IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,192-01

EX PARTE MORRIS LANDON JOHNSON II, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CR13895A IN THE 266TH DISTRICT COURT FROM ERATH COUNTY

WALKER, J., filed a dissenting opinion in which RICHARDSON, J., joined.

DISSENTING OPINION

The Court today holds that mandamus relief is not warranted for Applicant, Morris Landon Johnson, II, who is seeking relief from a parole policy of holding a parole vote on all of an inmate's concurrent sentences only when the inmate's controlling sentence is eligible for parole. In my view, the parole authorities are failing to perform a ministerial duty imposed by one of the Board of Pardons and Paroles's own valid regulations, the policy is improper, and Applicant should be granted mandamus relief. Because the Court does not grant relief, I respectfully dissent.

I - Mandamus Jurisdiction

Before I address whether this Court should grant mandamus relief in this case, I first address whether the Court has the jurisdiction to do so. The Texas Constitution and the Code of Criminal

Procedure provide that we have the power, in criminal law matters, to issue writs of mandamus. Tex. Const. art. V, § 5(c); Tex. Code Crim. Proc. Ann. art. 4.04, § 1 (West 2015 & Supp. 2016). However, Government Code section 22.002(c) provides that the Texas Supreme Court has exclusive mandamus jurisdiction over executive officers of the state. Tex. Gov't Code Ann. § 22.002(c) (West 2004 & Supp. 2016). Does this section of the Government Code preclude us from exercising mandamus jurisdiction over the Board of Pardons and Paroles?

Although the parole authorities in this case are within the executive department of the state, the Texas Supreme Court has construed section 22.002(c) to grant it exclusive mandamus jurisdiction against specifically identified constitutional executive officers, namely, the Lieutenant Governor, the Secretary of State, the Comptroller of Public Accounts, the Treasurer, the Commissioner of the General Land Office, and the Attorney General. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995). These executive officers, unlike every State official at every level, are the State's "chief administrative officers–the heads of State departments and agencies who are charged with the general administration of State affairs." *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 776 (Tex. 1999).

Thus, the Texas Supreme Court does not have original mandamus jurisdiction against other state officials like court reporters,[1] or county officers and district officers (other than district judges).[2] It does not have original mandamus jurisdiction against college administrators.[3] Indeed, the Texas

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[1] *Wolters v. Wright*, 623 S.W.2d 301, 304 (Tex. 1981).

[2] *Pat Walker & Co., Inc. v. Johnson*, 623 S.W.2d 306, 308 (Tex. 1981).

[3] *Givens v. Woodward*, 196 S.W.2d 456 (Tex. 1946) (University of Texas Board of Regents); *Malone v. Rainey*, 133 S.W.2d 951 (Tex. 1939) (President, Auditor, and Board of Regents of the University of Texas); *McLarty v. Bolton*, 191 S.W.2d 850 (Tex. 1946) (Dean and Board of Directors

Supreme Court has stated that its original mandamus jurisdiction does not run against state boards and commissions. *Nolo Press/Folk Law, Inc.*, 991 S.W.2d at 776; *Superior Oil Co v. Sadler*, 458 S.W.2d 55, 56 (Tex. 1970).[4] It does not cover the Unlicensed Practice of Law Committee,[5] the Governor,[6] any board that has the Governor as a member,[7] the State Board of Medical Examiners,[8] and the Industrial Accident Board.[9] Most importantly for the case before us, prison commissioners have been held to be outside the ambit of the statute. *Herring v. Hous. Nat'l Exch. Bank*, 241 S.W. 534, 540 (Tex. Civ. App.–Galveston 1922), *rev'd on other grounds*, 253 S.W. 813 (Tex. 1923). Therefore, section 22.002(c) of the Government Code does not preclude us from exercising mandamus jurisdiction against the Board of Pardons and Paroles, and I believe that we have the authority to issue a writ of mandamus in this case.

II - Is Mandamus Available?

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of The Agricultural & Mechanical College of Texas (now known as Texas A&M University)).

