NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

In Re HUBERT D. SMITH,

Petitioner,

For Writ of Writ of Habeas Corpus.

STATE OF CALIFORNIA, and,
LESLIE R. BLANKS, WARDEN, CMC-EAST
and, BOARD OF PRISON TERMS for the
State of California,

Respondents.

On Petition for Writ of Habeas Corpus to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF HABEAS CORPUS

HUBERT D. SMITH, C-04326
California Men's Colony-East
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93409-8103

Petitioner in pro se

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QUESTIONS PRESENTED

I.

Is the federal statutory provision regarding "second" or "successive" petitions (28 U.S.C. § 2244(b)(2)) unconstitutionally overly-restrictive so as to violate 1) the right of access clause of the U.S. Constitution, Amendment 1, sec. 1, 2) the right to habeas corpus clause of U.S. Constitution, Article I, sec. 9.2, 3) the due process clause of U.S. Constitution, Amendment 14, and 4) the equal protection clause of U.S. Constitution, Amendment 14?

II.

Did the Ninth Circuit Court of Appeals err when it denied petitioner Hubert D. Smith leave to file a second petition for writ of habeas corpus pursuant to an intervening construction and clarification of applicable law because his application allegedly did not meet the strictures of 28 U.S.C. § 2244(d), notwithstanding the travesty of justice involved?

III.

Where a state prisoner has been denied habeas relief because of an erroneous construction of

state law by the district court, and the Circuit has been previously indecisive on the question in published cases, and where the district court and Circuit in a subsequent case construes the law correctly according to USSC precedents and provided the other prisoner relief on an identical claim where the factual circumstances were virtually identical, has the previous prisoner been denied due process and equal protection of the law where the Circuit refuses to allow him to relitigate the same claim?

IV.

Is remand to the district court proper in petitioner Smith's case so that he can fully litigate his rescission challenge before a proper factfinding tribunal, and should the Court order the district court to appoint counsel to represent him in this case?

V.

Has petitioner Smith been subjected to substantive due process violations where the California Board of Prison Terms rescinded his parole release date absent any evidence to support the rescission?

IN THE

SUPREME COURT OF THE UNITED STATES

INTRODUCTION

Petitioner Hubert D. Smith ("SMITH") respectfully prays that the Writ of Habeas Corpus issue to provide remedy from unconstitutional conditions depriving him of his rightful liberty from restraint. Pursuant to **Rule 20.1**, exceptional circumstances warranting the exercise of the Court's discretionary powers, as described herein, warrant this Court's intervention. Pursuant to **Rule 20.1**, petitioner will show, as described herein, how the Writ will be in aid of the Court's appellate jurisdiction, and why adequate relief cannot be obtained in any other form or from any other court. (Also **Rule 20.4(a).**) Pursuant to **Rule 20.3**, a copy of the judgments/orders in respect of which the Writ is sought is appended, as described herein.

This case arises out of the efforts of petitioner to achieve habeas relief from what has become a system-wide abuse of the parole system by the former and current California Governors and the Board of Prison Terms, whose commissioners are appointed by the governors. Before former Governor Pete Wilson took office in 1990, once a parole

board panel granted a parole release date it was seldom disturbed or rescinded unless the prisoner committed misconduct or exhibited mental deterioration. In 1992 the newsmedia quoted Gov. Wilson as directing the Board of Prison Terms (BPT) to rescind all previous grants of parole because he was afraid of a "Willie Horton" incident occurring to jeopardize his presidential aspirations. (Discussed and exhibited elsewhere herein.) As a result, the BPT commenced systematic rescissions of all previous grants under a formerly seldom used "improvident grant" clause (Cal.Code Regs., tit.15, Div.2, § 2451(c), exhibited elsewhere herein.). The California State and federal courts failed to provide any sort of protection or relief for the many prisoners affected, leaving such prisoners to remain imprisoned many years beyond their appropriate terms required under the uniformity provisions of the statute (Section 3041(a), Penal Code) and by BPT's regulatory sentencing matrices (Cal.Code Regs., tit.15, Div.2, §§ 2282(b),(c); §§ 2403(b),(c).)

