *Hayward* v. *Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), the Ninth Circuit held that, in light of *Lawrence* and *Shaputis*, the federal habeas court may review, under 28 U.S.C. § 2254, "whether the California judicial decision approving the [parole authority's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'" *Hayward*, 603 F.3d at 563. The Ninth Circuit subsequently reiterated that federal courts must apply California's state standard of judicial review for some-evidence on federal habeas review. *Cooke* v. *Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010), *petition for cert. filed*, (No. 10-333); *Pearson* v. *Muntz*, 625 F.3d 539, 546 (9th Cir. 2010); *Pirtle*, 611 F.3d at 1020; *McCullough* v. *Kane*, ___ F.3d ___, 2010 WL 5263140, *3-4 (9th Cir. Dec. 27, 2010).

Respondent Pirtle's Case

1. *State Parole Proceedings*

Respondent Pirtle was sentenced in a California court to an indeterminate term of seventeen years to life in state prison for the second-degree murder of his wife. That sentence was enhanced because Pirtle had used a firearm during the murder. In 2002, the Board concluded that Pirtle was not suitable for parole and that his release would pose an unreasonable risk of danger to society. The Board based its decision on Pirtle's commitment offense, his failure to curb his criminal behavior after previous

jail terms, his escalating pattern of domestic violence towards his wife, his lack of substance-abuse programming even though alcohol had played a role in the murder and in his previous criminal convictions, and his failure to upgrade vocationally despite earlier recommendations by the Board to do so. App. 29a-34a.

2. *State Court Proceedings*

Pirtle filed a petition for writ of habeas corpus in the state superior court, challenging the Board's 2002 decision. App. 23a-24a. The superior court denied the petition, stating that "[i]ssues resolved on appeal cannot be reconsidered on habeas corpus." App. 24a.

Pirtle filed a petition for writ of habeas corpus in the California Court of Appeal. The court summarily denied the petition. App. 22a.

Pirtle then filed a petition for direct appellate review in the California Supreme Court. Pirtle argued that the Board's decision was arbitrary and capricious and violated his federal right to due process. App. 21a. The court asked for and received briefing on the merits of Pirtle's claims. App. 86a. The court summarily denied the petition. App. 21a.

3. *Federal Habeas Corpus Proceedings*

a. Respondent Pirtle next filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254. It challenged the Board's denial of parole on the grounds that the state courts had violated his constitutional rights in their application of the state "some-evidence" standard and further alleged that the Board had violated his due process rights in various other ways. App. 35a. Purportedly invoking

the deferential-review standard of 28 U.S.C. § 2254(d), the district court granted the petition. The court posited that constitutional due process required that the parole decision comport with the state-law "some evidence of current dangerousness" standard. But, the court concluded, no evidence of current dangerousness supported the Board's decision. App. 35a-80a.

b. In a published opinion authored by Judge Reinhardt, a three-judge panel of the Ninth Circuit affirmed. App. 1a. First, the panel held that the deferential-review standard of 28 U.S.C. § 2254(d) did not apply because the state courts had not adjudicated the merits of Pirtle's claim. App. 8a-9a. The panel reasoned that, under the so-called "look through" doctrine of *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), the California Supreme Court and the Court of Appeal's unexplained summary denials of Pirtle's petitions should be deemed to rest on the same ground as that cited by the superior court in its explained ruling denying Pirtle's claim. The superior court had explained that Pirtle had forfeited his claim under state procedural law. Therefore, the Ninth Circuit panel concluded, the state courts never reached and adjudicated the merits of the claim so as to trigger § 2254(d) deference. App. 9a.

Next, the panel asserted that California's parole scheme gives prisoners a "liberty interest" in parole release, and that the "liberty interest encompasses the state-created requirement that a parole decision must be supported by 'some evidence' of current dangerousness." App. 9a. The panel then independently examined each of the Board's stated reasons for denying Pirtle parole under the Board's regulations, and found each of them wanting. App. 9a-20a.

