No. 95-1598

In the
Supreme Court of the United States

October Term, 1995

Leroy L. Young and Attorney General of Oklahoma, Petitioners,

v.

Ernest Eugene Harper, Respondent.

On Writ of *Certiorari to the United States Court of Appeals for the Tenth Circuit*

Brief

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction in this case because the State's petition for rehearing in the Court of Appeals was untimely, and therefore did not toll the statutory 90-day period for filing a petition for writ of certiorari?(1)
2. Whether, consistent with the Due Process Clause and *Morrissey v. Brewer, 408 U.S. 471 (1972), a State may return to prison without a hearing, "for any reason or no reason," a person who was conditionally released to the community in a program that, under Morrissey, differs from parole in name only, and who, the State concedes, abided by all the conditions of his release?*

STATEMENT OF THE CASE

1. Statement of the Facts

Ernest Eugene Harper has served 21 years of a life sentence. In 1990, the Oklahoma Pardon and Parole Board(1) considered Mr. Harper for release from prison under two separate conditional release programs: parole and "preparole."(2) The Parole Board decided to recommend Mr. Harper under both programs.(3)

Oklahoma's "preparole" program is parole by another name; essentially, it is early parole. A prisoner must serve 30 percent of his sentence to be eligible for parole, only 15 percent to be eligible for preparole; otherwise, the eligibility requirements and criteria are identical. Mr. Harper met *all criteria for parole eligibility.(4)*

The purposes of the two programs overlap. The purposes of preparole are to reduce prison overcrowding(5) and to "reintegrate the prisoner in society;"(6) the purposes of parole are "to alleviate the costs to society of keeping an individual in prison" and "to help individuals reintegrate into society as constructive individuals as soon as they are able."(7) Like a parolee, a preparolee reports periodically to a parole officer for supervision in the community,(8) and has no contact with prison officials unless he is returned to prison.(9) Like a parolee, he can be removed from the program and returned to prison if he does not comply with the conditions of his release.(10)

The standard conditions of release are nearly identical in the two programs.(11) Consequently, when the State of Oklahoma releases a prisoner on preparole, it conditionally restores to him essentially the same freedoms of association, autonomy, independence, dignity, and bodily privacy enjoyed by parolees. Like parolees, preparolees are free from surveillance by prison guards, and free from the prison rules and regulations which circumscribe the details of a prisoner's daily existence. They are free to wear what they choose, to eat what they choose, to rise, go to bed, and turn out the light when they choose; they are free to guard their bodily privacy; they are free to consult with a doctor whenever they see fit; subject to the conditions of their release, they are free to associate and correspond with whomever they choose, to recreate and socialize as they wish, to spend time alone with family and loved ones; to earn a living at whatever honest employment their skills and experience fit them for, at whatever wages their abilities may command; and to spend their wages as they see fit. In short, exactly like parole, preparole contemplates nothing less than the offender's reintegration into society.

The chief difference between the two programs lies in the admission process. Under both programs, the prisoner must be recommended for release by the Parole Board; but in the case of parole that recommendation must be approved by the Governor, and in the case of preparole by the DOC.(12) The Governor has no statutory role in granting or revoking preparole.(13) The programs operate on separate tracks within the statutory framework. Participation in preparole is not necessarily a prerequisite to parole,(14) and parole denial does not disqualify a preparolee from continued participation in the preparole program.(15) In fact, according to a DOC spokesman, "most preparole inmates who are turned down for full parole are allowed to remain out of prison."(16)

On October 16, 1990, Mr. Harper was released from prison on preparole. The Parole Board's recommendation to the Governor for parole was still pending.

Prior to his release, Mr. Harper and his caseworker executed a form titled "Rules and Conditions of Preparole Conditional Supervision." (J.A. at 7-9). The conditions of release were almost identical to the Standard Rules and Conditions governing Oklahoma parolees.(17) The preparole form also contained the stipulation, "I understand that waiving parole while on pre-parole status will result in reclassification to higher security status."(18) The form did not indicate that parole *denial would result in any change in status.*

After his release, Mr. Harper was required to execute a second form, titled "Orientation for Preparole Conditional Supervision," which states "[t]his orientation is provided to insure that each Offender is aware of the rules, responsibilities, expectations and possible consequences of not meeting these obligations." (J.A. at 4). Following a list of rules and obligations is the stipulation "I [] understand that being classified to community level depends upon my compliance with each of these expectations." (J.A. at 6). The form also included the stipulation, "Reviewed options in the event of parole denial." (J.A. at 5). The form did not provide that Mr. Harper would be returned to prison if the Governor did not approve him for parole.(19)

During the five months that he was in the program, Mr. Harper's existence in the community was virtually identical to that of a parolee. He lived in an apartment in Tulsa for which he paid rent, he was gainfully employed, and he was free to be with his family and friends and to form other attachments of normal life.(20) He had no contact at all with correctional officers, and only periodic meetings with a parole officer for counselling and supervision.(21) The State does not contend that Mr. Harper violated a single rule or condition of preparole, or that he was anything less than a model participant.(22)

On March 14, 1991, after five months at liberty, Mr. Harper's parole officer telephoned him at 5:30 in the morning to inform him that the Governor had not approved him for parole, and that he must report back to prison by ten o'clock.(23) Mr. Harper reported back to prison as directed. He was never granted a hearing, either before or after his return to prison, on whether his preparole status should be revoked.(24)

The Oklahoma statutes do not enumerate grounds for revoking either parole or preparole,(25) and do not provide that parole denial shall affect preparole status. Nor, during the time Mr. Harper was in the preparole program, did the administrative regulations implementing the program indicate that parole denial could affect participation in the preparole program.(26) However, on August 8, 1991, five months after Mr. Harper was returned to prison, the Parole Board amended its Procedure No. 004-11, to provide that "[i]nmates who are denied [parole] by the Governor shall remain on PPCS [preparole] and shall be reviewed by the Parole Board ninety days from denial to determine whether or not the Parole Board desires to allow the inmate to remain on PPCS."(27) On April 1, 1994, the Parole Board again amended its Procedure No. 004-11, this time to provide that "[i]nmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process."(28) The State has never provided any kind of revocation hearing to Mr. Harper. He remains in prison.

2. Proceedings in the Lower Courts

Although key issues of fact were disputed in this case in the courts below,(29) Mr. Harper's requests for an evidentiary hearing were denied,(30) as were his requests for appointment of counsel.(31)

Mr. Harper filed a *pro se Petition for Habeas Corpus in state court, challenging the State's revocation of preparole without affording him due process.(32) The court denied Mr. Harper's petition on the ground that habeas corpus was an inappropriate vehicle to challenge the revocation.(33) Mr. Harper then filed pro se in the court of criminal appeals.(34) That Court ordered the State to respond, stating:*

> When a prisoner is released from incarceration pursuant to a preparole conditional supervision program and lives outside institutional facilities, the due process clause vests this person with a liberty interest in remaining in said program. Therefore, the minimum requirements of *Morrissey must be observed before this person can be removed from the program for a rule or condition violation. However, the record before this Court reflects that petitioner was not removed from the [preparole] program for a violation of a rule or condition of probation, but that he was removed because he was no longer eligible for the program because the Governor did not sign his out-of- state parole recommendation.*
>
> We are, therefore, directing the ... State ... to respond to Petitioner's application, specifically addressing eligibility for the [preparole] program when the Governor does not approve parole after a prisoner has been recommended for parole and placed in the [preparole] program by the ... Parole Board and the Department of Corrections. The response shall also address any due process protections required before a prisoner is removed from the [preparole] program because the Governor does not approve parole.(35)

In its response, the State supplied the court with amended Parole Board Procedure 004-11 (issued five months *after Mr. Harper was returned to prison) as evidence that "inmates are aware that they will only remain on preparole status so long as they remain otherwise eligible for parole."(36) The State claimed that Mr. Harper was "no longer eligible" for preparole after the governor denied parole.(37)*

The court of criminal appeals thereupon reversed its earlier decision that *Morrissey applied to preparole revocations. Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The court stated that the issues presented by Mr. Harper were "fully addressed" in a decision it had issued the same day in a companion case, Barnett v. Moon, 852 P.2d 161, 162 (Okla. Crim. App. 1993). Barnett held that preparolees were not entitled to a revocation hearing under Morrissey v. Brewer because the very word "preparole" shows that a person in the program has not been released from prison:*

> The prefix "pre" means "in front," "before," or "in advance." . . . Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. Therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, . . . logically preparole means before such release.(38)

Barnett, 852 P.2d at 162. Applying Barnett to Mr. Harper's case, the court reasoned that since preparolees are, "by definition," already "confined," the "degree of confinement" when they are returned to prison is of no concern to the court, "so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified." Harper, 852 P.2d at 165. The court went on to hold that amended Parole Board Procedure 004-11 (issued five months after Mr. Harper was returned to prison) afforded him both notice and due process, because it:

> gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole. The governor's refusal to grant parole does not change the fact that Petitioner is confined and the provisions of *Morrissey do not apply. The procedures used by the Pardon and Parole Board in determining whether Petitioner should stay in the [preparole] program assure [Harper] he is receiving the process that is due him.*

Id. Thus, the court of criminal appeals' decision was based on three findings of fact, not one of which had been tested at an evidentiary hearing, and all of which Mr. Harper contests: (1) that he had been in "confinement" while in the preparole program; (2) that the Parole Board regulation issued after he had been returned to prison had given him notice that he could be removed from the program if parole were denied; and (3) that his case had been reviewed pursuant to the newly-issued regulation.

