No. 10-868

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

REPLY TO BRIEFS IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
JULIE L. GARLAND
Senior Assistant Attorney General
CHRISTOPHER J. RENCH
Deputy Attorney General

JENNIFER A. NEILL
Supervising Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-4361
Jennifer.Neill@doj.ca.gov

Counsel for Petitioners

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Blank Page

REPLY BRIEF

Recently this Court held that the federal due process inquiry for California inmates seeking conditional release on parole is limited to whether they received the procedural protections of an opportunity to be heard and a statement of reasons why parole was denied. *Swarthout* v. *Cooke*, 562 U.S. ___, 131 S. Ct. 859, 862-63 (2011) (per curiam). As in the judgments of the Ninth Circuit this Court reversed in *Cooke*, the Ninth Circuit here granted respondents habeas relief despite the fact that the State had afforded them these two procedural protections. And, as in *Cooke*, the Ninth Circuit here erroneously deemed California's "some-evidence" standard to be a component of a federal liberty interest in parole, second-guessed the state court's application of state law, and improperly evaluated the merits of the parole decisions. In light of *Cooke*, the judgments below are untenable and should be summarily reversed.[1]

1. Despite *Cooke*, respondents Johnson and Pirtle argue that the Ninth Circuit opinions should stand because due process includes the substantive requirement that a state parole decision be supported by sufficient evidence. Resp. Johnson Opp. at 10-21; Resp. Pirtle Opp. at 3, 14. But in *Cooke*, this Court

---

[1] Because of *Cooke*, the Ninth Circuit has withdrawn its opinion in respondent Ron Mosley's case, so that case is no longer implicated in the State's consolidated petition. Supp. Pet. at 2-3. The Ninth Circuit, however, has not withdrawn its judgments as to any of the other four respondents. Further, respondent Anthony Sneed was recently released from prison pursuant to the Ninth Circuit's judgment; thus, Secretary Matthew Cate, not Warden James Hartley, is now the proper petitioner as to Sneed.

reiterated its holding in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979), that there is no inherent federal right under the Constitution to parole. *Cooke*, 131 S. Ct. at 862. Rather, if a state creates a liberty interest in parole, due process only requires constitutionally sufficient procedures, not a review of whether the evidence compelled a certain substantive conclusion. *Id.* at 862-63. The Court expressly found that the "liberty interest at issue here is the interest in receiving parole when the California standards for parole have been met, and the minimum procedures adequate for due process protection of that interest are those set forth in *Greenholtz*." *Cooke*, 131 S. Ct. at 862. Simply put, whether respondents here received the *Greenholtz* protections is the "beginning and the end of the federal habeas court's inquiry into whether [they] received due process." *Cooke*, 131 S. Ct. at 862. It is undisputed that each respondent received the minimal protections of an opportunity to be heard and a statement of reasons for their parole denial. *Cooke* squarely rejects the notion that respondents are entitled to anything more under the Due Process Clause. *Id.*

2. While acknowledging that the Ninth Circuit's decision has been "discredited" by *Cooke*, respondent Johnson maintains that, because this Court has imposed an evidentiary standard in some due process contexts, such as when earned good-time credits are revoked in a prison disciplinary proceeding, the Ninth Circuit "achieved the outcome directed by this Court's clearly established precedent." Resp. Johnson Opp. at 8-17. Yet these arguments and citations mirror the arguments the respondents in *Cooke* unsuccessfully raised before this Court just a

few months ago. See *Cooke*, 131 S. Ct. at 862 n.1; Opp. to Certiorari Pet., No. 10-333.

