IN THE MISSOURI SUPREME COURT

Lynda Ruth Branch,	)	
Petitioner,	)	
	)	
vs.	)	Cause No. SC88111
	)	
Jennifer Miller, Superintendent, Chillicothe	)	
Correctional Center,	)	
Missouri Board of Probation and Parole,	)	
and its Chairman, Dana D. Thompson,	)	
Respondents.	)	

PETITIONER'S BRIEF

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III. Jurisdictional Statement

This is a petition for a writ of habeas corpus against Jennifer Miller, superintendent of Chillicothe Correctional Center, and the Missouri Board of Probation and Parole, and its Chairman, Dana D. Thompson, for Lynda Branch, an inmate currently incarcerated in the Livingston County Correctional Center, who was granted a commutation by Governor Robert Holden on November 24, 2004. Governor Holden's Commutation Order, Exhibit 2, p. A3.

Lynda Branch filed a petition for a writ of habeas corpus in the 43rd Circuit Court of Missouri in Livingston County where she resides. Circuit Judge Warren McElwain denied that writ. Judge McElwain's Order, Exhibit 5, p. A7. Petitioner filed for a writ of habeas corpus in the Missouri Court of Appeals for the Western District. Judges Paul M. Spinden and Patricia A. Breckenridge denied that writ. Missouri Court of Appeals, Western District Order, Exhibit 6, p. A8. Because the Missouri Court of Appeals denied Lynda Branch's petition for a writ of habeas corpus on October 20, 2006, Petitioner now seeks relief in the Supreme Court of Missouri pursuant to the this Court's holding in *Blackmon v. Mo. Bd. of Prob. & Parole*, 97 S.W.3d 458 (Mo. 2003).

"The petition in the first instance shall be to a circuit or associate circuit judge for the county in which the person is held in custody if at the time of the petition such judge is in the county." Mo. S. Ct. R. 91.02 (2006). "There is no appeal from the denial of a petition for a writ of habeas corpus." *Blackmon v. Mo.*

Bd. of Prob. & Parole, 97 S.W.3d 458 citing *E.W. v. K.D.M.*, 490 S.W.2d 64, 67 (Mo. Banc 1973). However, "[p]romptness of adjudication can be best accomplished by the filing of a new petition for writ of habeas corpus rather than taking an ordinary appeal from the judgment of the circuit court." *Id.* Lynda Branch herewith files a new petition for writ of habeas corpus with the Supreme Court of Missouri.

Petitioner Lynda Branch sought relief under Mo. S. Ct. R. 91.02 because the superintendent impermissibly incarcerates Lynda Branch in that the Missouri Board of Probation and Parole denied her parole in subversion of her gubernatorial commutation and in violation of Branch's protected liberty interest in the Board's adherence to its own Parole Regulation 14 C.S.R. 80-2.010(4)(H) (2005). "Habeas corpus is the proper remedy by which [the] movant should challenge the action of the Board of Probation and Parole and the legality of [her] present incarceration." *Nebbit v. State*, 738 S.W.2d 162 at 164 (Mo. App. E.D. 1987).

Based on the foregoing reasons, this court has jurisdiction pursuant to *Blackmon v. Mo. Bd. of Prob. & Parole*, and a writ of habeas corpus is the proper remedy for Petitioner Lynda Branch.

IV. Statement of Facts

Lynda Branch was married to Raymond Branch in 1975. Throughout their eleven year marriage, Raymond Branch abused Lynda Branch. Lynda Branch's Petition for Clemency, Exhibit 8, p. A36-A43. On May 16, 1986 Raymond Branch

came into their bedroom with a gun, and threatened to kill Lynda Branch and her daughter. Exhibit 8, p. A43-A44. Lynda Branch got control of the gun and shot and killed her husband. Exhibit 8, p. A44.

Lynda Branch was convicted of first degree murder by a jury on October 31, 1986. see *Branch v. Turner*, 37 F.3d 371, 373 (8th Cir. 1994). This conviction was reversed and remanded because Lynda Branch was not permitted to introduce evidence of domestic violence. *Id*., citing *State v. Branch*, 757 S.W.2d 595 (Mo. App. 1988).

On March 3, 1989, Lynda Branch was again convicted of first degree murder, and again without evidence of the domestic violence. Lynda Branch's Original Judgment, Exhibit 1, p. A1-A2. The jury sentenced her to life in prison without the possibility of parole. *Id.* After her second trial, Lynda Branch failed to appear for sentencing. Because of this failure to appear, the escape rule prevented Lynda Branch from appealing her second trial on the same grounds upon which she successfully appealed her first trial. *Goeke v. Branch*, 514 U.S. 115 (1995).

On November 24, 2004, Governor Holden granted clemency to Lynda Branch and commuted her sentence from life in prison without the possibility of parole to life in prison with the possibility of parole. Exhibit 2, p. A3. Lynda Branch was immediately eligible for parole, Mo. Rev. Stat. § 558.019 (2004), but the Missouri Board of Probation and Parole (hereinafter "MBPP") inexplicably postponed Lynda Branch's parole hearing for six months to June 1, 2005. During that six month interval, a new governor took office with a different party

affiliation; the composition of the Parole Board changed including the appointment of a new chairperson; and the major party affiliation of the MBPP consequently turned over.

After the hearing in June, the MBPP denied Lynda Branch's parole stating that, "[r]elease at this time would depreciate the seriousness of the present offense based upon the following: A) circumstances surrounding the present offense B) use of a weapon C) use of excessive force or violence." Ltr. from Mo. Dept. of Corrections, Bd. of Probation & Parole, to Lynda R. Branch, Inmate No. 83699, Doc. No. 83699 (July 1, 2005), Exhibit 4, p. A6. The Board of Probation and Parole did not give Lynda Branch a release date, and set her next parole hearing for June, 2008.

On May 2, 2006, Governor Holden executed an affidavit clarifying his process of commuting Lynda Branch's sentence and his intent with respect to the MBPP's consideration of her parole.

On May 23, 2006, Lynda Branch filed a petition for a writ of habeas corpus in the Livingston County Circuit Court, and on September 1, 2006 the writ was denied. In denying the writ, Circuit Judge Warren McElwain held that the "Missouri parole statutes create no liberty interest and further that the Missouri Parole Board has broad discretion in determining when to release an inmate." Exhibit 5, p. A7. Lynda Branch had never claimed a liberty interest in a statute.

