Rel: 03/04/2016

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1140610

Ex parte Curtis J. Cook, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: Curtis J. Cook, Jr.

v.

Governor Robert Bentley et al.)

**(Elmore Circuit Court, CV-14-116;
Court of Civil Appeals, 2140459)**

1140611

Ex parte Joe Daniel Holt, Jr.

PETITION FOR WRIT OF MANDAMUS

1140610, 1140611

(In re: Joe Daniel Holt, Jr.

v.

Robert Bentley et al.)

(Elmore Circuit Court, CV-14-71; Court of Civil Appeals, 2140460)

BRYAN, Justice.[1]

Facts and Procedural Background

Curtis J. Cook, Jr., and Joe Daniel Holt, Jr. (hereinafter sometimes referred to collectively as "the petitioners"), are inmates incarcerated by the Alabama Department of Corrections ("the DOC"). The petitioners each filed in the Elmore Circuit Court ("the trial court") a "petition for release order" seeking their release from prison pursuant to the Alabama Prisoner Litigation Reform Act, § 14-15-1 et seq., Ala. Code 1975 ("the APLRA"). Holt filed his petition on or around June 20, 2014; Cook filed his petition on or around September 12, 2014.[2] The petitioners also filed

[1]These petitions were not assigned to Justice Bryan for decision until December 17, 2015.

[2]Holt's petition for release is not included in the materials provided to this Court; however, Holt claims in his petition for a writ of mandamus that he filed his petition for

requests for in forma pauperis ("IFP") status. On June 27, 2014, the trial court entered an order granting Holt's request for IFP status. However, on August 25, 2014, the trial court entered an order revoking Holt's IFP status. On September 17, 2014, the trial court entered an order denying Cook's request for IFP status.

The petitioners each filed with the Court of Criminal Appeals petitions for a writ of mandamus in which they sought an order from that court directing the trial court to set aside its orders denying the petitioners' requests for IFP status. On March 12, 2015, the Court of Criminal Appeals entered separate orders in which it stated that it did not have jurisdiction over Cook's and Holt's petitions for a writ of mandamus and, consequently, transferred the petitions to the Court of Civil Appeals. On March 13, 2015, the Court of Civil Appeals likewise determined that it lacked subject-matter jurisdiction over Cook's and Holt's petitions and

---

release "on or about June 20, 2014." Cook's petition for release does not indicate the date it was filed in the trial court; however, the certificate of service for that petition indicates a service date of September 12, 2014.

entered separate orders transferring the petitions to this Court.[3]

This Court assigned Cook's petition case no. 1140610, assigned Holt's petition case no. 1140611, and entered an order consolidating the cases for the purpose of issuing one opinion and to address the issue of which of Alabama's appellate courts has jurisdiction to review proceedings arising from the APLRA. Accordingly, before addressing the merits of the petitioners' arguments, this Court must determine which of Alabama's appellate courts has jurisdiction over Cook's and Holt's petitions.

Jurisdiction

The APLRA, which became effective on April 24, 2013, applies "to all pro se civil actions for money damages relating to terms and conditions of confinement brought under the laws of this state, or for injunctive, declaratory, or mandamus relief, brought by prisoners incarcerated in any state correctional facility." § 14-15-2, Ala. Code 1975. The APLRA requires a prisoner to exhaust all administrative

[3]These petitions were not assigned to Justice Bryan until approximately nine months after the Court of Civil Appeals transferred the petitions to this Court. See note 1, supra.

remedies before filing a civil action under state law. § 14-15-4(b), Ala. Code 1975. Should a prisoner commence an action seeking relief in the form of a release order, he or she must file with the petition for release a request for a three-judge court and materials sufficient to indicate that certain prerequisites, found in § 14-15-10(a), Ala. Code 1975, have been met.[4] § 14-15-10(d), Ala. Code 1975. One limitation on relief prescribed by the APLRA is that a state court may order a prisoner's release from incarceration only when a three-judge court finds from clear and convincing evidence that "[c]rowding is the primary cause of the violation of a right" and "[n]o other relief will remedy the violation of the right." § 14-15-10(f)(1) and (2), Ala. Code 1975.

---

[4]Although it is not at issue in these cases, § 14-15-10(a) of the APLRA provides:

> "(a) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless both of the following are satisfied:
>
> > "(1) A court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the right sought to be remedied through the prisoner release order.
> >
> > "(2) The defendant has had a reasonable amount of time to comply with the previous court orders."

The APLRA also provides that a pro se prisoner seeking relief as prescribed by the APLRA may seek IFP status by providing the court with a certified copy of his or her "prisoner money account" for the 12 months preceding the filing of the request for relief. § 14-15-5(a)(1), Ala. Code 1975. If the prisoner's "inmate trust account" shows no deposits in the 12 months preceding the filing of the request for relief, the court has no discretion regarding IFP status but, instead, "shall permit the prisoner to proceed without paying the filing fee and costs." § 14-15-5(a)(3), Ala. Code 1975 (emphasis added). The APLRA does not give courts guidance or provide factors for courts to consider in determining whether to grant IFP status in cases in which the prisoners' inmate trust accounts indicate that deposits have been made into the accounts in the 12 months preceding the filing of the request for relief.