On October 13, 1993, Mr. Harper filed a *pro se Petition for Habeas Corpus in Federal District Court.(39) The State asserted that preparole was like the House Arrest Program (without supplying any evidence to permit a comparison) and again asserted that Mr. Harper became ineligible for preparole when the governor denied parole.(40) Without holding an evidentiary hearing, the court denied the writ, on the ground that a prisoner in preparole "has not yet 'been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person;'" that Mr. Harper "had not been released from institutional life altogether;" and that requiring a due process revocation hearing would undercut the statutory purpose to relieve overcrowding.(41) The district court issued a Certificate of Probable Cause,(42) and Mr. Harper filed an appeal to the Tenth Circuit pro se on February 24, 1995.*

On August 30, 1995, the Tenth Circuit reversed the district court's ruling and remanded, directing the lower court to issue the writ of habeas corpus unless Mr. Harper was reinstated to preparole, and ordering the State to provide Mr. Harper with a due process hearing prior to any future revocation. *Harper v. Young, 64 F.3d 563 (10th Cir. 1995). The court of appeals found that preparole was "sufficiently similar to parole or probation to merit protection by the Due Process Clause itself," in that participants are selected by the Parole Board, are "free to enjoy most of the benefits of a normal existence," and are subject to restrictions similar to those of a parolee. Id. at 565. The court also found that "[t]he liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate," and that*

> [t]he passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in Morrissey.*

Id. at 566 (citation omitted). The court noted that Mr. Harper was revoked from preparole because he was denied parole, but that "nothing in the regulations governing the program mandated that result," and pointed to Procedure 004-11 as evidence that revocation is not mandated. Id. at 565.

The State of Oklahoma filed an untimely Petition for Rehearing and Suggestion for Rehearing En Banc, on September 15, 1995, sixteen days after the entry of judgment. On September 25, 1995, the Tenth Circuit entered an order*sua sponte which "grant[ed] appellees leave to file a late petition for rehearing and suggestion for rehearing en banc."(43) On February 21, 1996, the court of appeals issued its mandate to the district court,(44) and on February 28 the district court issued its order*

directing that Mr. Harper be released immediately from prison or reinstated in the program. (J.A. at 15, District Court Order (No. 93-CV- 948)). Also on February 28, the court of appeals entered an order (nunc pro tunc to February 13, 1996), denying the State's Petition for Rehearing, without any discussion of the merits.(45)

The State filed a motion in the court of appeals, seeking recall of its mandate and a stay, pending application to this Court for certiorari.(46) The Motion to Recall the Mandate and for a Stay was granted. (J.A. at 16, Order filed March 6, 1996 (No. 95-5026)). The State filed a Petition for a Writ of Certiorari on April 4, 1996, within 90 days of the denial of the untimely petition for rehearing, but more than 90 days after the original entry of judgment in the Tenth Circuit on August 30, 1995.

SUMMARY OF THE ARGUMENT

Ernest Harper was released from prison after the Oklahoma Parole Board reviewed his case and decided to recommend him for two conditional release programs, parole and "preparole." Preparole is essentially early parole. The eligibility requirements, selection criteria, and conditions of release and are virtually identical in both programs. Admission to both programs is only upon recommendation of the Parole Board. The main difference between the two programs is that for preparole the DOC must approve the Board's recommendation, while for parole the Governor must approve the Board's recommendation. The Governor plays no statutory role in the grant of preparole.

Mr. Harper was released from prison under the preparole program, with the Board's recommendation for parole still pending. While in the community, he conducted himself as a model citizen. Five months after his release, the Governor decided not to approve parole, and the State informed Mr. Harper that he must report back to prison. Mr. Harper did so. The State never granted him any kind of hearing to determine whether his return to prison was warranted.

In the courts below, the State claimed that it returned Mr. Harper to prison because the Governor's denial of parole made Mr. Harper ineligible for preparole under the statute. It transpired that this was incorrect. Oklahoma statutes mandate no such result, and furthermore the Parole Board's implementing regulations provide just the opposite: the agency presumption is that denial of parole shall have no effect on preparole status. The State now offers a new rationale for returning Mr. Harper to prison without a hearing: it claims the authority to return preparolees to prison "for any reason or no reason," and argues that since it has unlimited discretion to return persons to prison from preparole, fact- finding is unnecessary and a hearing would be pointless.

The Tenth Circuit found that preparole was similar to parole; held that *Morrissey v. Brewer, 408 U.S. 471 (1972), was applicable; and ordered the State to release Mr. Harper and not return him to prison without a hearing in conformity with Morrissey. The State filed an untimely petition for rehearing of this judgment. The Circuit Court accepted the late filing, but denied the State's untimely petition, without reaching the merits. The State then filed for certiorari, more than 90 days after the entry of the Circuit Court's original order.*

The 90-day period for filing for certiorari is jurisdictional and not subject to equitable tolling. *See Missouri v. Jenkins, 495 U.S. 33 (1990). Only timely petitions for rehearing toll the 90-day period for rehearing; an untimely petition has no such effect, unless the court of appeals grants it. See Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942). Here, the Circuit Court denied the State's untimely petition. Therefore, the 90-day period for certiorari commenced with the entry of the Circuit Court's original order, and the State's petition for certiorari was untimely. Accordingly, this Court lacks jurisdiction, and should dismiss the case and remand to the Tenth Circuit. See infra Point I.*

In the event the Court does not dismiss for lack of jurisdiction, it should affirm the decision of the Tenth Circuit. The difference between parole and the "preparole program" is only one of nomenclature under *Morrissey. In releasing Mr. Harper from prison, the State restored to him on a conditional basis many of the core values of unqualified liberty, just as it does when it releases a person on parole. Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison arbitrarily, "for any reason or no reason." A Morrissey-style hearing was required to provide sufficient protection against an erroneous, arbitrary and unnecessary deprivation of the freedom the State had conditionally restored to him. Mr. Harper was entitled to an opportunity to show that it would be inappropriate to return him to prison; and the State was obliged to decide on the basis of verified facts and informed discretion whether Mr. Harper was fit to remain at liberty.*

ARGUMENT

I. THE COURT LACKS JURISDICTION IN THIS CASE SINCE THE STATE'S PETITION FOR REHEARING WAS UNTIMELY AND DID NOT TOLL THE 90-DAY PERIOD FOR SEEKING CERTIORARI

A.The Ninety Day Period for Filing is Jurisdictional and Is Not Tolled By an Untimely Petition for Rehearing

Congress has limited the Supreme Court's jurisdiction to entertain petitions for certiorari by requiring that the petition must be filed within 90 days after entry of the judgment for which review is sought. 28 U.S.C. § 2101(c).(47) As this Court has stressed:

> This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990). Accord Federal Election Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537, 539, 543 (1994). Statutory provisions specifying the timing of judicial review "are not subject to equitable tolling." Stone v. I.N.S., 115 S. Ct. 1537, 1549 (1995). See also Cheng Fan Kwok v. I.N.S., 392 U.S. 206, 212 (1968).