On September 11, 2006, Lynda Branch filed a petition for a writ of habeas corpus in the Missouri Court of Appeals for the Western District. The writ was

denied on October 20, 2006. The Appellate Court stated "[i]n light of 14 C.S.R. 80-2.020(1) this court denies petitioner's request for a writ of habeas corpus." Exhibit 6, p. A8.

Even though Petitioner has pled it, no lower court has addressed the intent of Governor Holden in his grant of clemency to Lynda Branch vis a vis the Board's subversion of the commutation.

V. Points Relied On

1. Petitioner is entitled to an order requiring Respondent to grant her immediate release on parole from Missouri Department of Corrections because the Missouri Board of Probation and Parole exceeded its authority by denying Petitioner's parole based upon only the circumstances of her offense because those circumstances constitute impermissible grounds because Petitioner has a protected liberty interest in Parole Regulation 14 C.S.R. 80-2.020(4)(H) (2005), which indicates that Petitioner had already satisfied the deterrent and retributive portions of her sentence that fully compensate society for the circumstances of her offense.

   State ex rel. Shields v. Purkett, 878 S.W.2d 42 (Mo. 1994)

   Olim v. Wakinekona, 461 U.S. 238 (1983)

   Parker v. Corrothers, 750 F.2d 653 (8th Cir. 1984)

State ex rel. Martin-Erb v. Mo. Comm'n. on Human Rights, 77 S.W.3d 600 (Mo. 2002)

14 C.S.R. 80-2.020(4)(F) (1986)

14 C.S.R. 80-2.010(4)(H) (2005)

2. A Writ of Habeas Corpus should issue to grant Petitioner immediate release on parole from Missouri Department of Corrections, because the Missouri Board of Probation and Parole exceeded its authority and denied Petitioner's parole based only upon the circumstances of her offense, subverting both the Governor's sworn intent that the circumstances of her offense were the precise basis for the commutation and not to be reconsidered by the Missouri Board of Probation and Parole, and the Governor's justifiable reliance upon the Missouri Board of Probation and Parole's adherence to its own Parole Regulation, 14 C.S.R. 80-2.020(4)(H) (2005).

   People v. Morris, 219 Ill.2d 373 (Ill. 2006)

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VI. Argument

A. Petitioner is entitled to an order requiring Respondent to grant her immediate release on parole from Department of Corrections, because the Missouri Board of Probation and Parole exceeded its authority by denying Petitioner's parole based upon only the circumstances of her offense because those circumstances constitute impermissible grounds because Petitioner has a protected liberty interest in Parole Regulation 14 C.S.R. 80-2.020(4)(H) (2005), which indicates that Petitioner's then 18 year incarceration had already satisfied the deterrent and retributive portions of her sentence that fully compensate society for the circumstances of her offense.

1. Governor Holden's commutation of Lynda Branch's life sentence constitutes a modification of her original sentence meaning she has now served 20 years of a life sentence with the possibility of parole.

Lynda Branch committed the offense for which she was sentenced on May 16, 1986, and began serving her sentence on December 4, 1986. On November 24, 2004 Governor Robert Holden commuted Lynda Branch's sentence of life in prison without the possibility of parole to a life sentence with the possibility of parole. Exhibit 2, p. A3. This commutation does not constitute a new and different sentence, but instead is a change in the original sentence and dates back to the

original date of sentencing. The Missouri Supreme Court has applied this rule, and stated in *Ex Parte Collins*, "[t]he commutation does not annul the sentence of the court, but is, *pro tanto*, an affirmance of it, with a modification." 94 Mo. 22, 25 (Mo. 1887). More recently, the Court affirmed this rule in *State v. Cerny*, when it held; "[t]he commuted sentence has the same effect and the status of the prisoner is the same as though the original sentence had been for the commuted term." 248 S.W.2d 844, 845 (Mo. 1952). In an attached affidavit, Governor Holden stated that he commuted Lynda Branch's sentence, "with the intent that the commutation date back to her original date of sentencing in 1986." Governor Holden's Affidavit, (hereinafter "Holden Aff.") ¶ 5, Exhibit 3, p. A4. Lynda Branch began serving her sentence in 1986, and the commutation of her sentence is a modification of the original sentence, not a new sentence. Therefore, Lynda Branch had served over 18 years at the time of her parole hearing June 1, 2005 and has now served in excess of 20 years of a regular life sentence with the possibility of parole. Respondents have not challenged this point in trial or appellate courts.

2. The Missouri Board of Probation and Parole stated one reason only for denying parole to Lynda Branch, and that was "[r]elease at this time would depreciate the seriousness of the present offense."

In June, 2005, the MBPP denied Lynda Branch's parole stating in its entirety that, "[r]elease at this time would depreciate the seriousness of the present

offense." Exhibit 4, p. A6. The MBPP provided three reasons for reaching this conclusion: "A) Circumstances surrounding the offense B) Use of a weapon [and] C) Use of excessive force or violence." *Id.*

The MBPP regulations require the MBPP to give an inmate a statement of the reasons for their decision. The regulation states, "[i]f a decision above the guidelines is reached, the reasons shall be stated in the notice to the inmate." 14 C.S.R. 80-2.020(1). The regulations further state:

> The reasons for decisions above the guidelines, for extension of the presumptive release date, denial of good time credit and for inmates for whom a presumptive release date has not been set may include, but are not limited to, the following reasons, with further specification of board policy where appropriate. (1) Release at this time would depreciate the seriousness of the offense committed or promote disrespect for the law. (2) There does not appear to be a reasonable probability at this time that the inmate would live and remain at liberty without violating the law. (3) The inmate has not substantially observed the rules of the institution in which confined. (4) Release at this time is not in the best interest of society. 14 C.S.R. 80-2.010(9)(A)(1) – (4) (2005).

In denying Lynda Branch parole, the MBPP cited only that, "[r]elease at this time would depreciate the seriousness of the present offense." Exhibit 4, p. A6. Had there been any other reason for parole denial, the MBPP was obligated to state that

reason in Lynda Branch's notice of denial. MBPP had a variety of other grounds available upon which it might have denied parole, but it did not list any other grounds. It could not. Branch's then 18 year record in prison includes exhaustive classes that she completed to improve herself and ready herself for society, a nearly spotless prison record with minimal trivial conduct violations, and the absence of any criminal history suggesting she would re-offend if released into society. Her record simply didn't support any other grounds to deny parole; the MBPP listed the only reason it could find.

