IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1998 Term

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No. 25184

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STATE OF WEST VIRGINIA ex rel. GEORGE CARPER,
Petitioner,

v.

WEST VIRGINIA PAROLE BOARD,
Respondent.

Writ of Mandamus

WRIT GRANTED AS MOULDED

Submitted: October 6, 1998
Filed: November 20, 1998

George Carper
Pro se

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

2. Under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the 1997 amendment to *W.Va. Code*, 62-12-13(a)(5) [1997] that allows parole review hearings to be conducted within a period of up to 3 years following the denial of parole for prisoners serving sentences of life imprisonment with the possibility of parole may be applied retroactively to prisoners whose relevant offenses occurred prior to the effective date of the statutory amendment.

3. To pass constitutional muster under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the provisions of *W.Va. Code*, 62-12-13(a)(5) [1997] allowing up to 3 years between parole reviews for prisoners serving terms of life imprisonment with the possibility of parole must be applied on a case-by-case to prisoners whose offenses occurred at a time when the law prescribed annual parole reviews. The Board of Parole may only extend the period between parole review hearings for such prisoners beyond 1 year if the Board has made a case-specific individualized determination with reasoned findings on the record showing why there

will be no detriment or disadvantage to the prisoner from such an extension. Additionally, due process requires that such a prisoner receiving a review period of more than 1 year must be afforded the opportunity to submit information for the Board's consideration during any extended period requesting that a review be granted before the expiration of the extended period.

Starcher, J.:

In the instant case, we review the retroactive application of a 1997 statutory amendment authorizing increased periods of time between parole hearings for prisoners serving "life" terms of imprisonment with the possibility of parole. We conclude that this retroactive application does not facially violate the constitutional prohibition against *ex post facto* laws, if the amendment is narrowly applied on a case-by-case basis, with appropriate safeguards.

I.
Facts and Background

In 1997 the West Virginia Legislature enacted an amendment to our parole law, *W.Va. Code,* 62-12-13, that allows the respondent West Virginia Board of Parole ("the Board") to decrease the frequency of parole hearings for prisoners who are serving sentences of life imprisonment with the possibility of parole.

As amended, *W.Va. Code,* 62-12-13(a)(5) [1997] (effective July 10, 1997) states in pertinent part:

> In the case of a person sentenced to any state correctional center, it shall be the duty of the board, as soon as such person becomes eligible, to consider the advisability of his or her release on parole. If, upon such consideration, parole be denied, the board shall at least once a year reconsider and review the case of every inmate so eligible, which reconsideration and review shall be by at least three members of the board: *Provided, however, That the board may reconsider and review parole eligibility any time within three years following the denial of parole of a person serving a life sentence.*

(Emphasis added.)

The petitioner George Carper began serving a life with mercy sentence in 1978. On February 11, 1998, the petitioner was denied parole. The Board informed the petitioner that the Board would next review his parole eligibility in 2 years, or February of 2000. The petitioner filed a *pro se* pleading in this Court challenging the Board's action as violative of constitutional *ex post facto* provisions. We treated his pleading as a writ of mandamus and made it returnable by the respondent Board.

II.
Standard of Review

> "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment' Point 3, Syllabus, *Willis v. O'Brien*, 151 W.Va. 628 [153 S.E.2d 178] [(1967)]." Syllabus Point 1, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

Syllabus Point 3, *Donley v. Bracken*, 192 W.Va. 383, 452 S.E.2d 699 (1994).

III.
Discussion

The petitioner challenges the constitutionality of the Board's application of the above-quoted langauge from *W.Va. Code,* 62-12-13(a)(5) [1997] to him, by denying him an annual parole review.[1] Treating the petitioner's *pro se* pleadings with liberality, we determine that the petitioner has stated a claim that the application of the 1997 amendment to the Board's review of his sentence violates *ex post facto* principles.[2]

This Court has recognized that parole hearings are a substantial interest subject to legal protection. *See Vance v. Holland*, 177 W.Va. 607, 355 S.E.2d 396 (1987) (*per curiam*). Accordingly, legal provisions affecting "parole eligibility [are] . . . scrutinized under the Ex Post Facto Clause." *Adkins v. Bordenkircher,* 164 W.Va. 292, 296, 262 S.E.2d 885, 887 (1980).

