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Supreme Court of Texas.
In Re Billy James Smith.
No. 10-0048.

November 10, 2010.

Appearances:

Kristopher E. Moore of Glasheen, Valles & Inderman, LLP, for relator.
Philip A. Lionberger, Office of the Attorney General-Solicitor General's Office, for real party in interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the second cause this morning. It's 10 matter 0048 In Re Billy James Smith.

MARSHAL: May it please the Court, Mr. Moore will present argument for the Relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KRISTOPHER E. MOORE ON BEHALF OF THE PETITIONER

ATTORNEY KRISTOPHER E. MOORE: Good morning and may it please the Court. We are here this morning to discuss the statute codified at Texas Civil Practice and Remedies Code Section 103.001 et seq. otherwise known as an act relating to the compensation of persons wrongfully imprisoned. Before us today is an issue related to how to construe Section 103.001(b) relates to Relator's claim here, Mr. Billy James Smith, of his wrongful conviction. Mr. Smith was arrested in 1986 in Dallas and convicted in 1987 of a rape that he did not commit. At the time of his arrest in 1986, Billy James Smith was serving parole on an offense that he'd obtained conviction more than a decade prior. As a result of his conviction on the rape, a wrongful conviction, his parole was revoked and he was returned to prison both on the rape convicted, wrongful conviction and on the parole revocation as a result of the wrongful conviction.

JUSTICE DAVID M. MEDINA: Counselor, is there a distinction between a parole and probation for the purpose of this statute?

ATTORNEY KRISTOPHER E. MOORE: For the purpose of this statute, Your Honor, no. No, in *ex parte Hill*, that the Relator has cited in his petition, the Texas Court of Criminal Appeals, they said that basically probation is the power of parole which is otherwise reserved to the Executive Branch now extended to the judiciary. In the United States Supreme Court case of *Gagnon v. Scarpelli*, which the Respondent cites to, the United States Supreme Court said parole and probation, for all intents and purposes, substantively are the ability to live and have liberty on certain conditions and, therefore, when parole or probation is revoked, it's a revocation of liberty on conditions. So for the purposes of this case and this statute, which is the statute for the compensation of persons wrongfully imprisoned, we're talking about people that have lost their liberty for something they did not do and were returned to prison for something they did not do. Whether that's probation or parole, the point here is that the only reason they were in prison was because of the wrongful conviction.

JUSTICE DAVID M. MEDINA: But does it matter if they were serving the sentence concurrently? And in this situation, I think the judge imposed a concurrent sentence for the previous violation to run with the new wrongfully issued conviction. Does that matter?

ATTORNEY KRISTOPHER E. MOORE: No, sir, it does not matter. Your Honor, based upon the fact that the concurrent sentence would not have been imposed but for the wrongful conviction in this case and so, therefore, under the statute and if you'd like I'd read Section 103.001(b) the relevant language in this case, which says a person is not entitled to compensation under subsection (a) for any part of a sentence in prison during which the person was also serving a concurrent sentence for another crime to which subsection (a) does not apply. Subsection (a) being the part that allows you the remedy of wrongful imprisonment compensation. Therefore, if you have that concurrent sentence and subsection (a) you've received a declaration of innocence then that effectively nullifies the revocation which returned you to prison, which is the institution of the concurrent sentence.

JUSTICE DALE WAINWRIGHT: To just talk about what's at stake here, under this statute, the Comptroller agrees that your client's entitled \$1,593,000 and some change for 19 years and 11 months of improper imprisonment, right?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: Your claim is that actually 19 years and 25 days is the Comptroller's position. Your position is that your client is entitled to 19 years and 11 months of compensation so another 10 additional months and that the difference between what the Comptroller's agreed to pay and what you say your client's entitled to is about \$67,000. Is that right?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, under lump sum payment it's \$67,000. Now, of course, the way the statute works is you get the lump sum payment plus then you have that amount matched and put into annuity that's annuitized over the lifetime of the applicant. So, therefore, in this case, it's actually roughly \$130,000 that's at issue. Of course, the construction here espoused by the Respondent applies not only in Mr. Smith's case, but has far-reaching implications where you have exonerees who have been denied 95% of their compensation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, what is the legislative purpose? It's clear that they're assuming that there will be some wrongful convictions and compensation will be paid, but statute says a person cannot receive that compensation for any part of a sentence during which the person was serving a concurrent sentence for another crime. What was the policy behind that?

