DISTRICT OF COLUMBIA COURT OF APPEALS

NOS. 98-SP-1234 & 98-SP-1240

MAURICE DELANE DAVIS, APPELLANT,

NO. 98-SP-1261

RANDALL PATRICK MARTIN, APPELLANT,

NO. 98-SP-1319

MARK EDWARD CHILDS, APPELLANT,

V.

MARGARET MOORE, *et al.*, APPELLEES.

Appeals from the Superior Court of the
District of Columbia

(Hon. Iraline Green Barnes, Trial Judge)

(Argued April 7, 1999 Decided December 9, 1999)

Jonathan S. Franklin, with whom *Jonathan L. Abram* and *E. Desmond Hogan* were on the brief, for appellants.

Stephen B. Kinnaird and *Mary L. Wilson*, Assistant Corporation Counsel, with whom *Jo Anne Robinson*, Acting Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellees.

Wilma A. Lewis, United States Attorney, and *John R. Fisher*, *Thomas J. Tourish, Jr.*, *Elizabeth H. Danello*, and *Lisa Hertzer Schertler*, Assistant United States Attorneys, and *Michael A. Stover*, General Counsel, United States Parole Commission, filed a brief as *amicus curiae*.

Before STEADMAN and RUIZ, *Associate Judges*, and GALLAGHER, *Senior Judge*.

Opinion for the court by *Senior Judge* GALLAGHER.

Dissenting opinion by *Associate Judge* RUIZ at p. .

GALLAGHER, *Senior Judge*: Appellants Maurice D. Davis, Randall P. Martin, and Mark E. Childs are parole violators under the supervision of the District of Columbia Department of Corrections ("DOC"). In accordance with a policy reached in 1987 by the District of Columbia Corporation Counsel

("Corporation Counsel") and implemented by the DOC, these parole violators had their prison sentences reduced by the amount of time spent on parole prior to their parole violations (*i.e.*, "street time credit"). In *United States Parole Comm'n v. Noble*, 693 A.2d 1084 (D.C. 1997), *aff'd on reh'g en banc*, 711 A.2d 85 (D.C. 1998), this court rejected the Corporation Counsel's opinion and held that parole violators must forfeit accrued street time credit. After *Noble*, the DOC retroactively withdrew appellants' street time credit and restored their prison sentences to their original length of time. Appellants each filed a petition for a writ of habeas corpus objecting to the DOC's retroactive application of *Noble* to their sentences. The trial court denied appellants' petitions for a writ of habeas corpus. We affirm.

I.

D.C. Code § 24-206 (a) (1996) provides that when a prisoner violates parole "[t]he time [the] prisoner was on parole shall not be taken into account to diminish the time for which he was sentenced." This statute, enacted in 1932, has never been repealed and was enforced by the DOC until 1987.

In 1987, the District of Columbia enacted D.C. Code § 24-431 (a) (1996) as part of the Good Time Credits Act.[1] In an issued opinion, the Corporation Counsel mistakenly interpreted D.C. Code § 24-431 (a) as impliedly repealing D.C. Code § 24-206 (a). In accordance with the Corporation Counsel's opinion, the DOC began crediting accrued street time for parole violators. However, the United States Parole Commission ("USPC"), the federal agency responsible for supervising the parole of District of Columbia offenders who had been housed in federal penitentiaries,[2] did not adopt the Corporation

[1] D.C. Code § 24-431 (a) states that "[e]very person shall be given credit on the maximum and the minimum term of imprisonment for time spent in custody or on parole as a result of the offense for which the sentence was imposed."

[2] As we noted in *Noble, supra*:

> The primary responsibility for the incarceration of persons who violate

(continued...)

Counsel's interpretation and continued its practice of withdrawing street time credit for parole violators, pursuant to D.C. Code § 24-206 (a). The discordant practices of the DOC and the USPC continued until the *Noble* decision in 1998.

In *Noble*, this court rejected the Corporation Counsel's interpretation of the two statutes and held that parole violators could not have their sentences reduced by their time spent on parole prior to revocation. 693 A.2d at 1105. The effect of the *Noble* decision was twofold: (1) it required the DOC to return to its pre-1987 practice in accordance with D.C. Code § 24-206 (a), and (2) it brought the DOC's practice back into accord with the USPC, which had continued to enforce D.C. Code § 24-206 (a) as related. *Noble* did not decide, however, whether the DOC should apply its holding retroactively or prospectively, but merely "flag[ged] the question." *Id*. at 1104. Therefore, the sole issue in this appeal is whether *Noble* should be applied retroactively to those prisoners who, like appellants, violated their parole prior to our decision in *Noble*.