For example, the panel rejected the Board's concerns regarding Pirtle's mindset in shooting his wife, suggesting that his feelings of jealously and betrayal were understandable because he had watched "his intoxicated wife dance with another man at a bar" and because such motives were common in "literature and song," including Shakespeare's Othello. App. 13a. Although the Board had recognized that Pirtle's prior terms of incarceration in jail for misdemeanor and felony convictions had not deterred him from committing murder, the Ninth Circuit panel second-guessed the Board's view of those crimes and deemed them to be inconsequential. App. 14a. Similarly, the panel minimized the Board's concerns regarding Pirtle's numerous and escalating incidents of domestic violence towards his wife; it suggested that a "tumultuous relationship with a wife who engaged in multiple extra-marital affairs does not support a finding of an unstable social history." App. 15a. The Ninth Circuit panel also discounted the Board's determination that Pirtle needed additional substance-abuse programming; instead, it accepted at face value Pirtle's professed commitment to abstain from alcohol. App. 15a-17a. Based on this re-consideration of the evidence, the panel found that the "Board's stated reasons for the denial of parole either lacked evidentiary support, had no rational relationship to Pirtle's current dangerousness, or both." App. 19a.

The panel approved the district court's remedy of requiring the Board to set a release date within thirty days. App. 20a. Under compulsion of the panel's order, the Board set a release date for Pirtle.

And, on August 27, 2010, the district court ordered Pirtle's release to state-supervised parole. App. 82a.

Respondent Johnson's Case

1. *State Parole Proceedings*

Respondent Johnson was sentenced in California to seven years to life in prison after he pled guilty to first-degree murder. In 2001, the Board found Johnson suitable for parole. The Governor, however, exercised his right to review the Board's decision and on December 13, 2001, found Johnson unsuitable for parole. App. 156a. The Governor cited Johnson's commitment offense, unstable social history, and failure to take full responsibility for his crime. App. 156a-160a.

2. *State Court Proceedings*

Johnson filed a petition for writ of habeas corpus in the state superior court. He claimed, among other things, that his federal due process rights were violated because the Governor's decision was unsupported by the record. After recounting the evidence on which the Governor had relied, the court concluded that the Governor had provided Johnson individualized consideration and that "some evidence" supported the Governor's decision. App. 149a-155a.

Johnson filed a petition for writ of habeas corpus in the California Court of Appeal. The court denied his petition after concluding that Johnson's crime provided some evidence supporting the denial of parole. App. 146a-148a. Johnson then filed a

petition in the California Supreme Court, which was summarily denied. App. 145a.

3. *Federal Habeas Corpus Proceedings*

a. Johnson next filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging the Governor's denial of parole on the grounds that the decision was not supported by the record and there was no evidence that Johnson remained a danger to society. The district court denied the petition, concluding that Johnson's due process rights were satisfied because some evidence supported the Governor's decision. In the court's view, the aggravating factors of the commitment offense went beyond the minimum elements necessary to sustain the conviction, and suggested that Johnson remained a danger to public safety. App. 108a-114a.

b. In an unpublished memorandum decision, a three-judge panel of the Ninth Circuit reversed. App. 92a-96a. Relying exclusively on Ninth Circuit authority and state law, the panel concluded that, when a state court denies habeas relief to a state prisoner who was denied parole solely because of the circumstances of his commitment offense, the prisoner is entitled to a writ of habeas corpus on the ground that "the state court decision was based on an unreasonable determination of the facts in light of the evidence." App. 94a. The panel then concluded that the Governor's similar reliance on circumstances of the commitment offense "cannot, standing alone, constitute the requisite evidence of current dangerousness." App. 94a (citing *Cooke*, 606 F.3d at 1216). The court discounted the Governor's two remaining reasons for denial of parole—Johnson's unstable social history and his failure to take full

responsibility for his role in the murder—saying that, to the extent they were supported by the record, they were insufficient to provide some evidence of current dangerousness. App. 94a-96a.

c. The State's petition for rehearing and rehearing en banc was denied. App. 90a. In response to the State's motion to stay the mandate, the Ninth Circuit temporarily stayed the mandate and remanded the case back to the district court to set conditions for Johnson's release. App. 88a. The district court did so and on December 6, 2010, Johnson was released from prison and ordered to report to federal pretrial services. App. 97a.