Respondents' Return did not advance any new reasons for Petitioner's continued incarceration, with the possible exception that they have either added a reason to the MBPP's original answer of July 1, 2005 denying parole to Petitioner or they explain that it meant something different from the plain language of the original answer. On page 9 of Respondents' Return, they indicate that MBPP was allowed to deny parole based on the seriousness of her offense if the board's opinion was that granting release on parole would be "detrimental to the community by depreciating the seriousness of the offense." The "detrimental to the community" language simply is not in the original letter denying Lynda Branch parole and constitutes either a supplement to that original letter or an attempt to explain the Board's reasoning beyond the language it originally chose. Either option must fail because MBPP is not permitted to change its reasons for denying parole in response to litigation. Respondents cite no cases in their return

that actually support this contention – that the seriousness of the offense means the person is a detriment to society.

Respondents cite factual findings of the trial court on page 4 of their Return perhaps to bolster the MBPP's finding that the circumstances of Petitioner's offense are serious. Petitioner has never disputed that her offense was serious; what she disputes is that the seriousness of her offense constitutes an available ground to deny her parole after she satisfied the deterrent and retributive portions of her sentence.

3. The Missouri Board of Probation and Parole exceeded its authority in denying parole to Lynda Branch because their reason was unavailable because Branch had already satisfied the deterrent and retributive portions of her sentence under Parole Regulation 14 C.S.R. 80-2.020(4)(H) (2005), and thus, had already fully compensated society for the seriousness and circumstances of her offense.

MBPP denied Lynda Branch's parole because of the seriousness of her offense. A parole denied because "release would depreciate the seriousness of the offense" is equivalent to denial based upon the prisoner not having satisfied the deterrent and retributive portions of her sentence. The deterrent and retributive portions of a life sentence are satisfied when an inmate has served fifteen (15)

years. 14 C.S.R. 80-2.020(4)(F) (1986); 14 C.S.R. 80-2.010(4)(H) (2005)[1]. Thus, when Lynda Branch satisfied the deterrent and retributive portions of her sentence at 15 years of incarceration, she had made full compensation to society for the seriousness and circumstances of her offense. These contentions derive from a Missouri Supreme Court opinion, an affidavit by a Chairman of the Missouri Board of Probation and Parole, and MBPP regulations.

In *State ex rel. Shields v Purkett*, 878 S.W.2d 42 (Mo. 1994), MBPP denied parole to the petitioner Shields because: 1) the petitioner's release would depreciate the seriousness of the offense committed and/or promote disrespect for the law because he was convicted of an offense in which he attempted to rob three victims at gun point, and 2) there did not appear to be a reasonable probability at that time that the petitioner would live and remain at liberty without again violating the law because he had been previously convicted on two separate occasions for robbery. *Id.* at 44.

A parole regulation in place at that time stated that one factor that the MBPP considered was the, "[s]eriousness of the offense and the nature and

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[1] The language of the regulation at issue in this case has not changed from what it said in 1986, when the crime was committed, in 2005, when Lynda Branch received her parole hearing, and what it says today. The regulation's number has changed, and both the 1986 version and the current version citations are provided for the Court's convenience.

circumstances of the offense to determine if the inmate has served sufficient time for the purposes of retribution and general deterrence." 13 C.S.R. 80-2.010(5)(A) (repealed 1992). This means that the seriousness of the offense determines the years of incarceration needed to satisfy retribution and general deterrence. An additional provision in the regulations stated at what point in a sentence the deterrent and retributive portions of the sentence could be minimally satisfied.

Petitioner Shields argued that, "the MBPP is precluded from considering the seriousness, nature, and circumstances of his offense as a basis for parole denial" because the deterrent and retributive portions of the sentence had been served and satisfied. *Shields,* 878 S.W.2d at 46. The Missouri Supreme Court acknowledged the concept that parole denied because, "[r]elease at this time would depreciate the seriousness of the offense committed and/or promote disrespect for the law" equated to a MBPP finding that the deterrent and retributive portions of the sentence had not been served and satisfied. *Id.* When the Court denied relief to Shields, its decision was based on the facts that 1) the petitioner was denied parole for reasons other than the deterrent and retributive portions of the sentence and 2) the parole regulation on which Shields relied did not meet the requirements to create a liberty interest in a parole regulation because of the regulation's permissive, not mandatory, language. *Id*.

While not granting Shields's petition, this Court did not disturb its approval of the concept that serving out the deterrent and retributive portions of a sentence makes full compensation to society for the seriousness and circumstances of the

offense. Thus, serving out the retributive and deterrent portions of the sentence eliminates the availability of the "seriousness of the offense" as grounds for denying parole. Respondents have not disputed this point in the trial court, appellate court, or in their Return to this Court.

Lynda Branch's case is distinguishable from *Shields* in two important ways. First, the MBPP listed two reasons for denying Shields' parole (release at this time would depreciate the seriousness of the offense" and "there does not appear to be a reasonable probability . . . that [he] would live and remain at liberty without again violating the law,"), but listed only one in denying Lynda Branch's parole (the seriousness of her offense). *Shields*, 878 S.W.2d at 44. Second, the parole regulation applicable to Shields did not create a liberty interest, but the parole regulation applicable to Lynda Branch does meet the requirements to create a protected liberty interest as set out in *Olim v. Wakinekona*, 461 U.S. 238 (1983), which will be discussed in the next section.

The MBPP itself has affirmed that satisfaction of the deterrent and retributive portions of a sentence fully compensates society for the seriousness of the offense. In *Parton v. Atkins*, 641 S.W.2d 129, (Mo. App. W.D. 1982), a prisoner had filed a claim against the MBPP for equal protection and due process violations. The Chairman of the MBPP justified the petitioner's parole denial in an affidavit which, "asserted that parole had been denied plaintiff because release would 'depreciate' the seriousness of the offense in that the retributive and deterrent portions of the sentence had not been satisfied." *Id.* at 130-31. Thus, the

MBPP Chairman affirmed that a denial of parole based upon depreciation of the seriousness of the offense constituted a denial based on unsatisfied service of the deterrent and retributive portions of a sentence. Because Lynda Branch's denial of parole was based *only* on the seriousness of the offense, and because she has already satisfied the deterrent and retributive portions of her sentence set out by the MBPP in its regulation, the MBPP actually listed no valid reason to deny her parole.