ATTORNEY KRISTOPHER E. MOORE: The policy behind that was the fact that the intent of the legislature, of course, this Court said in *Laporte v. Barfield* that intent of the legislature is the polestar of statutory construc-

tion. The intent of the legislature here is easily discerned from the title. We're talking about compensation to persons wrongfully imprisoned and, therefore, Section 103.001(b), if construed as we urge and as the Attorney General and their opinion construed it is such that if you were in prison when you received a wrongful conviction, you don't get compensated for the time you were in prison and you should have been in prison. It's a very simple and straightforward construction that fits within the whole remedial scheme of this statute and, again, this is a remedial statute.

JUSTICE EVA M. GUZMAN: And is that what compels the result in the interpretation that you're advocating, the fact that it is a remedial statute intended to redress these wrongs?

ATTORNEY KRISTOPHER E. MOORE: Yes, Your Honor, the fact that it's a remedial statute should be construed broadly because it was intended to remedy the injustice of wrongful imprisonment and allow for compensation to deal with those problems that arise from wrongful imprisonment. Not only that, but I would point out that in 2009 when the Texas legislature met and passed the Timothy Cole Act, they did so at the behest of Texas municipalities which were seeking to increase compensation to encourage exonerees to instead of relying upon Section 1983 Federal Civil Rights claims and going into Federal Court, they would instead now have enough incentive to take this statutory compensation and be able to go on with their life. Have that wrong remedied. So, therefore, if the respondent's construction is now allowed to stand and anytime a person was on parole at the time of their wrongful conviction and that parole was revoked on the basis of the wrongful conviction, then in many cases that can completely take the teeth out of this statute. Not only would it deny them the compensation and remedy that the legislature intended, but would also force many individuals, like for instance the exoneree example that is now denied 95% of his compensation, his only remedy is to go back to federal court and seek damages against the municipality, which the legislature intended to try to prevent. Again, the Respondent's construction urges that what we're asking is for this Court to read in and amend into the statute the words "in prison" after concurrent sentence, but our reading of the statute, relying upon the Attorney General's opinion relies upon the plain language, the plain language being that grammatical rules of construction here say that in prison is an indirect prepositional phrase. In prison, whereas it modifies any part of a sentence in prison can also modify the noun sentence anywhere it's found within this section or within this sentence so, therefore, it can easily be found to modify any part of the sentence in prison during which the person was also serving a concurrent sentence. It doesn't ask the Court to read in and amend judicially amend to put the words "in prison" after concurrent sentence because the rules of grammar say you can read it that way. The intent of the legislature was that only compensation would be paid to people that have been wrongfully imprisoned.

CHIEF JUSTICE WALLACE B. JEFFERSON: What is the compensation for? What does it replace? Is it living expenses? Is it mental anguish? What is it for?

ATTORNEY KRISTOPHER E. MOORE: Good question, Your Honor, and in the Relator's reply, in the appendix is the legislature record from the Timothy Cole Act where you'll find testimony and the words of legislators talking about this and, in fact, what they, what it's for specifically is to mitigate the economic, physical and emotional impact long-term imprisonment has had on the innocent that's been in prison and so we're talking about lost wages. We're talking about, in fact, prior to 2009, there was a clause that allowed for mental health, for people to seek mental health treatment. That was taken out in 2009 simply because what they figured the legislature figured if they raised the levels far enough that people would be able to pay for their own health insurance, for their mental health, for their physical health and be able to compensate those wrongs.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well you would think someone who has committed another crime and is on probation for that crime that that person's economic wherewithal would be somewhat diminished. So would this, is this compensation, would it be sensible to conclude that the legislature did not want to spend the money to bridge that gap for a person who had already committed a crime and, therefore, would have had a tough time economically anyway?