II.

Appellants argue that the four-factor balancing test established in *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc)[3] requires a prospective-only application of *Noble*.[4] The District of Columbia,

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[2](...continued)

> District of Columbia criminal statutes, and for the supervision of such individuals, is lodged in the District government. As a result of overcrowding at District of Columbia facilities, however, some District of Columbia offenders are housed at federal correctional institutions. When a District of Columbia prisoner is released on parole from a federal facility, the parole is supervised by the United States Parole Commission in conformity with District of Columbia law.

693 A.2d at 1085-86 n.2 (citations omitted).

[3] *Mendes* established the following four factors for determining the retroactive affect of a new rule of (continued...)

on the other hand, contends that the *Mendes* analysis is not applicable because the *Noble* decision did not announce a new rule of law, and thus *Noble* should be applied retroactively.

"[A] *threshold* requirement for depriving a decision of retroactive effect is that such decision 'must establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not *clearly foreshadowed*.'" *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1137 (D.C. 1985) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) (emphasis added)).[5] Because we conclude that *Noble* does not announce a "new principle of law," the *Mendes* test does not apply.

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[3](...continued)
law:

> (1) the extent of the reliance of the parties on the old rule (including the degree of justifiable reliance and the hardship which might result to the litigants as a result of retrospective application); (2) avoidance of altering vested contract or property rights; (3) the desire to reward plaintiffs who seek to initiate just changes in the law; and (4) the fear of burdening the administration of justice by disturbing decisions reached under the overruled precedent.

Id. at 789 (footnote omitted).

[4] Appellants also argue that a retroactive increase in their punishment would violate the *Ex Post Facto* Clause and the Due Process Clause. Both arguments are unavailing. First, the *Ex Post Facto* Clause is not applicable because it applies to legislative action only. *Marks v. United States*, 430 U.S. 188, 191 (1977). Second, retroactive application of a court's interpretation of a statute violates the Due Process Clause only if the judicial construction is "unforeseeable." *Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 811 (1999). For the same reasons discussed under the following "clearly foreshadowed" analysis, *Noble* was foreseeable and thus its retroactive application does not violate the Due Process Clause.

[5] In *O'Connell*, the court went on to state that the "threshold requirement" was "not conclusive." 495 A.2d at 1137. However, after *O'Connell* the Supreme Court in *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 921 (1990) applied the "threshold requirement" conclusively when it held that because the decision "did not . . . decide a wholly new issue of first impression, it does not meet the first prong of the *Chevron Oil* test [, and thus] . . . applies retroactively." *See also United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982).

Noble did not overrule "clear past precedent." Consequently, the issue becomes whether the holding in *Noble* was "clearly foreshadowed" by the circumstances surrounding its pronouncement, such that it was not a new rule of law. We hold that *Noble* must be applied retroactively because the entirety of the surrounding circumstances clearly foreshadowed its holding.

First, the revocation of street time credit mandated by the *Noble* holding had been legislated and administered by the District of Columbia for more than fifty years prior to *Noble*, pursuant to D.C. Code § 24-206 (a). This statute has never been repealed and was enforced by the DOC from 1932 until 1987. This administrative history distinguishes the present case from *French v. District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023, 1031 (D.C. 1995), which appellants contend is dispositive of whether *Noble* was "clearly foreshadowed."

Appellants argue that *Noble* cannot be "clearly foreshadowed" because *French* justifies their "belief that following the Corporation Counsel's advice [would] present no legal hazards." 658 A.2d at 1031 ("Although the opinions of the Corporation Counsel are not valid legal authority, the mere fact that they have been issued by the city's top legal officer may cause interested persons (and government agencies) to rely on them in good faith."). However, because the circumstances surrounding the Corporation Counsel's opinion in this case are distinguishable from those circumstances in *French*, we find that *French* is not dispositive.

