No. 25184 - State of West Virginia ex rel. George Carper v. West Virginia Parole Board

Chief Justice Davis, dissenting:

This case presented a classic violation of the Ex Post Facto Clause contained in Article II, Section 4 of the West Virginia Constitution. The majority opinion perpetuates the violation by contending that it is following the guidelines established by the United States Supreme Court in *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed.2d 588 (1995) (Stevens, J., and Souter, J., dissenting). I do not read *Morales* as authorizing any state judiciary or legislative body to, in effect, repeal its constitutional Ex Post Facto Clause. Therefore, based upon the following analysis, I respectfully dissent.

The Majority Concedes That Retroactive Application Of W. Va. Code §62-12-13(a)(5) (1997) Violates The Ex Post Facto Clause

The issue presented to this Court was straightforward and uncomplicated. The petitioner sought a writ of mandamus to compel the West Virginia Parole Board (hereinafter "the Board") to review him for parole on an annual basis consistent with the language of

W. Va. Code § 62-12-13 pre-existing the statute's 1997 amendment. In his petition, the petitioner argued that the Ex Post Facto Clause prohibited application of the 1997 version of W. Va. Code § 62-12-13 because it impermissibly increased his punishment by

allowing the Board to conduct only tri-annual parole hearings. The majority opinion cited approvingly Syllabus point 1 of *Adkins v. Bordenkercher*, 164 W. Va. 292, 262 S.E.2d 885 (1980), which held:

> 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.

From this reference, it appears that the majority opinion could not ignore the *force of clarity* pronounced in *Adkins*. Thus, the majority opinion implicitly conceded that, as written, W. Va. Code § 62-12-13(a)(5) would violate the Ex Post Facto Clause if given retroactive application. Instead of dispensing with the issue based upon this implicit finding, however, the majority decided to do what, in effect, only the Legislature could do--amend the statute to meet the minimum standard permitted by *Morales*.

The United States Supreme Court Did Not Amend Any Statute In Morales

Upon implicitly concluding that the Ex Post Facto Clause barred retroactive application of W. Va. Code § 62-12-13(a)(5), the majority opinion further concluded that "we can take an appropriately deferential approach to the challenged statute's

constitutionality, [and] act consistently with the Supreme Court's decision in *Morales* . . . by requiring reasonable safeguards in the retroactive application of the statute[.]" The problem with this conclusion is that it is inconsistent with *Morales*.

In *Morales*, the defendant had two separate convictions for murder. Both convictions occurred at a time when the law in California required annual parole hearings. Several years after the defendant's last murder conviction, the California legislature changed the frequency of parole hearings. The defendant argued that the retroactive application of the amended statute violated the federal Ex Post Facto Clause. The United States Supreme Court disagreed based upon very specific provisions that *were part of the statute addressed* in *Morales*. First, *Morales* found that California's statute stated explicitly that it applied only to "those prisoners who have been convicted of 'more than one offense which involves the taking of a life.'" *Morales*, 514 U.S. at 510, 115 S. Ct. at 1603. In the instant proceeding, the majority opinion conceded that W. Va. Code § 62-12-13(a)(5) applies to *all* prisoners serving a life sentence. Common sense dictates that the narrowly tailored statute in *Morales* and the all-inclusive statute in the instant proceeding require different outcomes. Second, in *Morales*, the California statute explicitly provided that it had "no effect on any prisoner unless the Board has first concluded, after a hearing, not only that the prisoner is unsuitable for parole, but also that 'it is not reasonable to expect that parole would be granted at a hearing during the following years.'" *Morales*, 514 U.S. at 510, 115 S. Ct. at 1604. The majority opinion in the case *sub judice* has conceded that W. Va. Code § 62-12-13(a)(5) provides

absolutely no guidance to the Board in making the decision to deny annual parole review. This blatant distinction further mandates that the outcome for the two statutes be different.

The Supreme Court summed up its decision in *Morales* by holding that California's statute did not violate the federal Ex Post Facto Clause as follows:

> In light of the particularized findings required under the [statute] and the broad discretion given the Board, the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings. For these prisoners, the [statute] simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis.