ATTORNEY KRISTOPHER E. MOORE: Absolutely, Your Honor, and, in fact, under prior visions of this act,

the levels were at I believe \$25,000 per year, which would be more commensurate to just speaking about economic damages because you're right, if you were on parole, probation, most of the exonerees would not have been making let's say in 1986 when Billy Smith was arrested, more than \$12,000, \$15,000 a year and that may be optimistic. However, the intent of the legislature in 2009 when they passed the Tim Cole Act was to look beyond simply the economic damages and go towards providing for all of the losses that they've had, of course, mental and physical health and then economic. Understand that even if you were on parole, you would, Billy Smith would have had 20 years in which to build a retirement, develop his skills, start a business, all of those things. So it would be hard to anticipate what his actual, what the wrongful imprisonment denied him as far as opportunities.

JUSTICE DAVID M. MEDINA: We're talking about a lot more than that, aren't we? We're talking about someone spending one day wrongfully accused, wrongfully convicted and wrongfully imprisoned. You multiply that by a factor of 19 years and 11 months and there's, in my view, probably no value you can put on that.

ATTORNEY KRISTOPHER E. MOORE: No, Your Honor, and I believe if you spoke to any exoneree in the State of Texas of which there are about 42 now, they will say that even the compensation levels currently set aren't going to compensate them adequately for what they've lost. Billy Smith, for instance, he might tell you that he never got to have a family, raise children. That's of particular importance to him. No amount of money even at \$80,000, \$160,000 or \$500,000 per year of incarceration is going to compensate you for those losses, absolutely, and, in fact, that's why the legislature felt they had to reach these certain levels of compensation because most exonerees were choosing to go the route of the 1983 civil rights claims because they felt that what the state was offering was simply not enough to compensate them and was in many instances just to them inadequate and so they would go seek the federal civil rights claim and then come back as this Court has recognized previously and receive the statutory compensation. That's why the levels were placed so high in this instance to try to encourage them to go ahead and take this money now and be able to get on with their lives and not spend the next two, three, four years in litigation over those matters.

JUSTICE DAVID M. MEDINA: Do you think that there was any reason to believe that this was passed perhaps as a detriment or to make prosecutors think through their case before they go after someone with weak evidence or no evidence?

ATTORNEY KRISTOPHER E. MOORE: Your Honor, I honestly can't speak to that simply because I, not being a prosecutor myself, I wouldn't know whether a prosecutor actually takes into account that if this conviction is later overturned, it's going to cost the state millions of dollars.

JUSTICE DAVID M. MEDINA: Probably not.

ATTORNEY KRISTOPHER E. MOORE: My guess would probably be not. I think just the sheer number of exonerations that have happened in the State of Texas have been enough that cities like Dallas, Austin, Houston, Lubbock have taken a step back and started to relook at the way cases are prosecuted and even investigated in order to make sure that 20 years from now we're not here having this same discussion. In conclusion, it makes no sense to accept the Respondent's construction of this statute to narrowly construe it so that a person who should not have been in prison but for the wrongful conviction is now denied his wrongful imprisonment compensation. When he was denied his liberty because of a wrongful conviction, he should not now be denied his compensation. Thank you, I see my time's up and I thank the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Moore. The Court is ready to hear argument from the Real Party In Interest.

MARSHAL: May it please the Court, Mr. Lionberger will present argument for the Real Party In Interest.

ORAL ARGUMENT OF PHILIP A. LIONBERGER ON BEHALF OF THE RESPONDENT

ATTORNEY PHILIP A. LIONBERGER: Good morning, Mr. Chief Justice and may it please the Court. At bottom, this case asks the Court to choose between two fundamentally different constructions of the wrongful imprisonment act. On the one hand, the Comptroller has construed the provision in question according to its plain language. On the other hand, Mr. Smith asks the Court to take the drastic step of creating a judicial amendment by inserting words into the provision that the legislature could have used, but didn't. The comptroller offers two main reasons why the Court should accept her construction instead of Mr. Smith's. One is the plain meaning rule and the other is the rule of strict construction and also during the course of my presentation here today, I would like to address three very important questions that were asked of the Relator. One has to do with the distinction between parole and probation. The other has to do with whether this is a remedial statute and the third has to do with what is the proper way of reading this statutory provision grammatically.

