**[J-175-2001][M.O. - Eakin, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| WALTER WINKLESPECHT, | : | No. 57 MM 2001 |
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| Petitioner | : | Application for Writ of Habeas Corpus |
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| v. | : | |
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| PENNSYLVANIA BOARD OF PROBATION AND PAROLE, | : | |
| | : | |
| | : | |
| Respondent | : | SUBMITTED: November 20, 2001 |

## CONCURRING AND DISSENTING OPINION

**MR. JUSTICE SAYLOR** **DECIDED: DECEMBER 31, 2002**

In this decision the Court, upon petition for a writ of habeas corpus, proceeds to review the Petitioner's constitutional challenge to the denial of his application for parole.[1] After concluding that there is no merit to Petitioner's underlying claim, and correspondingly that no relief is due, the majority then states that "we leave for another day the question of the propriety of habeas corpus as a remedy." Majority Opinion, slip op. at 5. I believe that this approach may have unintended consequences.

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[1] In granting Petitioner's application to file original process, this Court directed that the parties brief three separate issues: 1) whether a claim that a denial of parole violated ex post facto prohibitions, see U.S. CONST. art. 1, §10, is cognizable under Pennsylvania's habeas corpus statute; 2) if so, in which court should the habeas petition initially be filed; and 3) whether the Parole Board violated such principles when it denied Petitioner parole.

Recourse to the writ of habeas corpus, historically used to test the legality of custody, see Commonwealth ex rel. Paulinski v. Isaac, 483 Pa. 467, 471, 397 A.2d 760, 762 (1979), is more of a right than a "remedy." See Commonwealth ex rel. Milewski v. Ashe, 362 Pa. 48, 50, 66 A.2d 281, 282 (1949); Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 340, 19 A.2d 464, 466 (1941) (observing that habeas corpus is a "writ of right" and not a "writ of error"). Upon habeas petition allowed, the writ issues, directed to the authorities and ordering them to produce the prisoner and "certify[] the true cause of detention." 42 Pa.C.S. §6504.[2] Following review, if the issuing court finds merit to the allegations of wrongful detention, the ultimate remedy is a release from custody or confinement. See Commonwealth v. Hess, 489 Pa. 580, 586, 414 A.2d 1043, 1046 (1980). By passing upon the merits of Petitioner's constitutional claim, therefore, the court has, in effect, afforded habeas review, while simultaneously denying that it is deciding the question of whether such review may be had. This method suggests, moreover, that any prisoner incarcerated within the Commonwealth's penal system who is denied parole will be entitled, upon the filing of a habeas corpus petition, to Supreme Court merits review of any alleged constitutional deprivation. The more prudent course, in my view, would be to simply dismiss the petition, as Petitioner's underlying claim is not cognizable under a habeas corpus paradigm.

Habeas corpus is an extraordinary measure, which "'involves a collateral attack on the process or judgment constituting the basis of the detention.'" Commonwealth ex rel. McGlinn v. Smith, 344 Pa. 41, 48, 24 A.2d 1, 5 (1942) (quoting Goto v. Lane, 265 U.S. 393, 401, 44 S. Ct. 525, 527 (1924)). Thus, while the scope of the writ is broad, its

[2] Ordinarily, however, the writ may not issue unless the application contains allegations which, if true, would show illegal detention. See Milewski, 362 Pa. at 50, 66 A.2d at 282-83.

purpose has traditionally been limited to reaching detention which is illegal in the first instance. See McGlinn, 344 Pa. at 48, 24 A.2d at 5. Although, in recent years, the writ has also been used as a vehicle to obtain prison transfer where the conditions of confinement violate fundamental freedoms, see Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 88-89, 280 A.2d 110, 112-113 (1971) (habeas relief available where prison conditions constitute cruel and unusual punishment), the fact remains that the habeas petitioner's underlying contention is that he is entitled to be delivered from the custody of the authorities presently holding him. See Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 101, 71 A.2d 107, 111 (1950) (observing that "'habeas corpus should only be allowed when the court or judge is satisfied that the party hath probable cause to be delivered'") (quoting 3 Blackstone 132); Commonwealth ex rel. Milewski v. Ashe, 362 Pa. 48, 50, 66 A.2d 281, 282-83 (1949) (habeas corpus may only issue where the petitioner's allegations, if true, would entitle him to release from confinement). See generally Commonwealth ex rel. Codispoti v. Rundle, 200 Pa. Super. 487, 489, 190 A.2d 153, 154 (1963) (the function of a court entertaining a habeas petition is limited to delivering from imprisonment those who are illegally confined).

