IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 082566

JOHN JAY CARROLL,

Appellant,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Appellee.

BRIEF OF APPELLEE

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Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Respondent Virginia Department of Corrections ("VDOC") Director Gene M. Johnson ("Johnson") generally agrees with Carroll's Statement of the Nature of the Case and the Material Proceedings in the Court Below. (Appellant's Brief, pp. 1-2). Carroll prosecuted his habeas corpus petition pro se, seeking a reduction in the amount of time he must spend in confinement to satisfy two prison sentences that the Stafford County Circuit

Court imposed on him while he was a New Jersey inmate. (Joint Appendix ("J/A"), 1-10). The Respondent moved to dismiss, arguing both that habeas corpus did not lie since the effect of an order entered in Carroll's favor would not result in his immediate release, and arguing that his underlying claim in any event lacked merit. The Respondent's motion to dismiss incorporated the affidavit of Wendy K. Brown, Manager with Court and Legal Services Section for the VDOC. (J/A, 13-22).

After Carroll had responded to the motion to dismiss (J/A, 23-25), the circuit court on November 7, 2008, entered its order denying and dismissing the petition. The court determined it lacked habeas corpus jurisdiction because a result in Carroll's favor would not cause his immediate release. The court also determined that the affidavit evidence demonstrated that Carroll had been credited with the subject time in confinement on another state's sentence. (J/A, 11-12). Carroll timely

appealed. (J/A 26).[1] This Court appointed counsel to represent Carroll on appeal.

QUESTIONS PRESENTED

Respondent believes Carroll correctly identifies the Questions Presented.

STATEMENT OF FACTS

Respondent generally agrees with Carroll's Statement of Facts. A very few corrections or amplifications are appropriate. Carroll was not extradited from New Jersey, as that term is generally understood.. His presence in Stafford County was occasioned by the terms and conditions of the Interstate Agreement on Detainers ("IAD"), as Carroll was a New Jersey inmate, serving a New Jersey sentence at the time. (J/A, 3; 10; 19). He actually suffered two convictions in the Stafford County Circuit Court, Docket Nos. CR95-373-02 (Use Of Firearm); and CR95-373-04 (Carjacking). (J/A, 9). The time Carroll wants credited to his term of

[1] The notice of appeal is certified as having been mailed to opposing counsel on December 5, 2008, within the 30 days authorized to note an appeal. Va. Sup. Ct. R. 5:9(a). However, the Clerk of the Stafford County Circuit Court did not date stamp the notice of appeal as having been filed until December 10, 2008, after the time allowed for filing an appeal had expired. This Court's "prison mailbox" rule, however, deems the notice of appeal as timely filed so long as it was placed for mailing in the prison's internal mail system within the allowed time for filing the notice. Va. Sup. Ct. R. 5:5(c). Undersigned counsel has confirmed that the notice of appeal was timely placed in Carroll's internal prison mail system.

imprisonment represents the 288 days he was in a Virginia jail from October 3, 1997, until his return to New Jersey on July 17, 1998. (J/A, 10). It appears he was continuously incarcerated in New Jersey from July 17, 1998, until he returned to Virginia on February 13, 2008, to begin service of the Stafford County sentences. (See Appellant's Brief, p. 3).

ARGUMENT

I. This Court Should Find Habeas Corpus Jurisdiction Available Where The Result Of An Order Entered In The Petitioner's Favor Will Reduce The Amount Of Time That Must Be Served To Satisfy His Term Of Incarceration.

A. The Proceedings In The Circuit Court

Carroll filed his habeas corpus petition to challenge the alleged failure of VDOC personnel to credit his prison sentence with the time he had spent in a Virginia jail. He did not claim that crediting these jail days to his prison sentence would result in his entitlement to release from confinement. (J/A, 1-5). Since Carroll sought credit for 288 jail days, and since his projected release date is May 6, 2019, there is no argument that could be made that crediting his record with these jail days would result in his release. (J/A, 4 (seeking credit for 288 days); 20 (affidavit evidence of projected May 6, 2019 release)). Accordingly, the habeas corpus Respondent moved the circuit court to dismiss the petition, among other reasons, because the writ of habeas corpus only lies "where the release of the prisoner from his

immediate detention will follow as a result of an order in his favor." (J/A, 14).[2]