JUSTICE EVA M. GUZMAN: Beginning with your first one, the distinction between parole and probation, is there a substantive difference? They're both criminal sentences are they?

ATTORNEY PHILIP A. LIONBERGER: Yes, Your Honor, there is a very drastic distinction between the two. Probation is something that a court offers and when someone receives a probated sentence, they don't actually serve a sentence. It is probated. It is postponed. Parole is different. Parole is someone who is already under a sentence. They are in prison. They have been sentenced. They have been punished and the Board of Pardons and Paroles, Pardons and Paroles Review Board grants them parole. Their sentence is not expunged. They are still under a sentence. They just now serve that sentence under the custody and control of the Pardons and Parole Division of the TDCJ instead of the institutional division.

JUSTICE EVA M. GUZMAN: How do you respond to the argument that probation is essentially the power of parole extended by the legislature to the judiciary?

ATTORNEY PHILIP A. LIONBERGER: Both probation and parole are forms of conditional release. That is true. But it is not proper to say that the two are the same. They are different.

JUSTICE NATHAN L. HECHT: What are the practical differences? When you're out and about under probation or under parole, what are the practical differences?

ATTORNEY PHILIP A. LIONBERGER: Well under both a person who is either on probation or parole are not free as the relator suggest in their brief that they're somehow out in society and they're free to come and go as they please. Both are under restrictions and conditions that they must meet.

JUSTICE DAVID M. MEDINA: They're both under the criminal justice system, but there sure is a significant difference to be outside in the free world as opposed to being incarcerated in the not-free world. You have to agree with that.

ATTORNEY PHILIP A. LIONBERGER: Absolutely there is a difference, but the main difference is probation someone who is on probation has not been sentenced. Someone who is on parole is under a sentence.

JUSTICE EVA M. GUZMAN: But you can be sentenced even though you're under probation assuming it's revoked.

ATTORNEY PHILIP A. LIONBERGER: You can, but if you complete your probation, you will not have ever suffered a criminal sentence.

JUSTICE DON R. WILLETT: Why don't we make language that our Court has used and the Court of Criminal Appeals has used where we talk about people being "sentenced to probation."

ATTORNEY PHILIP A. LIONBERGER: Well, I'm not sure what to make of that. We could say that that is some loose language that doesn't take into consideration the very difference, the very meaningful differences between probation and parole. The-- as I've cited in my brief, there are cases that say that there is a very drastic difference between the two.

JUSTICE NATHAN L. HECHT: What is it?

ATTORNEY PHILIP A. LIONBERGER: The main one is someone on probation isn't actually serving a sentence.

JUSTICE NATHAN L. HECHT: Is there any practical difference?

JUSTICE PHIL JOHNSON: For example, do they both still have to report to someone in the criminal justice system? Do either one of them allow you freedom to travel anywhere without reporting in, things of that nature?

ATTORNEY PHILIP A. LIONBERGER: They, my understanding is that you would have to report to a probation or a parole officer. A parolee has to literally sign a contract that contains certain conditions and those conditions may be different depending on whether they're on parole or whether they're on probation.

JUSTICE NATHAN L. HECHT: Can both of them vote?

ATTORNEY PHILIP A. LIONBERGER: I don't believe, well a parolee has been convicted of a felony so.

JUSTICE NATHAN L. HECHT: So no.

ATTORNEY PHILIP A. LIONBERGER: No.

JUSTICE NATHAN L. HECHT: But on probation?

ATTORNEY PHILIP A. LIONBERGER: I don't know the answer to that. I'm thinking since you have not been sentenced that you would have, you may still have your right to vote in that situation if you successfully complete your probation.

JUSTICE DALE WAINWRIGHT: If a person is on probation or parole, they can still get a job and earn an income.

ATTORNEY PHILIP A. LIONBERGER: That's true.

JUSTICE DALE WAINWRIGHT: If a person is in prison, they can't.

ATTORNEY PHILIP A. LIONBERGER: That's true.