This Petitioner's underlying claim, by contrast, constitutes a challenge only to the standards employed by the Parole Board when it exercised its discretion after the relevant statutory changes took effect. Thus, even assuming the validity of his interpretation of the Ex Post Facto Clause, the only relief to which he would be entitled would be an order directing the Parole Board to re-consider his suitability for parole under the standards existing when he was sentenced. This is mandamus relief.[3]

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[3] Even if Petitioner were seeking an order directing the Parole Board to order Petitioner's release on parole, it is not apparent that habeas corpus would be an appropriate avenue to such relief. This court has stated that parole

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This Court, moreover, has already determined that, where the Parole Board exercises its discretion pursuant to changed statutory requirements, mandamus "remains viable as a means for examining whether such requirements have been altered in a manner that violates the ex post facto clause," Coady v. Vaughn, 564 Pa. 604, 608-09, 770 A.2d 287, 290 (2001), the very claim that Petitioner advances here. Thus, I see no need for an additional avenue of review, particularly one that, as noted, does not traditionally encompass decisions regarding parole. See generally McGlinn, 344 Pa. at 48, 24 A.2d at 4-5 (observing that habeas corpus can only be successfully invoked where there is a "peculiar and pressing need for it"); Paulinski, 483 Pa. at 471, 397 A.2d at 762-63 (1979) (habeas corpus is only available when other remedies have been exhausted); Commonwealth ex rel. Johnson v. Bookbinder, 213 Pa. Super. 335, 339, 247 A.2d 644, 647 (1968) (habeas is not available when mandamus is employable). Accordingly, I would hold that habeas corpus does not lie to challenge the

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> is a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls; it does not set aside or affect the sentence and the convict remains in the legal custody of the state and under the control of its agents, subject at any time for breach of condition, to be returned to the penal institution.

Commonwealth ex rel. Sparks v. Russell, 403 Pa. 320, 323, 169 A.2d 884, 885 (1961) (per curiam) (citing Commonwealth ex rel. Banks v. Cain, 345 Pa. 581, 585, 28 A.2d 897, 899 (1942)). Accordingly, although, once released, a parolee retains a liberty interest in his continued freedom from incarceration, see Rogers v. Pennsylvania Bd. of Probation and Parole, 555 Pa. 285, 291, 724 A.2d 319, 322 (1999), he nonetheless remains in the legal custody of the state. See Commonwealth ex rel. Ensor v. Cummings, 420 Pa. 23, 26, 215 A.2d 651, 652 (1966). Consequently, a decision to grant parole neither extinguishes such custody nor impugns the validity of the prior detention. Cf. id. (concluding that release on parole did not render prior habeas petition moot because petitioner's freedom was still restricted by conditions of parole).

standards utilized by the Parole Board in denying parole, and would dismiss the petition on that basis without reaching the merits of the constitutional issue presented.