Respondent Sneed's Case

1. *State Parole Proceedings*

Respondent Sneed was sentenced in California to a prison term of twenty-six years to life with the possibility of parole based on a conviction for first-degree murder, assault with a deadly weapon, and shooting at an inhabited dwelling. In 2004, the Board found Sneed suitable for parole. The Governor, however, exercised his right to review the Board's decision and, on December 18, 2004, found Sneed unsuitable for parole. App. 185a. The Governor cited the cruel and callous nature of Sneed's murder, the fact that multiple victims were shot in the commitment offense, and the inexplicable motive for the murder. App. 185a-190a.

2. *State Court Proceedings*

Sneed filed a petition for writ of habeas corpus in the California Supreme Court. He argued that he was denied due process because the Governor's

decision was not supported by some evidence. The court summarily denied the petition. App. 183a.

3. *Federal Habeas Corpus Proceedings*

a. Sneed next filed a federal petition for writ of habeas corpus alleging, among other things, that his due process rights were violated because the Governor's decision had not been supported by "some evidence." The district court conducted an independent review of the record and determined that the factors cited by the Governor provided some evidence to support the Governor's decision. The court denied the petition. App. 167a-182a.

b. In an unpublished memorandum decision, a three-judge panel of the Ninth Circuit reversed the district court's judgment and remanded the matter with instructions to grant the writ. With no further explanation, the panel stated that,

> [a]n independent review of the record reveals that the state court unreasonably concluded that some evidence supported the Governor's decision. *See* 28 U.S.C. § 2254(d); *Cooke v. Solis*, 606 F.3d 1206, 1216 (9th Cir. 2010); *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *see also Hayward v. Marshall*, 603 F.3d 546, 562 (9th Cir. 2010) (en banc) ("The prisoner's aggravated offense does not establish current dangerousness 'unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state' supports the inference of

dangerousness.") (quoting *In re Lawrence*, 190 P. 3d 535, 555 (Cal. 2008)).
App. 165a.

c. On December 1, 2010, the district court granted the writ, reinstated the Board's 2004 parole grant, and ordered the State to inform the court of Sneed's release date by January 21, 2011.

Respondent Mosley's Case

1. *State Parole Proceedings*

Respondent Ron Mosley was sentenced in California to fifteen years to life in prison after he pled guilty to second-degree murder. In 2004, the Board found Mosley suitable for parole. On March 15, 2005, the Governor exercised his right to review the Board's decision and he found Mosley unsuitable for release on parole. App. 223a. The Governor based his decision on Mosley's misconduct in prison, his history of substance abuse, and the underlying crime itself. App. 223a-227a.

2. *State Court Proceedings*

Mosley filed a petition for writ of habeas corpus in the state superior court challenging the Governor's decision on various grounds, including an allegation that it was not supported by some evidence. According to the court, Mosley's "own recitation of the Governor's stated reasons for reversal of the Parole Board demonstrates that the decision is not arbitrary or capricious and that it is supported by some evidence." App. 220a-221a. The court rejected Mosley's claims by noting that it "cannot order what the law does not provide, namely that the Governor

may not disagree with the Parole Board on the basis of a different view of the same record. In fact, he has authority to do that and apparently has done it." App. 221a.

Mosley filed a petition for writ of habeas corpus in the California Court of Appeal. The court summarily denied the petition. App. 219a. Mosley then filed a petition for review in the California Supreme Court. The court summarily denied the petition. App. 218a.