In *Adkins*, we held that prisoners were entitled to have good time credits on their sentences calculated at the rate established by the statute in effect at the time of the commission of a prisoner's offense. We recognized the general rule established in the

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[1]The petitioner also argues that the permissive word "may" in the statutory proviso at the end of the quoted section -- "the board may reconsider and review parole eligibility any time within three years following the denial of parole of a person serving a life sentence" -- does not authorize the Board to increase the length of time between parole reviews to up to 3 years for prisoners serving terms of life with the possibility of parole.

This argument is meritless. The language of the proviso is clear and constitutes an exception to the annual parole review required for prisoners generally.

[2]*Ex post facto* laws are barred under Article III, Section 4 of the *West Virginia Constitution* and Article I, Section 10 of the *United States Constitution.*

federal courts that "a superseding law or administrative rule cannot change the conditions of parole eligibility to the detriment of an imprisoned offender without running afoul of the Ex Post Facto Clause." 164 W.Va. at 296-297, 262 S.E.2d at 887 (citations omitted).

In Syllabus Point 1 of *Adkins*, this Court stated:

> Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.

In *State v. R.H.*, 166 W.Va. 280, 288-90, 273 S.E.2d 578, 583-84 (1980) this Court recognized the classic United States Supreme Court definition of an *ex post facto* law as set forth by the United States Supreme Court in *Calder v. Bull*, 3 U.S. 386, 390, 1 L.Ed. 648, 650 (1798):

> (1) every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the offense, in order to convict the offender.

We noted in *State v. R.H.* that the *ex post facto* prohibition extends to any alteration, even one labeled procedural, "which in relation to the offense or its

consequences, alters the situation of a party to his disadvantage." 166 W.Va. at 289, 273 S.E.2d at 584. We further stated that these general observations provide a standard by which the courts are to be guided in their determination of which statutory changes may be applied retroactively to an accused. Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. 166 W.Va. at 290, 273 S.E.2d at 584[3]

[3]This Court has recognized the problems inherent in attempting to label such changes as "procedural" or "substantive" with respect to their retroactive application to criminal defendants. In *Pnakovich v. SWCC*, 163 W.Va. 583, 591, 259 S.E.2d 127, 131 (1979) we stated:

> In practice, very few changes [to criminal statutes] are perceived to be merely procedural because of the nature of the right which the criminal statute alters. If the procedural change is not perceived to deny the accused a defense available under the laws at the time of his offense, or operates only in a limited and unsubstantial manner to his disadvantage, then the provision may be applied retroactively. Thus it may be seen that limitations on retroactive criminal legislation are particularly severe, while those in the civil area turn upon the amount of substantial reliance.

We stated in Syllabus Point 7 of *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 460 S.E.2d 636 (1995):

> A procedural change in a criminal proceeding does not violate the ex post facto principle found in the *W.Va. Const.* art. III, § 4 and in the *U.S. Const.* art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

In *State v. Hensler*, 187 W.Va. 81, 83, 415 S.E.2d 885, 887 (1992) (*per curiam*), we stated further:

[T]he United States Supreme Court and this Court have recognized that the principle on which the prohibition against *ex post facto* action is based is a fundamental concept of constitutional liberty embodied in the due process clauses of the respective Constitutions.

With respect to legal changes that retroactively affect a prisoner's parole eligibility, we stated in *Adkins*, *supra,* that:

> In *Warden v. Marrero*, 417 U.S. 653, 662-63, 94 S.Ct. 2532, 2538, 41 L.Ed.2d 383, 392 (1974), the Supreme Court strongly implied that a law which altered the conditions of parole eligibility to the detriment of an inmate would contravene the *ex post facto* prohibition:
>
> > "[O]nly an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. For the confined prisoner, parole -- even with its legal constraints -- is a long step toward regaining lost freedom.
> >
> > * * *
> >
> > "[A] repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause . . . of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the . . . offense.'["]
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> * * *
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> In *Rodriguez* [*v. U.S. Parole Comm'n,* 594 F.2d 170 (7th Cir. 1979)], the court emphasized that it was immaterial that the imprisoned offender might not have received parole at the time of his eligibility. It was, rather, the right of the prisoner to satisfy eligibility conditions, and thus earn the right to demonstrate fitness for parole, which could not be retroactively affected to the inmate's disadvantage.