In moving to dismiss on this ground, the Respondent relied on this Court's decision in Virginia Parole Board v. Wilkins, 255 Va. 419, 498 S.E.2d 695 (1998). The circuit court's November 7, 2009, dismissal order determined that the court lacked habeas corpus jurisdiction "because even a result in [Petitioner's] favor would not result in his immediate release from confinement." (J/A, 11). The circuit court further concluded that the affidavit evidence presented (J/A, 18-20) demonstrated that Carroll had been credited with the time he had spent in jail on his sentence in another state. (J/A, 11)

B. History Of The "Immediate Release" Rule

This Court in its decision in McDorman v. Smyth, 187 Va. 522, 47 S.E.2d 441 (1948), first articulated what is commonly referred to as the immediate release rule. The habeas corpus petitioner in McDorman challenged multiple convictions. He had completed service of the sentences imposed on some of the challenged convictions; was deemed to be serving a single sentence at the time he filed his petition; and would serve other sentences after he had completed service of the sentence on

[2] The motion to dismiss also addressed the merits of Carroll's jail credits claim.

which he was then confined. This Court concluded as follows, in finding that habeas corpus would not lie other than for the conviction, the sentence for which he was serving when he filed the petition.

> Habeas corpus is a writ of inquiry granted to determine whether a person "is detained without lawful authority." Virginia Code, 1942 (Michie), section 5848. It is available only where the release of the prisoner from his immediate detention will follow as a result of an order in his favor.

187 Va. at 525, 47 S.E.2d at 443.

In reaching this conclusion, this Court referred to the "excellent review and discussion of the history, use and purpose of the writ of habeas corpus" in McNally v. Hill, 293 U.S. 131 (1934). McDorman, supra, 187 Va. at 525, 47 S.E.2d at 444. The decision in McNally, however, would later be overruled in Peyton v. Rowe, 391 U.S. 54 (1968), putting this Court's assessment as to the availability of the writ at odds with that of the United States Supreme Court. Compare Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965) (favorably referencing McDorman's immediate release rule) with Peyton v. Rowe, supra, (overruling United States Supreme Court precedent relied upon in McDorman).

Also in 1968 the General Assembly amended Virginia's habeas corpus statute so as to alter the McDorman rule, with respect to sentences either suspended or to be served in the future. The Amendment

established Va. Code § 8-596(b)(3), and stated as follows:

> Such [habeas corpus] petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.[3]

Thus as of 1968, Virginia and federal habeas corpus laws were co-extensive insofar as challenges to convictions, the sentences for which were to be served in the future are concerned. This Court has had little reason in the intervening years to decide cases where application of McDorman's immediate release rule might apply. In Virginia Parole Board v Wilkins, supra, the Court relied upon the immediate release rule in determining that a prisoner could not use habeas corpus to challenge the timing of, or procedures attendant to, parole considerations. The logic of that conclusion is clear, as judicial determinations of the timing of parole considerations, or decisions relative to the procedures attendant to those considerations, cannot lead either to a release from prison, or even a shortening of the time a prisoner must serve to satisfy his sentence.

More recently, in West v. Director, 273 Va. 56, 639 S.E.2d 190 (2007), this Court, while not citing the McDorman decision, rejected the

[3] As Carroll points out in his Brief, this same language is contained in the current habeas corpus statute at Va. Code § 8.01-654(B)(3). (Appellant's Brief, p. 5).

notion that the immediate release rule precluded assertion of habeas corpus jurisdiction where the prisoner was serving concurrent sentences.[4]

> Although West is serving concurrent sentences on the two manslaughter convictions, our judgment granting a writ of habeas corpus with regard to his common law involuntary manslaughter conviction will result in his release from immediate detention on that conviction and sentence. Therefore, our decision complies with the purpose and scope of the writ of habeas corpus, which is to test the legality of a prisoner's detention. (citations omitted).

273 Va. at 66-67, 639 S.e.2d at 197.

The situation that Carroll's case presents is not covered by the language in the habeas corpus statute, nor is his jail credits challenge quite like the West case. The question facing the Court then is whether McDorman's immediate release rule precludes Carroll's case from being litigated in habeas corpus, and if it does, should the immediate release rule be modified so as to allow habeas corpus challenges where the result of an order entered in the petitioner's favor will result in shortening the time he

[4] The language of Va. Code § 8.01-654(B)(3) does not quite capture the situation presented in West, as the concurrent sentence has not been suspended, and is not to be served subsequently to another sentence presently being served.

must serve in confinement to serve his term of imprisonment.[5]

C. The Court Should Find Habeas Corpus Jurisdiction Is Available Where The Effect Of An Order Entered In The Petitioner's Favor Will Result In Shortening The Duration Of His Confinement