A timely petition for rehearing in the court of appeals does extend the time for filing a petition for certiorari, by suspending the finality of the judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the parties' rights. *See Missouri v. Jenkins, 495 U.S. at 45-46 (citing Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942)). In contrast, an untimely request for rehearing does not extend the period for seeking review. See Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 150-51 (1942).*

Here, the State's petition for rehearing was unquestionably untimely. The court of appeals' judgment was entered August 30, 1995. On September 15, sixteen days after the entry of judgment, without the time for filing having been enlarged by local rule, and without the State having sought or been granted an enlargement of time in which to file for rehearing,(48) the State filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The State's Petition for Rehearing was thus filed two days out of time.(49) Ten days later, the Tenth Circuit entered an order *sua sponte which "grant[ed] appellees leave to file a late petition for rehearing and suggestion for rehearing en banc."(50)*

Of course, the courts of appeals have the equitable power, reflected in Rules 40(a) and 26(b), Fed. R. App. P., to enlarge the time for filing a petition for rehearing, and to permit filing even after the time for filing has expired. Had the State timely moved for an enlargement of time in which to file a petition for rehearing, the court could have granted it; and had the State by motion shown "good cause," even *after the expiration of the deadline for the petition for rehearing, the court could have entered an order under Rule 26(b) enlarging the time after the fact. Had the court of appeals done so, and entered an order accepting the late petition nunc pro tunc, the State could now claim that the court had made its untimely petition "timely."*

But there is no occasion for the Court to decide whether the courts of appeals can make untimely petitions for rehearing "timely" in a case such as this, by entering an order permitting filing "*nunc pro tunc;" for that is not what happened here. No such order was entered, because the State did not show good cause, or any cause at all, for the late filing, and did not even ask for an enlargement of time, either before or after the expiration of the deadline for filing. Consequently, rather than entering an order enlarging the time for filing pursuant to Rules 40(a) and 26(b) and Tenth Circuit Local Rule 27.4.4, the court of appeals instead entered an order accepting the filing of a "late" petition.*

The court of appeals' prudential decision to entertain the State's untimely petition did not extend the deadline for applying for certiorari. *Compare Missouri v. Jenkins, 495 U.S. at 49. In Jenkins, the State filed a document in the court of appeals styled "State Appellants' Petition for Rehearing En Banc," within the prescribed time period for petitions for rehearing. Id. at 43. The question was whether this document actually constituted a "petition for rehearing," so as to toll the 90-day period. This Court concluded that it did. Id. at 47-48. In Jenkins, unlike this case, the court of appeals corrected the record by entering an order nunc pro tunc denying the State's "petition for rehearing with suggestion for rehearing in banc." Id. at 49. The court of appeals "cannot make the record what it is not," but it could correct the record to show that it had in fact entertained and denied a "petition for rehearing," even though the petition was incorrectly styled. Id. at 49-50.*

There is only one exception to the rule that an untimely petition does not toll the period for seeking review, and this case is not within that exception. *See infra Point I.B.*

B.The State's Petition for Rehearing Was Untimely, the Circuit Court Denied It, and Accordingly the 90-Day Period for Seeking Certiorari Was Not Tolled

The Court has recognized but a single, narrow exception to the strict jurisdictional rule that only a timely petition for rehearing tolls a time for appeal: An untimely petition for rehearing tolls the limitations period for review *only if the court not only entertains, but actually grants, the petition for rehearing, and then proceeds to a merits review. Pfister v. Northern*

Illinois Finance Corp., 317 U.S. 144, 149-151 (1942). Accord Wayne United Gas Co. v. Owens Illinois Glass Co., 300 U.S. 131, 137 (1937); Bowman v. Loperena, 311 U.S. 262, 266 (1940).(51)

The mere fact that a court decides to entertain an untimely petition for rehearing does not mean that there is a merits review, for "[o]f course, the court must examine the petition to see whether it should be granted." *Pfister, 317 U.S. at 150. "If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough." Id.*

Under *Pfister, any ambiguity about whether a court reached the merits of a rehearing petition is appropriately resolved by examining the terms of the court's order:*

> [T]he order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the original order. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

Pfister, 317 U.S. at 150-51 (citation omitted).

In this case, it is clear that the Tenth Circuit did not decide the untimely petition on the merits. On February 28, 1996, the court entered an order denying the petition for rehearing, without restoring the case to the calendar, without issuing an opinion, and without any other indication that it had reached the merits.(52) The February 28 Order shows that the court merely consider[ed] whether the petition set [] out, and the facts . . . offered support[ed], grounds for opening the original order and determine[d] that no grounds for a reexamination of the original order [were] shown.

Pfister, 317 U.S. at 150.(53) Rule 40(a), Fed. R. App. P., is consistent with the bright-line test in Pfister, and with the procedure followed by the court below. The rule(54) contemplates a two-stage decision-making process, whereby the court examines the petition to determine whether it sets forth adequate grounds to justify a rehearing. Only if the petition supports the claim that the panel overlooked points of law or fact will the petition be granted and the court proceed to reconsider the merits.

In reiterating the rule that an untimely petition for rehearing does not toll the period for review unless the petition is granted and the court enters a subsequent judgment on the merits, the Court has warned applicants to

> take heed of [the] principle . . . that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period.

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. at 213. That the party seeking certiorari in this case is the State, and the party opposing it an indigent pro se prisoner, is no justification for abandoning a firmly entrenched jurisdictional rule.

II.THE STATE VIOLATED HARPER'S RIGHT TO DUE PROCESS WHEN IT REINCARCERATED HIM WITHOUT A HEARING

A."Preparole" Is a Parole Program, and Gives Rise to a Fundamental Liberty Interest Under the Due Process Clause

A quarter of a century ago, in *Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that a State may not revoke parole without a hearing. Chief Justice Burger, writing for the majority, concluded that*

> the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey, 408 U.S. at 484. In reaching this conclusion the Court considered the following factors:

The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of

confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

Id. These very same factors dictate a similar result in the case at bar. See supra Statement of the Case, at 2 - 7.

Mr. Harper does not dispute that a lawful conviction and prison sentence extinguish a defendant's right to freedom from physical confinement during the term of the sentence, and "empower the State to confine him in any of its prisons" and to "subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum v. Fano, 427 U.S. 215, 224 (1976). However, when the State chooses to release a person from prison before the end of his sentence and permits him to live entirely outside an institution, "many of the core values of unqualified liberty" which his conviction extinguished are restored to him, even if on a conditional and qualified basis. Morrissey, 408 U.S. at 482. This is not "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." Id. at 480. The individual has a liberty interest arising under the Due Process Clause in retaining the conditional freedom the State has restored to him.*

Thus, "'[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'" *Morrissey, 408 U.S. at 482 n.8, (quoting United States ex rel. Bey v. Connecticut Board of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971)). To the contrary, the principle that the State may not arbitrarily and capriciously take away the freedom it has conditionally restored is by now deeply imbedded in this Court's jurisprudence. See Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (probation cannot be revoked without a hearing); Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 10-11 (1979) (there is a "critical distinction" between the initial grant of parole and the revocation of the conditional liberty of parolees); Wolff v. McDonnell, 418 U.S. 539, 560-62 (1974) (full range of procedures dictated by Morrissey is not required in discipline involving the loss of good-time credits, because "[f]or the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee" since it "does not then and there work any change in the conditions of his liberty.").*

The State argues that *Morrissey is inapplicable here because "the nature of the interest [of a preparolee] is very different from that of the parolee." (Pet'r Br. at 18). However, "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." Morrissey, 408 U.S. at 477. None of the differences asserted by the State, either alone or in combination, distinguish preparole from parole for purposes of Morrissey. See supra Statement of the Case at 2 - 7.*

Of course, there are limitations and conditions on the liberty that preparolees enjoy, which "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *Morrissey at 478; but these limitations and conditions are virtually identical to the standard conditions imposed on parolees in Oklahoma,(55) and are essentially the same as the conditions and limitations described in Morrissey.(56) Once Mr. Harper was released from prison, he had a substantial interest in retaining the freedom that was conditionally restored to him.*

The State of Oklahoma argues that *Morrissey does not apply in this case, because preparole is merely a form of "confinement, albeit constructive." (Pet'r Br. at 17-18).(57) Since "[t]he inmate remains in the custody of the DOC," (Pet'r Br. at 11), it follows that "[t]he only difference between an inmate behind four walls and an inmate on the Program is the security level classification." Because the preparolee is already "constructively" in prison, the State's decision to revoke preparole does not actually return the preparolee to prison; it merely effects a "transfer . . . to a higher security level," a matter "completely within the discretion of the DOC." (Pet'r Br. at 32).*

This argument is unpersuasive for two reasons. First, the fact that preparolees are formally "in custody" is of no particular significance; for so are parolees.(58) More important, this very same "in custody" argument was advanced by the State of Iowa, and rejected by the Court, a quarter of a century ago, in *Morrissey. There, the State cited an Iowa statutory provision that "[a]ll paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent."(59) The State argued that since "[t]he parolee while on parole is still within the custody of the correctional authorities" he is therefore "entitled to no greater rights than a prisoner."(60) The Court rejected this argument, finding that parolees have a significant liberty interest in avoiding a return to confinement, and requiring the State to grant a revocation hearing. See Morrissey, 408 U.S. at 483-84. "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Id. at 480. That the parolee "is often formally described as being in custody" does not mean that "summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." Id. at 483.(61)*

Sandin v. Conner, 115 S.Ct. 2293 (1995), supports the conclusion that Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison without a hearing. Reaffirming the principles articulated in Morrissey and Wolff v. McDonnell, Sandin held that for a liberty interest to arise directly under the Due Process Clause, prisoners must have "suffered a 'grievous loss' of liberty retained even after sentenced to terms of imprisonment." Sandin, 115 S.Ct. at 2298 (citation omitted). Under this standard, the Court found that Conner had not suffered such a loss. Disciplinary segregation for 30 days did not "present a drastic departure from the basic conditions of Conner's indeterminate sentence" because the record showed that disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." Id. at 2301. Thus, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment."Id.(62) Chief Justice Rehnquist, writing for the majority, stressed that the State's action in Conner's case would not "inevitably affect the duration of his sentence" since the State's code did not require the parole board "to deny parole in the face of a misconduct record or to grant parole in its absence." Sandin, 115 S.Ct. at 2302.