Although no party argues that the Court of Criminal Appeals has jurisdiction over these matters, we briefly address, for thoroughness, that court's appellate jurisdiction. The Court of Criminal Appeals has exclusive appellate jurisdiction "of all misdemeanors, including the

violation of town and city ordinances, habeas corpus and all felonies, including all post conviction writs in criminal cases." § 12-3-9, Ala. Code 1975. Because Cook's and Holt's mandamus petitions arise from actions seeking relief based on the conditions of their incarceration, rather than from actions giving rise to their incarceration, the proceedings underlying the petitions are civil, not criminal, in nature. That determination is supported by the fact that the APLRA consistently refers to actions seeking relief pursuant to the procedures set forth in the APLRA as civil in nature. See, e.g., § 14-15-2, § 14-15-3(1), § 14-15-4(b), and § 14-15-10(a) and (b). In addition, § 14-15-2 expressly provides that the APLRA does not apply to actions brought pursuant to § 15-21-1, Ala. Code 1975, which governs habeas corpus proceedings. Thus, although the APLRA provides that a prisoner may seek release from incarceration as a form of relief, our legislature clearly intended to make a distinction between a prisoner's action seeking release from incarceration pursuant to the procedures set forth in the APLRA and a prisoner's petition for a writ of habeas corpus. Because Cook's and Holt's petitions for release seek relief as prescribed by the

APLRA, we conclude that their petitions are not in the nature of habeas corpus petitions. Thus, the Court of Criminal Appeals does not have jurisdiction over Cook's and Holt's mandamus petitions arising from the proceedings initiated by the filing of their petitions seeking relief under the APLRA. Accordingly, appellate jurisdiction over an action seeking relief prescribed by the APLRA must lie either with the Court of Civil Appeals or with this Court.

The petitioners argue that the Court of Civil Appeals has jurisdiction over their mandamus petitions because, they say, the Court of Civil Appeals has exclusive appellate jurisdiction over all appeals and petitions for extraordinary writs arising from decisions of administrative agencies. The respondents,[5] on the other hand, argue that this Court has jurisdiction over the mandamus petitions because, they say,

[5]Based on the materials before this Court, it appears that Cook named Governor Robert Bentley, Attorney General Luther Strange, "the State," and two other individuals, Kim Thomas, "Prison Commissioner," and Leon Forniss, "Warden," as respondents in his petition for release filed in the trial court. As indicated in note 2, supra, Holt's petition for release is not included in the materials before this Court. The attorney general has filed a brief on behalf of "the respondents" in this Court.

the petitions do not fall within the exclusive appellate jurisdiction of the Court of Civil Appeals.

Section 12-3-10, Ala. Code 1975, provides that the Court of Civil Appeals has exclusive appellate jurisdiction

> "of all civil cases where the amount involved, exclusive of interest and costs, does not exceed $50,000, all appeals from administrative agencies other than the Alabama Public Service Commission, all appeals in workers' compensation cases, all appeals in domestic relations cases, including annulment, divorce, adoption, and child custody cases and all extraordinary writs arising from appeals in said cases."

The only area of the Court of Civil Appeals' exclusive jurisdiction that could conceivably encompass Cook's and Holt's mandamus petitions is that court's jurisdiction to issue extraordinary writs "arising from appeals" from decisions of administrative agencies. However, Cook's and Holt's petitions for release filed in the trial court are not appeals from an administrative agency. These are not cases in which an administrative agency has denied a petitioner requested relief and that petitioner has appealed the agency's decision either to a circuit court or to the Court of Civil Appeals. Although the basis for the relief sought by the petitioners concerns the DOC's alleged failure to address

overcrowding in Alabama's prisons, the DOC has no authority under the APLRA to grant the petitioners the relief they seek; the relief they seek can be granted only by a three-judge court. § 14-15-10(b). The mere fact that the DOC is the agency charged with overseeing Cook's and Holt's incarceration does not bring their mandamus petitions within the Court of Civil Appeals' exclusive appellate jurisdiction of "all appeals from administrative agencies" and "all extraordinary writs arising from appeals in said cases" as envisioned by § 12-3-10. Thus, we conclude that the Court of Civil Appeals does not have jurisdiction over Cook's and Holt's mandamus petitions. Because no other appellate court has jurisdiction over Cook's and Holt's mandamus petitions, jurisdiction lies with this Court. Ala. Const. 1901, Art. IV, § 140(c); § 12-2-7(1), Ala. Code 1975. Thus, we turn now to the merits of the petitioners' arguments.