[4] *But see Tex. Emp't Comm'n v. Norris*, 634 S.W.2d 85, 87 (Tex. App.–Beaumont 1982, no writ) (finding that the trial court erred in granting writ of mandamus against the Employment Commission); *Middlekauff v. State Banking Bd.*, 242 S.W. 442 (Tex. 1922) (writ of mandamus issued in original mandamus proceeding at the Supreme Court against the State Banking Board). However, *Middlekauff* is unclear as to which persons or entities the writ was issued against. *In re TXU Elec. Co.*, 67 S.W.3d 130, 142 (Tex. 2001) (Baker, J., concurring). The writ was sought against the Banking Board, the Commissioner of Insurance and Banking, the State Treasurer, and the Attorney General, but the Banking Board was comprised of those same three individuals. *Id.*

[5] *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 776 (Tex. 1999).

[6] Tex. Const. art. V, § 3(a); Tex. Gov't Code Ann. § 22.002(a) (West 2004 & Supp. 2016).

[7] *McFall v. State Bd. of Ed.*, 110 S.W. 739, 740 (Tex. 1908).

[8] *Betts v. Johnson*, 73 S.W. 4 (Tex. 1903).

[9] *Glenn v. Indus. Accident Bd.*, 184 S.W.2d 302, 307 (Tex. Civ. App.–Austin 1944), *rev'd on other grounds*, 190 S.W.2d 805 (Tex. 1945).

To obtain mandamus relief, a relator must establish that no other adequate remedy at law is available and that the act he seeks to compel is ministerial, rather than discretionary, in nature. *Dickens v. Court of Appeals for the Second Supreme Judicial Dist. of Tex.*, 727 S.W.2d 542, 548 (Tex. Crim. App. 1987).

II-A - No Adequate Remedy

What remedy is available to Applicant to compel the Board to consider him for parole? The decision to delay parole consideration on the forgery sentence until the controlling delivery of a controlled substance sentence is eligible is not a judicial judgment or order from which Applicant can appeal. The Board's regulations do not contain any provision by which an eligible inmate can initiate parole consideration. However, the regulations do provide for a type of "appeal." Under Rule 145.17, an inmate has the ability to request a "special review" of a parole panel's decision to deny parole or mandatory supervision. 37 Tex. Admin. Code § 145.17 (2017) (Tex. Bd. of Pardons and Paroles, Action upon Special Review–Release Denied). Obviously, however, this provision is inapplicable if an inmate has not been denied parole or mandatory supervision. A denial cannot occur if a parole hearing does not occur; therefore, this appeal provision is not available if a hearing has yet to occur. Thus, there is no adequate remedy under the Administrative Code for an inmate, such as Applicant, who is not being considered for parole. Additionally, I agree with the majority's conclusion that Applicant cannot compel consideration by means of a writ of habeas corpus, but I disagree with the analysis and the decision to overrule *Ex parte Sepeda*.[10] Consequently, he has no

[10] Last year, in *Ex parte Sepeda*, we held that habeas corpus was the proper remedy by which to compel the parole board to provide a parole-denial letter in compliance with Government Code section 508.1411. *See Ex parte Sepeda*, 506 S.W.3d 25, 26-27 (Tex. Crim. App. 2016). The opinion applies to a very narrow issue that does not encompass the issue in this case. Overruling this recent opinion is not warranted.

avenue to parole consideration except through mandamus.

II-B - Ministerial Duty

The next requirement for mandamus is that the act Applicant seeks to compel is ministerial, rather than discretionary. An act is ministerial if the actor has a duty clearly fixed and required by law to do the act, and the law does not authorize the exercise of discretion or judgment in determining whether the act is to be performed. *Smith v. Flack*, 728 S.W.2d 784, 789 (Tex. Crim. App. 1987).

Applicant points us to sections 508.145(f), 508.150(b)(2), and 508.150(a) of the Government Code and 37 Tex. Admin. Code § 145.3(4) (2017) (Tex. Bd. of Pardons and Paroles, Policy Statements Relating to Parole Release Decisions by the Board of Pardons and Paroles). I believe Rule 145.3(4) is controlling, and I will address it directly. The provision at issue here, Rule 145.3(4), is not a statute. However, "[v]alid rules and regulations promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation." *Lewis v. Jacksonville Bldg. and Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976). Agencies are bound to follow their own valid and subsisting rules and procedures. *S. Clay Prods., Inc. v. Bullock*, 753 S.W.2d 781, 783 (Tex. App.–Austin 1988, no writ) (citing *Gulf Land Co. v. Atl. Ref. Co.*, 131 S.W.2d 73, 79 (Tex. 1939)). If an agency fails to follow the clear, unambiguous language of its own regulation, a court must reverse the agency's action as arbitrary and capricious. *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 104 (Tex. 2010) (quoting *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999)). Therefore, because a regulation has the force and effect of law, it can impose a duty clearly fixed and required by law to form the basis for a writ of mandamus.