With regard to the majority's treatment of the underlying issue, I agree that Petitioner's substantive claim is not meritorious. One function of the Ex Post Facto Clause is to prevent states from enacting laws which increase the punishment for a crime after its commission. See U.S. CONST., art. I, §10, cl. 1. While laws altering the standards for parole eligibility may fall within the scope of that proscription, see Lynce v. Mathis, 519 U.S. 433, 445-46, 117 S. Ct. 891, 898 (1997) (citing Weaver v. Graham, 540 U.S. 24, 32 101 S. Ct. 960, 966 (1981)), it "should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" Garner v. Jones, 529 U.S. 244, 252, 120 S. Ct. 1362, 1368 (2000) (quoting California v. Morales, 514 U.S. 499, 508, 115 S. Ct. 1597, 1603 (1995)). Instead, the states "must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." Id. Consequently, there is no per se rule precluding retroactive changes in parole procedures or guidelines, even where such measures may potentially alter a prisoner's actual term of confinement. See Morales, 514 U.S. at 506 n.3, 115 S. Ct. at 1602 n.3 (the mere fact that a legislative change may work "some ambiguous sort of 'disadvantage'" to the prospective parolee is insufficient to support a determination that an ex post facto violation has occurred). The controlling inquiry is whether the retroactively-applied rule "creates a significant risk of prolonging [Petitioner's] incarceration." Jones, 529 U.S. at 251, 120 S. Ct. at 1368 (citing Morales, 514 U.S. at 509, 115 S. Ct. at 1603).

The Supreme Court has not defined precisely what constitutes a sufficient risk of increased punishment, and indeed, has repeatedly eschewed use of any single formula for identifying those legislative parole adjustments which would survive an ex post facto

challenge. See, e.g., Jones, 529 U.S. at 252, 120 S. Ct. at 1368. It has, however, noted that the question is a matter of degree, see id. at 250, 120 S. Ct. at 1367, and indicated further that the party asserting an ex post facto claim bears the burden of "establishing that the measure of punishment itself has changed." Morales, 514 U.S. at 510 n.6, 115 S. Ct. at 1603 n.6. In further defining this standard, the Supreme Court recently indicated that, "[w]hen the rule does not by its own terms show a significant risk, the [challenger] must demonstrate, by evidence drawn from the rule's practical implementation . . . that its retroactive application will result in a longer period of incarceration than under the earlier rule." Jones, 529 U.S. at 255, 120 S. Ct. at 1370. This creates a two-step inquiry, including a facial analysis of the rule -- considered within the entire context of the state's parole system, see id. at 252, 120 S. Ct. at 1368 -- as well as a review of how the amendment is likely to be applied. In undertaking this analysis, the recent Supreme Court decisions in Morales, Jones, and Lynce provide guidance.

Morales involved a facial challenge to a change in California's parole regulations whereby the parole board had discretion to wait up to three years to reconsider releasing individuals convicted of multiple murders, rather than holding annual suitability reviews as required under the prior law. The Court upheld the statute, noting that the affected inmates were those least likely to be deemed suitable for parole in any event, and hence, the amendment created only a speculative, attenuated risk of increasing their punishment. See Morales, 514 at 508-09, 115 S. Ct. at 1603. Likewise, in Jones the petitioner challenged a revision in Georgia's parole guidelines, which increased the maximum interval between parole suitability considerations from three to eight years. The Supreme Court determined that such change did not create a sufficient risk of prolonged incarceration because the parole board retained discretion to reconsider a

prisoner for release well before the eight-year period expired, particularly where a change in circumstances warranted expedited review. Furthermore, the board's internal guidelines dictated that it would only wait the full eight years when the inmate was not expected to become suitable for parole in any event. This allowed the board to "put its resources to better use, to ensure that those prisoners who should receive parole come to its attention." Jones, 529 U.S. at 254, 120 S. Ct. at 1370. In Lynce, on the other hand, the Court disallowed a Florida parole amendment which retroactively cancelled provisional early release credits, resulting in the petitioner's re-arrest and incarceration. In striking down the law, the Court noted that, unlike the California amendment at issue involved in Morales, the Florida statute "did more than simply remove a mechanism that created an opportunity for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible -- including some, like petitioner, who had actually been released." Lynce, 519 U.S. at 447, 117 S. Ct. at 898 (emphasis in original).