Under the reasoning of *Sandin, which focused on whether the individual had suffered a "grievous loss" of liberty retained even after sentence to imprisonment, this case presents the very situation in which the Due Process Clause does confer a liberty interest. Preparolees, like parolees, are no longer prisoners, even though like parolees they remain "in the custody" of the DOC. The revocation of preparole, exactly like the revocation of parole, is an "immediate disaster," since it "then and there" works a dramatic change in the conditions of the individual's liberty. See Wolff v. McDonnell, 418 U.S. at 561. When the State returned Mr. Harper to prison without a hearing, it stripped from him those "core values of unqualified liberty" which it had restored to him when he left the prison five months earlier; he was removed, not to a worse prison from a better prison, but to a prison from freedom. By any measure, this was "a grievous loss" of liberty: freedom from physical confinement "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)). "[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self determination," Cruzan v. Director, Missouri Dep't of Health, 110 S.Ct. 2841, 2856 (1990) (O'Connor, J., concurring). Since "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, . . . freedom from this restraint is essential to the basic definition of liberty" in the Fifth and Fourteenth Amendments. Foucha, 504 U.S. at 90 (Kennedy, J., dissenting).*

The State claims that parole and preparole are essentially different, because "an inmate is released to parole after an evaluation that he can return to society and function as a responsible person," whereas "[a]n inmate is not placed on [preparole] after a finding that he will function well in society," but rather "pursuant to the need of the State to manage its prison population." (Pet'r Br. at 18). This purported distinction is not supported by the statutory language and has been contradicted by the State's repeated admissions in the lower courts. *See supra Statement of the Case at 1-2. True enough, Oklahoma's preparole statute does not explicitly require the Parole Board to find that the preparolee "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person;" but not even Oklahoma's parole statute explicitly requires the Board to make such a finding.(63) Nevertheless, implicit in the entire statutory and administrative scheme is a requirement that the Parole Board determine that a prisoner "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person," before ordering his release on either parole or preparole. It is unthinkable that the Parole Board and DOC would exercise their discretion to release a felon without making such a determination.*

The State further argues that parole and preparole are different because, under *Morrissey, "a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole," while "an inmate on the [preparole] Program is not given a promise that he will be transferred only if he violates a condition of the Program," but instead "is aware that he may be reclassified to a higher security level [i.e., returned to prison] for any reason," (Pet'r Br. at 18), or "for no reason," (Pet'r Br. at 20). This claim is simply not supported by the statutory language, the implementing regulations, or anything else in this record. Whatever the DOC may tell prisoners now about their release on preparole, the record does not show that Mr. Harper was provided notice that he could be returned to prison for any reason other than a violation of the conditions of his release. The "evidence" the State cites to the contrary, (Pet'r Br. at 6 & n.3, 20 n.13), simply does not support its assertion. See supra Statement of the Case at 5 - 9.(64)*

In this Court, although not below, the State argues that preparole is like a furlough, and thus cannot give rise to a liberty interest, citing *Bowser v. Vose, 968 F.2d 105 (1st Cir. 1992) (per curiam) and Smith v. Saxbe, 562 F.2d 729 (D.C. Cir. 1977). However, there is a profound difference between the "liberty" bestowed in a furlough program, and the "liberty" which a conditional release program like parole or preparole restores to a prisoner. The furlough program described in Bowser v. Vose was typical of furlough programs, in that it permitted release from prison for a definite, brief period of time, to attend a relative's funeral, visit a critically ill family member, obtain medical care, or establish employment or housing plans for release. Bowser v. Vose, 968 F.2d at 106 n.1. The First Circuit explicitly distinguished the prisoner's furlough denial from*

the deprivation of liberty when parole is revoked based upon the nature of the liberty involved: "'Unlike the parolee or probationer . . . , the furloughed prisoner is on a short string. His freedom is not potentially unlimited in duration even upon compliance with the official rules.'" Id. at 107 (citation omitted).(65) Similarly, preparole is utterly unlike furlough because it is potentially unlimited in duration, and the goal is nothing less than the complete reintegration of the offender into the community.(66)

Nevertheless, the State asserts, when a preparolee is released from prison he is merely "transferred for a limited time for the purpose of overcrowding. Once the purpose of the Program is eliminated, the inmate may be transferred to a facility as his placement in the Program will no longer serve the purpose for which it is intended." (Pet'r Br. at 15 n.9.) In fact, the Oklahoma statute provides nothing of the kind. Rather, the statute provides that whenever the State's prison population exceeds 95 percent of capacity, the Parole Board and DOC must "implement" the preparole program "until such time as the [prison] population is reduced to ninety-two and one-half percent (92 1/2%) of capacity." *See Okla. Stat. § 365. The plain language and obvious intent of this provision is that State authorities must cease releasing prisoners on preparole status when the prison population is reduced to 92 1/2 percent of capacity. Nothing in either the statute or the implementing regulation indicates that an individual preparolee is to be returned to prison when and if the prison population drops; and if the statute did so provide, that would present a serious problem of substantive due process. The liberty guaranteed by the Due Process Clause "'includes a freedom from all substantial arbitrary impositions and purposeless restraints.'" Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (citation omitted). It is not apparent that the State could have any legitimate interest in returning to prison a model preparolee, perhaps after many years at liberty, simply because a prison bed became available. However, that issue is not presented here; Oklahoma's law does not permit the interpretation the State suggests, and there is no evidence that the State itself has ever returned a preparolee to prison on this ground.*

B.The State's Newly-Asserted Claim That It May Revoke Preparole "For Any Reason or No Reason" Is Unsupported By the Record and Is Incompatible With Substantive Due Process

Unable to defend its earlier stance that parole denial *disqualifies an individual for preparole, the State now asserts that corrections officials have the authority to revoke preparole, not only if the Governor denies parole, but "for any reason or no reason." If the Oklahoma statute purported to confer any such unlimited authority on state officials, this case would present the question whether the States could circumvent Morrissey simply by amending their parole laws to provide that parole may be revoked "for any reason or no reason" or whether the Due Process Clause would forbid such a result.*

However, that question is not presented by this case: the Oklahoma statute does *not purport to confer any such limitless discretion on state officials who administer the program. As discussed in Point II.A., supra, the Oklahoma legislature created a conditional release program which differs from the "parole" described in Morrissey v. Brewer in little more than name. It is implicit in the statutory scheme that the conditional freedom the State restored to the prisoner will not be revoked "for any reason or no reason," but only if the preparolee has done something to forfeit the conditional freedom the State restored to him.*

In the absence of an explicit statutory grant of authority to revoke preparole "for any reason or no reason," the issue is the more narrow one of whether correctional officials can take it upon themselves to revoke conditional release status "for any reason or no reason," consistent with substantive due process. The answer to this question is that they cannot. A person conditionally released from prison has a constitutionally protected right not to be arbitrarily returned to prison. *See supra Point II.A. The Due Process Clause imposes substantive as well as procedural limits on the State's authority to revoke this conditional liberty. See Black v. Romano, 471 U.S. 606, 610 (1985) (dictum) (probation); Bearden v. Georgia, 461 U.S. 660, 665-66, 668-69 (1983) (trial court's automatic revocation of probation for the probationer's failure to pay the imposed fine and restitution was "fundamentally unfair," in the absence of evidence and findings that the defendant was somehow responsible for the failure or that alternative means of punishment were inadequate); Douglas v. Buder, 412 U.S. 430 (1973) (per curiam) (substantive violation of due process where state court revoked probation with no evidence that the probationer had violated probation).(67)*