3. *Federal Habeas Corpus Proceedings*

a. Mosley next filed a petition for writ of habeas corpus in the federal district court. The court denied that petition after concluding that the Governor's decision was supported by some evidence. The district court found that the Governor had properly relied on Mosley's past drug and alcohol use and his disciplinary record and that some evidence supported the Governor's conclusions. The district court also rejected Mosley's claim that reliance on his commitment offense violated due process; it noted that the plain language of California's parole statute permits the Board and the Governor to rely on the crime. The district court further found that Mosley's commitment offense was "especially heinous" because it was premeditated, demonstrated extreme dispassion and callousness, and had been committed for a trivial motive—and that this combination of factors provided some evidence that Mosley was unsuitable for parole and his release would pose an unreasonable public safety risk. Ultimately the district court concluded that "[t]he Governor's determination is neither an unreasonable determination of the facts in light of the evidence

presented, nor a decision that is contrary to or an unreasonable application of federal law." App. 202a-217a.

b. In an unpublished memorandum decision, a three-judge panel of the Ninth Circuit reversed the district court and remanded the matter to the district court with directions to grant the writ, vacate the Governor's decision, and reinstate the Board's February 2005 grant. App. 195a-199a. The court determined that the state courts' denial of habeas relief amounted to an unreasonable application of California's some-evidence standard of review. According to the court, Mosley's crime, his history of substance abuse, a past incident of aggression, and his prison disciplinary record—the factors that the Governor relied on—were not evidence of future dangerousness.

Although rendering this ruling, the panel made the following comment: "The question remains whether the state determination is contrary to federal law, *Wilson v. Corcoran*, No. 10-91, ___ U.S. ___, [131 S. Ct. 13] 2010 WL 4394137, at *2 (U.S. Nov. 8, 2010) (per curiam), but *Hayward* prescribes how we are to decide this." App. 197a.

c. The State's motion to stay the mandate pending the filing of a petition for writ of certiorari was granted. Mosley, however, had filed a motion for release pending appeal, which the Ninth Circuit remanded to the district court. App. 193a-194a. On December 21, 2010, the district court ordered Mosley released to federal pretrial supervision. App. 228a-238a.

Respondent Slater's Case

1. *State Parole Proceedings*

Slater was sentenced in California to a term of seventeen years to life following his conviction for second-degree murder with the use of a firearm. In 2005, the Board denied Slater parole based on the nature of his commitment offense, and his escalating criminal history, which involved drug related crimes. The Board also noted a prison disciplinary action that Slater received when he failed to correct his behavior after being counseled twice for misconduct. App. 303a-309a.

2. *State Court Proceedings*

Slater filed a petition for writ of habeas corpus in the state superior court, alleging that the Board's decision violated his due process rights because it lacked evidentiary support. The court denied the petition after concluding that the murder constituted some evidence that Slater "continues to pose a risk of danger to society." App. 300a-302a. Slater filed petitions in the California Court of Appeal and the California Supreme Court. Both petitions were summarily denied. App. 298a-299a.

3. *Federal Habeas Corpus Proceedings*

a. Slater filed a petition for writ of habeas corpus in the district court under 28 U.S.C. § 2254. He alleged that the Board's decision was not supported by some evidence. The district court granted Slater's petition and ordered the Board to find Slater suitable for parole unless there were new facts demonstrating

unsuitability; to calculate his release date; and to credit his parole term if the calculated release date preceded the parole hearing date. App. 257a-268a.

b. The State's request for a stay of the order was denied by both the district court and the Ninth Circuit. App. 245a-246a. Thus, under compulsion of the court order, the Board found Slater suitable for parole, calculated a term, and credited his parole period as if he had been found suitable at the 2005 parole hearing. Slater was released from prison on January 14, 2010. Further, because of the requirement to credit his parole period, he was also discharged from parole.