Because the amendment presently under review applies to all prisoners, it arguably creates a greater risk of increased punishment than the rule at issue in Morales, which, as noted, only pertained to inmates convicted of multiple murders. Additionally, it addresses the manner in which the Board must exercise its discretion, as indicated by the word "shall." See 61 P.S. §331.1; Majority Opinion, slip op. at 2. In this respect, it is not subject to qualification by internal Board guidelines or policy, as was the change at issue in Jones. Consequently, I believe that this is a closer case than can be gleaned from the majority opinion. See Majority Opinion, slip op. at 4 (stating that Petitioner's punishment "clearly" has not been increased). Still, as noted, the change must not be analyzed in isolation, but within the context of Pennsylvania's parole system as a whole. See Jones, 529 U.S. at 252, 120 S. Ct. at 1368. In this regard, it is

worth noting that, under Section 21(a) of the Act, 61 P.S. §331.21(a), release on parole has traditionally been deemed appropriate only when "it does not appear that the interests of the Commonwealth will be injured thereby." Such interests manifestly subsume public safety, as well as the fair administration of justice. See generally Reynolds v. Pennsylvania Bd. of Probation and Parole, ___ A.2d ___, 2002 WL 31355456 (Pa. Cmwlth., Oct. 21, 2002) (undertaking a detailed review of the standards embodied in the Parole Act prior to, and after, the legislative amendment here at issue, and ultimately concluding that the changes to Section 1 of the Act, 61 P.S. §331.1, did not effect an overall revision in the standards for determining an inmate's suitability for release).[4] Thus, under longstanding statutory guidelines, the Board, in exercising its discretion, has always been required to take public safety concerns into account. While the statutory changes may have placed particular emphasis on such considerations, any conclusion that there is a substantial risk of prolonging incarceration sufficient to

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[4] In Reynolds, the Commonwealth Court opined that

> the former and current versions of Section 1 of the Parole Act are general statements of public policy and philosophy and do not affect an offender's eligibility or opportunity to be paroled. Rather they are a legislative emphasis and reminder to the Board to make paroling decisions in accordance with the factors set forth in 61 P.S. §331.19. Section 1 does not change the parole review process so that it no longer begins with the best interest of the convict because 61 P.S. §331.21 also states that parole be appropriate when "it does not appear that the interests of the Commonwealth will be injured thereby." Therefore, Section 1 only reemphasizes that there is a pre-existing consideration of public safety as already indicated in 16 P.S. §331.21[.]

Id. at ___, 2002 WL 31355456 at *4.

offend ex post facto prohibitions would appear to be based upon mere conjecture. Accord In re Haynes, 996 P.2d 637, 644-45 (Wash. Ct. App. 2000); cf. Powell v. Ray, 301 F.3d 1200, 1203-04 (10th Cir. 2002) (finding no ex post facto violation where the petitioner only offered speculation that elimination of pre-parole supervised release program would increase his term of incarceration). Accordingly, there is no facial violation of the Ex Post Facto Clause.

The second portion of the analysis involves whether the change is likely to be applied so as to enhance inmates' punishment. In this regard, it is notable that the Board's articulation of its reasons for denying parole in 1999 and 2000 appear drawn from the text of the 1996 amendment. See Majority Opinion, slip op. at 2. While this may weigh in favor of a conclusion that the amendment has, in practical effect, disadvantaged Petitioner in his quest for early release, it is not, in my view, sufficient in itself to support such conclusion, or, more generally, a claim that the rule's overall application is likely to increase punishment. As already explained, the basis for denial recited in Petitioner's post-1996 dispositions reflects the Commonwealth's longstanding review policy as embodied in other portions of the statute. Therefore, absent some evidence of a systemic change in the rate at which the Board grants parole, or other proof regarding changes in parole frequency following the 1996 amendment, Petitioner cannot carry his burden of establishing that the Constitution has been violated. See Morales, 514 U.S. at 510 n.6, 115 S. Ct. at 1603 n.6; cf. Ganci v. Washington, 745 N.E.2d 42, 52 (Ill. App. Ct. 2001) (overruling a demurrer where the petitioners had placed into the record statistical evidence suggesting that the amended parole rules had

resulted in a significant reduction in the rate of release for similarly-situated prisoners). As Petitioner has failed to adduce any such evidence, his claim must fail.[5]

[5] Petitioner's claim premised upon the Board's requesting a sexually violent predator assessment is also meritless. Such request, standing alone, does not shed any light upon the basis for the 1999 and 2000 parole denials, nor is it sufficient to indicate that the Board's future actions will violate ex post facto principles.