While the outcome in McDorman has been changed legislatively, and the McDorman reasoning undercut by subsequent United States Supreme Court authority, the immediate release rule that McDorman announced has never been revisited. This appeal likely cannot be decided on the language of Va. Code § 8.01-654(B)(3), since Carroll in no sense is challenging his conviction. Strictly speaking, McDorman does not control this appeal since McDorman dealt with a challenge to a conviction, while Carroll simply wants the time that he needs to be confined in order to serve his sentence reduced. Nonetheless the immediate release rule hovers over the appeal,

[5] The phrase "term of imprisonment" is carefully chosen, so as to distinguish between individual sentences and the cumulative term of imprisonment. Years ago the VDOC calculated service of individual sentences seriatim. See generally Peyton v. Williams, supra, 206 Va. at 150-151, 145 S.E.2d at 598-600. For roughly the past three decades, however, the practice has been to calculate sentence service based on the cumulative sentences, without ending service on one sentence, and then beginning calculation of service of the next sentence.

as well as the numerous other lawsuits Virginia prisoners initiate to mount the same type of challenge as Carroll has done.[6]

The Respondent encourages this Court presently to modify the immediate release rule so as to clarify that state habeas corpus lies to give this Court and the circuit courts jurisdiction to adjudicate a prisoner's claim challenging the length of time he must serve in order to satisfy his term of imprisonment. On the other hand, the Court is strongly encouraged to insure that some manifestation of the immediate release rule remains in place so as to make sure that habeas corpus, in the prisoner context, is not available for any purpose other than challenges to convictions and sentences, and where inmates are seeking a court order that would directly result in a shortening of their period of incarceration. As in Wilkins, habeas corpus should not be available to challenge parole issues that only

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[6] Prisoner challenges to sentence service take many forms. Some, like Carroll, want adjustments in jail credits. Others will challenge prison disciplinary proceedings that have resulted in the forfeiture of credits previously earned so as to reduce their period of confinement. Yet others will complain that their good conduct credits, or earned sentence credits, are not being properly computed and applied to their sentences. Many inmates complain about the interpretation of their sentencing orders—whether a concurrent sentence is being properly run with some other sentence; what credits the sentencing order mandates; has time served in the federal prison system been properly applied to the Virginia sentence. The list literally goes on and on. The common denominator is the effort to reduce the amount of time the prisoner must spend in confinement to satisfy his term of imprisonment.

tangentially affect an inmate's confinement. Nor should habeas corpus be available to challenge prison classification issues, such as the rate at which a prisoner earns good conduct or earned sentence credits; whether segregation housing is appropriate as opposed to being in the general population; or the prison in which the inmate is confined. Habeas corpus should not become a procedural vehicle by which prisoners can mount challenges to innumerable aspects of their confinement.

The limited modification of the immediate release rule that is being advocated has many salutary purposes. For instance, the availability of other avenues of jurisdiction to address sentence service issues is uncertain, at best. Both declaratory judgment actions and mandamus proceedings likely are not available. See, e.g., Spivey v. Bass, Va. Sup. Ct. Record No. 080869 (April 3, 2009) (finding sovereign immunity bars declaratory judgment action challenging sentence calculation).[7] The availability of habeas corpus insures that the prisoner and the VDOC can obtain a measure of finality, in the present time, if the courts can adjudicate challenges to the length of time an inmate must serve to satisfy his term of

[7] Undersigned counsel personally can attest to receiving a number of this Court's orders finding that mandamus does not lie for sentence calculation challenges. E.g., Perry v. Johnson, Record No. 081770 (Feb. 3, 2009) ("mandamus does not lie to address a claim that a sentence has been miscalculated").

imprisonment. The many reasons the United States Supreme Court gave in Peyton v. Rowe, supra, for overturning the federal version of the McDorman rule apply just as forcefully to sentence calculation challenges, as they do to challenges to conviction, the sentences for which are not yet being served.

Presently permitting these types of habeas actions also serves to reduce the prospect of a prisoner serving too many days in confinement, in the event a court ultimately were to sustain a prisoner's challenge. If the prisoner must wait to litigate until the effect of an order entered in his favor will result in his immediate release, an order entered in his favor cannot undo the fact that he will by then have served too much time. This concern applies to the Commonwealth as well, as taxpayers do not want to be faced with the prospect of a damages action challenging an improper sentence calculation where the error might have been judicially addressed prior to when the prisoner has already been confined too long.