Both the regulation in place when Lynda Branch committed her offense in 1986, and those in place when the MBPP denied her parole in 2005 state: "For inmates serving life sentences and for inmates with sentences of forty-five (45) years or more, the board considers the deterrent and retributive portion of the sentence to have been served when the inmate has completed fifteen (15) years of the maximum sentence." 14 C.S.R. 80-2.020(4)(F) (1986); 14 C.S.R. 80-2.010(4)(H) (2005). This regulation on the deterrent and retributive portions of a life sentence is not discretionary.

Respondents contend in their Return on page 6 that 14 C.S.R. 80-2.010(4)(H) does no more than define the deterrent and retributive portions of a sentence as a minimum parole release date. Petitioner agrees that fifteen (15) years constitutes a minimum period of incarceration to compensate society for the seriousness of her offense. However, the regulation does not authorize MBPP discretion to extend incarceration for the seriousness of the offense past fifteen (15) year. In contrast to the regulation applicable to Lynda Branch, the provision

immediately preceding this regulation states, "[f]or the purpose of retribution and general deterrence, *in the board's discretion*, inmates convicted of class C and D offenses shall not be eligible for parole until…" 14 C.S.R. 80-2.010(4)(G) (2005) (emphasis added). This preceding regulation grants the MBPP discretion in deciding when the deterrent and retributive portion of the sentence is considered served for these types of offenders. Furthermore, this provision's use of the language "shall not be eligible…until" indicates that this regulation establishes only a minimum standard for satisfying this portion of the sentence. The provision applicable to Lynda Branch does not establish only a minimum eligibility requirement for the satisfaction of the deterrent and retributive portion of the sentence. It is satisfied at fifteen (15) years.

Had both of these parole regulation provisions been meant to confer such discretion on the MBPP, the MBPP would have used the same language in both regulations instead of using the absolute and mandatory language the MBPP chose for that which is applicable to life sentences, as is the case of Lynda Branch.

Thus, when a Missouri inmate serves fifteen (15) years of a regular life sentence, that inmate has satisfied the deterrent and retributive portions of the sentence. A prisoner pays her full debt to society for the seriousness of the offense and circumstantial factors composing the sentenced offense when she has fully served the deterrent and retributive portions of her sentence. Other factors may enter into a parole decision to extend incarceration, but the seriousness of the offense and circumstances surrounding the sentenced offense are no longer

available grounds to deny parole when the deterrent and retributive portions of the sentence are satisfied by the served prison term. Thus, the MBPP had the discretion to list any and all factors in denying parole to Lynda Branch except the seriousness of her offense.

The MBPP denied parole apparently based on its erroneous belief that the seriousness of the offense was a valid reason to deny Lynda Branch parole. In reality, under *Shields* and according to the former Chairman of the MBPP, Lynda Branch had already fully paid her debt to society for the seriousness of the offense by having served out the stated time for purposes of deterrence and retribution because she had served eighteen (18) years at the time of the parole hearing, which is greater than the fifteen (15) years required by both 14 C.S.R. 80-2.020 (4)(F) (1986) and14 C.S.R. 80-2.010(4)(H) (2005).

Respondents point out in footnote 1 on page 7 of their Return that Branch's minimum parole eligibility is 15 years. Petitioner does not dispute that 15 years is her minimum parole eligibility and relies upon the version of Mo. Rev. Stat. §558.019 in place when Branch was sentenced in 1986, which also sets out Branch's minimum parole eligibility at 15 years. Her minimum parole eligibility is not the point. The point is that the parole regulation mandates that 15 years served also fulfills the deterrent and retributive portions of a sentence – which fully compensates society for the seriousness and circumstances of her offense. Thus, the regulation applicable to Lynda Branch sets both a minimum and maximum requirement for parole the inmate is not deemed to have satisfied the

requirements of her sentence for the seriousness of her offense prior to serving fifteen (15) years, but immediately upon completion of fifteen years the board may no longer consider the seriousness of the offense when determining parole eligibility once the inmate has completed fifteen (15) years of incarceration.

The MBPP's letter (Exhibit 4, p. A6) actually indicated that Lynda Branch had not yet completed the deterrent and retributive portions of her sentence and this statement conflicts with the effective parole regulation.

Respondent has not disagreed nor cited cases in the trial court, appellate court, or in its Return to this Court undermining the principle that a prisoner pays her full debt to society for the seriousness of the offense when she has fully served the deterrent and retributive portions of her sentence.

4. Lynda Branch has a justifiable expectation of release on parole based on her protected liberty interest in the Missouri Board of Probation and Parole applying Parole Regulation 14 C.S.R. 80-2.020(4)(H) (2005) to her.

It has been consistently held that a liberty interest can arise out of parole regulations as well as parole statutes. In *Parker v. Corrothers*, the Eighth Circuit stated, "A regulation or policy statement need not necessarily be a 'rule of law' in order to create a liberty interest." 750 F.2d 653, 659 (8th Cir. 1984). Lynda Branch claims a protected liberty interest in parole regulation 14 C.S.R. 80-2.010(4)(H) (2005).

In *Olim v.Wakinekona*, the United States Supreme Court held that a liberty interest arises when "particularized standards or criteria guide the State's decisionmakers." 461 U.S. at 249. In *Parker*, the Eighth Circuit relied on *Olim*, and other cases, when it listed the standards used to determine whether a parole statute creates a liberty interest: (1) the existence of particularized substantive standards or criteria which significantly guide the exercise of discretion and (2) the use of mandatory language similar in substance or form to that used in other statutes deemed to have created a liberty interest. *Parker v. Corrothers*, 750 F.2d at 656. The Court then stated that these standards constitute the relevant factors for determining whether a parole regulation establishes a protected liberty interest. *Id.* at 661. In *Dace v. Mickelson*, the Eighth Circuit defined the substantive standards required by the *Parker* test as, "specific, objective, measurable criteria such as length of time served, prior criminal history, *seriousness of the offense*, any disciplinary reports, and existence of any detainers filed against the inmate." 816 F.2d 1277, 1280 (8th Cir. 1987) (emphasis added). Therefore, 'seriousness of the offense' is a substantive standard, and regulations applicable to it may create a liberty interest if they contain the requisite mandatory language.

