

**[J-87-00]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

|                                |   |   |
|--------------------------------|---|---|
| JOSEPH COADY,                  | : | No. 212 M.D. Miscellaneous Docket 1999        |
|                                | : |   |
| Appellee                       | : |   |
|                                | : |   |
| v.                             | : | On petition for certification of questions of |
|                                | : | law from the United States Court of           |
| DONALD T. VAUGHN, THE DISTRICT | : | Appeals for the Third Circuit                 |
| ATTORNEY OF THE COUNTY OF      | : |   |
| MONTGOMERY, and THE ATTORNEY   | : |   |
| GENERAL OF THE STATE OF        | : |   |
| PENNSYLVANIA,                  | : |   |
|                                | : |   |
| Appellants                     | : | SUBMITTED: March 14, 2000                     |

OPINION OF THE COURT

MR. CHIEF JUSTICE FLAHERTY

DECIDED: March 22, 2001

This court granted certification of questions of law from the United States Court of Appeals for the Third Circuit to address the issues of whether a person who has been denied parole may obtain review from a Pennsylvania state court of a claim that the denial of parole violated the *ex post facto* clause of the United States Constitution, and, if so, what is the proper method for review.

Appellee was convicted of rape and indecent assault in the Court of Common Pleas of Montgomery County and, on June 14, 1990, was sentenced to six to twelve years imprisonment. Following the expiration of appellee's minimum sentence in 1996, the

Pennsylvania Board of Probation and Parole (board) denied parole. The following year, appellee was again eligible for parole but was denied relief. On December 11, 1997, appellee filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania challenging the denial of his parole and seeking immediate release from prison. The petition alleged that between the time of appellee's offense and the time his parole was reviewed, changes in the criteria for granting parole<sup>1</sup> in this commonwealth violated the *ex post facto* clause of the federal constitution.<sup>2</sup> Following the district court's dismissal of the petition, appellee appealed to the U.S. court of appeals for the third circuit. The court, after hearing oral argument, declined to reach the merits of appellee's claim on the grounds that the *ex post facto* claim had not been presented to a state court. Accordingly, the court of appeals petitioned this court for certification, which we granted on December 13, 1999.

Direct appeal of the denial of parole is precluded by Rogers v. Com. Bd. of Prob. and Parole, 724 A.2d 319 (Pa. 1999), which held that due to its discretionary nature, the decision to deny parole is not an adjudication subject to appeal under the Administrative Agency Law<sup>3</sup> and does not implicate any constitutionally protected interest. However, the

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1. These changes consisted of: (1) *Ex post facto* violation based on the application of Pennsylvania's 1996 parole statute to appellee's June 1997 parole review; (2) *Ex post facto* violation based on Pennsylvania's agreement with the federal government to receive increased funding in exchange for releasing fewer prisoners at the expiration of their minimum sentences, pursuant to the Violent Offenders Incarceration and Truth In Sentencing Act; (3) *Ex post facto* violation based on the application of amended guidelines, which required the affirmative vote of three of five parole board members; and (4) the arbitrary and capricious denial of parole, in denial of due process of law.

2. A state law violates the *ex post facto* clause if it was adopted after the complaining party committed the criminal acts and "inflicts a greater punishment than the law annexed to the crime, when committed." California Dept. of Corrections v. Morales, 514 U.S. 499, 504-06, 509, 131 L.Ed.2d 588, 593-94, 596-97 (1995).

3. 2 Pa.C.S. § 101.

Rogers decision noted that “[w]hile appellants are not entitled to appellate review of a Parole Board decision, they may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus. . . .” 724 A.2d at 323, n.5. Rogers, then, leaves open the possibility that a writ of mandamus is the appropriate avenue for presenting an *ex post facto* constitutional challenge to the denial of parole.

A proceeding in mandamus is an extraordinary action at common law, designed to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy. Bronson v. Com. Bd. of Prob. and Parole, 421 A.2d 1021 (Pa. 1980), *cert. denied*, 450 U.S. 1050 (1981).

It is undisputed that appellee does not have a clear legal right to the grant of parole, nor does the board have a corresponding duty to grant the same. However, the Commonwealth argues that a proceeding in mandamus is available to compel the board to correct a mistake in applying the law. Bronson, supra.

As this court has noted, “the General Assembly, in its wisdom, has conferred upon the Parole Board sole discretion to determine whether a prisoner is sufficiently rehabilitated to serve the remainder of his sentence outside the confines of prison.” Rogers, 724 A.2d at 322. The threshold question to be addressed is whether the parole board improperly applied a new law that increased the appellee’s penalty. This determination of whether the *ex post facto* right has been violated will necessarily involve an examination of the law that was applied in the denial of appellee’s parole versus the law in effect at the time appellee was incarcerated. In keeping with the rationale of Rogers, that parole denials are not

adjudications, and the fact that the granting of parole is wholly discretionary, parole denial claims are not normally suited to review by way of mandamus.

Mandamus will not lie to compel a purely discretionary act. County of Allegheny v. Commonwealth, 490 A.2d 402 (Pa. 1985). In Pa. Dental Ass'n v. Com. Ins. Dept., 516 A.2d 647, 652 (Pa. 1986), this court further explained the nature of mandamus by stating:

[This standard] has usually been interpreted to mean that while a court may direct that discretion be exercised, it may not specify how that discretion is to be exercised nor require the performance of a particular discretionary act. . . . In short, mandamus is chiefly employed to compel the performance (when refused) of a ministerial duty, or to compel action (when refused) in matters involving judgment or discretion. It is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken.

Thus, mandamus will not lie where the substance of the board's discretionary action is the subject of the challenge. Where, however, discretionary actions and criteria are not being contested but rather the actions of the board taken pursuant to changed statutory requirements are being challenged, an action for mandamus remains viable as a means for examining whether statutory requirements have been altered in a manner that violates the *ex post facto* clause. Such an action could be brought in the original jurisdiction of the Commonwealth Court.<sup>4</sup> Absent a change in the statutes governing parole, however, denial of parole would generally constitute a discretionary matter that is not subject to review. See Rogers, supra.

Accordingly, having answered the questions certified for review, we refer this matter back to the United States Court of Appeals for the Third Circuit.

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4. 42 Pa.C.S. §761(a)(1).

Mr. Justice Castille files a concurring opinion in which Madame Justice Newman joins.

Mr. Justice Nigro files a dissenting opinion.