Petitioner's offense occurred in 1976, under the former Indeterminate Sentence Law (ISL). In 1977 the new comprehensive and expressly retroactive Determinate Sentencing Law (DSL) became operative. Only certain offenders were excluded from the mandatory, court-imposed determinate sentencing requirements of the DSL. However, for murder and kidnapping offenders under the ISL, and murder, kidnapping, conspiracy to commit murder, and

attempted murder offenders under the DSL, whose sentences remained "indeterminate" until determined by the Board of Prison Terms, Section 3041 was amended to require that 1) parole dates **shall** "normally" be set and, 2) in a uniform manner with other similarly-situated offenders. Section 3041 provided authority to the Board to create criteria for doing so. Subd.(b) of Section 3041 limited the exception to granting parole to the gravity of the commitment offense and/or the gravity and timing of prior convicted offenses. Nonetheless, not a single State or federal court construed Section 3041's presumptions for the next 26 years, although in numerous cases based on USSC precedent they were asked to do so. As a result, the BPT interpreted their discretion as virtually unlimited such that they implemented a parole denial rate beginning in 1979 through 1990 to be an average of 96%. During the 1990's, this figure dropped to 99%, with 100% rescissions of previous grants of parole to first degree murder offenders. After the election of Gray Davis as governor, he announced that former Gov. Wilson was 'soft' on criminals and implemented a denial rate of 99.85%, virtually slamming the door on paroles despite the substantial presumptions favoring parole in Section 3041. Murder offenders just simply did not get released to parole. Such interpretation, or, more correctly, mis-interpretation of the statute and responsibilities to grant parole, is a grossly unconstitutional condition of the California

parole system, such that all affected prisoners' federal constitutional rights to due process and equal protection are being and have been violated for many years.

The petitioner had a parole date granted in 1986. The petitioner was subjected to the loss of his parole date by Gov. Wilson's 1992 edict, although he had committed no misconduct nor mentally deteriorated. Because of the lack of adequate construction of the liberty interests in Section 3041, his litigation efforts failed at every turn.

At the district court level, his petition was preliminarily denied because the judge did not find a federally protectible liberty interest in Section 3041, despite two Ninth Circuit cases that assumed, without deciding, the statute did create such interests. The court further found "some evidence" supported the rescission decision. Petitioner was denied a Certificate of Appealability by both the district court and the Ninth Circuit, and was subsequently denied certiorari by this Court. At all stages, petitioner proceeded with only the assistance of another inmate, as here.

On September 25, 2002, petitioner's inmate paralegal assistant, Carl McQuillion, won his appeal in the Ninth Circuit on virtually identical issues and law, and was ordered immediately released. (McQuillion v. Duncan, 306 F.3d 895 (9th Cir.2002).) The State did not appeal the Circuit decision, but subsequently appealed only the

remedy of actual release. The Circuit analyzed the statute and found that it created federally cognizable liberty interests in parole, id., at 901-903, and further found that a prisoner with an unexecuted release date had a heightened liberty interest in that date. Ibid.

Petitioner sought permission from the Ninth Circuit to re-litigate his rescission challenge in the district court, based on the Circuit finally construing the statute. (It should be pointed out that on December 16, 2002, the California Supreme Court followed suit and, finally, after 26 years, construed Section 3041 as creating a liberty interest under State law. In re Rosenkrantz V, 29 Cal.4th 616.) Petitioner was denied leave to re-litigate this challenge by the Circuit's citation to 28 U.S.C. § 2244(b)(2),(A)(B).

He now seeks the Writ of habeas corpus from this Court because of the egregious injustice that has been imposed upon him solely due to the fault of the California State and federal courts not adequately construing Section 3041 for 26 years, causing him to lose a meritorious petition the first time around.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals denying him permission to file a "second" petition appears at **Appendix 1** and is unpublished. Because the petitioner sought an application to file a second petition for writ

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 15 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

HUBERT DOUGLAS SMITH, Petitioner, v. L. R. BLANKS, Warden; et al., Respondents.	No. 03-70550 ORDER

Before: RYMER, KLEINFELD and FISHER, Circuit Judges

The application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court is denied. Petitioner has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

> (A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

No petition for rehearing shall be filed or entertained in this case. *See* 28 U.S.C. § 2244(b)(3)(E).