Standard of Review

> "In Ex parte Melton, 837 So. 2d 819, 820–21 (Ala. 2002), this Court discussed the standard of review applicable to a petition for the writ of mandamus:
>
> > "'"A writ of mandamus is an extraordinary remedy, and it will be 'issued only when there is: 1)

> a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.' Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993). A writ of mandamus will issue only in situations where other relief is unavailable or is inadequate, and it cannot be used as a substitute for appeal. Ex parte Drill Parts & Serv. Co., 590 So. 2d 252 (Ala. 1991)."
>
> "'Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998).'
>
> "Further, this Court has stated: '"'[M]andamus, and not appeal, is the proper method by which to compel the circuit court to proceed on an in forma pauperis petition.'"' 837 So. 2d at 822 (quoting Ex parte Beavers, 779 So. 2d 1223, 1224 (Ala. 2000), quoting in turn Goldsmith v. State, 709 So. 2d 1352, 1353 (Ala. Crim. App. 1997))."

Ex parte Ward, 957 So. 2d 449, 451 (Ala. 2006).

Case No. 1140610

Based on the materials provided to this Court, it appears that Cook's "average balance" in his inmate trust account as of August 31, 2014, was $11.76. Although Cook does not indicate what the filing fee for his action would have been,

it appears as though he would have had to pay a filing fee of $297 to prosecute his action. § 12-19-71(a)(4), Ala. Code 1975.

In its September 17, 2014, order denying Cook's request for IFP status, the trial court noted that it had denied Cook's request because it found that he "has had $853.00 deposited into his account within the last year; more than enough from which a filing fee might be paid." Because Cook had deposits in his inmate trust account in the 12 months preceding the filing of his petition for release, the trial court was not required to grant Cook's request for IFP status. § 14-15-5(a)(3). Rather, the trial court had the discretion more generally afforded trial courts in determining whether to grant IFP status in non-APLRA cases. Accordingly, we consider only whether the trial court exceeded its discretion in denying Cook's request for IFP status. See Wilson v. Southeast Alabama Med. Ctr., [Ms. 2140225, July 24, 2015] ___ So. 3d ___, ___ (Ala. Civ. App. 2015); Ex parte Holley, 883 So. 2d 266, 269 (Ala. Crim. App. 2003).

In Ex parte Wyre, 74 So. 3d 479 (Ala. Crim. App. 2011), Wyre sought IFP status in connection with the filing of a

postconviction petition in the Baldwin Circuit Court. Id. at 480. After the Baldwin Circuit Court denied Wyre's IFP request, Wyre filed a petition for a writ of mandamus with the Court of Criminal Appeals. Id. In that petition, Wyre alleged that the Baldwin Circuit Court had erred in denying his IFP request because, he said, he had only 28 cents in his inmate trust account when he filed his IFP request and the average balance of his inmate trust account for the 12 months preceding the filing of his request was $30.74. Id.

In denying Wyre's mandamus petition, the Court of Criminal Appeals noted that Wyre's inmate trust account showed total deposits of $876.52 in the 12 months preceding the filing of his petition for postconviction relief. Wyre, 74 So. 3d at 481. Given those deposits, the Court of Criminal Appeals stated: "Wyre could have saved the money to pay the filing fee; thus, he is not indigent." Id.

Similarly, in Cook's case, Cook's inmate trust account indicates that Cook had total deposits of more than $800 in the 12 months preceding the filing of his petition for release, including deposits of $259 in 1 month alone. Those deposits, if saved, would have been more than sufficient to

pay a filing fee. Although Cook argues that the trial court should not consider the assets of "friends and relatives" in determining whether to grant IFP status, there is no indication in the materials provided to this Court that the trial court considered any "assets" other than the deposits in Cook's inmate trust account. Thus, we cannot say that the trial court exceeded its discretion in denying Cook's request for IFP status, and we deny Cook's petition.

Case No. 1140611

Based on the materials provided to this Court, it appears that Holt's "average balance" in his inmate trust account as of April 30, 2014, the most recent "average balance" provided on the "average inmate deposit balances" form submitted by Holt, was $2.24. Like Cook, Holt does not indicate what the filing fee for his action would have been, although, as noted above, it appears as though the required filing fee would have been $297. § 12-19-71(a)(4).