In *Shields*, the petitioner claimed the parole regulations, "precluded the MBPP from considering the seriousness, nature, and circumstances of his offense as a basis for parole denial." 878 S.W.2d at 46. The applicable parole guideline in *Shields* stated that, "the board considers the deterrent and retributive portion of the sentence to have been served when *approximately* twenty-five percent (25%) of

the maximum sentence has been served." *Id*. at 46 (providing text of 13 C.S.R. 80-2.010(5)(A)) (emphasis added). In concluding that the petitioner's argument failed because it misconstrued the regulations, this Court wrote, "the regulations themselves say 'approximately twenty-five percent'; an approximation by definition cannot be construed as a bright-line rule." *Id*. at 46. The regulation affecting Shields did not provide clear cut criteria, and did not constitute a mandatory cut off at twenty-five percent (25%) of the sentence served. Thus, *Shields* did not have a liberty interest, because the regulations did not satisfy the *Parker* test for mandatory language in a particularized standard. This regulation changed prior to Lynda Branch's time of sentencing in 1986, and her liberty interest is distinguishable from that which *Shields* unsuccessfully asserted.

In 1986, and in 2005, the applicable regulation read, "[f]or inmates serving life sentences…the board considers the deterrent and retributive portion of the sentence to have been served when the inmate has completed fifteen (15) years of the maximum sentence." 14 C.S.R. 80-2.010(4)(F) (1986); 14 C.S.R. 80-2.010(4)(H) (2005). This regulation satisfies the first prong of the *Parker* test for the existence of a liberty interest in a parole regulation in that 1) this regulation sets a particularized substantive standard, the seriousness of the offense, and 2) this regulation significantly guides the exercise of discretion, and does not allow for *any* discretion or approximation as did the regulation in *Shields.* Fifteen (15) years is an exact point in time served, and at fifteen (15) years, the inmate has served out the deterrent and retributive portions of the sentence.

This regulation is about the seriousness of the offense, and thus sets a substantive standard under the Eighth Circuit decision in *Dace v. Mickelson.* 816 F.2d at 1280.

This regulation satisfies the second prong of the *Parker* test in that it uses mandatory language. The regulation states, "the board considers the deterrent and retributive portion of the sentence to have been served when the inmate has completed fifteen (15) years of the maximum sentence." 14 C.S.R. 80-2.010(4)(H) (2005). This regulation leaves the MBPP no choice in whether or when it will consider the retributive and deterrent portion of a life sentence to have been served. The standard is fifteen (15) years. Unlike the regulation in *Shields*, which used an approximation, both the 1986 and the current regulation state that the deterrent and retributive portion of the sentence is considered served at the end of fifteen (15) years. The MBPP has no authority to consider more or less than fifteen (15) years.

Lynda Branch's parole denial based on the seriousness of the offense constitutes a finding that she has not served sufficient time for purposes of deterrence and general retribution when she had in fact satisfied the fifteen (15) year non-discretionary benchmark. Lynda Branch has a protected liberty interest in application of this parole regulation to her because she is serving a life sentence and has served over fifteen years, and because failure to serve the deterrent and retributive portions of her sentence was the only ground listed to deny her parole.

The Missouri legislature granted the MBPP broad discretion in parole decisions under Mo. Rev. Stat. § 217.690, but the inquiry does not end there. "Once an agency exercises its discretion and creates procedural rules under which it desires to have its actions judged, the agency denies itself the right to violate those rules." *State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights*, 77 S.W.3d 600, 608 at n. 6 (Mo. 2002). "Administrative agencies must follow their rules that regulate procedure governing substantial rights of individuals." *State ex rel. Stewart v. Civil Serv. Comm'n*, 120 S.W.3d 279, 287 (Mo. App. 2003) citing *United States v. Caceres*, 440 U.S. 741, 752 (1979); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The seriousness of the offense is a substantive right under *Dace*, and the MBPP denied itself the right to violate that right once it established the fifteen (15) year, non-negotiable incarceration standard.

In addition to the requirement that administrative agencies follow their own rules, the Supreme Court of the United States held in *Olim* that a liberty interest is created if the regulations are "particularized standards of criteria [which] significantly guide the State's decisionmakers." *Olim*, 461 U.S. at 249. A prisoner's liberty interest in regulations may, and in this case does, trump the Missouri statute regarding the MBPP's discretion. Respondents turned this around in their Return on page 5 proposing that the MBPP never reached the level of exercising discretion under its regulations because the statute precluded it from doing so. The United States Supreme Court decision in *Olim* protects prisoners from such capricious derogation of the parole regulations written to set non-

arbitrary standards for inmates, and thus precludes such an escape route for MBPP.

Circuit Judge McElwain made the same mistake in denying Lynda Branch's writ when he cited *Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. 1995), which recognizes that the current parole statute gives *almost* unlimited discretion to the MBPP. Exhibit 5, p. A7. Importantly, *Cavallaro* clarifies that the determination of whether a liberty interest is created "must be made on a case-by-case basis." *Id*. at 135. *Cavallaro* stated that the new post-1982 parole statute does not create a liberty interest, but this does not mean that a liberty interest is never created with regard to parole *regulations*. In *Cavallaro*, this Court noted that the board has "*almost* unlimited discretion," and in the word "almost," this Court makes clear that the MBPP's discretion is *not* unlimited. Where regulatory language satisfies the test for creating a protected liberty interest, the discretion of the MBPP disappears.

The present case is one which falls within the area in which the MBPP does not have discretion, and thus, falls within an area in which a protected liberty interest may be, and is presently found.

