SUPREME COURT OF THE UNITED STATES

No. 96–1769

OHIO ADULT PAROLE AUTHORITY, ET AL., PETITIONERS *v.* EUGENE WOODARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OFAPPEALS FOR THE SIXTH CIRCUIT

[March 25, 1998]

JUSTICE STEVENS, concurring in part and dissenting in part.

When a parole board conducts a hearing to determine whether the State shall actually execute one of its death row inmates– in other words, whether the State shall deprive that person of life– does it have an obligation to comply with the Due Process Clause of the Fourteenth Amendment? In my judgment, the text of the Clause provides the answer to that question. It expressly provides that no State has the power to "deprive any person of life, liberty, or property without due process of law."

Without deciding what "minimal, perhaps even barely perceptible" procedural safeguards are required in clemency proceedings, the Court of Appeals correctly answered the basic question presented and remanded the case to the District Court to determine whether Ohio's procedures meet the "minimal" requirements of due process.[1] In Part II of his opinion today, however, the CHIEF JUSTICE takes a different view– essentially concluding that a clemency proceeding could *never* violate the Due Process Clause. Thus, under such reasoning, even procedures infected by

[1] 107 F. 3d 1178, 1187–1188 (CA6 1997).

bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable. Like JUSTICE O'CONNOR, I respectfully disagree with that conclusion.

I

The text of the Due Process Clause properly directs our attention to state action that may "deprive" a person of life, liberty, or property. When we are evaluating claims that the State has unfairly deprived someone of liberty or property, it is appropriate first to ask whether the state action adversely affected any constitutionally protected interest. Thus, we may conclude, for example, that a prisoner has no "liberty interest" in the place where he is confined, *Meachum* v. *Fano*, 427 U. S. 215 (1976), or that an at-will employee has no "property interest" in his job, *Bishop* v. *Wood*, 426 U. S. 341 (1976). There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.

Nor does *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), counsel a different conclusion. In that case the Court held that a refusal to commute a prison inmate's life sentence was not a deprivation of his liberty because the liberty interest at stake had already been extinguished. *Id.*, at 461, 464. The holding was supported by the "crucial distinction between being deprived of liberty that one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 9 (1979).[2] That "crucial distinction" points in the opposite

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[2] "Our language in *Greenholtz* leaves no room for doubt: There is *no constitutional or inherent right* of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial re-

direction in this case because respondent is contesting the State's decision to deprive him of life that he still has, rather than any conditional liberty that he desires. Thus, it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.

II

There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required. Presumably a State might eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy. Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. I think, for example, that no one would contend that a governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency. Our cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.

Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does estab-

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sistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'' 442 U. S., at 7 (emphasis supplied; citation omitted). *Greenholtz* pointedly distinguished parole revocation and probation revocation cases, noting that there is a 'critical' difference between denial of a prisoner's request for initial release on parole and revocation of a parolee's conditional liberty. *Id.*, at 9–11, quoting, *inter alia*, Friendly, 'Some Kind of Hearing,' 123 U. Pa. L. Rev. 1267, 1296 (1975)." *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981) (footnote omitted).

lish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985). Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. *Morrissey* v. *Brewer*, 408 U. S. 471, 480–490 (1972); *Gagnon* v. *Scarpelli*, 411 U. S. 778, 781–782 (1973). Similarly, if a State establishes postconviction proceedings, these proceedings must comport with due process.[3]

The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in those cases.[4] For "death is a different kind of

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[3] While it is true that the constitutional protections in state postconviction proceedings are less stringent than at trial or on direct review, *e.g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551, 555–557 (1987), we have never held or suggested that the Due Process Clause does not apply to these proceedings. Indeed, *Finley* itself asked whether the State's postconviction proceedings comported with the "fundamental fairness mandated by the Due Process Clause." *Id.*, at 556–557; see also *Murray* v. *Giarratano*, 492 U. S. 1, 8 (1989) (opinion of REHNQUIST, C. J.) ("[T]he fundamental fairness mandated by the Due Process Clause does not require that the [S]tate supply a lawyer'" (quoting *Finley*, 481 U. S., at 557)). The CHIEF JUSTICE, then, is simply wrong when he states that these cases "make clear that there is no continuum requiring varying levels of process at every . . . phase of the criminal system," *ante*, at 10; instead, these cases simply turned on *what process is due*. If there could be any question whether state postconviction proceedings are subject to due process protections, our unanimous opinion in *Yates* v. *Aiken*, 484 U. S. 211, 217–218 (1988), makes it clear that they are.