Holt's inmate trust account shows total deposits of $199.26 between May 31, 2013, and April 30, 2014. Thus, the trial court was not required to grant Holt's request for IFP status. § 14-15-5(a)(3). As noted above, the trial court

initially granted Holt's request for IFP status but later revoked that status in an order that does not indicate the ground for the revocation. That order simply states, in pertinent part: "Reconsideration of indigent status filed by [the respondents] is hereby granted." It is undisputed that the respondents filed with the trial court a motion to reconsider Holt's IFP status and that Holt filed a response to that motion. Because the trial court initially granted Holt's request for IFP status and then revoked that status, we infer that the trial court was persuaded by the respondents' arguments. However, because neither the respondents' motion nor Holt's response to that motion are included in the materials provided to this Court, we are unable to determine the grounds for the trial court's revocation of Holt's IFP status, and, thus, we are unable to determine whether the trial court exceeded its discretion.[6]

---

[6]In their brief to this Court, the respondents argue that the trial court correctly revoked Holt's IFP status because, they say, Holt has previously filed three pro se civil actions that have been dismissed as frivolous, malicious, or for failure to state a claim upon which relief can be granted. Section 14-15-5(b) of the APLRA provides:

> "The court shall deny in forma pauperis status to any prisoner who has had three or more pro se civil actions or appeals dismissed by any federal or state

As the petitioner, Holt carried the burden of providing this Court with the pertinent materials showing that he is entitled to mandamus relief. Ex parte Dangerfield, 49 So. 3d 675, 680 (Ala. 2010). Holt has failed to carry that burden, and this Court will not conclude that the trial court exceeded its discretion when Holt failed to provide this Court with all the arguments and evidence the trial court considered in denying his request for IFP status. Thus, we deny Holt's petition.

Conclusion

> court for being frivolous, malicious, or for failure to state a claim, unless the prisoner shows that he or she is in imminent danger of serious physical injury at the time of filing his or her motion for judgment, or the court determines that it would be manifest injustice to deny in forma pauperis."

In support of their argument, the respondents submitted with their brief to this Court three orders, two from the Montgomery Circuit Court and one from the Limestone Circuit Court, dismissing prior civil actions filed by Holt. However, nothing in the materials provided to this Court indicates that those orders were before the trial court for its consideration, and this Court will not consider exhibits or arguments based on those exhibits when there is no indication that those exhibits were presented to the trial court for its consideration. Ex parte Cincinnati Ins. Co., 51 So. 3d 298, 310 (Ala. 2010).

For the reasons set forth above, we deny Cook's and Holt's petitions for a writ of mandamus.

1140610 -- PETITION DENIED.

1140611 -- PETITION DENIED.

Stuart, Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Moore, C.J., concurs in part and dissents in part.

Murdock, J., dissents.

MOORE, Chief Justice (concurring in part and dissenting in part).

I concur with the majority opinion insofar as it holds that appellate jurisdiction over actions filed by incarcerated inmates seeking release from prison pursuant to the Alabama Prisoner Litigation Reform Act, § 14-15-1 et seq., Ala. Code 1975 ("the APLRA"), lies with this Court, not with the Court of Civil Appeals or the Court of Criminal Appeals. I respectfully dissent from that part of the majority opinion that predicates its denial of the requested mandamus relief -- namely, the issuance of writs directing the Elmore Circuit Court to grant in forma pauperis ("IFP") status to inmates Curtis J. Cook, Jr., and Joe Daniel Holt, Jr., the petitioners -- on the rationale expressed in Ex parte Wyre, 74 So. 3d 479 (Ala. Crim. App. 2011).

Today the Court adopts the Wyre "look back" or "could have saved" rule for the first time, even though the resolution of this case does not depend on Wyre. Under this rule, a court may deny an inmate IFP status if it surmises from recent deposits into the inmate's trust account that the inmate could have saved enough money in the previous 12 months to pay his or her filing fee. The present case involves

determinations of IFP status under § 14-15-5, Ala. Code 1975, not under Rules 32.6 and 32.7, Ala. R. Crim. P., which were the dispositive rules in Wyre. Wyre is relevant to this case only by loose analogy. Under § 14-15-5(b), a court "shall deny in forma pauperis status to any prisoner who has had three or more pro se civil actions or appeals dismissed by any federal or state court for being frivolous, malicious, or for failure to state a claim," unless the prisoner makes certain showings specified in § 14-15-5(b). The respondents argue that the trial court properly denied Holt IFP status under § 14-15-5(b) because Holt had three or more pro se civil actions dismissed for being frivolous, malicious, or for failure to state a claim. Given that this case involves the application of § 14-15-5, and not the specific rules of criminal procedure addressed in Wyre, I do not believe that the rule espoused in Wyre should be discussed, let alone play a deciding role, in our decision in Holt's case.

Even in cases governed by Rules 32.6 and 32.7, Ala. R. Crim. P., however, the "look back" or "could have saved" rule articulated in Wyre raises troubling constitutional questions. The Wyre rule impedes a prisoner's access to the courts in

possible violation of the Due Process Clause by weighing the interests of rich and poor criminals unequally. The Wyre rule also may violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See also Ala. Const. 1901, Art. I, §§ 1, 6, 13, and 22, and Ex parte Johnson, 123 So. 3d 953, 954 (Ala. 2013) (Moore, C.J., dissenting)("'The Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale.'" (quoting Smith v. Bennett, 365 U.S. 708, 714 (1961))).