Adkins, supra, 164 W.Va. at 296-97, 262 S.E.2d at 887 (citations omitted).

In *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), a federal court of appeals struck down a Georgia parole board rule as violative of *ex post facto* principles. The rule that allowed the parole board to increase the length of time between parole hearings to 8

years was a change from the annual review that was prescribed by parole board rules in place when the prisoner committed his offense.

In *Akins,* the federal court stated that a key issue was whether a prisoner who committed an offense when a previous rule was in effect was "deprived of an opportunity for parole that existed prior to the alteration of the parole rules." 922 F.2d at 1562. *But see Jones v. Georgia State Bd. of Pardons and Paroles*, 59 F.3d 1145, 1149 n. 8 (11th Cir. 1995) (questioning the continued viability of *Akins,* in light of *California Dep't of Corrections v. Morales*, 514 U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), *see infra*.)

In *Kellogg v. Shoemaker*, 46 F.2d 503 (6th Cir. 1995), a federal court of appeals found that new and more onerous Ohio parole revocation procedures could not be retroactively applied to prisoners who had committed offenses when other, less onerous revocation procedures were in effect.

Recently, in *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed 2d 63 (1997), the United States Supreme Court applied *ex post facto* principles to prohibit Florida's retroactive cancellation of early release credits. However, 2 years before deciding *Lynce,* in *California Dep't of Corrections v. Morales*, *supra,* 514 U.S. ___, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), the Supreme Court declined to strike down a California statute that retroactively changed the frequency of parole review for a very limited class of prisoners.

In *Morales*, the statute allowed the parole board to grant "setoffs" of 3 years (a "setoff" is a term used to describe the time until the next parole review that is given by a parole board when it denies parole to a prisoner) to a small group of prisoners who had been convicted of more than one offense that involved taking a life. These multiple-homicide prisoners had been sentenced under laws requiring an annual parole review.

The Supreme Court in *Morales* found that the retroactive application of the California 3-year-setoff statute for multiple-homicide prisoners created "only the *most speculative and attenuated possibility* of producing the prohibited effect of increasing the measure of punishment for covered crimes . . . [and] *applies only to a class of prisoners for whom the likelihood of release on parole is quite remote*." 514 U.S. at ___, 115 S.Ct. at ____, 131 L.Ed.2d at 597 (emphasis added).

The Court also noted that the California statute required a finding that there was no likelihood of a parole for an individual prisoner within the year after parole denial, and that a prisoner receiving an extended setoff had the right to ask for review before the end of their setoff period. 514 U.S. at ___, ___, 115 S.Ct. at ___, ___, 131 L.Ed.2d at 596, 599.

Unlike the statute at issue in the *Morales* case, *W.Va. Code*, 62-12-13(a)(5) [1997] applies to the entire population of prisoners in this state who are serving a life sentence with the possibility of parole (approximately 300 persons). Nothing in the record of the instant case suggests that the "likelihood of parole" for members of this

class is "quite remote." *Morales, supra*. Indeed, it is certain that a significant number (if not the majority) of the members of this class will at some time be released on parole. Additionally, the 1997 proviso added to *W.Va. Code*, 62-12-13(a)(5) [1997] contains no requirement that the Board articulate reasons for giving a prisoner a longer than 1 year setoff. Nor does our statute contain provisions allowing a prisoner who is given such a setoff to ask for a review hearing at an earlier date, if conditions change.