[4] The Court has recognized the integral role that clemency proceedings play in the decision whether to deprive a person of life. *Herrera* v. *Collins*, 506 U. S. 390, 411–417 (1993). Indeed, every one of the 38 States that has the death penalty also has clemency procedures. Ala. Const., Amdt. 38, Ala. Code §15–18–100 (1995); Ariz. Const., Art. V, §5, Ariz. Rev. Stat. Ann. §§31–443, 31–445 (1996); Ark. Const., Art. VI, §18, Ark. Code Ann. §§5–4–607, 16–93–204 (1997, Supp. 1997); Cal. Const., Art. V, §8, Cal. Penal Code Ann. §§4800–4807 (West 1992);

punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. . . . From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically

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Colo. Const., Art. IV, §7, Colo. Rev. Stat. §§16–17–101, 16–17–102 (1997); Conn. Const., Art. IV, §13, Conn. Gen. Stat. §18–26 (1997); Del. Const., Art. VII, §1, Del. Code Ann., Tit. 29, §2103 (1997); Fla. Const., Art. IV, §8, Fla. Stat. §940.01 (1997); Ga. Const., Art. IV, §2, ¶2, Ga. Code Ann. §§42–9–20, 42–9–42 (1997); Idaho Const., Art. IV, §7, Idaho Code §20–240 (1997); Ill. Const., Art. V, §12, Ill. Comp. Stat., ch. 730, §5/3–3–13 (1997); Ind. Const., Art. V, §17, Ind. Code §§11–9–2–1 to 11–9–2–4, 35–38–6–8 (1993); Kan. Const., Art. I, §7, Kan. Stat. Ann. §22–3701 (1995); Ky. Const., §77; La. Const., Art. IV, §5(E), La. Rev. Stat. Ann. §15:572 (West 1992); Md. Const., Art. II, §20, Md. Ann. Code, Art. 27, §77 (1996), and Art. 41, §4–513 (1997); Miss. Const., Art. V, §124, Miss. Code Ann. §47–5–115 (1981); Mo. Const., Art. IV, §7, Mo. Rev. Stat. §§217.220, 217.800, 552.070 (1994); Mont. Const., Art. VI, §12, Mont. Code Ann. §§46–23–301 to 46–23–316 (1994); Neb. Const., Art. IV, §13, Neb. Rev. Stat. §§83–1,127 to 83–1,132 (1994); Nev. Const., Art. V, §13, Nev. Rev. Stat. §213.080 (1995); N. H. Const., pt. 2, Art. 52, N. H. Rev. Stat. Ann. §4:23 (1988); N. J. Const., Art. V, §2, ¶1, N. J. Stat. Ann. §2A:167–4 (West 1985); N. M. Const., Art. V, §6, N. M. Stat. Ann. §31–21–17 (1994); N. Y. Const., Art. IV, §4, N. Y. Exec. Law §§15–19 (McKinney 1993); N. C. Const., Art. III, §5(6), N. C. Gen. Stat. §§147–23 to 147–25 (1993); Ohio Const., Art. III, §11, Ohio Rev. Code Ann. §§2967.01 to 2967.12 (1996); Okla. Const., Art. VI, §10, Okla. Stat., Tit. 21, §701.11a (Supp. 1998); Ore. Const., Art. V, §14, Ore. Rev. Stat. §§144.640 to 144.670 (1991); Pa. Const., Art. IV, §9; S. C. Const., Art. IV, §14, S. C. Code Ann. §§24–21–910 to 24–21–1000 (1977 and Supp. 1997); S. D. Const., Art. IV, §3, S. D. Codified Laws §§23A–27A–20 to 23A–27A–21, 24–14–1 to 24–14–7 (1988); Tenn. Const., Art. III, §6, Tenn. Code Ann. §§40–27–101 to 40–27–109 (1997); Tex. Const., Art. IV, §11, Tex. Crim. Proc. Code Ann., Art. 48.01 (Supp. 1997); Utah Const., Art. VII, §12, Utah Code Ann. §77–27–5.5 (Supp. 1992); Va. Const., Art. V, §12, Va. Code Ann. §§53.1–229 to 53.1–231 (1994); Wash. Const., Art. III, §9, Wash. Rev. Code §10.01.120 (1994); Wyo. Const., Art. IV, §5, Wyo. Stat. §7–13–801 (1995). It is, of course, irrelevant that States need not establish clemency proceedings; having established these proceedings, they must comport with due process. See *Evitts* v. *Lucey*, 469 U. S. 387, 393, 400–401 (1985).

from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (citations omitted) (plurality opinion). Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life.

Accordingly, while I join Part III of the Court's opinion, I cannot accept the reasoning or the conclusion in Part II. Because this case comes to us in an interlocutory posture, I agree with the Court of Appeals that the case should be remanded to the District Court, "in light of relevant evidentiary materials submitted by the parties,"[5] for a determination whether Ohio's procedures meet the minimum requirements of due process.

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[5] 107 F. 3d, at 1194.