Does the regulation at issue impose a duty clearly fixed and required by law, without any

contrary authorization for the exercise of discretion or judgment? Rule 145.3(4) provides:

> An offender will be considered for parole when eligible and when the offender meets the following criteria with regard to behavior during incarceration.
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> (A) Other than on initial parole eligibility, the person must not have had a major disciplinary misconduct report in the six-month period prior to the date he is reviewed for parole; which has resulted in loss of good conduct time or reduction to a classification status below that assigned during that person's initial entry into TDCJ-CID.
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> (B) Other than on initial parole eligibility, at the time he is reviewed for parole the person must be classified in the same or higher time earning classification assigned during that person's initial entry into TDCJ-CID.
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> (C) If any offender who has received an affirmative vote to parole and following the vote, notification is received that the offender has been reduced below initial classification status or has lost good conduct time, the parole decision will be reviewed and revoted by the parole panel that rendered the decision.
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> (D) A person who has been revoked and returned to custody for a violation of the conditions of release to parole or mandatory supervision will be considered for release to parole or mandatory supervision when eligible.
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> (E) An offender who is otherwise eligible for parole and who has charges pending alleging a felony offense committed while in TDCJ, and for which a complaint has been filed with a magistrate of the State of Texas, any facility under its supervision, or a facility under contract with TDCJ will not be considered for release to parole.
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> (F) An offender who is otherwise eligible for release and meets the criteria for Medically Recommended Intensive Supervision (MRIS) as required by Texas Government Code, Section 508.146, may be considered for release on parole.

37 Tex. Admin. Code § 145.3(4). Under this regulation, an offender will be considered for parole when two conditions are met: (1) the offender is eligible, and (2) none of the exceptions of subsections (A)-(F) apply. Subsections (A) and (B) do not apply "on initial parole eligibility." *Id.* § 145.3(4)(A), (B). Subsection (C) and (D) apply to inmates who not only have already had parole votes, but affirmative ones granting parole release. *See id.* § 145.3(4)(C), (D). Because Applicant has

not had a parole vote at all for his forgery sentence, neither of those two situations apply. Subsection (E) forecloses a parole vote altogether for an inmate that has a pending charge for a felony offense committed while in TDCJ. *Id.* § 145.3(4)(E). Subsection (F) involves parole voting for medically recommended intensive supervision. *Id.* § 145.3(4)(F). Neither subsection (E) nor (F) apply because there are no indications that Applicant has a pending charge or that he has a need for medically recommended intensive supervision. Therefore, for an inmate such as Applicant who is simply up for his first parole vote, none of the delay situations apply, and the "offender will be considered for parole when eligible." *Id.* § 145.3(4). Because Rule 145.3(4) imposes a duty clearly fixed and required by law, without any contrary authorization for the exercise of discretion or judgment, the duty is ministerial. And because no adequate remedy at law exists for violations of this ministerial duty, mandamus relief is available.

III - "When Eligible"

The majority finds that mandamus relief is not warranted by construing "when eligible" to mean that an offender is eligible for parole only when he has reached the parole eligibility date on the longest concurrent sentence. The majority supports this conclusion by finding that the policy is actually an administrative construction not made in anticipation of litigation, which is entitled to deference. I agree that the construction was not made in anticipation of litigation. The paper trail for the policy begins and ends in the very documents created for the litigation before the Court today–the affidavits submitted by TDCJ and the brief TDCJ filed with this Court. Clearly, they were not made in *anticipation of* litigation, but *as a part of and in response to* litigation. In my view, if the policy is an administrative interpretation of Rule 145.3(4), it is a convenient litigating position or a *post hoc* rationalization advanced by TDCJ, seeking to defend its past action against attack. *See Christopher*

v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012). Deference is unwarranted in such cases. *Id.*

Additionally, the majority's construction adds words to the rule which simply do not exist in a plain reading. Rule 145.3(4) says that "an offender will be considered for parole when eligible," not that "an offender will be considered for parole when eligible on the longest concurrent sentence." This construction would also lead to an absurd result, because it has the potential to violate section 508.150(a). That provision states:

> If an inmate is sentenced to consecutive felony sentences under Article 42.08, Code of Criminal Procedure, a parole panel shall designate during each sentence the date, if any, the inmate would have been eligible for release on parole if the inmate had been sentenced to serve a single sentence.