c. In a two-to-one unpublished memorandum decision, a Ninth Circuit panel affirmed the district court's judgment. The majority stated that, "[i]n a series of recent cases, we have rejected the State's argument that the Antiterrorism and Effective Death Penalty Act of 1996 precludes relief on Petitioner's claim because California's 'some evidence' requirement is not 'clearly established federal law.' Hayward v. Marshall, 603 F.3d 546, 563 (9th Cir. 2010) (en banc); Cooke v. Solis, 606 F.3d 1206, 1213 (9th Cir. 2010); Pearson v. Muntz, 606 F.3d 606, 608-09 (9th Cir. 2010) (per curiam)." App. 241a. Concluding that the State did not argue that the Board's decision was in fact supported by some evidence, the court declined to consider that question. App. 242a.

d. Judge Kleinfeld dissented. He criticized the Ninth Circuit's expansion of *Hayward*:

> The district court's grant of the writ was based on a line of reasoning that was rejected by our court earlier this year in Hayward v. Marshall, 603 F.3d 546, 559–61 (9th Cir. 2010) (en banc). The recent

> applications of Hayward in Pearson v. Muntz, 606 F. 3d 606 (9th Cir. 2010) (per curiam), and Cooke v. Solis, 606 F.3d 1206 (9th Cir. 2010), do not purport to overrule Hayward, nor could they, since they are not en banc. Hayward did "not decide whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future dangerousness." Hayward, 603 F.3d at 562. It cannot be read to allow for us to become something akin to a state parole board or appellate court. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1–2); Estelle v. McGuire, 502 U.S. 68, 72 (1991).

Judge Kleinfeld's dissent concluded that, "[t]here is no showing that California violated the holdings of the Supreme Court, or made an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(d)(1–2); Hayward, 603 F.3d at 559–61." App. 244a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions raise profound issues of comity and habeas corpus jurisdiction. In interfering on the substantive question of a prisoner's suitability for parole, the Ninth Circuit's decisions strike at the heart of the State's special police powers.

Further, in arriving at its indefensible decision to second-guess the State parole decisions, the Ninth Circuit violated any number of federalism principles. In second-guessing the state courts on their application of the *Rosenkrantz/Lawrence* "some

evidence" test, the Ninth Circuit invaded the exclusive province of the state judiciary. And, in granting habeas corpus relief on a novel procedural due process theory, the Ninth Circuit once again transgressed basic limits on its habeas corpus powers.

Further, the Ninth Circuit decisions will exert these harmful effects in numerous cases posing significant threats to public safety. Based on the Ninth Circuit's decisions, over 23,000 prisoners serving indeterminate life sentences in California will be eligible to enlist the federal court to sit as an additional arbiter of their parole suitability. Indeed, since 2008 over 1,500 district court petitions involving sufficiency-of-evidence challenges to California parole decisions and roughly 400 similar appeals in the Ninth Circuit have been filed. In the eight months since *Hayward*, the federal courts already have invalidated approximately seventy state parole decisions that the state courts had approved. Seven judges of the Ninth Circuit have acknowledged that the circuit's approach to state parole cases "bind[s] this circuit to an analytical approach that will consistently generate wrong decisions in the hundreds of challenges to California parole decisions adjudicated by federal courts in this circuit each year." *Pearson*, 625 F.3d at 541 (Ikuta, J., dissenting from denial of reh'g en banc).

Moreover, the federal review the Ninth Circuit's authority provides to life prisoners is unnecessary and duplicative. It reviews, for mere reasonableness, the state court's application of a minimal "some evidence" test in at least one and as many as three levels of state judicial review.

1. The Ninth Circuit's decisions conflict with this Court's precedents recognizing the State's authority over parole-suitability determinations.