Morales, 514 U.S. at 512, 115 S. Ct. at 1604. The majority opinion purports to apply *Morales* to the facts of the case before it. Yet, the majority opinion can point to only one similarity between the California statute under consideration in *Morales* and W. Va. Code § 62-12-13(a)(5). Each law retroactively decreased the frequency of parole hearings. The Supreme Court did not base its decision to allow California's statute to pass federal constitutional muster on the mere fact that it retroactively decreased the frequency of parole hearings. In *Morales*, the Supreme Court relied on specific provisions in California's statute that provided a basis for departing from federal precedent previously

barring such statutes. *See Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *Warden v. Marrero*, 417 U.S. 653, 94 S. Ct. 2532, 41 L. Ed.2d 383 (1974). In this regard, California's statute explicitly stated that it was not to be allowed carte blanche application. Rather, it was to be applied only to prisoners who had been convicted of multiple murderers and only after the Board conducted a hearing and determined that it was not reasonable to expect that such prisoners would be granted parole in the following years. Moreover, the California statute mandated that these specific findings be made *before* the statute could be retroactively applied. The Supreme Court did not invent these criteria--they were included in the California statute.

In all respects, the California legislature, not the California Supreme Court, crafted the language and conditions in the statute that convinced the United States Supreme Court that it should be upheld. In contrast, the West Virginia statute complained of in the case *sub judice* provides 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." W. Va. Code § 62-12-13(a)(5). These few words, which bear no real similarity to the California statute upheld in *Morales*, have been used by the majority to conclude that their actions are consistent with that case. Such illogical reasoning by the majority, in my judgment, not only violates this State's Ex Post Facto clause, but also defiles the federal Ex Post Facto Clause. *See Miller v. Warden*, 921 P.2d 882 (Nev. 1996) (finding, under *Morales*, that federal Ex Post Facto Clause was violated

by new law revoking power of parole board to commute sentence of defendants convicted of first degree murder).

The Majority's Amendment To W. Va. Code § 62-12-13(a)(5) Provides Absolutely No Standards To Guide The Board's Discretion

As I have indicated, in my judgment, the decision rendered by the majority opinion is inconsistent with both the federal and state ex post facto clauses. Two factors guide me to this conclusion.

First, the majority opinion has purportedly given the Board the authority to apply W. Va. Code § 62-12-13(a)(5) on a case-by-case basis. I have absolutely no idea what the majority means by such a ruling. I do know, however, what the consequences will be from such unbridled discretion. This Court will be inundated with legitimate appeals from prisoners alleging they have been unfairly discriminated against by the Board's decision to deny them annual parole review. I simply cannot understand how the majority convinced itself that it could allow the Board to create, on an *ad hoc* whimsical basis, reasons for denying or allowing annual parole review. In *Morales*, a statutory standard existed which narrowed the class of prisoners to encompass solely multiple murderers who were not reasonably expected to be granted parole. Neither the majority opinion nor the West Virginia statute provides any guidance to the Board by identifying the class of prisoners to whom it may deny annual parole review. The net

result of this dangerous decision is that this Court will be forced to once again legislate without a compass. This Court will have to create, as the cases come before us, standards for denying and approving annual parole reviews. We are not the Legislature. It is not within this Court's power to create a body of law to breathe *Morales*-type life into W. Va. Code § 62-12-13(a)(5). If the majority truly had followed *Morales*, it would have barred application of W.Va. Code § 62-12-13(a)(5), as the West Virginia statute does not meet the minimal narrow standard approved by *Morales*.

Second, contrary to *Morales*, the majority opinion has permitted W. Va. Code § 62-12-13(a)(5) to be applied retroactively to all parole eligible prisoners serving life sentences. By contrast, the primary basis for *Morales*' deviation from federal precedent was the extremely narrow subgroup of prisoners to which California's statute applied, *i.e*., multiple murderers. The limitations of the *Morales* decision were explained by the United States Supreme Court in *Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997)[1]. In *Lynce* the Court stated that, under *Morales*, the relevant inquiry is whether the "'change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.'" *Lynce*, 519 U.S. at ___, 117 S. Ct. at 897 (quoting *Morales,* 514 U.S. at 506 n.3, 115 S. Ct. at 1602 n.3). *Lynce* reiterated the

[1]The decision in *Lynce* held that a state statute, which retroactively canceled provisional early release credits awarded to alleviate prison overcrowding, violated the Ex Post Facto Clause by increasing the prisoners' punishment.

Morales court's finding "'there is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement.'" *Lynce*, 519 U.S. at ___, 117 S. Ct. at 897 (quoting *Morales*, 514 U.S. at 511, 115 S. Ct. at 1604). According to the *Lynce* court, *Morales* unequivocally concluded that, "'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.'" *Lynce*, 519 U.S. at ___, 117 S.Ct. at 897 (quoting *Morales*, 514 U.S. at 513, 115 S.Ct. at 1605). In the final analysis, *Lynce* found *Morales* to be constitutional only because California's statute had no impact on the actual punishment imposed upon the multiple murderers who were subject to the statute. In contrast, the West Virginia statute *will* impact upon the actual punishment of *all* prisoners sentenced to life with mercy.