In *French*, we denied retroactive effect to a decision which abrogated the Corporation Counsel's earlier opinion on a matter. *Id.* at 1031-32. However, unlike the present case, in *French*, the Corporation Counsel's opinion was consistent with a "standard practice" that "traditionally" had been in effect up to the date of the *French* holding. *Id.* at 1031. Consequently, the *French* court determined that its holding was not "clearly foreshadowed," and thus its "new rule of law" should be afforded prospective effect. *Id.*

Unlike the *French* court's decision, *Noble* did not upset the "traditional," "standard practice" of handling a parole violator's street time credit. Quite the contrary, the *Noble* court *reasserted* the "traditional" method for handling street time credit which had been in place from 1932 until 1987. Therefore, contrary to appellants' contention, *French* is not dispositive of whether the *Noble* decision was "clearly foreshadowed." Instead, the administrative history of street time credit served to foreshadow the holding in *Noble*.

Second, the USPC and the DOC, both of whom were tasked with supervising parole for District offenders, applied different treatment to a parole violator's street time credit. Unlike the DOC, the USPC did not follow the Corporation Counsel's mistaken interpretation of D.C. Code § 24-431 (a), but continued to revoke parole violators' street time credit in accordance with D.C. Code § 24-206 (a). Thus, District of Columbia offenders placed in federal penitentiaries were not entitled to street time credit, even before *Noble* was decided.[6] After *Noble*, this court essentially required the DOC to adopt the USPC's continued practice of revoking a parole violator's street time credit. Certainly, appellants cannot claim that our decision in *Noble* created an unforeseen rule of law when it merely harmonized one agency's practice with another's.

Finally, the Ninth Circuit Court of Appeals' decision in *Tyler v. United States*, 929 F.2d 451, *cert. denied*, 502 U.S. 845 (1991), certainly predicted the reasoning and conclusion reached in *Noble*. Just three years after the Corporation Counsel's ill-fated opinion and seven years before our en banc decision in *Noble*, the Ninth Circuit addressed the same issue raised in *Noble*. Joseph Tyler was convicted in the District of Columbia and incarcerated under the authority of the USPC. The USPC, acting under their interpretation of D.C. Code §§ 24-206 (a) and -431 (a), refused to credit Tyler's street time

[6] Notably, at the time of their sentencing, appellants did not know whether they would be incarcerated in a federal penitentiary and be subject to the USPC's application of D.C. Code § 24-206 (a) or held in a District of Columbia prison and be subject to the DOC's mistaken application of D.C. Code § 24-431 (a).

following the revocation of his parole. Tyler appealed, citing the Corporation Counsel's contrary opinion.

The Ninth Circuit Court of Appeals upheld the USPC's practice of excluding a parole violator's street time credit. 929 F.2d at 456-57. Moreover, the *Tyler* court's decision was based on many of the same reasons offered by this court in *Noble*, including a disfavor of implied statutory repeals and a rejection of the Corporation Counsel's interpretation of legislative history as flawed. *Id.* at 456. Of course, prisoners under the supervision of the DOC would not expect to be bound by the Ninth Circuit's holding. Nevertheless, in the context of foreshadowing, *Tyler*'s significantly similar reasoning and identical conclusion leads us to conclude that it was not beyond reason for appellants to expect that this court may someday conclude as the *Tyler* court did.

These three circumstances -- (1) the DOC's long-standing enforcement of D.C. Code § 24-206 (a) from 1932 to 1987; (2) the continued divergent application of street time credit between the USPC and the DOC; and (3) the Ninth Circuit Court of Appeals' *Tyler* decision in 1991 -- all add up to the conclusion that the *Noble* holding was "clearly foreshadowed." Therefore, we hold that the *Noble* decision must be applied retroactively.

Affirmed.