For the first decade after this Court adopted the Alabama Rules of Criminal Procedure, the Court of Criminal Appeals was responsive to prisoners' complaints that a trial court was unfairly denying IFP status in postconviction proceedings even after a demonstration of indigence. In fact, the Court of Criminal Appeals "uniformly granted IFP status when the balance in an inmate's prison account on the date the Rule 32[, Ala. R. Crim. P.,] petition was filed was less than the filing fee and the prisoner's account balance had never exceeded the filing fee in previous months." Ex parte Robey, 160 So. 3d 757, 761 (Ala. 2014)(Moore, C.J., dissenting).[7]

[7]See, e.g., Lucas v. State, 597 So. 2d 759, 760 (Ala. Crim. App. 1992)(reversing order denying IFP status when

"there has never been any more than $31.47 in the [prisoner's] account at any one time" and the filing fee was $95); Robinson v. State, 629 So. 2d 5, 5 (Ala. Crim. App. 1993) (reversing order denying IFP status when prisoner's IFP declaration "states that the only money available to the [prisoner] is $6.25, which is in his prison account"); Stafford v. State, 647 So. 2d 102 (Ala. Crim. App. 1994)(reversing order denying IFP status when filing fee was $110, prisoner's inmate trust account contained $91.83 at the time of filing, the highest monthly balance in the account in the previous nine months was $104.33, and the average balance for that period was $63.15); Griggs v. State, 659 So. 2d 1044 (Ala. Crim. App. 1995)(reversing order denying IFP status when prisoner had only $1.10 in his inmate trust account when he filed his Rule 32 petition); Powell v. State, 674 So. 2d 1259, 1260 (Ala. Crim. App. 1995)(reversing order denying IFP status when prisoner had $1.00 in his inmate trust account when he attempted to file the petition, the filing fee was $110, and thus "it appear[ed] that the [prisoner was] indigent"); Hawkins v. State, 675 So. 2d 1359, 1360 (Ala. Crim. App. 1995)(reversing order denying IFP status because, "[f]rom examining the [prisoner's] prison account balances, we conclude that the [prisoner] is indigent"); Malone v. State, 687 So. 2d 218 (Ala. Crim. App. 1996)(reversing order denying IFP status when prisoner showed a balance of $15.04 in his inmate trust account on the filing date, the maximum balance in the account over the previous four months was $60.21, and the filing fee was $110); Cummings v. State, 687 So. 2d 1290 (Ala. Crim. App. 1996)(reversing order denying IFP status when prisoner had $31.49 in his inmate trust account when he filed the petition and the filing fee was $110); Ex parte Coleman, 728 So. 2d 703, 705 (Ala. Crim. App. 1998)(reversing order denying IFP status when certificate attached to IFP declaration showed $.29 in prisoner's inmate trust account); Ex parte Ferrell, 819 So. 2d 83 (Ala. Crim. App. 2001)(finding that prisoner satisfied definition of indigency in Rule 6.3(a), Ala. R. Crim. P., when he had a balance of $.17 in his inmate trust account on the filing date, the maximum balance in the account in prior months was $40, and the filing fee was $140); and Ex parte Spence, 819 So. 2d 106, 106 (Ala. Crim. App. 2001)(ordering the trial court to allow the prisoner "to

This Court routinely affirmed the judgments of the Court of Criminal Appeals in these matters.

In Ex parte Hurth, 764 So. 2d 1272, 1273 (Ala. 2000), we rejected the trial court's finding that an inmate was not entitled to IFP status because he could have saved his usual monthly deposit to cover the costs of the filing fee. Instead, this Court ordered the trial court to permit the inmate to proceed with his petition for postconviction relief based on the inmate's financial condition when he filed for IFP status. Hurth, 764 So. 2d at 1274. In similar cases from this period this Court recognized that courts should look to the amount of an inmate's funds at the time of filing to determine whether the inmate was indigent and, thus, entitled to IFP status. See Ex parte Beavers, 779 So. 2d 1223, 1224-25 (Ala. 2000); Ex parte Dozier, 827 So. 2d 774, 776 (Ala. 2002).

Not until Wyre did an appellate court adopt the "look back" or "could have saved" rule. Robey, 160 So. 2d at 762 (Moore, C.J., dissenting). Because I continue to believe that "Wyre is inconsistent with our prior cases on determining

---

file his Rule 32 petition without the prepayment of a filing fee" when his inmate trust account had $2.06 on deposit at the time of filing).

indigency," and, worse still, is "constitutionally questionable" and "unspecified in rule or statute," Robey, 160 So. 2d at 765 (Moore, C.J., dissenting), I object to the majority's reliance on Wyre. Moreover, Wyre does not apply to an IFP determination under § 14-15-5. The facts and arguments before us do not justify ratifying a dubious decision by a lower appellate court on an issue ancillary to the one presented. Therefore, although I concur in the jurisdictional holding, I respectfully dissent from the Court's approval of the unnecessarily harsh Wyre rule.

MURDOCK, Justice (dissenting).

Because I believe original appellate jurisdiction over this matter lies with the Court of Criminal Appeals, I respectfully dissent.