How to specifically apply the *Morales* decision to parole law changes, in cases arising under the *ex post facto* clause of the *United States Constitution,* is somewhat unclear. For example, in *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (*Roller II*), the majority of a three-judge panel, applying *Morales,* held that retroactive application of changes in South Carolina's parole laws did not violate the *ex post facto* clause. *See also Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995) (relying on *Morales* to uphold a retroactive change to the frequency of parole review in Virginia.) *See also Jones, supra,* 59 F.2d at 1149 n. 8.

However, in *Roller II,* Senior Judge K. K. Hall persuasively argued in dissent that applying *Morales,* the South Carolina changes did indeed violate the federal *ex post facto* clause, because they "decreas[e] the likelihood of release on parole to a degree that offends the Ex Post Facto Clause." 107 F.3d at 240. (In *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993) (*Roller I*), Judge Hall, writing for a unanimous panel pre-*Morales*, had prohibited the retroactive application of South Carolina parole law changes under *ex post facto* principles).

Moreover, some jurists who have applied *Morales* to permit the retroactive imposition of "speculative" disadvantages on prisoners with respect to their eligibility for release have found that they were reading *Morales* too broadly. *See Calamia v. Singletary*, 686 So.2d 1337 (Fla. 1996) (upholding retroactive cancellation of release credits), *vacated and remanded*, ___ U.S. ___, 117 S.Ct. 1309, 137 L.Ed.2d 473 (1997), *rev'd* 694 So.2d 733 (Fla. 1997) (on remand from the United States Supreme Court after issuance of the opinion in *Lynce v. Mathis, supra.*)[4]

[4]This uncertainty in federal *ex post facto* jurisprudence, and a due regard for our historic position that *ex post facto* protections must be strictly applied to prohibit legislation that retroactively enhances punishment for crimes (*see Adkins v. Bordenkircher, supra*), lead us to decline to express wholesale approval for cases like *Roller II, supra, Hill v. Jackson, supra,* and *Jones v. Georgia State Bd. of Pardons and Paroles, supra* -- cases that seem to take an uncritically tolerant approach to broad and clearly disadvantageous retroactive changes in parole eligibility provisions. A stricter approach, as exemplified in *Akins v. Snow, supra, Kellogg v. Shoemaker, supra, Roller v. Cavanaugh, supra,* and Senior Judge Hall's dissent in *Roller II, supra,* is more consistent with the approach that this Court has historically taken to these issues.

Additionally, we note that in the instant case, a retroactive increase in parole review frequency from annual review to up to 3 years, even with the safeguards that we require in this case to meet constitutional muster, presses the constitutionally permissible limit.

We certainly understand and appreciate the force of the argument of the State of West Virginia in the instant case, to the effect that the statutory proviso that petitioner Carper challenges can be applied narrowly and in a constitutionally acceptable fashion, as a narrowly tailored mechanism for reducing the frequency of truly "pointless" parole hearings for those individual life-term prisoners who the Board determines are certainly not going to be paroled within a year after a parole denial, absent extraordinary circumstances.[5] And of course, it is our duty to construe statutes in a constitutionally acceptable fashion if at all possible. Syllabus Point 3, *Donley v. Bracken,* 192 W.Va. 383, 452 S.E.2d 699 (1994).

Based on the foregoing discussion, we determine that we can take an appropriately deferential approach to the challenged statute's constitutionality, act consistently with the Supreme Court's decision in *Morales*, and at the same time adhere to and reinforce our historically strict approach to constitutional *ex post facto* jurisprudence, by grounding our ruling in the instant case on the provisions of our state constitutional provision prohibiting *ex post facto* laws, Article III, Section 4, and by

[5]It is true that many prisoners serving life terms with the possibility of parole have committed heinous offenses. But it is precisely our treatment of such persons that tests our legal system's commitment to an exacting standard of fairness. As Winston Churchill (while serving as Home Secretary) said in 1910: "[T]he treatment of crime and criminals measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it." M. Gilbert, *In Search of Churchill*, 269 (Harper Collins, 1993), *quoted in U.S. v. Gorski*, 47 M.J. 370, 376 (1997), Sullivan, Judge, concurring.

requiring reasonable safeguards in the retroactive application of the statute to prisoners like petitioner Carper.[6]

[6]"States have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975)." *Peters v. Narick*, 165 W.Va. 622, 628 n.13, 270 S.E.2d 760, 768 n.13 (1980).