State action or regulations that burden the exercise of a fundamental constitutional right will be held to offend the Due Process Clause unless the State's action is "generally necessary" to serve a legitimate government interest; there must be a "close fit" between the challenged regulation and the interest it purports to serve. *See Thornburgh v. Abbott, 490 U.S. 401, 411, 413 (1989).(68) Accordingly, the State must show that revoking Mr. Harper's preparole status without a hearing and returning him to prison merely because the Governor denied parole -- or "for any reason or no reason" -- was "generally necessary" to further a legitimate government interest.*

The State has shown no such thing. In fact, the State has not met even the exceedingly deferential test of *Turner v. Safley, 482 U.S. 78, 89 (1987), which applies in cases where the exercise of a fundamental constitutional right can reasonably be*

expected to present a danger to the community inside the prison. Under Turner, there must at least be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. (citation omitted). There is no such connection here. "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." Turner, 482 U.S. at 89-90.(69)

The State's interest in implementing release programs to relieve a prison overcrowding crisis is indisputably a legitimate one; however, the State does not explain how or why it is "rationally related" to this interest, let alone "generally necessary" to it, to return to the State's overcrowded prisons a model preparolee, who has obeyed all the rules and conditions of his release, and who has given parole officials no reason to believe that his continued release would endanger the community or his own chances for successful rehabilitation.(70)

Amici attempt to fill this void, suggesting that "even though Mr. Harper did not violate the rules of the program, the prison officials may have determined that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." (Br. of Amici Curiae at 9).(71) But the State of Oklahoma has never suggested that it revoked Mr. Harper's preparole because it "determin[ed] that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." The State should not be permitted to raise such a claim in Mr. Harper's case, so late in the day. However, if this were the basis on which preparole was actually revoked in Mr. Harper's case, then Mr. Harper ought to have had notice of this basis, and an opportunity to address it at a *Morrissey-style hearing. See infra Point II.C.*

C.A Morrissey-Style Hearing Is Required

To determine what procedural protections the Constitution requires in a particular case, the Court weighs the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The standard set forth in Mathews is fully applicable in the prison context. See Washington v. Harper, 494 U.S. 210, 229 (1990). "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." Id. (citing Morrissey v. Brewer, 408 U.S. at 481). The same rights and interests are at stake in this case as in the revocation of parole, and therefore a Morrissey-style hearing is appropriate.*

1. The Private Interest

The private interest that will be affected is the individual's interest in not having his conditional freedom unjustifiably taken away. There is scarcely any other private interest so significant. The revocation of conditional freedom is "an immediate disaster" for the individual returned to prison. *Wolff v. McDonnell, 418 U.S. at 560-561 (discussing parole). Revocation proceedings determine whether the person conditionally released "will be free or in prison, a matter of obvious great moment to him." Id. at 560. This private interest is entitled to added weight, since it coincides with interests of the State. In Gagnon v. Scarpelli, the Court found that*

> [b]oth the probationer or the parolee and the State have interests in the accurate finding of fact and the informed use of discretion -- the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785. *See also Wolff v. McDonnell, 418 U.S. at 561 (revocation decision "based on an accurate assessment of the facts is a critical matter to the State as well as the parolee.") Similarly, unjustifiably returning a preparolee to prison thwarts the statutory purpose of relieving prison overcrowding by conditionally releasing to the community prisoners who can live as responsible and self-reliant members of society.*

2. The Value of a Hearing

The risk of needless, purposeless revocation is enormous when, as in Mr. Harper's case, the State holds no hearing at all.(72) The State argues that there is no value in a preparole revocation hearing in cases where preparole is revoked merely because the Governor did not approve parole; for "[where] there is no 'claimed violation,'" (Pet'r Br. at 22), "there is no factual question." (Pet'r Br. at 23). According to the State, "'verified facts' and 'accurate knowledge of the parolee's behavior' are not necessary in making the decision of whether to transfer an inmate to a higher level of security" (*i.e., return the preparolee to*

prison), because "[s]uch a determination is purely predictive and discretionary" and "would not be assisted by any type of adversary proceeding." (Pet'r Br. at 23.)

In fact, however, the value of procedural safeguards is as great here as in revocation of parole or probation. That a revocation decision may be "predictive and discretionary" does not mean that it can be arbitrary. It must be an individualized determination of a person's suitability to remain at liberty, informed by consideration of the relevant, ascertainable facts.

The decision to revoke preparole is neither more nor less "predictive and discretionary" than the decision to revoke parole. In *Morrissey, the Court pointed out that the "enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules." 408 U.S. at 478-79. The Court concluded that "implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." Id. at 479. That same notion is implicit in preparole, for the same reasons: in the words of the Oklahoma Parole Board, "the conditions [of preparole] are similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and returned to prison."(73)*

The reality is, as the *Morrissey Court recognized, that even in the case of parole, parole officers typically are accorded broad discretion as to whether or not to revoke parole; that discretion is "inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence." 408 U.S. at 479. Whether or not a clear-cut violation of a black- letter rule is charged, the fundamental issue that concerns the parole officer is whether or not the parolee's or preparolee's conduct in the community shows he is able to function as a responsible member of society, and thus whether or not he should be permitted to retain his conditional freedom.(74)*

In *Morrissey, as here, the State argued that hearings should not be required because "non-legal, non-adversary considerations" were often the determinative factors in making a parole revocation decision.(75) This Court rejected the argument, holding that "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey, 408 U.S. at 484. Similarly, although "[t]he decision to revoke probation is generally predictive and subjective in nature," Black v. Romano, 471 U.S. at 613 (1985) (citing Gagnon v. Scarpelli, 411 U.S. at 787), the Court requires Morrissey-style hearings for probation revocation because "[b]oth the probationer . . . and the State have interests in the accurate finding of fact and the informed use of discretion." Gagnon, 411 U.S. at 785. Justice O'Connor, delivering the opinion of the Court in Black v. Romano, explained that when a statute confers discretion on a factfinder to revoke conditional release status, the exercise of that discretion must be informed by the facts:*

> Where such discretion exists . . . , the parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.

Black v. Romano, 471 U.S. at 612.(76)

Here, the State treated the Governor's decision to deny Mr. Harper parole as conclusive proof that Mr. Harper was unfit for preparole (even though neither statute nor agency regulations required any such result, and even though the Governor has no statutory role at all in preparole decisions). The Parole Board declined to hear any evidence of Mr. Harper's conduct while he was at liberty in the community. It refused him any opportunity to testify and to present testimony from his parole officer, employer, co-workers, family, friends, and other members of the community, about his conduct and accomplishments during his months at liberty, to show that revocation was not warranted in his case, and to rebut any erroneous facts which may have influenced the decision to revoke. Further, the Board failed to explain the reason for its decision, apart from the bare fact of the Governor's parole denial, thus leaving no basis for review to determine if the decision to revoke rested on permissible grounds supported by the evidence. Consequently, the decision that Mr. Harper was no longer fit for preparole was not based on verified facts, and the exercise of discretion to return him to prison was not informed by knowledge of his behavior on preparole. *See Morrissey, 408 U.S. at 484.*

3. The State's Interest

The State's interests in avoiding revocation hearings for preparolees are minimal. Revocation proceedings do not involve the problems inherent in "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey, 408 U.S. at 483. In Wolff v. McDonnell, 418 U.S. at 561-62, the Court elaborated on the "very different stake the State has in the structure and content of the prison disciplinary hearing" in contrast to a parole revocation hearing. Prison disciplinary*

proceedings "take place in a closed, tightly controlled environment" where "[g]uards and inmates co-exist in direct and intimate contact" and "[t]ension between them is unremitting;" whereas:

> the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses -- at least no more so than in the case of the ordinary criminal trial.

Id. at 561.