JUSTICE DALE WAINWRIGHT: Does that say anything about the purpose of the act, at least the part of the act to provide economic compensation because if you're out of prison, you could provide part of that, not maybe the lost wages, but part of that yourself by working. If you're in prison, you can't. What does that suggest about the interpretation of the statute?

ATTORNEY PHILIP A. LIONBERGER: Your Honor, that is a true statement. I'm not sure what it suggests about how to interpret the statute. What I would say with regard to how to interpret the statute is the legislature used certain words here as it is constitutionally authorized to do. It may grant compensation under, for a wrongful imprisonment under such regulations and limitations as it deems expedient. One of those limitations that the

legislature has imposed here is a concurrent sentence. You do not get compensation for a period during which you were serving a concurrent sentence for another crime to which the act does not apply. The provision here does not say serving a concurrent sentence in prison. And--

JUSTICE DAVID M. MEDINA: Do you not think that reaches an absurd result?

ATTORNEY PHILIP A. LIONBERGER: I do not, Your Honor.

JUSTICE DAVID M. MEDINA: And why is that?

ATTORNEY PHILIP A. LIONBERGER: Because the person, because the legislature has said you do not get compensation for that and the absurd result that has been suggested here is if somehow a person has had their parole revoked and because of pre-2001 statutory provisions, their original sentence is prolonged and they end up serving a longer sentence than they would have originally served had they not been wrongfully imprisoned. Here, Mr. Smith did not serve, the record does not indicate that he served one day more on his sentence for robbery than he would have served had he not been wrongfully imprisoned.

JUSTICE DAVID M. MEDINA: So that interpretation--

ATTORNEY PHILIP A. LIONBERGER: So he lost no compensation, he had no prolonged period that would somehow decrease the amount of his compensation.

JUSTICE DAVID M. MEDINA: That reasoning seems to be flawed. You seem to want us to disregard the fact that he was wrongfully in prison and you're saying that but not if that never would have happened, he still would have potentially had the risk of serving out the remainder of his original sentence.

ATTORNEY PHILIP A. LIONBERGER: I don't believe I'm saying that, Your Honor. I'm saying that the statute says if you're serving a concurrent sentence at the same time you're serving a wrongful sentence, you do not get compensation for it and that's the way the Comptroller has strictly construed it.

JUSTICE EVA M. GUZMAN: Let me ask you this. If there is no substantive difference between the probation and the parole, is the Attorney General opinion at issue here appropriately inform our decision in this case?

ATTORNEY PHILIP A. LIONBERGER: The Attorney General's opinion was appropriate to the question that it was asked.

JUSTICE EVA M. GUZMAN: But if there was no, if we conclude that there is no substantive difference between probation and parole.

ATTORNEY PHILIP A. LIONBERGER: Well, to say that, Your Honor would have to hold that a probated sentence is a sentence when there is case law that says someone who's on probation isn't serving a sentence.

JUSTICE EVA M. GUZMAN: But there's also case law that says that has referred to probation as a criminal sentence, correct?

ATTORNEY PHILIP A. LIONBERGER: I'm not versed in that, but the case law that I cite in my brief points out that there is a material difference between the two.

JUSTICE DEBRA H. LEHRMANN: But I would like for you to answer Justice Guzman's question. If we find that there's not a substantive difference, then what do you say about the Attorney General's opinion?

ATTORNEY PHILIP A. LIONBERGER: Then the Attorney General's, the problem with the Attorney General's opinion, the reason I'm having trouble answering that is because--

JUSTICE NATHAN L. HECHT: You're the Attorney General.

ATTORNEY PHILIP A. LIONBERGER: I am the Attorney General, but the Attorney General's opinion is premised on the fact that someone was not serving any sentence at the time. Someone was on probation. That sentence was revoked, I mean the probation was revoked and then they were serving a sentence and that's why they say that the concurrent sentence actually came under subsection (a) instead of (b) and, therefore, (b) didn't apply and therefore, they were entitled to compensation. Here, the--

JUSTICE PAUL W. GREEN: So it's a semantic difference, but insofar as incarceration, there is no difference really is there?

ATTORNEY PHILIP A. LIONBERGER: Your Honor, I would respectfully submit that it's not just a matter of semantics. There is a material difference between parolee and probation and that's what makes the Attorney General's opinion a different situation than the one here.