This Court has determined repeatedly that the *West Virginia Constitution* may be more protective of individual rights than its federal counterpart. *See, e.g., State v. Bonham*, 173 W.Va. 416, 317 S.E.2d 501 (1984). As Justice Workman stated in *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W.Va. 436, 442, 446 S.E.2d 658, 664 (1993):

> In *Bonham*, this Court noted that, "the United States Supreme Court has . . . recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution." . . . Based on the principle that "'[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution[,]' Syllabus Point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979) . . ." we ruled in *Bonham*, that this state's due process clause affords a criminal defendant greater protections than the federal counterpart. . . (holding that imposition of more severe sentence following trial de novo *does* violate defendant's due process rights); *see also West Virginia Citizens Action Group v. Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984) (state constitution compels striking limitation on soliciting after sunset even if federal constitution does not); *Woodruff v. Board of Trustees of Cabell Huntington Hospital*, 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984) (Article III, § 1 "more stringent in its limitation on waiver [of fundamental rights] than is the federal constitution"); *Pushinsky v. West Virginia Board of Law Examiners*, 164 W.Va. 736, 266 S.E.2d 444 (1980) (recognizing that state constitution imposes more stringent limitations on power of state to inquire into lawful associations and speech than those imposed by federal constitution); *Pauley v. Kelly*, 162 W.Va. 672, 707, 255 S.E.2d 859, 878 (1979) (ruling that education is a

"fundamental constitutional right"); *see generally* Justice Thomas B. Miller, *The New Federalism in West Virginia*, 90 W.Va.L.Rev. 51 (1987-88).

The provision of enhanced guarantees for "the enjoyment of life and liberty . . . and safety" by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent. W.Va. Const. art. III, § 1. Accordingly, we are not bound by federal precedent in interpreting issues of constitutional law arising from these enhanced guarantees.

(Citations omitted).

Based upon the foregoing reasoning, we determine that under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the 1997 amendment to *W.Va. Code*, 62-12-13(a)(5) [1997] that allows parole review hearings to be conducted within a period of up to 3 years following the denial of parole for prisoners serving sentences of life imprisonment with the possibility of parole may be applied retroactively to prisoners whose relevant offenses occurred prior to the effective date of the statutory amendment.

However, to pass constitutional muster under the *ex post facto* clause of the *West Virginia Constitution*, Article III, Section 4, the provisions of *W.Va. Code*, 62-12-13(a)(5) [1997] allowing up to 3 years between parole reviews for prisoners serving terms of life imprisonment with the possibility of parole must be applied on a case-by-case basis to prisoners whose offenses occurred at a time when the law prescribed annual parole reviews. The Board of Parole may only extend the period between parole review hearings for such prisoners beyond 1 year if the Board has made a case-specific individualized determination with reasoned findings on the record showing why there will be no detriment or disadvantage to the prisoner from such an extension. Additionally, due process requires that such a prisoner receiving a review period of more than 1 year must be afforded the opportunity to submit information for the Board's consideration during any extended period requesting that a review be granted before the expiration of the extended period.

The actions of the Board in this regard, of course, are subject to the same "abuse of discretion/arbitrary and capricious" review standard that is applied to the Board's other determinations. *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 163 (1980). We further conclude that as to prisoners other than petitioner Carper, our ruling in the instant case is to be applied prospectively.

IV.
Conclusion

In the instant case, we have a scant record with respect to the Board's decision to give Mr. Carper a 2-year setoff. We deny the requested writ of mandamus insofar as Mr. Carper asks us to require the Board to give him an annual parole review. We grant the writ to the extent that the Board is required to make an individualized determination with respect to any extension of Mr. Carper's review period beyond 1 year, and to otherwise act in accordance with the principles enunciated in this opinion.

Writ Granted as Moulded.