RUIZ, *Associate Judge,* dissenting: In *United States Parole Comm'n v. Noble*, 711 A.2d 85 (D.C. 1998) (en banc) (*Noble II*),[1] the court ruled that under the Good Times Credit Act of 1986, a revoked parolee is not entitled to credit against his sentence for time spent on parole prior to revocation,

[1] The en banc court adopted the opinion of the division that first heard the case, *United States Parole Comm'n v. Noble*, 693 A.2d 1084 (D.C. 1997) (*Noble I*).

a decision which overturned a contrary opinion of the District of Columbia Corporation Counsel that had guided the District of Columbia Board of Parole and formed the basis for Department of Corrections regulations[2] and practice for over ten years. In this appeal, we are asked to decide an issue we flagged in *Noble I*, *supra* note 1, 693 A.2d at 1104, whether the *Noble* ruling is to have retroactive application to those inmates whose parole was revoked during the time, prior to the *Noble II* decision, when the District of Columbia Board of Parole and the Department of Corrections held to the view that time spent on parole was not forfeited by parole revocation.[3] This determination, we are informed, will impact at least one thousand District of Columbia prisoners, at various stages of their incarceration, whose paroles have been revoked for any number of reasons.[4] All of the appellants before us would have completed their sentences in 1998 under the pre-*Noble* interpretation. If *Noble* applies to them, however, Martin and Childs have until November 2000 and January 2001, respectively, to serve out their sentences.[5]

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[2] 35 D.C. Reg. 1077, 1078 (1988) (to be codified at 28 DCMR § 601.7).

[3] Upon our decision in *Noble II*, the District, acting on the assumption that the decision would be applied retroactively, recalculated the "face sheets" of those inmates whose paroles had been revoked so as to add to the time remaining on their sentence the "street time" that *Noble* announced was forfeited by revocation. It appears that the District has elected not to seek to reincarcerate persons who were released once their sentences were deemed to have been completed using the District's pre-*Noble* interpretation.

[4] Of the appellants before us, Randall Martin's parole was revoked because he was arrested on an assault charge of which he has since been acquitted. He had been sentenced to two to six years for attempted distribution of cocaine; at the time his parole was revoked, Martin had been on parole for two and half years. Pre-*Noble* his full sentence would have been served on May 30, 1998. Post-*Noble* that date was pushed back to November 4, 2000. Martin was re-paroled in January 1999.

Mark Childs was sentenced in 1993 to sixteen to forty-eight months for attempted distribution of cocaine. He had been on parole during two separate periods exceeding two years when his parole was revoked in 1998. Pre-*Noble* his full sentence would have been served on June 10, 1998. Post-*Noble*, on January 8, 2001.

Maurice Davis was sentenced in 1991 to thirty to ninety months for attempted distribution of cocaine. He was paroled in June 1996 and had been on parole approximately four months when his parole was revoked in October of that year. Pre-*Noble* his full sentence would have been served on December 27, 1998; post-*Noble*, completion of the sentence was delayed by 110 days.

[5] Presumably Davis had served his full sentence as of the spring of 1999. See note 4.

The majority concludes that *Noble* should be applied retroactively, without first engaging in the four-prong analysis we established in *Mendes v. Johnson*, 389 A.2d 781, 789 (D.C. 1978) (en banc), on the ground that the current situation does not even meet the threshold requirement for a retroactivity analysis, whether the subject ruling announces "a new principle of law." *See O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1137 (D.C. 1985) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)). That is an astounding conclusion in view of the ten-year history of a contrary understanding by the Board of Parole and the practice of the Department of Corrections granting credit to revoked parolees, which was based on an interpretation by the Corporation Counsel, the chief legal officer of the District of Columbia. *See Noble I*, 693 A.2d at 1101 (citing *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1031 (D.C. 1995)). The fact that the Corporation Counsel had a long-standing opinion on the question decided in *Noble* is important to the issue before us in this appeal, whether *Noble* established "a new principle of law," and should be applied retroactively. Its importance in this context is easily distinguishable from the lesser weight to be given to the substance of the Corporation Counsel's opinion in the court's interpretation of the applicable statutes. *See Noble I*, 693 A.2d at 1099-1102. As we recognized in *Noble I*, "there can be reliance interests that justify prospective application of a court decision that rejects a formal opinion of the Corporation Counsel." 693 A.2d at 1104. This is precisely what we determined in *French*, where we declined to give retroactive application to a decision that contravened an opinion of the Corporation Counsel that was relied upon by the litigants, even though we had concluded that the Corporation Counsel's opinion contradicted the statute's plain meaning which "could not be clearer." 658 A.2d at 1030.