Curtis J. Cook, Jr., and Joe Daniel Holt, Jr. (sometimes hereinafter referred to collectively as "the petitioners"), seek an actual release from prison. This, in my view, makes all the difference. It makes their claims quite different than a claim merely for money damages to compensate for the conditions of their past confinement or for equitable relief to alter the conditions of their future confinement. Review of an action seeking an actual physical release from penal incarceration expressly falls, and appropriately so, within the appellate jurisdiction of the Court of Criminal Appeals. To put it colloquially, whether to release a prisoner from prison is a subject within the Court of Criminal Appeals' "wheelhouse."

I begin by emphasizing a point with which I believe the main opinion agrees: The Alabama Prisoner Litigation Reform Act, § 14-15-1 et seq., Ala. Code 1975 ("the APLRA"), does not create or provide some new cause of action by which an inmate

may complain of the conditions of his or her confinement, nor does it create or provide for a release from prison as a substantive remedy or form of relief for any such action. Rather, it contemplates that other law (e.g., the Eighth Amendment to the United States Constitution) might already provide such a cause and, under the right circumstances, might provide for a release from prison as the necessary remedy for such a cause. On that basis, the APLRA seeks merely to impose certain procedural requirements or conditions on any such action seeking to obtain such relief. The threshold question in these cases is whether such an action, seeking the release of a convicted prisoner, would by its nature constitute a habeas corpus action that falls within the original appellate jurisdiction of the Court of Criminal Appeals.[8]

The main opinion posits that, "[b]ecause Cook's and Holt's mandamus petitions arise from actions seeking relief based on the conditions of their incarceration, rather than from actions giving rise to their incarceration, the

[8]In addition to "habeas corpus," § 12-3-9, Ala. Code 1975, places "post conviction writs in criminal cases" within the "exclusive appellate jurisdiction" of the Court of Criminal Appeals. I leave for another day the question whether an action such as the ones presented in these cases also falls in this latter category.

proceedings underlying the petitions are civil ... in nature." ___ So. 3d at ___. It also notes that the APLRA refers to actions governed by it as "civil." Id. For present purposes these points may be conceded, but they do not show that the petitioners' claims for an actual release from prison are not within the appellate jurisdiction of the Court of Criminal Appeals. Both habeas corpus petitions and Rule 32, Ala. R. Crim. P., proceedings are labeled by our jurisprudence as "civil" actions. See Woods v. State, 264 Ala. 315, 318, 87 So. 2d 633, 635-36 (1956) ("It seems to be the general opinion that habeas corpus is a civil, as distinguished from a criminal, remedy or proceeding."); Ex parte Wright, 860 So. 2d 1253, 1254 (Ala. 2002) ("'[P]ost-conviction proceedings filed pursuant to Rule 32 are civil proceedings.' State v. Hutcherson, 847 So. 2d 378, 383 (Ala. Crim. App. 2001)."). Yet both are within the appellate jurisdiction of the Court of Criminal Appeals pursuant to § 12-3-9. See note 8, supra.

The main opinion also reasons that

> "§ 14-15-2 expressly provides that the APLRA does not apply to actions brought pursuant to § 15-21-1, Ala. Code 1975, which governs habeas corpus proceedings. Thus, although the APLRA provides that a prisoner may seek release from incarceration as a form of relief, our legislature clearly intended to

> make a distinction between a prisoner's action seeking release from incarceration pursuant to the procedures set forth in the APLRA and a prisoner's petition for a writ of habeas corpus. Because Cook's and Holt's petitions for release seek relief as prescribed by the APLRA, we conclude that their petitions are not in the nature of habeas corpus petitions."

___ So. 3d at ___.

The problem with this argument, as I see it, is that § 15-21-1, Ala. Code 1975, does not codify the entire universe of common-law habeas corpus actions. If it did, § 14-15-2, Ala. Code 1975, would come closer to being the suggested expression of legislative intent that no action or request for relief governed, or limited, by the APLRA should be considered a habeas corpus action. But 15-21-1 codifies only that species of habeas corpus by which someone seeks to inquire into the reason for a pre-conviction confinement; it states merely that

> "[a]ny person who is imprisoned or restrained of his liberty in the State of Alabama on any criminal charge or accusation or under any other pretense whatever ... may[, subject to certain exceptions not applicable in these cases,] prosecute a writ of habeas corpus according to the provisions of this chapter[, i.e., Title 15, Chapter 21,] to inquire into the cause of such imprisonment or restraint."

(Emphasis added.) Thus, it is not surprising that the legislature might expressly confirm in the APLRA that the APLRA was not intended to govern the specific, pre-conviction habeas action described in § 15-21-1. That does not mean that an action to which the APLRA does apply, one in which a convicted inmate seeks release from state custody, cannot be understood to be a habeas corpus action. I believe that, by definition and by intrinsic nature, it is.