Circuit Judge McElwain also cited *Marshall v. Mitchell*, 57 F.3d 671 (1995), in denying Lynda Branch's writ. Exhibit 5, p. A7. The Eighth Circuit held in *Marshall* that the "Missouri parole statutes give the State Board of Probation and Parole *virtually* unlimited discretion to place an eligible offender on parole." *Id.* at 672 (emphasis added). Not only has the Eighth Circuit mirrored the Missouri

Supreme Court's holding in *Cavallaro* with regard to the parole statute, but the Eighth Circuit has repeated that the MBPP does not have unlimited discretion. Lynda Branch has a protected liberty interest which is found in that area of the law which continually compels courts to note the MBPP's *almost* unlimited discretion. Lynda Branch's liberty interest is created by the mandatory nature of the applicable parole regulation, independent of the parole statute. Lynda Branch's claim is based on a mandatory regulation, and is not based on the statute It is thus a claim contemplated by the Eighth Circuit as one which can and does create a protected liberty interest. It is within a mandatory regulation that Lynda Branch's claim is found, and thus her claim is one which has not only been contemplated by the Missouri Supreme Court and the Eighth Circuit, and is a claim which fulfills the test set forth by the United States Supreme Court for a protected liberty interest.

In Respondents' Return, they cite new cases to support a contention that the regulation applicable to Lynda Branch does not create a liberty interest. However, the regulations at issue in Respondent's cases do not contain the same language as the regulation applicable to Lynda Branch. *McKown v. Mitchell*, 869 S.W.2d 765 (Mo. App. W.D. 1993), *Watley v. Missouri Board of Probation and Parole*, 863 S.W. 2d 337 (Mo. App. W.D. 1993), and *State ex rel. Shields v. Purkett*, 878 S.W.2d 42 (Mo. banc 1994) all rely on a parole regulation which states that "the board considers the deterrent and retributive portion of the sentence to have been served when approximately twenty-five percent (25%) of the maximum sentence

has been served." Branch claims an enforceable interest in 14 C.S.R. 80-2.010(4)(H) (2005), which does *not* contain the word "approximately." Use of the word "approximately" gave the MBPP discretion in *McKown, Watley*, and *Shields* - discretion which the board does not have in Lynda Branch's applicable regulation.

Respondent also cites *Blackburn v. Missouri Board of Probation and Parole*, 83 S.W.3rd 585 (Mo. App. W.D. 2002) and *Marshall v. Mitchell* 57 F.3d 671 (8th Cir. 1995) for the proposition that the parole statute does not create a liberty interest. Petitioner agrees. It is not the parole statute that creates the liberty interest she claims; it is the parole regulation. And, both *Blackburn* and *Marshall* actually recite the rule safeguarding Branch's liberty interest. *Marshall* sought a protected interest in a procedural regulation, and the court declined because the "inmate did not identify any non-statutory particularized standards or criteria that guided the state's decisionmakers," and because Missouri had imposed no substantive predicates on MBPP. Unlike *Marshall*, Petitioner's claim refers to a substantive, particularized criteria that leaves MBPP no discretion. *Marshall*, 57 F.3d at 671.

Blackburn's claim also revolved around procedural issues, and was dismissed because "this case, (sic) does not implicate any fundamental rights." *Blackburn*, 83 S.W.3d at 587. The *Blackburn* Court discussed that no liberty interest is implicated in being denied parole, and that the Board is not therefore required to follow its own rules and regulations. However, the Court delineates a

protectible interest: "A fortiori, agency violation of a legislative regulation does not per se offend due process; the offense arises only when the regulation reflects a preexisting or creates a new constitutionally protected entitlement." *Blackburn*, 83 S.W.3d at 587, n. 2. This means that a prisoner acquires a protected liberty interest in a parole regulation when it meets the test for a constitutionally protected entitlement with a particularized, substantive standard set out in non-discretionary, mandatory guidelines for decision makers.

5. The parole regulation applicable to Lynda Branch is not a parole guideline, and constitutes one exception to the almost unlimited discretion the MBPP has in determining parole eligibility

Circuit Judge McElwain cited *Gettings v. MO Dept. of Corrections, and its Board of Probation and Parole*, 950 S.W.2d 7, (W.D. Mo. 1997) in denying Lynda Branch's writ. Exhibit 5, p. A7. And the Missouri Court of Appeals for the Western District cited 14 C.S.R. 80-2.020(1) when it denied Lynda Branch's writ. Exhibit 6, p. A8. *Gettings* deals with parole guidelines, and 14 C.S.R. 80-2.020(1) explains how the guidelines are applied. The guidelines allow for broad discretion for MBPP to make parole determinations above the guidelines. Both courts' reliance on the discretion afforded by the guidelines are inapplicable because the guidelines specifically exclude prisoners with life sentences like Lynda Branch.

The Parole Policy Guidelines which were the sole basis the Missouri Court of Appeals for the Western District gave in denying Lynda Branch's writ, and were considered by the *Gettings* court are found in Missouri State Regulation 14 C.S.R. 80-2.020 (2005) which is titled "Parole Policy Guidelines." The regulations which determine the duties of the MBPP are found in Missouri State Regulation 14 C.S.R. 80-1 through 14 C.S.R. 80-5, and are not limited to the section entitled "Parole Policy Guidelines." The Guidelines are limited to one section of one chapter, which deal with deriving salient factor scores. The regulations encompass five entire chapters. It is clear that that the guidelines are a subsection of the regulations that apply to a specific set of prisoners (a set which does not include Lynda Branch), and that the guidelines do not purport to control all the regulations or all the prisoners. The regulations are not equivalent to the guidelines.

The guidelines are found in the Missouri Code of State Regulations and are in fact a subset of the parole regulations, but the guidelines do not apply to Lynda Branch. She relies on a regulation, and MBPP did not attempt to utilize the guidelines to develop a salient factor score for Lynda Branch. The fact that the guidelines are among the regulations does not transfer any given regulation into a guideline. This is made clear by the fact that Missouri State Regulation 14 C.S.R. 80-2.020(1)(E) (2005) states that "Guidelines shall not apply to inmates serving sentences of more than thirty (30) years." Lynda Branch's life sentence is considered a 50 year sentence so the guidelines do not even apply to her. 14 C.S.R. 80-2.020(1)(E). The fact that the regulations themselves dictate the

function of the guidelines demonstrates that a guideline is a regulation but not all regulations are guidelines, and this relationship eluded the Missouri Court of Appeals for the Western District when they cited 14 C.S.R. 80-2.020(1) in denying Lynda Branch's writ. Exhibit 6, p. A8.