Whether *Noble* announced a "new rule of law," requiring retroactivity analysis, depends on whether its holding "was clearly foreshadowed." *Nimetz v. Cappadona*, 596 A.2d 603, 608 (D.C. 1991).[6] In deciding whether to eschew retroactivity analysis because a ruling does not announce a "new

[6] A "new rule of law" requiring retroactivity analysis is also shown if a ruling "overruled clear past (continued...)

principle of law" on the ground that it was "clearly foreshadowed," it is important to keep in mind that the purpose of the "clearly foreshadowed" standard is to identify those cases where it is plain that the weighing of the *Mendes* factors in the context of an individual case is unnecessary because the interests sought to be protected by a retroactivity analysis are not implicated. The determination that a court ruling was "clearly foreshadowed" and thus did not announce a "new principle of law" that would require a retroactivity analysis, in other words, is nothing more than a summary conclusion that it is evident that there would be no cognizable unfairness if the ruling were to be applied retroactively. This case presents with a background of contradictory statements by courts and administrative agencies preceding the *Noble* decision and the fact that an interpretation contrary to the one ultimately adopted was held and implemented by the District, which had the bulk of affected prisoners in its jurisdiction. These facts counsel against reaching a summary conclusion that *no* retroactivity analysis is required here. In addition, we must be mindful that retroactive application of the *Noble* decision will affect a great many District of Columbia prisoners who will have their sentences extended beyond the date they had been originally assigned under official interpretations which they had every reason to believe were authoritative. Thus, I believe that the majority's truncated consideration of the retroactivity issue is unwarranted in the circumstances of this case.

The proper question to ask in deciding whether a ruling was "clearly foreshadowed," we have said, is "whether the rule is a 'clear break' from the past, a 'newly minted principle,' or a rule that an attorney 'should have known' was 'about to be changed, because of either judicial or legislative intimations to that effect.'" *Nimetz*, 596 A.2d at 608 (citations omitted). Answering those questions in the context of this case, I cannot agree with the majority's conclusion that the *Noble* ruling was "clearly foreshadowed." First, there were no "judicial or legislative intimations" of the result in *Noble* in this jurisdiction. The plain language of the Good Time Credits Act of 1986 states that "every person" is to be given credit for time

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[6](...continued)
precedent," referring to judicial decisions, not administrative interpretation and regulations. *See id.* We also have declined to apply a decision retroactively where it has overruled a longstanding procedural practice in the Superior Court. *See Brodis v. United States*, 468 A.2d 1335, 1337 (D.C. 1983).

"spent . . . on parole." D.C. Law 6-218, 34 D.C. Reg. 484 (1987), D.C. Code § 24-431 (a) (1996). Moreover, earlier opinions of this court had indicated, albeit in dicta, that revoked parolees are entitled to credit for their street time prior to revocation. *See Franklin v. Ridley,* 635 A.2d 356, 358 (D.C. 1993)*; Luck v. District of Columbia,* 617 A.2d 509, 510-11 (D.C. 1992). One would hope that those indications would not be found in published opinions of the court if the contrary view were "clearly foreshadowed." Second, *Noble* announced a "clear break" from the understanding and practice in the District of Columbia, where the Corporation Counsel had interpreted the statute consistent with its plain language, and the Department of Corrections so implemented it for over ten years, until this court's en banc decision in 1998. Although the *Noble* court ultimately disagreed with the Corporation Counsel's interpretation of the statute, in considering whether *Noble* was a "clear break" from past practice, we cannot blind ourselves to the reality in the District during the preceding ten years. *See French*, 658 A.2d at 1031 ("We are mindful nevertheless that, until today, the standard practice in the District of Columbia has been to accept the view of the Corporation Counsel, wrong as it is . . . .") In this appeal, the court must credit that the Corporation Counsel's opinion was a good faith and reasonable effort by the government official charged with advising District of Columbia agencies. In the face of the Corporation Counsel's opinion, the conclusion that the *Noble* ruling was "clearly foreshadowed" necessarily implies not only that the Corporation Counsel's opinion was analytically flawed, but also that it was so unreasonable or incompetent that any reliance on it was unjustified. *But see Noble I*, 693 A.2d at 1114-15 (Schwelb, J., dissenting); *Luck*, 617 A.2d at 515 (adopting administrative interpretation of the Good Times Credit Act based on the Corporation Counsel's opinion); *French*, 658 A.2d at 1030. I do not subscribe to any such implication. Finally, at both levels of consideration of the issue, by the division and by the en banc court, one member of this court vigorously dissented, indicating that he still believes that the law entitles revoked parolees to credit for street time prior to revocation. *See Noble II*, 711 A.2d at 87; *Noble I*, 693 A.2d at 1106–17 (Schwelb, J., dissenting). These factors are impossible to reconcile with the majority's conclusion that *Noble* was "clearly foreshadowed." As the Supreme Court stated in refusing to apply retroactively a ruling that would have required new elections, the issue "involve[d] complex issues