The Ninth Circuit's decisions—in Pirtle, Johnson, Sneed, Mosley, and Slater's cases—and also in *Hayward*, *Pearson*, *McCullough*, *Cooke*, and *Clay*—are directly at odds with this Court's precedent and the notion that parole is inherently a state process. As this Court has explained, "we have long been adverse to imposing federal requirements upon the parole systems of the States." *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 369 (1998); see also *Morrissey* v. *Brewer*, 408 U.S. 471, 490 (1972). "Our system of federalism encourages . . . state experimentation" in developing methods of determining parole suitability. *Greenholtz*, 442 U.S. at 13. And, as this Court has recognized, state parole determinations should not be "encumbered by procedures that states regard as burdensome and unwarranted," as that may provide incentive for states to abandon or curtail parole. *Id.* Indeed, states have "no duty" to establish a system of parole, because "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. If a State chooses to establish a parole system, the State retains wide latitude in "defining the conditions for release and the factors that should be considered by the parole authority." *Id.* at 8.

State authorities, rather than federal courts, have expertise in making the predicative assessment of whether a given individual should be released into the community, and their parole decisions are an integral part of the State's overall administration of its system of corrections. "[B]eyond question, the

authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). Federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). "The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner* v. *Jones*, 529 U.S. 244, 252 (2000).

This Court has never authorized federal habeas corpus relief for insufficiency of evidence supporting a State's determination that a prisoner is unsuitable for parole under state-law criteria. Federal courts should not be drawn into the administration of the State's parole system or its individual parole decisions. To do so, as the Ninth Circuit has done here, the federal court must second-guess the State's parole authority, as well as the State's judiciary. The Ninth Circuit's intrusion into the State's parole decisions compromises important principles of federalism and inappropriately installs the federal judiciary as the final arbiter of an exclusive state function.

2. The Ninth Circuit's inappropriate intrusion into the state parole system rests on multiple violations of federalism and comity principles.

It is not surprising that, on its way to reaching the dubious result of second-guessing state parole decisions, the Ninth Circuit violated any number of traditional federalism principles. It "bootstrapped" a state-law standard of judicial review and untenably transformed it into a "liberty interest" protected by

federal due process. It improperly intruded itself into second-guessing the state courts' applications of state law. It placed burdens on the administration of state parole that exceeded the limits this Court laid down in *Greenholtz*. And, once again, it failed to abide by the standard requiring deferential review of state court judgments mandated by 28 U.S.C. § 2254. Each of these would warrant certiorari review by itself. That the Ninth Circuit committed such violations in seeking to justify the improbable results of its *Pirtle*, *Johnson*, *Sneed*, *Mosley*, and *Slater* decisions further underscores the need for this Court's intervention by certiorari.

The Ninth Circuit's decisions unjustifiably transform a state evidentiary standard into a "liberty interest"

As if it somehow could support federal review of the substantive merits of a state parole-suitability decision, the Ninth Circuit held that California's standard of judicial review—for some evidence—is a component of a prisoner's liberty interest: It stated that a California inmate's liberty interest in parole "encompasses the state-created requirement that a parole decision must be supported by 'some evidence' of current dangerousness." App. 9a; see also, *Cooke*, 606 F.3d at 1213 ("California's 'some evidence' requirement is a component of the liberty interest created by the parole system of that state.").

But these holdings are at odds with this Court's recognition that:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of

> entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Olim v. *Wakinekona*, 461 U.S. 238, 250-51 (1983). Thus, "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at n.12.

The Ninth Circuit's approach further conflicts with that of other circuits. See, e.g., *Brandon* v. *Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987) ("Courts have explicitly and repeatedly rejected the proposition that an individual has an interest in a state-created procedural device, such as a hearing, that is entitled to constitutional due process protection. . . . [T]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive liberty interests entitled to federal constitutional protection under the Due Process Clause."); *Shango* v. *Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982) ("The argument that the procedures established by the regulations can themselves be considered a liberty interest is analytically indefensible."). *Pirtle*, *Johnson*, *Sneed*, *Mosley*, and *Slater*, that is, may well have been decided differently in those circuits. This Court should intervene to assure consistency in the law in this area.