The court of appeals did not distinguish between parole regulations and parole guidelines, did not notice that MBPP had not developed a salient factor score for Lynda Branch under the guidelines, and did not recognize the mandatory nature of the parole regulation at issue in the present case. Because the regulation applicable to Lynda Branch is mandatory and satisfies the test for a protected liberty interest, it is distinct from the guidelines which merely aid the MBPP for prisoners with shorter prison sentences. In *Gettings*, the Court held that "'an evaluation sheet containing a salient factor score serves as *an aid* in determining release.' If the salient factor score is just an aid in determining release, then it cannot mandate release." *Id.* at 10. Parole guidelines regarding the salient factor score do not apply to Lynda Branch because she is serving a life sentence which is calculated at 50 years, and the salient factor score, as well as any other guideline "shall not apply to inmates serving sentences of more than thirty (30) years." 14 C.S.R. 80-2.020(1)(E). In deciding *Gettings*, the Court of Appeals held that "the guidelines place release fully within the discretion of the board." *Id.* at 9. But, the broad discretion granted under guidelines and the salient factor scores outlined by the guidelines do not apply to Lynda Branch, and do not control all of the regulations.

In *Gettings*, the Court of Appeals considered only the guidelines, and the regulation which is at issue in the present case was not discussed, and was further irrelevant to *Gettings*. *Id.* It is clear that because the guidelines are a distinct subset of the regulations and because the MBPP does not have unlimited discretion under each of the regulations, certain regulations can create a protected liberty interest. Because the regulation applicable to Lynda Branch is not a mere guideline meant to aid the MBPP in its decision, because the guidelines do not apply to Lynda Branch, and because 14 C.S.R. 80-2.010(4)(H) meets the test set out by the United States Supreme Court in *Olim*, this is one regulation which has created a protected liberty interest.

Respondents' Return, page 6-7, also indicates that the Board may use the guideline grid to determine a recommended range for parole. The fact is that the Board did not develop a salient factor score, use or attempt to use the guidelines in Branch's case. This was appropriate since the guidelines were not written for persons with a sentence as long as Lynda Branch's.

In summary, Lynda Branch has now served more than 20 years in prison. Lynda Branch became eligible, after her commutation, for parole and completed the deterrent and retributive portions of her sentence when she finished serving fifteen (15) years of her life sentence. The MBPP's denial of her parole, based on factors used to calculate the deterrent and retributive portions of her sentence having not been served, exceeds its authority under the regulation providing fifteen (15) years as the benchmark for completing the retributive and deterrent

portions of the sentence. This regulation meets the *Parker* test for a regulation giving rise to a liberty interest in that it sets out a particularized substantive standard in mandatory language to guide or control the discretion of the decisionmakers. Lynda Branch has a protected liberty interest in the MBPP following its regulations governing her parole eligibility. The MBPP has unlimited discretion to list reasons to deny parole, but it is required to provide the inmate with a statement of the reasons for parole denial, and the only reason given Lynda Branch was, "[r]elease at this time would depreciate the seriousness of the present offense." This reason contradicted MBPP regulations in violation of Lynda Branch's protected liberty interest in parole, which was created by that regulation, in that it is based upon a mandatory, particularized, substantive standard. Therefore, Lynda Branch has a justifiable expectation of release on parole immediately. These reasons alone are sufficient to compel the release of Lynda Branch.

B. A Writ of Habeas Corpus should issue to grant Petitioner immediate release on parole from Department of Corrections, because the Missouri Board of Probation and Parole exceeded its authority by denying Petitioner's parole based only upon the circumstances of her offense in derogation of both the Governor's sworn intent that the circumstances of her offense were the precise basis for the commutation and not to be reconsidered by the MBPP,

and the Governor's justifiable reliance upon the MBPP's adherence to its own Parole Regulation, 14 C.S.R. 80-2.020(4)(H) (2005).

1. Governor Holden's affidavit constitutes a rightful effort to protect the gubernatorial clemency power against party politics, and serves as a clarification of his process of clemency and his intent in commuting Lynda Branch's sentence.

On November 24, 2004, Governor Robert Holden granted clemency to Lynda Branch, and commuted her sentence from life in prison without the possibility of parole to life in prison with parole. Exhibit 2, p. A3. When Lynda Branch was convicted, a flaw existed in the criminal justice system that precluded her from introducing evidence of prior abuse at her trial. That inadmission formed the basis for reversal of Lynda Branch's first trial, and review of the second trial on the same grounds was precluded by the escape rule when she failed to show up for a sentencing hearing.

The Missouri legislature subsequently righted this systemic wrong by enacting a statute that remedied that evidentiary flaw. Mo. Rev. Stat. § 563.033 (2005). Governor Holden has righted the effect of that wrong specifically on Lynda Branch by commuting her sentence after obtaining a recommendation from the MBPP.

Governor Holden took the highly unusual step of swearing out an affidavit in which he explained his process in commuting Lynda Branch's sentence,

including his consideration of the circumstances of her offense - many of which were facts not admitted in evidence at her trials. According to his affidavit, Governor Holden considered, prior to commuting Lynda Branch's sentence, "all of the facts of her case, including the circumstances surrounding her crime, the abuse she suffered at the hands of her husband, and the fact that she used a weapon to commit her offense." Holden Aff. ¶ 6, Exhibit 3 (original on file with Livingston County Court), p. A4.

The commutation power is "a mere matter of grace" that the governor can exercise "upon such conditions and with such restrictions and limitations as he may think proper…" *Ex parte Reno*, 66 Mo. 266, 269, 273 (1877); see also *Ex parte Webbe*, 30 S.W.2d 612, 615 (banc 1929). This power is derived from the Missouri Constitution which establishes the governor's authority to confer commutations:

> The governor shall have power to grant… commutations… after conviction…upon such conditions and with such restrictions and limitations, as he may deem proper, subject to provisions of law as to the manner of applying for pardons. . .(Mo. Const. art. 4, §7)

The governor has unlimited discretion, but other branches of government and persons within the executive branch do not have such power, and may not condition the governor's clemency power. The language in Section 7 does not restrict what factors a governor may utilize in evaluating the merits of a clemency petition or deciding the terms of commutation, including parole. Shirley Lute is

another prisoner who is contemporaneously seeking a Writ of Habeas Corpus, and her brief contains this same analysis of clemency power. Governor Holden's commutation of Lynda Branch's sentence is unquestionably a proper constitutional exercise and Respondents have not disputed that.