of first impression – issues subject to rational disagreement." *Allen v. State Bd. of Elec.*, 393 U.S. 544, 572 (1968). In determining whether a new rule of law was not "clearly foreshadowed," the threshold test is met "if the question answered by the new rule was 'subject to rational disagreement.'" *Truesdell v. Halliburton Co.*, 754 P.2d 236, 239 (Alaska 1988). In *Noble*, the court resolved the "rational disagreement" among a number of responsible litigants.

The majority points to the fact that a federal court[7] and the United States Parole Commission, contrary to the District, had for some time interpreted the statute in the same manner ultimately adopted in *Noble*. This indicates, at best, that the issue was so disputed that it was the subject of diametrically opposed views at high levels of the District of Columbia and United States governments.[8] Rather than lending support to the conclusion that resolution of the issue was "clearly foreshadowed" by the views of the United States Parole Commission and the Ninth Circuit, the contrary views of District of Columbia and federal officials underscore that *Noble* decided "a matter of first impression in a matter not clearly foreshadowed," at least in our court. *French*, 658 A.2d at 1031; *cf. Nimetz*, 596 A.2d at 603 ("even if we now decide an issue of first impression, *the court* has, in effect, forecast its resolution" (emphasis added). Similarly, the majority may not logically rely on the fifty years preceding the Good Times Credit Act of 1986, during which District of Columbia law was clear that revoked parolees forfeited street time credit. *See* D.C. Code § 24-206 (a) (1996). The majority points to that history as proof that the *Noble* ruling was "clearly foreshadowed" because its holding announced nothing more than the "traditional" method of denying street time credit for revoked parolees. Although the state of the law prior to enactment of the statute that is at issue in a court ruling may well be relevant to an interpretation of a later-enacted statute,

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[7] *See Tyler v. United States*, 929 F.2d 451 (9th Cir. 1991).

[8] The *Tyler* opinion was specifically criticized by this court in *Luck*, 617 A.2d at 514 n.6. In *Noble*, we expressly stated that "we do not rely on *Tyler* to inform the analysis." *See Noble I*, 693 A.2d at 1103 n.34. Moreover, even though the USPC had a view of the statute contrary to that expressed in the regulations of the Department of Corrections, the USPC was bound to follow the D.C. parole regulations. *See Cosgrove v. Thornburgh*, 703 F. Supp. 995, 1003-04 (D.C. 1988).

prior law necessarily cannot be dispositive of the statutory question because the statute at issue did not exist. *Noble* did not simply decide, moreover, that the "traditional" method of § 24-206 (a) prevailed as it had before enactment of §24-431 (a). Rather, in a long and careful opinion, *Noble* wrestled with the apparently plain — and apparently contradictory — language of D.C. Code §§ 24-431 (a) and -206 (a). The apparent facial inconsistency between the two statutes was resolved by application of the rule against implied repeal which requires a harmonizing interpretation, if at all possible. *See Noble I*, 693 A.2d at 1087-94. The court was able to give effect to both sections by construing § 24-431 (a) as being of general application and § 24-206 (a) as providing for a specific case. *See id.* at 1092-94. In its analysis the court had to consider legislative history, the weight to be given to the executive's interpretation, and the rule of lenity. Although I joined *Noble* and believe it is correctly decided, it was not a judicial slam-dunk that flowed from judicial precedent or generally accepted interpretation. Quite to the contrary, the case came to the court in a highly contentious mode in the context of sharply differing administrative and judicial interpretations. Considering it to be a case of "exceptional importance," the court heard the case en banc. It is unlikely that so much judicial attention would have been focused on the matter if the result had been "clearly foreshadowed."