The Ninth Circuit's approach, confusing "liberty interest" with process, also threatens to elevate a dispute about any state procedure into a federal constitutional question. As this Court has long

recognized, that would be an absurdity. See *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Beck* v. *Washington*, 369 U.S. 541, 554-55 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947). Constitutionalizing every state procedural right would stand any federal due-process analysis on its head.

Procedural due process questions are analyzed "in two steps: the first asks whether there exists a liberty . . . interest which has been interfered with by the State . . .; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dept. of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1980). However, instead of identifying any liberty interest at stake and then identifying the process due before the individual can be deprived of that interest, the Ninth Circuit views the process as a substantive end in itself.

A prisoner's interest, if any, is in parole release, not in the procedures the State affords prisoners to protect against an arbitrary deprivation of that interest. See *Olim*, 461 U.S. at 250-51. Even on that point, it is questionable whether a California life prisoner has a constitutionally protected entitlement in parole release. The criteria for ascertaining whether such an interest exists are themselves uncertain. This Court in *Greenholtz*, 442 U.S. at 12, treated the question as one of a negative inference drawn from state statutes and regulations where they compel a certain outcome based upon a certain factual showing. But, in *Sandin* v. *Connor*, 515 U.S. 472 (1995), the Court re-framed the inquiry as one focusing on whether the prisoner would suffer an "atypical and significant hardship." See *Wilkinson* v. *Austin*, 545 U.S. 209, 229 (2005) (*Sandin* abrogated

Greenholtz's methodology for establishing a liberty interest).

The Ninth Circuit's decisions intrude into the state courts' resolution of state-law questions

The Ninth Circuit's inappropriate assertion of authority to review the substance of state parole decisions finds no support in procedural due-process jurisprudence. To the contrary, it entangles the federal court in improper second-guessing of state-law decisions.

There is a basic difference between an alleged liberty interest created by state law and any procedural protection of that interest required under the Due Process Clause. See *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974) (liberty interest "entitle[s] [inmate] to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Austin*, 545 U.S. at 224 ("[a] liberty interest having been established, we turn to the question of what process is due"). While States may provide more protection than required by the federal Constitution, any additional standards imposed by the State do not thereby become federal constitutional protections. See *Austin*, 545 U.S. at 224; see also *Sandin*, 515 U.S. at 481-82; *California* v. *Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). Overlooking that basic difference, however, the Ninth Circuit erroneously arrogated to itself the power to enforce California's state-law "some-evidence" rule of judicial

review. App. 9a-20a, 93a-96a, 165a, 195a-199a, 240a-241a.

Not only did the Ninth Circuit violate this Court's decisions distinguishing between the alleged state interest and the claimed federal process, it also violated this Court's precedents recognizing that the federal habeas court has no power to remedy perceived violations of state law. *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972) ("The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards.").

Indeed, this Court recently reversed a federal court of appeals for granting habeas corpus relief based on a perceived violation of state law. *Corcoran*, 131 S. Ct. at 16. In reversing the federal court, this Court reaffirmed that "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." *Id.*

Here, the federal interest, if any, is in the adequacy of the procedures, not in the substantive correctness of the result under state law. That is a state-law question reserved exclusively to the state courts.

The Ninth Circuit's decisions impose on the State an obligation rejected by this Court in Greenholtz

The Ninth Circuit's notion in *Pirtle*, *Johnson*, *Sneed*, *Mosley*, and *Slater* that federal due process requires review of a state parole decision for "some evidence" is contrary to this Court's holding in *Greenholtz*. *Greenholtz* established the contours of any constitutional process "due" in a case such as this one: an opportunity to be heard and a statement of reasons why parole was denied. 442 U.S. at 16. *Greenholtz*, further, specifically recognized that "[t]he Constitution does not require more." *Id.* California provides the *Greenholtz* protections, and more. It provides life-term prisoners the right to review their prison files; appear at, and participate in, a hearing before two Board commissioners; receive a stenographic recording of the proceedings; if parole is denied, receive a written statement setting forth the reasons for the denial; and to have parole consideration hearings at regular intervals. Cal. Penal Code §§ 3041, 3041.5. Further, under California law, parole decisions are also subject to state judicial review for some evidence. As in these cases, the state process allows resort to three levels of state courts. Surely these are sufficient protections to ensure basic reliability of the process.