Further, a test announced by this Court in one context is not "clearly established" for purposes of federal habeas review under § 2254(d) in a different context and cannot justify the Ninth Circuit's grant of habeas relief to Johnson. E.g., *Knowles* v. *Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411, 1419 (2009); *Wright* v. *Van Patten*, 552 U.S. 120, 125-26 (2008); *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006). While this Court has held in some contexts that a government decision must be supported by some evidence, it has never held so in the parole context. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). As *Greenholtz* recognized, the parole context is unique and involves a discretionary, predictive decision that cannot always be articulated in traditional fact findings. 442 U.S. at 9-10, 15-16. Thus, *Greenholtz* plainly rejected the need for state authorities to cite evidence in support of a parole denial. *Id.* at 15. None of the cases Johnson cites arise out of the parole context and involve federal review of the prospective, subjective assessment of when a state should provide early release to an inmate serving a valid life sentence. Resp. Johnson Opp. at 8-17. Indeed, transferring a substantive evidentiary analysis from distinguishable due process contexts as Johnson urges is irreconcilable with this Court's rejection of an evidentiary review of parole decisions in *Greenholtz* and *Cooke*. *Cooke*, 131 S. Ct. at 862; *Greenholtz*, 442 U.S. at 15-16.

3. Respondent Pirtle makes two additional arguments unique to his situation. First, he asserts that this petition is moot because the State has complied with the Ninth Circuit's mandate. Resp.

Pirtle's Opp. at 7-13. "It is no small matter to deprive a litigant of the rewards of its efforts. . . . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 224 (2000) (per curiam). To avoid mootness, a litigant need only "have suffered, or be threatened with, an actual injury traceable to [] and likely to be redressed by a favorable judicial decision." *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998). Thus, mere compliance with a court order does not render a matter moot as long as relief remains available. See *Church of Scientology* v. *United States*, 506 U.S. 9, 12-13 (1992) (matter not moot after party had complied with court-ordered subpoena because court could still "fashion *some* form of meaningful relief"). Pirtle is on parole because the Ninth Circuit afforded him habeas relief and state parole authorities were compelled by court order to calculate a prison term and release him. App. 20a, 82a, 85a. The harm of the Ninth Circuit's erroneous judgment can be readily redressed by this Court. While the State cannot restore the time Pirtle was wrongfully released from custody, it will, upon reversal, have the opportunity to return Pirtle to custody to continue serving his valid life sentence.

Further, Pirtle suggests that the State must willfully disobey the mandate below and trigger contempt proceedings to preserve its certiorari rights. But the "orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *Mannes* v. *Meyers*, 419 U.S. 449, 459 (1975); see also *Howat* v. *Kansas*, 258 U.S. 181, 189-90 (1922) (litigants must

obey injunction "however erroneous the action of the court may be . . . ."). Thus, because the State retains a stake in the outcome of this litigation and relief remains available, the petition is not moot as to Pirtle.

Second, Pirtle argues that, because the Ninth Circuit "independently determined the federal substantive due process question," and did not apply 28 U.S.C. § 2254, his case is not implicated by the question presented. Resp. Pirtle Opp. at 14. That the Ninth Circuit conducted its flawed review *de novo*, as opposed to under 28 U.S.C. § 2254, is immaterial to the question presented and this Court's review. The Ninth Circuit in Pirtle's case engaged in the same analysis as it did in the other respondents' cases and in *Cooke*. App. 1a-20a, 92a-96a, 164a-165a, 195a-199a, 240a-244a. The Ninth Circuit determined that Pirtle had a liberty interest in parole which "encompasses the state-created requirement that a parole decision must be supported by 'some evidence' of current dangerousness," and it proceeded to evaluate the substance of Pirtle's parole denial under state law. App. 9a-19a. These errors persist regardless of whether the Ninth Circuit applied 28 U.S.C. § 2254 in its habeas review. Further, Pirtle does not dispute he received the procedural protections outlined in *Greenholtz* and *Cooke*. Resp. Pirtle Opp. at 13-15. Thus, the Ninth Circuit's decision affording Pirtle federal habeas relief cannot stand.

CONCLUSION

The consolidated petition for writ of certiorari should be granted and the judgments below should be summarily reversed.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
JULIE L. GARLAND
Senior Assistant Attorney General
CHRISTOPHER J. RENCH
Deputy Attorney General

JENNIFER A. NEILL
Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioners

March 10, 2011