The impact of application of the immediate release rule to habeas corpus actions such as Carroll's can be devastating for the defense of federal habeas corpus petitions. The federal courts will find jurisdiction to entertain these actions. While the federal Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214

(1996), contains numerous provisions that require federal deference to the state courts in the context of federal habeas corpus proceedings, see Williams v. Taylor, 529 U.S. 362 (2000); Lawrence v. Branker, 517 F.3d 700, 707-708 (2008), those standards will have no application if the state prisoner litigating a federal habeas corpus action has been shut out of the state judicial system. There will be no federal judicial deference to state court factual findings; no deference to state court determinations of federal constitutional law; and no possibility of applying state procedural default rules. In other words, the federal courts will apply federal law without having the benefit of a state court's consideration of the state prisoner's legal claim. This Court is then urged to use this appeal as a vehicle to clarify that the state habeas corpus courts are open to state prisoners who file actions challenging whether they are being required to serve too much time to satisfy their state criminal sentences.

II. The Circuit Court Correctly Ruled that Carroll Was Not Entitled To Additional Credit On His Virginia Sentence.

Carroll's claim for 288 jail day credits stems from his allegation that he was in the Stafford County, Virginia, jail from October 3, 1997, until July 17, 1998. He asserts that he had been transferred from New Jersey to the custody of the Stafford County Sheriff for a trial. He was sentenced July 7, 1998, to a consecutive term of confinement, and returned to New Jersey

July 17. (J/A, 3). He does not contest the affidavit evidence that his presence for trial in Stafford County was pursuant to the provisions of the IAD. (J/A, 19; 223-24; Appellant's Brief, pp. 10-13). His argument on appeal is that: (1) he is entitled to the credit for the jail days as a matter of Virginia and constitutional law; and (2) if the question of credit on a New Jersey sentence for the days he was in Virginia is an issue, then he is entitled to an evidentiary hearing. (Appellant's Brief, pp. 12-13).

The IAD is a Congressionally sanctioned compact among the signatory states, in accordance with the Compact Clause of the United States Constitution. Carchman v. Nash, 473 U.S. 716, 719-720 (1985). The IAD facilitates trying a prisoner of one state, here New Jersey, who is charged with a criminal offense in another state, here Virginia. Id. at 720. Virginia and New Jersey are both signatory states, and both have adopted the language of the uniform act that requires that the sending state (New Jersey) continue to run its sentence while the prisoner is in the receiving state (Virginia).

> During the continuance or temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allows.

Va. Code § 53.1-210 (V)(f); N.J. Stat. § 2A:159A-5(f).

Carroll not only was, by operation of law, continuing to serve his New Jersey sentence while in Virginia, he was deemed to continue to "remain in the custody of and subject to the jurisdiction of [New Jersey]. . . ." Va. Code § 53.1-210(V)(g). He legally continued to be a prisoner of the State of New Jersey, being held in the Virginia jail solely for the expedient purpose of having the Virginia criminal charge adjudicated.[8]

Carroll nonetheless argues that Va. Code § 53.1-187 demands that he be given credit on his Virginia sentence for this period of time. He in effect demands a double credit for the time he was in the Virginia jail—on his New Jersey sentence as well as his Virginia sentence. He further argues that language in the Stafford County Circuit Court sentencing order re-enforces his entitlement to credit on his Virginia sentence. (Appellant's Brief, pp. 10-11).

Va. Code § 53.1-187 provides as follows:

> Any person who is sentenced to a term of confinement in a correctional facility shall have deducted from any such term all time actually spent by the person in a state hospital for examination

[8] The record before the Court does not reveal whether Carroll himself initiated the process under the IAD to be returned to Virginia for trial, or whether the Stafford County prosecutor demanded his return. Compare Va. Code § 53.1-210, art. III (prisoner initiated demand) with § 53.1-210, art. IV (prosecutor demand).

> purposes or treatment prior to trial, in a state or local correctional facility awaiting trial or pending an appeal . . . .

This same Code section further provides that the prisoner is entitled to the credit even where his sentencing order "fails to provide for the credit authorized by this section, . . ." As Carroll notes, his sentencing order has language that incorporates this Code section:

> Credit for time served: The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

(J/A, 8).

If Virginia's law and Carroll's sentencing order were otherwise silent on this issue, then his argument for a double credit for the jail time might have considerable force. His sentencing order also provides, however, that "[t]hese sentences shall run consecutively with all other sentences." (J/A, 7). This provision in the order is consistent with the presumption in Virginia that criminal sentences are to be served consecutively, not concurrently.

> When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently unless expressly ordered by the court.