FILED
CLERK, U.S. DISTRICT COURT
NOV 12 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED: 11-13-97
DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HUBERT DOUGLAS SMITH,

Petitioner,

v.

W.A. DUNCAN, WARDEN, et al.,

Respondents.

Case No. CV 96-3906-WDK(MAN)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable William D. Keller, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. SUMMARY OF PROCEEDINGS

Petitioner, a state prisoner, filed a petition for writ of habeas corpus on June 3, 1996. Respondents filed a return on July 19, 1996. Petitioner filed a traverse on September 10, 1996, and an amended traverse on September 30, 1997. For the following reasons, the Magistrate Judge recommends the Petition be denied and dismissed with prejudice.

II. BACKGROUND

On March 1, 1979, petitioner was convicted by a jury of first

degree murder. [Return, Ex. A1 at 36.] Petitioner received an indeterminate sentence of seven years to life in prison. [Petition at 3.]

On August 5, 1986, a hearing panel of the California Board of Prison Terms ("BPT") conducted a parole consideration hearing, which was attended by petitioner and his attorney. [Petition, Appendix A at 1-2.] The hearing panel found petitioner to be suitable for parole. [Petition, Appendix A at 54; Return, Ex. A2 at 45.] The panel calculated a total term of confinement of two hundred and one months. [Return, Ex. A2 at 48.] Based on that term, petitioner's parole release date was set for May 1, 1995. [Return, Ex. A2 at 38.] Due to petitioner's subsequent accrual of good time credit, his parole release date was adjusted to February 1, 1992. [Petition, Appendix B, BPT decision dated August 7, 1991, at 3.]

On December 10, 1991, the BPT issued a notice scheduling petitioner for a rescission hearing. [Return, Ex. A3 at 50.] The notice stated that it appeared that parole had been improvidently granted. [Return, Ex. A3 at 50.] On March 24, 1992, petitioner appeared before a BPT hearing panel with his attorney. [Petition, Appendix B, Ex. 2 at 1-2; Return, Ex. A6 at 56.] The panel found good cause to rescind petitioner's parole release date. [Petition, Appendix B, Ex. 2 at 45-46; Return, Ex. A6 at 57-59.] The BPT Appeals Unit denied petitioner's appeal on August 11, 1992. [Return, Ex. A10 at 68.] The California Supreme Court denied petitioner's habeas corpus petition without citation of authority on April 10, 1996. [Return, Ex. C at 78.]

III. PETITIONER'S CONTENTIONS

Petitioner asserts the following grounds for federal habeas corpus relief:

1. The BPT violated petitioner's due process rights by arbitrarily rescinding his parole release date. [Petition at 6; Memorandum of Points and Authorities in Support of Petition at 19-27.]

2. The BPT violated petitioner's due process rights by failing to provide him with notice of the charges, or an opportunity to present and cross-examine witnesses. [Memorandum of Points and Authorities in Support of Petition at 16, 19-27.]

3. The Governor of California violated petitioner's due process rights by ordering the BPT to reexamine petitioner's parole release date. [Petition at 6; Memorandum of Points and Authorities in Support of Petition at 28-30.]

4. The application of California Penal Code section 3041.2 to rescind petitioner's parole release date violated the ex post facto clause. [Petition at 7; Memorandum of Points and Authorities in Support of Petition at 31-35.]

IV. DISCUSSION

A. STANDARD OF REVIEW

The petition was filed after April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in reviewing the claims asserted in the petition. See Lindh v. Murphy, __ U.S. __, 117 S. Ct. 2059, 2068 (1997); Woratzeck v. Stewart, 118 F.3d 648, 650 (9th Cir. 1997).