Although the State does not articulate any particular interest in revoking preparole with no hearing at all, the Amici predict that a "determination that a liberty interest is created" by release on preparole "would cause many of the Amici States to eliminate such programs due to the burden of providing a hearing pursuant to *Morrissey v. Brewer;" would "discourage states from experimenting with new procedures or programs utilized to eliminate the overcrowding dilemma;" and would "impose an enormous financial burden on the Amici States and restrict the ability of prison administrators to manage their correctional facilities." (Br. of Amici Curiae at 2-3.) These fears are surely greatly exaggerated; particularly because the costs and burdens associated with holding a hearing to determine whether the State has a legitimate interest in returning an individual to prison cannot possibly compare to the extremely heavy costs and burden of actually incarcerating him. Indeed, since the cost of incarcerating a person is more than fifteen times greater than the cost of supervising him on parole, it is unlikely that the States will dispense with conditional release programs in order to escape the burden of revocation hearings.(77)*

In *Morrissey, the State predicted, and the Court of Appeals agreed, that if adversary hearings were required for parole revocation, the function of the parole board "would be aborted," and the parole board "would be more reluctant to grant parole in the first instance." 408 U.S. at 475. This Court rejected the claim that providing a hearing "would be administratively intolerable," and concluded that "[a] simple factual hearing [would] not interfere with the exercise of discretion." Id. at 483. After a quarter of a century, it is safe to say that requiring revocation hearings has not discouraged the States from implementing parole systems or granting parole.(78) There is no reason to suppose that the dark fears expressed by the Amici, about the disastrous results of requiring preparole revocation hearings, are not as exaggerated as the fears expressed by the State in Morrissey.*

CONCLUSION

The Court lacks jurisdiction; therefore the writ of certiorari should be dismissed as improvidently granted and the case should be remanded to the Tenth Circuit to reinstate its mandate to the District Court. If the Court decides that it has jurisdiction, it should affirm the decision of the Tenth Circuit.

Respectfully submitted,

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NOTES

(1) Mr. Harper, who appeared *pro se until the appointment of undersigned counsel after this Court granted certiorari, did not argue the jurisdictional issue in his Brief in Opposition to Petition for Writ of Certiorari. Mr. Harper did point out that the petitioners had "filed an untimely petition for rehearing" in the Court of Appeals, and that the clerk of the court had entered an order granting Petitioners leave to file a "late" petition. Opp'n to Cert. at 6. Jurisdictional objections, in any event, should not be deemed waived even though not raised in the opposition to certiorari. See Sup. Ct. R. 15.2, 15.4.*

(1) Hereinafter Parole Board.

(2) Preparole Conditional Supervision Program (hereinafter preparole).*See Okla. Stat. tit. 57, § 365 (1989).*

(3) State's Resp. Br. at 1, filed November 10, 1992 (Okla. Crim. App.)(No. H-92-0735); Pet. for Habeas Corpus at 6, filed October 13, 1993 (N.D.Okla.)(No. 93-CV-948).

(4) To be eligible for the preparole program, a prisoner must meet all the criteria for parole eligibility (except for percentage of sentence served), which are set forth in Okla. Stat. tit. 57, §§ 332.7 and 332.8, and must be within one year of his regularly scheduled parole consideration date or his projected release date. *See Okla. Stat. § 365(A)(2). The Parole Board must "inquire into the conduct and the record" of the person during his custody in the DOC, Okla. Stat. § 332.7(A), and must consider, among other things, the number of previous felony convictions, the type of criminal violations leading to any such criminal convictions, and in every appropriate case monetary restitution to victims. Okla. Stat. § 332.8. Mr. Harper had served 15 years of his sentence at the time the Board recommended him for parole. Under Oklahoma law, this is considered one-third of a life sentence for purposes of parole eligibility. Resp't App. A at 3a, Parole Board Brochure (1989).*

(5) Okla. Stat. § 365 provides that whenever the population of the prison system exceeds 95% of capacity, the Department of Corrections (hereinafter DOC) and the Parole Board shall implement the preparole program until such time as the population is reduced to 92 1/2% of capacity, for persons in the custody of the DOC who meet certain guidelines. The parole statute provides that parole may also be used as a device to reduce overcrowding, in certain specified cases. *See Okla. Stat. tit. 57, § 332.7(B).*

(6) State's Resp. Br. at 3, filed November 10, 1992 (Okla. Crim. App.) (No. H-92-0735); State's Resp. Br. at 5, filed December 6, 1993 (N.D. Okla.) (No. 93-CV-948); State's Opp'n Br. at 7 n.2. filed April 5, 1995 (9th Cir.)(No. 95-5026).

(7) *See Morrissey v. Brewer, 408 U.S. 471, 477 (1972). The Oklahoma statutes do not recite the purposes of either parole or preparole.*

(8) Parole officers supervise both parolees and preparolees. Appendix A to Respondent's Brief (hereinafter Resp't App.) at 7a, 9a, Oklahoma Parole and Pardon Board Brochure, 1989 (hereinafter Parole Board Brochure).

(9) *See Opp'n to Resp. to Pet. for Habeas Corpus at 6, filed December 13, 1993.*

(10) Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

(11) *Compare Resp't App. C, Parole Fact Sheet, Standard Rules and Conditions with J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The only difference between these two sets of rules and conditions is that a parolee cannot leave the state to which he is paroled without written permission, while a preparolee cannot leave the State of Oklahoma under any circumstances. The burdens of this conditional freedom are also similar. For example, as of 1993, parolees and preparolees alike are entirely responsible for their own medical care and medical expenses, "includ[ing] any cost incurred for emergency medical care." See Resp't App. E at 35a, DOC Operations Manual Procedure OP160120, and Resp't App. D at 33a-34a, Rules and Conditions of Preparole Conditional Supervision (effective 6/93).*

(12) Okla. Stat. §§ 332.7(A), 365. When the DOC rejects a preparole applicant recommended by the Parole Board, an administrative review committee comprised of DOC and Parole Board staff members jointly reviews his suitability for preparole. Appendix F to Petitioner's Petition for Certiorari (hereinafter Pet'r App.) at 45a.

(13) Okla. Stat. § 365; Resp. Br. at 11, 14, filed November 10, 1992 (H-92-0735).

(14) *See Okla. Stat. § 332.7; see also Pet'r App. G at 55a, Pardon and Parole Board Procedure 004-11 ("Inmates who are not recommended by the Board [for preparole] will be considered for parole on the regularly scheduled docket.")*

(15) *See Okla. Stat. § 365; Pet'r App. G at 56a; Resp't App. F at 38a, Parole Board Procedure 004-11 (April 1, 1994).*

(16) Resp't App. G at 42a, Daily Oklahoman, May 29, 1996 at 6.

(17) *See Resp't App. C, Parole Fact Sheet. There is a blank space provided on the preparole form for "special conditions by the Pardon and Parole Board" but there were no special conditions listed in Mr. Harper's case. J.A. at 9, Rules and Conditions of Pre-Parole Conditional Supervision. Special conditions may also be imposed in parole. Resp't App. C, Parole Fact Sheet.*

(18) J.A. at 9. The State presented no evidence in the lower courts as to the meaning of this provision.

(19) The State has never presented any evidence as to what, if anything, Mr. Harper was actually told about the effect of parole denial, or what the "options" were that are mentioned here. The State has never gone so far as to make the direct claim that Mr. Harper was told preparole could or would be revoked. If an evidentiary hearing had been held, Mr. Harper would have testified that no explanation was ever given to him about the meaning of this stipulation, and that he was given no reason to believe that he would be returned to prison merely because the Governor denied parole.

(20) Br. in Opp'n to Resp. to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948). If the case is remanded for further findings, Mr. Harper will present evidence that he worked at a highly responsible job obtained through his own initiative and merits, made his own decisions as to how he would he spend his salary, paid his own bills, socialized, and visited public libraries, movies, parks, church and grocery stores without supervision; that he never had any contact with prison guards or with DOC officials of any kind; and that his only contact with program administrators was a periodic meeting with a parole officer, who monitored his progress and offered counsel and advice.

(21) Opp'n to Response to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948).

(22) (Pet'r Br. at 7). If Mr. Harper had been granted a hearing before his preparole status was revoked, as the State's regulations now provide, he would have presented testimony from his parole officer, employer, family, friends, and other members of the community as to his exemplary work record, conduct, and attitude while on preparole.

(23) The State has never offered any evidence and the record is silent as to the identity of the State agency or official who made the decision to return Mr. Harper to prison.

(24) Resp. Brief at 1, filed November 10, 1992 (No. H-92-0735); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948); Opp'n to Pet. for Writ of Habeas Corpus at 2, filed December 13, 1993 (No. 93-CV-948).

(25) In 1993, the preparole statute was amended to specify that preparole can be revoked for failure to make satisfactory progress in an educational program in which the inmate has been required to participate as a condition of eligibility in the program. Any such inmate "shall be returned to confinement in the custody of the Department of Corrections." Okla. Stat. §§ 365(A)(3) and (G) (effective as amended 4/29/93).

(26) Resp't App.H at 43a-50a, Parole Board Procedure 004-11 (effective September 1, 1989); Pet'r App. F at 43a-52a, DOC Procedure 090104 (effective July 4, 1990). The Parole Board's brochures suggest that the only grounds for preparole revocation are failure to comply with the conditions of release, or an election by the preparolee not to be considered for parole:

> The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she elects not to be considered for parole. ... Governor approval is not required for [preparole].

Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

(27) Pet'r App. G at 56a, Pardon and Parole Board Procedure 004-11 (effective August 8, 1991).

(28) Resp't App. E, Parole Board Procedure 004-11, as amended April 1, 1994. Furthermore, on October 29, 1992, citing *Morrissey v. Brewer, 408 U.S. 471 (1972), the DOC promulgated hearing procedures for revoking preparole in conformity*

with the requirements of Morrissey. See Resp't App. I, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208.

(29) These factual disputes included whether Mr. Harper had notice that he would be removed from the program if parole were denied; to what extent preparole resembles parole, other release programs, or incarceration; and the nature of the State's interest in revoking preparole without a hearing.

(30) *See Opp'n to Resp. to Pet. for Habeas Corpus at 3, filed December 13, 1993 (No. 93-CV-948).*

(31) *See J.A. at 13-14, Mtn. for Appointment of Counsel, filed June 20, 1994; District Court Order filed June 27, 1994; Appellant's Opening Brief at 9-10, filed February 24, 1995 (No. 95-5026).*

(32) Pet. for Writ of Habeas Corpus, dated March 20, 1992 (No. C-92- 44).

(33) Journal Entry and Order at 3, filed May 19, 1992 (No. C-92-44).

(34) Application for Extraordinary Writ of Habeas Corpus dated August 10, 1992 (No. H-92-0735).

(35) Order Directing Response at 2, filed September 10, 1992 (No. H- 02-0735).

(36) *See Pet'r App. G at 55a-56a; Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The State did not provide to the court the version of Parole Board Procedure 004-11, in effect in 1990 when Mr. Harper was in the program, which does not indicate that parole denial could be a basis for preparole revocation; or with the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of Morrissey. See Resp. Br. filed November 10, 1992 (No. H-92-0735); Resp't App. H at 43a, Parole Board Procedure 004-11 (effective September 1, 1989); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, (effective October 29, 1992).*

(37) Resp. Br. at 12-13, filed November 10, 1992 (No. H-92-0735). The State also asserted that preparole was similar to house arrest rather than to parole, without supplying any evidence of the nature of either preparole or house arrest. *See id. at 3. See also Resp. Br. at 5 filed December 6, 1993 (No. 93-CV-948); Opp'n Br. at 7 n.2 filed April 5, 1995 (No. 95- 5026). In the State's Petition for Rehearing filed in the Tenth Circuit, the State argued that preparole was like minimum security prison confinement, see Pet. for Reh'g at 5, filed September 15, 1995 (No. 95-5026), but did not present any evidence about the nature of minimum security confinement in Oklahoma. In this Court, the State argues that preparole is akin to furlough, without presenting any evidence about the nature of Oklahoma's furlough program. (Pet'r Br. at 15 n.9).*

(38) The court ignored the common use of the prefix "pre" to denote something already done, or done early: as in "preview," "prearranged," "preheat," "precook," "prepay," "preset," "predetermined." In this typical usage of the prefix "pre," preparole means "early parole."

(39) He filed a Motion for Appointment of Counsel in the District Court on June 20, 1994, based, *inter alia, on the complexity of the issues involved in the case, and his limited knowledge of the law. J.A. at 13-14. The motion was denied. District Court Order issued June 27, 1994 (No.93-CV-948).*

(40) Resp. Br. at 5, filed December 6, 1993 (No. 93-CV-948).

(41) District Court Order at 6, 10 and n.4, filed January 10, 1995 (No. 93-CV-948). The court accepted the State's unsupported assertions on these matters. The State did not provide to the court the 1989 version of Parole Board Procedure 004-11, that was in effect when Mr. Harper was in the preparole program. Resp. to Order Dated July 28, 1994, filed August 25, 1994 (No. 93-CV-948). That procedure does *not indicate that parole denial could lead to revocation from preparole. See Resp't App. H at 43a, Parole Board Procedure 004-11 (effective 9/1/89). The State also failed to provide to the District Court the 1994 amendment to Parole Board Procedure 004-11 providing that "inmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process;" or the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of Morrissey. See Resp't App. F at 38a, Parole Board Procedure 004-11 (effective 4/1/94); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208; Resp. to Order dated July 28, 1994 filed August 25, 1994 (No. 93-CV-948). In response to a district court Order to produce the implementing procedures for the Preparole Program, the State incorrectly represented that the 1991 version of Procedure 004-11 was the "first written procedure [by the Parole Board] regarding" preparole. Id. at 1 n.1.*

(42) Certificate of Probable Cause, filed February 13, 1995 (No. 93-CV- 948). *Id.*

(43) Order issued September 25, 1995 (No. 95-5026).

(44) Order issued February 21, 1996 (No. 95-5026).

(45) *See Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95-5026).*

(46) The sole reason the State offered for its failure to seek a stay of the mandate until after the mandate had issued was that counsel had received the order denying rehearing on Friday afternoon preceding a long weekend, and that the mandate was due to issue after the holiday; hence "counsel was unable to meet [the] deadline." Br. in Support of Mtn. to Recall Mandate and Application for Stay at 3 n.2., filed February 26, 1996 (No. 95-5026).

(47) Section 2101(c) provides that a Justice of the Supreme Court, for good cause shown, may extend the time for applying for the writ for a period not exceeding 60 days. The State did not seek an extension in this case, and none was granted.

(48) The State could have sought an enlargement of time in which to file for rehearing, pursuant to Fed. R. App. P. 40(a) and 26(b), and Tenth Circuit Local Rule 27.4.4.

(49) Rule 40(a) provides that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a).

(50) Order filed September 25, 1995 (No. 95-5026) (emphasis added). The Order also provided that "Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order." *Id.*

(51) *See also Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 210-12 (1952)(Court lacked jurisdiction to hear petition for certiorari as the 90-day period had not been tolled by untimely petition for review of the court of appeals' judgment, or the court's subsequent revision of that judgment in an immaterial way (citing Pfister)); Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20-21 & n.1. (1952)(dictum)(even if the motion resulting in the second order were viewed as an untimely petition for rehearing, the period for certiorari was tolled since the second order modified the first order, and therefore the court of appeals' reconsideration of its first order was "on the merits"); Chin Gum v. United States, 150 F.2d 765, 766 (1st Cir. 1945)(per curiam)(where 30-day period for petition to Supreme Court for certiorari expired, subsequent untimely petition for rehearing, filed by leave of court of appeals, but denied, did not revive jurisdiction of Supreme Court; result would have been different if the case had been restored to the docket for reargument (citing Pfister)); Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Hileman, 897 F.2d 1277, 1279 (4th Cir. 1990)(untimely motion for reconsideration tolled the period for review since the motion for reconsideration was granted, and the Benefits Review Board reaffirmed its original order after considering the merits (citing Bowman)).*

(52) Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95- 5026).

(53) Of course, the Tenth Circuit undoubtedly did consider the arguments raised in the State's petition for rehearing; "[a] petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked." Fed. R. App. P. 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them." *Missouri v. Jenkins, 495 U.S. at 46 n.14. But it does not follow from this that there was a merits review. Tenth Circuit Local Rule 40.1 provides that a petition for rehearing will be granted "only if a significant issue has been overlooked or misconstrued by the court."*

(54) Fed. R. App. P. 40(a) provides that "[t]he petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present." No oral argument is permitted at this stage; and the opposing party is not permitted to answer the petition unless requested by the court. But, "[i]f a petition for rehearing is *granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case." Fed. R. App. P. 40(a) (emphasis added).*

(55) *See Resp't App. C at 27a-30a, Parole Fact Sheet; J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State claims that there are "many" differences between parole and preparole conditions, but lists only two:*

> (1) a parolee can leave the state while an inmate on the Program [preparole] cannot; and (2) a parolee may be unsupervised after three years on parole while an inmate on the Program must remain supervised at all times. *See Okla. Stat. tit. 57, § 347 (1991); Okla. Stat. tit. 57, § 512 (Supp. 1993).*

Pet'r Br. at 17 n.10. Even these minor differences, however, are less than meet the eye. Parolees who are sex offenders must remain on active supervision until the maximum term of their sentences; other parolees are subject to active supervision beyond three years, at the discretion of the Division of Community Services. *See Okla. Stat. § 512(2). Parolees cannot leave the state except with written permission, according to the Standard Rules and Conditions for Parolees. See Resp't App. C.*

(56) The *Morrissey Court gave the following examples at 408 U.S. at 478:*

> Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, travling [sic] outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.