In these cases, the relief the petitioners have requested from the courts is an actual release from incarceration. Such a petition is by definition in the nature of habeas corpus. See Price v. Johnston, 334 U.S. 266, 283 (1948) ("The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." (emphasis added)); Black's Law Dictionary 825 (10th ed. 2014) (defining the term "habeas corpus" literally as "that you have the body"); Zach Howe, Detainment Power: The Limits of the President's Power to Suspend Habeas Corpus During Military Conflicts, 37 Harv. J.L. & Pub. Pol'y 677, 677 n. 1 (2014) ("Habeas corpus means, literally, 'produce the

body.'"); Brian R. Means, Postconviction Remedies § 7:4 (2015) (citing Taylor v. Egeler, 575 F.2d 773, 773 (6th Cir. 1978) (per curiam)) ("'The literal meaning of the writ of habeas corpus ad subjiciendum comes from the Latin habeas corpus which means "you should have the body."' If granted, the writ orders the jailer or other custodian to produce the body and free the prisoner either absolutely or conditionally."); Caprice L. Roberts, Rights, Remedies, and Habeas Corpus -- The Uighurs, Legally Free While Actually Imprisoned, 24 Geo. Immigr. L.J. 1, 8 (2009) ("The classic Latin definition of habeas corpus is an order: we command that you bring forth the body.").

Citing Looney v. State, 881 So. 2d 1061 (Ala. Crim. App. 2002), and Taylor v. State, 455 So. 2d 270 (Ala. Crim. App. 1984), the respondents argue that, because Cook's and Holt's petitions for release concern the conditions of their confinement, rather than the legality of their incarceration, the petitions are not in the nature of habeas corpus. The very reason that the plaintiff's complaint regarding conditions of confinement in Looney was considered by the Court of Criminal Appeals not to be a claim for habeas relief,

and therefore not within its jurisdiction, is because that case did not involve a release from prison as the remedy for the stated condition:

> "Looney's pleadings appear to assert a civil liberties violation and to request monetary relief -- an action akin to a 42 U.S.C. § 1983 cause of action. Such actions have been characterized by the United States Supreme Court as personal-injury actions. See Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Appeals from personal-injury actions are not within the jurisdiction of this Court."

Looney, 881 So. 2d at 1064.

Quoting from Taylor, the Looney court further explained why the claim in Taylor case was not properly understood to be claim for a writ of habeas corpus:

> "'The relief [the petitioner] seeks from alleged cruel and unusual treatment in the prison system is not cognizable under a writ of habeas corpus, and the appropriate remedy in this case for the claim of illegal conditions of confinement, if proved, would not be release from custody. ... The court stated in Cook v. Hanberry, [592 F.2d [248] at 249 [(5th Cir. 1979)]]:
>
> > "'"Assuming arguendo that his allegations of mistreatment demonstrate cruel and unusual punishment, the petitioner is still not entitled to release from prison. Habeas corpus is not available to prisoners complaining only of mistreatment during their legal incarceration. Granville v.

> Hunt, 5 Cir. 1969, 411 F.2d 9, 12-13[9]; see also Williams v. Steele, 8 Cir. 1952, 194 F.2d 917, cert. denied, 344 U.S. 822, 73 S.Ct. 20, 97 L.Ed. 640 [(1952)]. The relief from such unconstitutional practices, if proved, is in the form of equitably-imposed restraint, not freedom from otherwise lawful incarceration. See Konigsberg v. Ciccone, W.D. Mo. 1968, 285 F. Supp. 585, 589, aff'd, 8 Cir. 1969, 417 F.2d 161, cert. denied, 397 U.S. 963, 90 S.Ct. 996, 25 L.Ed.2d 255 (1970). This is because the sole function of habeas corpus is to provide relief from unlawful imprisonment or custody, and it cannot be used for any other purpose. See Rheuark v. Shaw, 5 Cir. 1977, 547 F.2d 1257, 1259; Hill v. Johnson, 5 Cir. 1976, 539 F.2d 439, 440; Pierre v. U.S., 5 Cir. 1976, 525 F.2d 933, 935-36."'"

Looney, 881 So. 2d at 1063 (quoting Taylor v. State, 455 So. 2d at 270-71) (emphasis added).[10]

---

[9]As is so often the case in this area of the law, this attempt by the federal court to summarize the holding of a case such as Granville misses the mark. The actual passage referenced reads: "[T]his Court has long taken the position that habeas corpus is not available to prisoners who are complaining only of mistreatment during their legal incarceration. Our rationale has been that 'it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.' Adams v. Ellis, 5 Cir. 1952, 197 F.2d 483, 485." Granville v. Hunt, 411 F.2d 9, 12 (5th Cir. 1969) (emphasis added). See note 11, infra.