Tex. Gov't. Code Ann. § 508.150(a) (West 2012 & Supp. 2016). Under this statute, for inmates serving consecutive sentences, the parole panel is required to designate during each consecutive sentence the date he would have been paroled as if he were serving only that sentence (a "paper parole"). However, under the policy under consideration in this case, if the currently operating consecutive sentence is shorter than the parole eligibility date of the longest concurrent sentence, that shorter consecutive sentence will not be considered for parole because the inmate will not have reached parole eligibility on the longest concurrent sentence. The shorter consecutive sentence therefore will be fully served before the parole eligibility date of the longest concurrent sentence, and the parole panel will not have designated, during that consecutive sentence, the date, if any, that the inmate would have been eligible for release on parole. Thus, to save the majority's construction that extends the plain language to "an offender will be considered for parole when eligible on the longest concurrent sentence," we would have to also add "unless the offender has a currently operating

consecutive sentence that would be fully served before the offender is eligible for parole on the longest concurrent sentence." For this Court to do so, in order to justify the delay in Applicant's parole consideration on his forgery sentence, we would usurp the legislative power delegated to the parole authorities to write their own regulations.

To me, there are only two possible readings of the plain meaning of the rule. One way to read it is that "when eligible" means when eligible for actual, physical release to parole. This construction, on first sight, seems compelling. However, it falls apart when an inmate is serving consecutive sentences. Such an inmate would not be eligible for actual, physical release on parole until he is eligible on the last sentence in the stack of consecutive sentences. Tex. Gov't Code Ann. § 508.150(c)(2) (West 2012 & Supp. 2016) ("A parole panel may not . . . release on parole an inmate sentenced to serve consecutive felony sentences before the date the inmate becomes eligible for release on parole from the last sentence imposed on the inmate."). Thus, for the first sentence in the stack, at that sentence's parole eligibility date he would *not* be considered for parole, because he is not eligible for actual, physical release. He must serve the first sentence day-for-day, until fully served, and then the next sentence in the stack would begin to operate. If that sentence is not the last sentence in the stack, he must serve that sentence in full, too, because again he would not be eligible for actual, physical release. And so on until he begins to serve the final, last sentence in the stack. Only then is he eligible for actual, physical release. An inmate serving five twenty-year consecutive sentences will not receive a parole hearing until he has already served four of the five consecutive sentences day-for-day, which would be a total of eighty years, and then he would become eligible on the last of the five sentences. Just like the majority's interpretation of the rule, this reading of the rule–that "when eligible" means when eligible for actual, physical release–would fail to satisfy the

demands of section 508.150(a) and is unreasonable.

The only other way to interpret the rule, consistent with the plain meaning of the words used–and the way that makes sense to me–is to read "when eligible" to mean when eligible for parole on each sentence. This reading satisfies section 508.150(a) because the parole panel would review each consecutive sentence for parole during each consecutive sentence, regardless of the length of any concurrent sentences.

IV - Conclusion

According to the affidavits submitted by TDCJ in this case, Applicant is eligible for parole on his forgery sentence and has been since January 5, 2014. Consequently, by the language of the regulation, Applicant should have been considered for parole at that time, and his parole review on his forgery sentence is long overdue. The regulation requiring consideration for parole when an inmate is eligible for parole has not been complied with, and, accordingly, the policy cited to support such delay is improper. Therefore, because Applicant lacks an adequate remedy at law by which he can compel his parole review, and because there is a ministerial duty imposed by regulation to consider an inmate for parole when that inmate is eligible, mandamus relief is warranted in this case. Because a majority of this Court holds otherwise, I dissent.

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