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

KEASLER, J., filed a concurring opinion, in which HERVEY, J., joined.

CONCURRING OPINION

I agree with the majority's judgment and I join its opinion. I write separately to suggest a reading of the relevant statute that may, going forward, satisfy both parties' concerns.

Although the majority accurately conveys the facts of this case, I recite them in chronological order to aid the reader's understanding.

1. In May 2013, Johnson was sentenced to 10 years' confinement for forgery ("Sentence 1");

2. In August 2013, Johnson was sentenced to 10 years' confinement for possession of a controlled substance ("Sentence 2"), stacked upon Sentence 1; and

> 3. In September 2014, Johnson was sentenced to 40 years' confinement for delivery of a controlled substance ("Sentence 3"), concurrent to Sentences 1 and 2.

Because it is stacked upon Sentence 1, Sentence 2 does not "begin"—that is, Johnson does not begin accruing credit on Sentence 2—until either (1) Sentence 1 is served day-for-day, or (2) the parole board votes to grant him parole on Sentence 1.[1] In practical terms, this means that Johnson cannot come any closer to attaining parole eligibility on Sentence 2 until he is "paroled" on Sentence 1. He is therefore understandably eager for an as-soon-as-possible parole vote on Sentence 1.

The problem is that, per Board of Pardons and Paroles ("Board") policy, the Board will not hold a parole vote on any of his sentences until he is statutorily eligible for release on Sentence 3—his longest or "controlling" sentence.[2] This will not occur until December 2017, nearly four years after he became statutorily parole eligible on Sentence 1 (January 2014). While this delay would seem to have potentially deprived Johnson of four years of accrued time towards Sentence 2, the Board's stated reason for the delay is sensible enough:

> The decision to delay the vote promotes efficiency; it means that the Board need not repeatedly review the same inmate for parole across a range of non-controlling, concurrent sentences. In other words, this policy . . . minimizes the burden on the parole system by reducing the need to prepare for and to

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[1] TEX. CODE CRIM. PROC. art. 42.08; TEX. GOV'T CODE § 508.150; *Ex parte Kuester*, 21 S.W.3d 264, 270 (Tex. Crim. App. 2000).

[2] Brief for the Texas Department of Criminal Justice at 1–3; *cf. Ex parte Mabry*, 137 S.W.3d 58, 63 (Tex. Crim. App. 2004) (Keasler, J., concurring) ("When an inmate has multiple convictions, he will have one conviction which governs his release date . . . . It is the conviction that will keep the prisoner in custody for the greatest amount of time.").

> conduct inefficient and repetitive votes where the benefit of such a vote is highly speculative.[3]

In essence, the Board seeks to avoid what is sometimes called "paper parole"—a parole determination that would not result in an actual, physical release of the inmate from TDCJ custody. Johnson, meanwhile, retorts that if "his second sentence [had] commence[d]" in January 2014 (when he became statutorily eligible for release on Sentence 1), he would be eligible for actual, physical release in a matter of months, rather than years.[4] As it currently stands, even if he is given parole on Sentences 1 and 3 in December 2017, that decision will only mark the commencement of Sentence 2. He will not be physically released from TDCJ custody until he becomes statutorily eligible for, and is paroled on, Sentence 2.

Both parties seem to think that the Board's impending parole vote on Sentences 1 and 3 can be only prospective in nature—that is, any vote to grant him parole would determine only the prospective commencement date of Sentence 2. I am not convinced that the Board's impending vote need be so limited.

Government Code Section 508.150, the statute governing "Consecutive Felony Sentences" in parole matters, states that the Board "shall designate during each sentence the date . . . the inmate would have been eligible for release on parole if the inmate had been

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[3] Brief for the Texas Department of Criminal Justice at 4–5.

[4] Brief for Morris Landon Johnson II at 7.

sentenced to serve a single sentence."[5] This statute seems to allow—and may, by dint of the word "shall," require—the Board to make retroactive parole determinations in the very limited context of consecutive sentences.

If this interpretation of Section 508.150 is the correct one, both parties may have their druthers in this case. The Board may wait until December 2017 to conduct a single parole determination on all of Johnson's eligible sentences in one fell swoop. It may also, at that time, designate the date upon which Johnson "would have been eligible for release on parole if [he] had been sentenced to" but one sentence.[6] That is, the Board may retroactively consider Johnson for "parole" on Sentence 1 as though they were considering him in January 2014. If he is determined to have been an unsuitable candidate in January 2014, the Board may go on to determine the date that he "would have been" so suitable, and grant him "parole" as of that date—or it may indicate that he was not a suitable candidate at any time during that period.[7]

Johnson, if he is retroactively granted parole in this manner, will receive all the credit towards Sentence 2 that he currently claims to have been unfairly kept from him. If, on the other hand, he is denied retroactive parole after appropriate review, he will not have been

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[5] TEX. GOV'T CODE § 508.150(a).

[6] *Id.*

[7] *See id.*

deprived of anything the law currently entitles him to.[8] After all, Johnson himself acknowledges that "parole is a privilege, rather than a right."[9] But he will at least have received review. In this respect, the unusual circumstances of his sentencing will not cause him to be treated any differently than other inmates, at least for parole purposes.

Because Section 508.150 requires only that consecutive-sentence parole determinations be made "during each sentence,"[10] until Sentence 1 is served day-for-day, the Board cannot yet be said to have run afoul of the statute in this case. And as I understand it, the majority says only that Parole Board Rule 145.3(4) does not clearly impose upon the Board a legal duty to conduct a vote sooner than that.[11] I do not disagree that this is the most reasonable construction of the rule. I simply note that if, at its impending vote, the Board elects to make a retroactive parole determination in the manner that I have just described, all of Johnson's stated concerns will thereby be addressed to his satisfaction.

With these thoughts, I join the majority.

Filed: November 22, 2017

Publish

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[8] *See Ex parte Retzlaff*, 135 S.W.3d 45, 49 (Tex. Crim. App. 2004) ("[A]n inmate does not have a statutorily vested liberty interest in being released on parole.").

[9] Brief for Morris Landon Johnson II at 4.

[10] *See* TEX. GOV'T CODE § 508.150.

[11] Majority Opinion at 4–5.