[10]At one juncture, the Looney court stated that "an inmate cannot challenge the conditions of his confinement in a habeas corpus petition." 881 So. 2d at 1063. Clearly, however, that

Read in a manner most favorable to the position of the respondents in these cases, the decision in Taylor was premised on the notion that the claim at issue there, because it was based on "conditions of confinement," could not result in an actual release from prison. But, as with Looney, that is precisely why the reliance on Taylor fails here. Here, claims for release from prison that are based on conditions of confinement are before us. Indeed, we deal here with a new Alabama legislative enactment that explicitly contemplates the existence of a claim for a "release order" based on just such a condition, e.g., "crowding." The very point of § 14-15-10, Ala. Code 1975, is to impose procedural preconditions on the issuance of any "prisoner release order[s]" based on "prison conditions" or, as stated in the above-quoted passage from Looney, from orders that the inmate be granted his "freedom

---

reference was merely to challenges to conditions for which the remedy would be money damages or equitable relief, rather than actual release from prison. Looney specifically reasoned that "'"[t]he relief from such unconstitutional practices, if proved, is in the form of equitably-imposed restraint, not freedom from otherwise lawful incarceration,"'" whereas "'"the sole function of habeas corpus is to provide relief from unlawful imprisonment or custody."'" Looney, 881 So. 2d at 1063. We have here cases in which the contemplated relief is in fact a release from prison. These cases, therefore, are inherently different than Looney, where the petitioner sought only money damages.

from otherwise lawful incarceration." Thus, we inescapably deal here with a type of claim not contemplated as even possible by the Court of Criminal Appeals in Taylor. And it falls to this Court to properly understand the intrinsic nature of the petitioners' claims and whether those claims fall within the jurisdictional reach of the Court of Criminal Appeals.

In addition to the earlier cited authority regarding the intrinsic nature of claims for release from custody, federal cases have recognized (1) that a claim for "release from custody" is by its very nature "an application for habeas corpus" and (2) that, in fact, release from penal custody is only available as a remedy through the mechanism of a habeas action (and not available as a remedy in an action brought under 42 U.S.C. § 1983). In Rodriquez v. McGinnis, 451 F.2d 730, 731 (2d Cir. 1971), the United States Court of Appeals for the Second Circuit stated:

> "The present application, since it seeks release from custody, is in fact an application for habeas corpus. '[R]elease from penal custody is not an available remedy under the Civil Rights Act[, i.e., 42 U.S.C. § 1983].' Peinado v. Adult Authority, of Dept. of Corrections, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968, 89 S.Ct. 2116, 23 L.Ed. 2d 755 (1969)."

(Emphasis added.) See also United States ex rel. Katzoff v. McGinnis, 441 F.2d 558 (1971) (holding that the inmate's petition was in essence an application for habeas corpus since it sought and obtained his immediate release from custody).

In Preiser v. Rodriquez, 411 U.S. 475, 482 (1973), the United States Supreme Court noted that it had previously held "that complaints of state prisoners relating to the conditions of their confinement were cognizable either in federal habeas corpus or under the Civil Rights Act[, i.e., 42 U.S.C. § 1983]." (Emphasis added.) And yet, it also has been held that "a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' Preiser v. Rodriquez, 411 U.S. 475, 489 (1973).... He must seek federal habeas corpus relief (or appropriate state relief) instead." Wilkinson v. Dotson, 544 U.S. 74, 78 (2005). In essence, therefore, § 1983 applies when the conditions of confinement can be remedied by means other than the release of the prisoner, e.g., through money damages or injunctive relief, but habeas corpus is the remedy where the condition of confinement can be remedied only by a release from that confinement.

In Preiser, the Supreme Court further explained the relationship between civil-rights actions and habeas petitions:

> "The problem involves the interrelationship of two important federal laws. The relevant habeas corpus statutes are 28 U.S.C. §§ 2241 and 2254. Section 2241(c) provides that '(t)he writ of habeas corpus shall not extend to a prisoner unless ... (3) (h)e is in custody in violation of the Constitution or laws or treaties of the United States ....' Section 2254 provides in pertinent part:
>
> > "'(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> >
> > "'....'
>
> "....
>
> "It is clear, not only from the language of §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."[11]

---

[11]In a case in which the continuation of custody would be in violation of the Eighth Amendment as it relates to conditions of confinement, the continuation of that custody would be "unauthorized" under the law, or "illegal." See generally Preiser, 411 U.S. at 485 ("[T]he writ of habeas

411 U.S. at 482-484 (emphasis added). See also Brown v. Plata, 563 U.S. 493, 560 (2011) (Scalia, J., dissenting) (explaining, among other things, that Brown involved the use of habeas corpus to effect the release of prisoners by a three-judge court under the federal Prisoner Litigation Reform Act based, like the claim here, on alleged overcrowding).

As stated at the outset, because I believe jurisdiction over these mandamus petitions lies with the Court of Criminal Appeals, I respectfully dissent.

---

corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law ...." (emphasis added)); Price v. Johnston, 334 U.S. at 283 ("The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." (emphasis added)).