Va. Code § 19.2-308; accord Hudson v. Youell, 179 Va. 442, 450, 19 S.E.2d 705, 709 (1942) ("The general rule in Virginia, both before we had a statute on the subject and since, is that sentences run consecutively and

not concurrently."); Wilkinson v. Youell, 180 Va. 321, 23 S.E.2d 356 (1942).[9]

Carroll cannot receive credit for the time he spent in a Virginia jail while he was a prisoner of New Jersey, serving his New Jersey sentence, without running afoul of Virginia's consecutive sentence rule, and his own sentencing order. To the extent Carroll's situation creates tension between Va. Code § 53.1-187 and Va. Code § 19.2-308, resolution of the question requires the Court to give force to § 19.2-308. As the present case suggests, Virginia's statutory scheme for interpreting sentence service is contained in statutory fragments located in various parts of the Virginia Code. The VDOC is responsible to compute a prisoner's sentence by interpreting and applying these Code sections to each prisoner's situation.

> The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to great weight by the court. The legislature is presumed to be cognizant of such

[9] In Wilkinson a Virginia circuit court had obtained a prisoner from the custody of the federal marshal for trial. The court convicted and sentenced the prisoner, and then returned him to the marshal's custody. The prisoner was thereafter convicted and sentenced in federal court, and remanded to serve his federal sentence. Upon completion of his federal sentence, he was turned over to Virginia officials to begin service of his state sentence. This Court in Wilkinson rejected the argument that service of his Virginia sentence commenced any sooner than when he was returned from federal custody to begin service of the Virginia sentence. 180 Va. at 330-331, 23 S.E.2d 360-361.

> construction. When it has long continued without change the legislature will be presumed to have acquiesced therein. (Citations omitted).

Peyton v. Williams, supra, 206 Va. at 600, 145 S.E.2d at 151.

Even without the great weight to be afforded the VDOC construction of the statutes, the various provisions concerning sentence computation must be considered *in pari material*. See Moreno v. Moreno, 24 Va. App. 190, 198, 480 S.E.2d 792, 796 (1997) (separate provisions to be considered as part of homogeneous system of laws). The statutes should not be construed so as to produce an irrational consequence. See McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952).

Read in isolation, Va. Code § 53.1-187 might well compel the result Carroll seeks. Unlike the typical pre-trial detainee housed in a jail awaiting trial, however, Carroll was actually the prisoner of another state. If the Court were to construe this provision as Carroll suggests, the result is an immediate conflict with the Virginia rule (and sentencing order language) mandating that his Virginia sentences must run consecutively. The better construction of § 53.1-187 is to read its provisions as applicable only to the situation where the prisoner otherwise would not receive any credit for his

jail confinement.[10] Carroll cannot be allowed a double credit for the time he spent in a Virginia jail while he was a New Jersey prisoner, serving his New Jersey sentence.

III. No Evidentiary Hearing is Needed.

Carroll contends that, if material to the proper disposition of his petition, the question whether he actually received credit on his New Jersey sentence must be the focus of an evidentiary hearing. As argued above, he received credit on his New Jersey sentence by operation of law. The records keeper for his New Jersey custodian had no more ability to ignore the period of his confinement in Virginia, than he would have had to ignore the time Carroll physically spent confined in a New Jersey facility. This Court adheres to the "presumption that public officials have acted correctly." Hladys v Commonwealth, 235 Va. 145, 148, 366 S.E.2d 98, 100 (1988). In the face of this legal presumption, it is incumbent upon Carroll to raise some plausible suggestion that he did not receive credit on his New Jersey sentence, where the law dictates otherwise.

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[10] An analogous situation would be that of a prisoner who, while awaiting trial on a felony charge, serves enough time in confinement to satisfy a misdemeanor sentence previously imposed. The VDOC would not, in that situation, additionally allow a credit on the resulting felony sentence for time served toward satisfaction of the misdemeanor sentence. A contrary result would be an absurd reading of this provision.

CONCLUSION

For the foregoing reasons, the Appellee asks this Court to affirm the judgment of the Stafford County Circuit Court.

Respectfully submitted,

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CERTIFICATE OF TRANSMISSION AND SERVICE

I hereby certify that on August 14, 2009, the required copies of this Brief of Appellee were hand-delivered to the Clerk's Office of this Court for filing and three copies were mailed to David B. Hargett, Esquire, Hargett Law, P.L.C., 11545 Nuckols Road, Suite C, Glen Allen, Virginia 23059, counsel for the Appellant. Additionally, a copy was sent to the Court electronically at: scvbriefs@courts.state.va.us.

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