JUSTICE PAUL W. GREEN: So somebody who is incarcerated by virtue of a parole violation might, well a probation violation might feel better about it being incarcerated than someone who's been incarcerated because of a parole violation?

ATTORNEY PHILIP A. LIONBERGER: Well they certainly, they would feel worse about it in this sense. They weren't under a sentence and now because of the wrongful conviction, they are under a sentence. A parole doesn't have the same complaint. They were already under a sentence and that's what the plain language of subsection (b) implicates.

JUSTICE EVA M. GUZMAN: Would it make a difference that this Court and the Court of Criminal Appeals has referred to individuals as being sentenced to probation and that is that we have, sentenced to probation?

ATTORNEY PHILIP A. LIONBERGER: I guess what I would point the Court to was if we're looking for a definition of sentence here, we should go to the Code of Criminal Procedure. There's Section 4202 of the Code of Criminal Procedure that describes what a sentence is and that provision says a sentence is that part of a judgment that orders punishment to be carried into execution in the manner prescribed by law. A person on probation has not been sentenced. A person on parole is sentenced. They go to prison and then later because the Pardons and Parole Board find that they are entitled to or they should receive parole, they are, their custody and control is transferred to a different division of the TDCJ.

JUSTICE PHIL JOHNSON: Counsel, would you go to your second point to remedial interpreting the statute in that manner.

ATTORNEY PHILIP A. LIONBERGER: Thank you, Your Honor. This is not a remedial statute. A remedial statute is one that changes the common law or fixes perceived deficiencies in the common law. As we know from this Court's decision in *State v. Oakley*, the common law never recognized, there was no such thing as a wrongful imprisonment claim at common law. Therefore, and a remedial statute is something that either enlarges the common law or restrains the common law. Here, we're not talking about a remedial statute. What we're talking about is a statute that creates a liability that is unknown to common law and when you have that situation, the rule is one of strict statutory construction, that the Court should look at the statute and according to its, the plain language that it uses and only apply it to persons who clearly come within its purview. This is not cited in my brief and I want to take a moment to give the Court the citation to this case for the rule regarding strict construction here. That is the *Satterfield* case, 448 S.W.2d 456 Texas 1969 and that was a case involving a guest statute. There the point was that we're talking about some statute that deprived a person of a common law

right and, therefore, the rule of strict construction would be applied and that's where we get the rule of liabilities unknown to the common law are strictly construed.

JUSTICE DON R. WILLET: So shift to argument 3 about how to read the statute grammatically.

ATTORNEY PHILIP A. LIONBERGER: Certainly. The Relator makes a grammatical argument and suggests that there is a rule of grammar known as an indirect prepositional object that somehow is free floating in the statute and may attach to words wherever I guess the Relator thinks that they're appropriate to be attached.

JUSTICE DAVID M. MEDINA: Is that different from a dangling participle?

ATTORNEY PHILIP A. LIONBERGER: They way they're using it, yes. If the grammatical way to read this statute is when you look at the second half of the statute that talks about concurrent sentences, that is in a restrictive dependent clause and the term concurrent sentence is not followed by the prepositional phrase in prison that appears earlier in the main clause of the sentence. I know of no rule of grammar and Relator has not cited to one that suggests that a preposition in a main clause that relates to some noun in the main clause can somehow be transferred to a dependent clause and some other word in that dependent clause. That is a very ungrammatical way of reading it and it would be frankly silly to think that the legislature drafted it that way so that in prison could be implied [inaudible].

JUSTICE PHIL JOHNSON: We should not presume that the legislature did not study English.

ATTORNEY PHILIP A. LIONBERGER: Pardon me?

JUSTICE PHIL JOHNSON: We don't want to presume the legislators did not study English when they were students.

ATTORNEY PHILIP A. LIONBERGER: I am not going to touch that with a 10-foot pole. I'm going to presume that they did study English and that they knew what they were doing and that this, the way that this provision is written is grammatical and the grammar here would suggest that in prison should not be implied after concurrent sentence in the second half of the provision.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can I just give one question, factual question cleared. When Mr. Smith's parole was revoked, was he at that time incarcerated or not? Was he in prison, in jail for this [inaudible]?