(57) *See also Pet'r Br. at 11, 15, 24, 28, 30, 31. This reading of the statute is inconsistent with the statutory provision that if preparole isrevoked, the preparolee "shall be returned to confinement in the custody of the Department of Corrections." See Okla. Stat. § 365(G) (Supp.1995). It is also inconsistent with the Parole Board's reading of the statute: "The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison." Resp't App. A at 9a, Parole Board Brochure (1989) (emphasis added).*

(58) *See Spurlock v. State of Oklahoma, 720 P.2d 733, 734 (Okla. Crim. App. 1986), rev'd on other grounds, Plotner v. State, 721 P.2d 810 (Okla. Crim. App. 1986).*

(59) Resp't Br. at 6-7 filed in *Morrissey v. Brewer, September Term, 1971 (No. 71-5103).*

(60) Resp't Br. at 19-20, filed in *Morrissey v. Brewer, September Term, 1971 (No. 71-5103). The court of appeals in Morrissey accepted the State's argument, reasoning that parole "is only a correctional device authorizing service of sentence outside the penitentiary," that the parolee is still "in custody," and thus, that "prison officials must have large discretion in making revocation determinations, and [] courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities." Morrissey v. Brewer, 408 U.S. at 474-75 (quoting Morrissey, 443 F.2d. 942, 947 (8th Cir. 1971)).*

(61) As evidence that a preparolee, unlike a parolee, is "in custody," the State points out that preparolees who abscond may be prosecuted for escape, while parolees who escape merely have their parole revoked. (Pet'r Br. at 11). This difference is irrelevant. While liability to prosecution for escape represents a significant additional motive to preparolees to conform to the rules of their release, it does not in any way reduce or devalue the freedom they enjoy. Equally irrelevant is the fact that Oklahoma law provides that "should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections." (cited in Okla. Stat. § 365; Pet'r Br. at 10-11, 17, 24). To interpret this statute to mean that preparolees are subject to the *same rules as prisoners would be absurd. By its very nature, life in the community frees the parolee from prison-specific rules; the list of preparole rules which were imposed on Mr. Harper did not include obedience to prison rules. See J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State also points to the fact that "[t]he inmate continues to receive earned credits [for time served] while on the Program." (Pet'r Br. at 19 n.12). However, it is not just preparolees but also parolees who continue to receive credit for time served while on release programs. See Okla. Stat. tit. 57, § 350(a).*

(62) The Court further held that a state might conceivably create a liberty interest in freedom from restraint in the prison setting, if the restraint involved an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life[,]" *id. at 2300; but punishment by solitary confinement is not such a restraint, because "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." Id. at 2301. Mr. Harper's case, like Morrissey, involves a liberty interest arising directly under the Due Process Clause. Although nominally "created" by the State when the prisoner walks out the prison door on conditional release, the liberty at stake is the "core liberty interest" of a free person, which is conditionally and partially restored to the parolee.*

(63) *See Okla. Stat. § 365; Okla. Stat. §§ 332.7, 332.8.*

(64) There was no statutory "promise" to Iowa parolees in *Morrissey that they would not be returned to prison except for violations of the conditions of their release, any more than there was a statutory "promise" to Mr. Harper (or to Oklahoma parolees, for that matter).*

(65) Likewise, the federal statute at issue in *Smith v. Saxbe limited furloughs to thirty days, unless extended for specific, enumerated purposes. Smith v. Saxbe, 562 F.2d at 731 n.3. The State also cites United States v. Taylor, 47 F.3d 508 (2d Cir. 1995), for the proposition that preparole does not give rise to a liberty interest because the defendant was "in custody" while in Connecticut's "Supervised Home Release Program," a program "strikingly similar" to Oklahoma's preparole program; ergo, preparolees must also be "in custody," and if they are "in custody" in the program they have no liberty interest in remaining in the program. (Pet'r Br. at 20-22). Taylor did not address the question of whether the defendant had any liberty interest in remaining in Connecticut's "Supervised Home Release Program." The issue in Taylor was whether or not the defendant was legally "in custody" while in the Program for purposes of deciding when his term of federal probation began to run.*

(66) If the Oklahoma statute in fact provided what the State earlier claimed in this case -- namely, that the Governor's denial of parole disqualified an individual from preparole -- this case might be different. The argument could then be made that preparole resembled a furlough that would definitely end upon the Governor's denial of parole. The record in this case, however, does not support that characterization. If there were any significant ambiguity in that regard, the proper course would not be to resolve the doubt in the State's favor, but rather to remand for the evidentiary hearing that Mr. Harper was denied.

(67) Justice O'Connor, delivering the opinion for a unanimous Court in*Bearden v. Georgia, stated that the probationer's "lack of fault provides a substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate." Bearden, 461 U.S. at 669 (quotingGagnon v. Scarpelli, 411 U.S. at 790 (internal quotation marks omitted)).*

(68) This standard applies even in the prison context, in cases where the exercise of the fundamental constitutional right "cannot reasonably be expected to present a danger to the community *inside the prison." Thornburgh v. Abbott, 490 U.S. at 411-412. This is the applicable standard here, since the exercise of the preparolee's liberty does not take place "[i]n the volatile prison environment, [where] it is essential that prison officials be given broad discretion to prevent [] disorder." Id. at 413. Hence, it "[does] not, by its very nature, pose a serious threat to prison order and security," id. at 411 (explaining Procunier v. Martinez, 416 U.S. 396 (1974)). See also Morrissey, 408 U.S. at 485.*

(69) Under *Turner, a second factor in determining reasonableness is "whether there are alternative means of exercising the right that remain open to prison inmates." Turner, 482 U.S. at 90. Here, there is obviously no alternative. As to "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally[,]" there can be no negative "ripple effect" on inmates, guards, or prison resources, from not returning to prison a model preparolee. Id.*

(70) Additional evidence that the policy is arbitrary is provided in the State's evolving explanation for returning Mr. Harper to prison without any hearing at all. The reason the State originally gave for revoking Mr. Harper's preparole was that the Governor's rejection of the Parole Board's parole recommendation automatically made Mr. Harper "ineligible" for preparole and thus, there was no need for a hearing since there was no fact to determine. This claim turned out to be contradicted by the State's own regulations. *See supra Statement of the Case at 7-9. The State now claims that it has the authority to return a preparolee to prison "for any reason or no reason."*

(71) There is no statutory or regulatory presumption in Oklahoma that parole denial makes a preparolee susceptible to flight; to the contrary, Parole Board regulations provide that in cases where the Governor denies parole the preparolee is to retain his conditional liberty, and remain in the community in preparole status, unless he is thereafter "classified to a higher security level after due process." Most preparolees are permitted to remain in the community after a denial of parole by the Governor. *See supra Statement of the Case at 4.*

(72) Procedures promulgated after Mr. Harper was returned to prison provide for some sort of "due process" review before a preparolee may be returned to prison on the basis of parole denial, *see supra Statement of the Case at 9 n.28, but there is no evidence in the record as to what that review entails.*

(73) Resp't App. A at 9a, Parole Board Brochure (1989).

(74) Thus, the Court need not reach the question of whether something less than a violation of the conditions of release will justify revocation of preparole.

(75) *See Resp't Br. (No. 71-5103) filed in Morrissey v. Brewer (at 11 n.2); see also Morrissey v. Brewer, 408 U.S. at 475.*

(76) *Compare Schall v. Martin, 467 U.S. 253, 277-79 (1984) (state law authorizing pretrial detention of an accused juvenile delinquent, based on a finding of either a "serious risk" that the juvenile may commit a criminal act before his next court appearance, or a "substantial probability" of flight, did not violate the Due Process Clause, since the procedural safeguards the statute afforded, including notice, a hearing, a statement of facts and reasons given prior to detention, a formal probable cause hearing, a fact-finding hearing, and a stenographic record of the initial appearance as a basis for review of individual cases, provided "sufficient protection against erroneous and unnecessary deprivations of liberty." Id. at 274 (citing Mathews v. Eldridge, 424 U.S. at 335).*

(77) It costs $22,000 per year in operating expenses to incarcerate, and an overall average of $1325 per year to supervise on parole. C. Camp & G. Camp, The Corrections Yearbook -- Adult Corrections at 1, 49 (1995); The Corrections Yearbook -- Probation and Parole at 43 (1995).

(78) In the five-year period ending January 1, 1995, the number of adults on active parole supervision in the United States increased from 545,804 to 664,404. *See C. Camp and G. Camp, The Corrections Yearbook Probation & Parole at 30-31 (1990); The Corrections Yearbook -- Probation & Parole at 47-48 (1995).*

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