The Ninth Circuit's decisions fail to afford the state court adjudications the deference required by 28 U.S.C. § 2254

The Ninth Circuit's decisions to grant habeas corpus relief on parole-suitability grounds, finally, runs afoul of the deferential-review standard that

strictly limits federal habeas corpus relief in cases brought by state prisoners.

Under 28 U.S.C. § 2254(d), federal habeas corpus relief "shall not be granted" on a claim adjudicated on the merits by the state court. Here, the state courts adjudicated respondent Pirtle, Johnson, Sneed, Mosley, and Slater's federal claims on their merits.[3] App. 21a-22a, 145a-155a, 183a, 218a-221a, 298a-302a.

To become eligible for relief, then, Pirtle, Johnson, Sneed, Mosley, and Slater must establish an exception to § 2254(d)'s basic rule. That is, they must show that the state court's decision of the federal claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), or that the state court's rejection of an otherwise valid federal claim was based on an unreasonable determination of the facts, § 2254(a), (d)(2). "Clearly established" federal law under § 2254(d)(1) is limited to the strict holdings of this Court's precedents squarely addressing the question raised by the petitioner's claim at the time the state court rendered its decision— not "dicta" and not mere circuit-court authority. *Renico* v. *Lett*, 130 S. Ct.

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[3] In *Pirtle*, the Ninth Circuit "looked through" the state court of appeal's and the California Supreme Court's summary denial to revive a trial court procedural ruling that the Ninth Circuit considered to be erroneous. In "looking through" the California Supreme Court's summary denial, the Ninth Circuit also erred in ignoring the fact that the court specifically requested and received briefing on the merits of Pirtle's claims. Nevertheless, the Ninth Circuit's grant of habeas relief raises the important question raised in this petition and was erroneous even without regard to the § 2254(d) deferential standard.

1855, 1865-66 (2010); *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008) (per curiam); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000).

This Court has "squarely addressed" the process due in a state parole proceeding only in *Greenholtz*, and there it did so only in light of the Nebraska system. *Greenholtz* held that "the Constitution does not require more" than an opportunity to be heard and a statement of the reasons why parole was denied. *Greenholtz*, 442 U.S. at 15-16. In doing so, this Court expressly rejected the claim that evidentiary support is required in the parole context, holding instead that "nothing in the due process concepts . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release." *Id.* at 15.

Here, then, it cannot be said that the state-court's decisions—even if they were "incorrect" or "unreasonable" in finding "some evidence" to support the denial of parole—violated "clearly established" law. For Pirtle's, Johnson's, Sneed's, Mosley's, and Slater's constitutional sufficiency-of-evidence claim was a novel one of a type never before endorsed by this Court as applicable to the question of parole suitability. The Ninth Circuit erred under § 2254(d) in granting relief on such a claim. As recognized by seven judges of the Ninth Circuit, the circuit's parole holdings contravene *Greenholtz*, reflect "one of our oddest habeas decisions to date," and "[n]ot only . . . rewrite AEDPA, [but] also contradict the entire body of Supreme Court AEDPA jurisprudence." *Pearson*, 625 F.3d at 541, 543-44 (Ikuta, J., dissenting from denial of reh'g en banc).

* * *

The Ninth Circuit's decisions to grant habeas corpus relief based on its own view of a state prisoner's suitability for parole are a serious violation of principles of federalism. The error of its decisions in this regard is underscored by its many other missteps, each transgressing federalism a little further, and each independently warranting certiorari review, on the way to such an improbable result.

CONCLUSION

The consolidated petition for writ of certiorari should be granted.

Respectfully submitted,

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