ATTORNEY PHILIP A. LIONBERGER: The timeline is this, Your Honor, and I believe you will find the best place to look for the timeline is in the party's briefs, but also you can look at respondent's mandamus record at page 53, there's a letter from the TDCJ that gives the relative dates. I believe the dates go like this. On August 7 of '86, Mr. Smith was convicted, not convicted, but charged with the crime and then on February 9 of 1987, he was sentenced and then on the 25th of February of '87, he was sent, put into TDCJ. So from and, but his sentence was made retroactive back to August 7 of '86. So technically he was serving a sentence all the way back to August 7. His parole was revoked on May 1, 1987 and then 41 days, that sentence discharged. So for about 267 days, he had not had his parole revoked, but he was technically serving a paroled sentence at the same time he was serving a prison sentence and that's an interesting sort of quirk about this case is technically he only served 41 days concurrently in prison with the wrongful sentence. So there was a very long, almost 267 days period where he was serving a concurrent sentence and technically serving a sentence in prison.

JUSTICE NATHAN L. HECHT: Let me ask you just to be clear about one other thing. As you can tell from the questions, the Comptroller's position might be stronger without the Attorney General's opinion, but the Comptroller does not challenge the Attorney General's opinion is that correct?

ATTORNEY PHILIP A. LIONBERGER: No, in fact, Your Honor, the Comptroller would say that it's consistent.

JUSTICE NATHAN L. HECHT: But she might argue that it's also wrong and, therefore, she's right in this case, but she doesn't make that argument or she does?

ATTORNEY PHILIP A. LIONBERGER: She has not argued that the, I see my time is up, may I finish?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may.

ATTORNEY PHILIP A. LIONBERGER: She has not argued that the Attorney General's opinion is wrong. In fact, she would take the position that she's being consistent with it and that the Attorney General's opinion just simply didn't address this situation here. They're two entirely different things and we have to look at it in context. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF KRISTOPHER E. MOORE ON BEHALF OF PETITIONER

ATTORNEY KRISTOPHER E. MOORE: May it please the Court. If I could address briefly the fact question that was asked about the revocation of parole, the Comptroller in Relator's appeal to his application provided the documents to the Comptroller to show that the parole revocation was as a result of the wrongful conviction and I believe that the documents are in the Appendix to the Relator's petition. I believe that the parole revocation might have actually been retroactive to August 7 as well the date of the arrest. I would have to check that for sure.

JUSTICE NATHAN L. HECHT: But do you agree that Mr. Smith was incarcerated only 41 days that he might otherwise have been out on parole?

ATTORNEY KRISTOPHER E. MOORE: Absolutely not. He was, Your Honor, he was incarcerated for as the Counsel just mentioned something like 247 days that he would have otherwise been out on parole and then the parole would have discharged. He would have been free. He would have satisfied his conditions and he would have been able to go on with life. I want to make it abundantly clear that Billy Smith would not have been in prison but for the wrongful conviction and it is the difference between parole and probation is really a difference of semantics. Ex parte Daniels which the respondent cites to in his brief and uses this language that there is a grave distinction, that is dicta within the context of there is a grave distinction between the procedure afforded a parole revocation as opposed to a probation revocation, not the status of being on parole, not the status of being on probation. They were looking to see whether it implicates double jeopardy, not to see what it means to be on parole or probation and that is the only Texas case to which Respondent cites in order to show that there's a difference between parole and probation. In fact, Respondent cites to the US Supreme Court case, Gagnon v. Scarpelli. Counsel just said that there is no liberty, but in the United States Supreme Court said in both parole and probation, there is liberty. There is conditions on their liberty, but who of us does not have conditions on our liberty. Every day we get up, we're free to go about our business. We're not free to speed or break laws. There's additional conditions, but they still have liberty. The US Supreme Court recognized this and recognized there was due process that should be afforded when parole or probation should be revoked.

JUSTICE DON R. WILLETT: When was the wrongful imprisonment act enacted? When did it become effective?