Having concluded that the *Noble* decision was not clearly foreshadowed, I turn to a retroactivity analysis, in the context of this case, of the factors set out in *Mendes*. We have identified those factors as justifiable reliance, avoidance of altering vested contract or property rights, desire to reward plaintiffs who seek to initiate just changes in the law, and fear of burdening the administration of justice by disturbing decisions reached under overruled precedent. *See Mendes*, 389 A.2d at 789-91. Of these, reliance has played a major role in the court's analyses of retroactivity. *See Washington v. Guest Servs.*, 718 A.2d 1071, 1076 (D.C. 1998); *Mendes*, 389 A.2d at 789. In *Noble I* and *Noble II*, the District of Columbia represented that for a period of more than ten years, the District of Columbia Board of Parole made decisions to revoke parole based on its understanding that revocation would not result in forfeiture of credit for street time prior to parole revocation. As appellants correctly note, implicit in that representation is that

the Board might not have revoked parole in certain cases, particularly those where the parole violations were of a lesser order, because of the disproportionate consequence that revocation would impose on the amount of time remaining to be served. The Board would have considered not only the impact that extended incarceration would have on the life of the individual revoked parolee and his or her family, but also the added burden that such extended incarceration would impose on an already strained correctional system. The District of Columbia's previous representation that there was regular and continued reliance by the Board of Parole on the interpretation rejected by *Noble* is, in my view, if not ground for estoppel, an insurmountable barrier to a conclusion that *Noble* should be applied retroactively. If the Board of Parole decided to revoke parole in individual cases based on its understanding that revocation would not result in a significant extension of incarceration, application of a contrary understanding to the consequence of revocation undermines the very basis of the executive's actions — actions which are not subject to judicial review on the merits and which may well be beyond the corrective power of the executive.[9] Retroactive application of *Noble*, in short, would implicate the integrity of decisions made by the Board of Parole. Although the decision whether and to what extent a judicial ruling is to be applied retroactively is for the court, *see Mendes*, 389 A.2d at 788, we must weigh that judicial imposition of a consequence unintended by the executive decision maker is a serious affront to the authority, vested in the Board of Parole, to make decisions affecting parole. That individual parolees relied on an interpretation contrary to that eventually adopted in *Noble* adds a human dimension to the number of expectations that are frustrated by the decision to apply *Noble* retroactively and deny "street time" credit to revoked parolees.

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[9] The regulatory picture is in a state of flux, as responsibility for parole is in the process of being transferred from the District of Columbia Board of Parole to the United States Parole Commission. *See* National Capital Revitalization and Self-Government Improvement Act, Pub. L. No. 105-33, tit. XI, § 11231 (a)(1), 111 Stat. 712, 745 (1997), D.C. Code § 24-1231 (a) (Supp. 1999). Under the new scheme, the USPC has authority to make reparole decisions concerning District prisoners as of August 1998. Reparole decisions made subsequent to *Noble* would of course be subject to the rule in that case. It is not at all clear whether, even if it knew the underlying rationale for prior Board of Parole revocations, the USPC could "revoke a prior revocation of parole" made by the Board of Parole in order to avert an unfair extension of incarceration in a particular case. Even if the parole authorities were able and disposed to reconsidering revocations, such a case-by-case approach implicates consideration of the fourth *Mendes* factor, burdening the administration of justice by disturbing decisions reached under overruled precedent. *See Mendes*, 389 A.2d at 791.

In this case, as in *French*, "the Board [of Parole] reasonably relied on the Corporation Counsel's opinion." 658 A.2d at 1031. Here, as in *French*, "no decision of this court ha[d] ever squarely [before *Noble*] addressed the precise issue at hand". *Id.* As in *French*, "[t]he Corporation Counsel's opinion was issued in [1987] and, until now ha[d] never been challenged in this court." *Id.* Thus, as in *French*, "given the long history of this case and the hardship that would result if we were to ignore [appellant's] reasonable reliance on the Corporation Counsel's opinion, we conclude that a purely prospective rule is the fairest under the circumstances presented here." *Id.* at 1032 (citations omitted).

For these reasons, I dissent and would not give retroactive application to this court's decision in *Noble*. Just as in *Noble*, the issue raised in this appeal is of "exceptional importance" because it affects a great number of District of Columbia prisoners and their families. In addition, the majority's conclusion that *Noble* was "clearly foreshadowed" is at odds with our decision in *French*. On both grounds, this appeal should be reconsidered by the court en banc.