ATTORNEY KRISTOPHER E. MOORE: The original one was enacted in 1985. It was amended again in 2001, I believe, and 2007 and in 2009.

JUSTICE DON R. WILLETT: Do you recall who requested the Attorney General opinion?

ATTORNEY KRISTOPHER E. MOORE: The Attorney General opinion was actually respondent's predecessor in office had a case come up and requested that opinion and the opinion was given in 2007. I would point out to the Court that the legislature in 2009 in passing the Tim Cole Act, that was a radical amendment and overhaul of this legislation and yet the Attorney General opinion was there. They knew it was there and they didn't touch it.

JUSTICE DON R. WILLETT: Do you recall if when the Attorney General opinion was sort of under consideration, was there other litigation, not your case, but other litigation kind of ongoing related to the interpretation of these words?

ATTORNEY KRISTOPHER E. MOORE: None ongoing, Your Honor, as to the interpretation of these words that I know of. Of course, it arose from the litigation in the Tulia convictions and that's where the Attorney General's opinion came from as an individual that had been convicted in the Tulia drug bust and later had that conviction overturned.

JUSTICE DON R. WILLETT: I only ask because the Attorney General usually declines to kind of weigh in if a matter presented is sort of embroiled in litigation somewhere that he sort of defers.

ATTORNEY KRISTOPHER E. MOORE: I don't believe so, Your Honor. I would point out that the Respondent's reasoning to differentiate the Attorney General opinion is after the fact reasoning. You will nowhere in the Attorney General's opinion that says I am basing this on the fact that this is probation and sentence has been deferred. In fact, the Attorney General's opinion uses the phrase in prison that prepositional object interchangeably with concurrent sentence and the sentence in prison on the wrongful conviction. It's interchangeably used to now come forward as the Attorney General as the respondent's counsel does and give another explanation for that opinion is not what the Attorney General had in mind from the actual text of the opinion.

JUSTICE PHIL JOHNSON: Counsel, the Attorney General says if we wanted a definition for the term sentence as used in the statute, it's found in the Code of Criminal Procedure. Where would you find the definition of the word sentence as used in this statute?

ATTORNEY KRISTOPHER E. MOORE: Well, I would find it in the Code of Criminal Procedure, but also in this Court and the Texas Court of Criminal Appeals decisions on the matter, that further define it and give an elucidate as far as the statutory language is concerned and how to apply that statutory language. I also want to point out that the rule of strict construction is based up on the idea of, oh I'm sorry, my time's up.

CHIEF JUSTICE WALLACE B. JEFFERSON: You can conclude your thought, Counsel.

ATTORNEY KRISTOPHER E. MOORE: Just on the point of strict construction, the rule of sovereign immunity, this Court from its earliest days has said implicates the right of a person to bring a lawsuit without the state's consent. This is an administrative proceeding. This Court has already determined where in an administrative proceeding is implicated, it is not an abrogation of sovereign immunity. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted. The Court would once again like to thank all of you who have paid such rapt attention to these two arguments. They are excellent arguments in both chases and we comment Counsel both in this case and the one before it. Mayor McCartt is here, I'm told and we want to thank her for her presence here. We have members of the Amarillo Bar Association, who have been very accommodating and we thank you all for your presence. I wanted to pay special thanks to the students. You have seen government in action. This doesn't happen very often and many of us were talking about this earlier how we wished we had the opportunity to see this

kind of proceeding when we were in high school or even college. There is another special guest here that I would ask Justice David Medina to recognize on behalf of the Court.

JUSTICE DAVID M. MEDINA: I would like to welcome Ms. Frances Wornick. She is a model citizen of Amarillo. She has been here since eight years after the founding of the Bar Association, so you can do the math. It's a long time. Her late husband, Tommy Wornick, flew and trained B-29 pilots during World War II and Veterans Day is coming up and we certainly thank all our veterans for their service and her family founded the first abstract county in Potter County back in 1903. So Ms. Wornick, I believe she's out here somewhere. We welcome you. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: There she is right there. That concludes the arguments for the day. The Court is going to take a brief recess and then we will return for questions and answers. The Clerk of the Court will adjourn the Court.

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