In commuting Lynda Branch's sentence, Governor Holden did not intend for the MBPP to reexamine the same factors he examined when using his gubernatorial power to grant her clemency. Holden Aff. ¶ 7, Exhibit 3, p. A4. In his affidavit, Governor Holden stated, "I designed my commutation of Lynda Branch's sentence such that the job of the Board of Probation and Parole in evaluating Lynda Branch's eligibility for parole, post-commutation, was to examine her conduct in prison and determine her readiness to re-enter society, and not to review the circumstances of her crime or her use of a weapon." Holden Aff. ¶ 8, Exhibit 3, p. A4. These few issues were properly left to MBPP who was in the best position to access that current information and to evaluate Lynda Branch's exit plan. In this way, Governor Holden's commutation made the most judicious use of the executive branch. Governor Holden's affidavit also clarified, "When I commuted Lynda Branch's sentence I did so with the intent that the commutation date back to her original date of sentencing in 1986." Holden Aff. ¶ 5, Exhibit 3, p. A4. This provided the obvious, that he assumed MBPP would apply its parole regulations in the usual manner for a woman who had served eighteen (18) years of a regular life sentence.

Governor Holden's affidavit explained that his commutation thus took off the table MBPP's reconsideration of the circumstances of Lynda Branch's offense. Governor Holden could reasonably rely on the belief that MBPP would in fact not reconsider the seriousness of Lynda Branch's offense in its parole evaluation because it lacked such authority under its own guidelines, which made the circumstances of her offense an unavailable basis for denying parole because she had already satisfied the retributive and deterrent portions of her sentence that fully compensate society for her offense.

That the importance of Governor Holden's intentions in commuting Lynda Branch's sentence are paramount in analyzing this Writ of Habeas Corpus has a corollary in recent Illinois caselaw. Illinois courts analyzed their Governor Ryan's clemency bequeaths by patterning clemency construction after statutory construction. Where the intent behind the Governor Ryan's grant of clemency was unclear on its face, Illinois courts clarified the meaning of the clemency by undertaking investigation of his intent.

In *People v. Morris*, 219 Ill.2d 373 (2006), (Exhibit 7), the Illinois Supreme Court dealt with the question of whether a commutation was limited to the terminology of the commutation or whether the intent behind the commutation was determinative, and held that the intent, rather than the strict terminology, must determine the effect of a governor's grant of clemency. *Id.* at 384. In *Morris*, the defendant, Morris, had received a death sentence prior to Governor Ryan's grant of statewide clemency to those whom had been sentenced to death or were having

the death sentence sought against them at the time of the clemency. *Id.* at 375. At the time of the clemency Morris's first conviction was being considered by the Illinois Supreme Court. *Id.* Morris's first conviction was reversed by the Illinois Supreme Court, and upon retrial the state again sought the death penalty. *Id.*

In seeking the death penalty, the state argued that Governor Ryan's commutation of Morris's sentence did not apply to the second trial, but only to the first. *Id.* at 380. The Circuit Court ordered that the death penalty not be sought, and based its decision on what it believed Governor Ryan's intent was behind the commutation rather than the strict terminology used by Governor Ryan in his commutation of Morris's sentence. *Id.* The Circuit Court based its determination on a speech given by Governor Ryan, and the state appealed the Circuit Court's decision claiming the "circuit court erred when it relied on the former Governor's speech to discern his intent regarding defendant's clemency order." *Id.* at 382-83.

The Supreme Court of Illinois upheld the decision of the Circuit Court treating the clemency order of Governor Ryan in the same way that courts have always treated statutes, stating "[i]t is a well-established rule of statutory construction that, in determining the intent of the legislature, a court 'may properly consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved.'" *Id.* at 383. And just as the court may rightly look beyond the language of the statute in order to determine its intent, there is no "separation of powers violation when a court of law applies these same principles of construction to the interpretation of a

clemency order." *Id.* Governor Holden's affidavit of his intent is a rightful tool this Court may use to give effect to a constitutional exercise of his clemency power, and such an analysis has precedent in a sister state.

In their Return, Respondents argue that Governor Holden's affidavit modifies his commutation. His commutation modified Lynda Branch's sentence, and nothing in his affidavit changes this commutation. He took the unusual step to explain his intent in the commutation because the MBPP took the unusual step of exceeding its authority, ignoring the commutation, and ignoring its own parole regulations. The MBPP is beneath the governor in the hierarchy of the executive branch. The MBPP is required to follow the orders of the Governor in a grant of clemency. Respondent's position is that the Governor was required to spell out his intent that the MBPP follow its own regulations, and grant Lynda Branch a fair parole hearing in his original commutation. This would imply that the Governor should have foreseen the MBPP violating its own regulations in violation of the law when he left office, and that is untenable. It is clear from MBPP's reason for denying Branch parole that it has no reasons to continue her incarceration other than the serious circumstances of her crime – a ground that both the Parole Regulations and Governor Holden's commutation made unavailable. MBPP has exceeded its authority in denying parole and subverting the proper constitutional exercise of clemency, and this conduct has occurred contemporaneously with a change of party in the Governor's office and of majority party affiliation in the MBPP that accompanied a newly appointed chairperson and member.

Governor Holden rightly seeks to protect the constitutional power of gubernatorial clemency by swearing out an affidavit that operates to force MBPP to adhere to its own regulations so as not to subvert clemency orders just because the Governor is no longer in office, the MBPP's composition has changed, and its major party affiliation has turned over.

2. MBPP impermissibly reviewed the serious circumstances of Lynda Branch's offense without full knowledge of the circumstances of her offense.

Respondents recite in their Return, page 4, the factual findings of the Trial Court describing the serious circumstances of Branch's crime - perhaps to bolster the MBPP finding that Lynda Branch's crime was serious. Petitioner has never denied the seriousness of her offense, but that is not the point. The point is that the MBPP exceeded its authority in listing the seriousness of her offense as the sole ground for parole denial, which its regulations prohibit.

In Respondents' recitation of the facts, they cannot of course list any of the Battered Women's Syndrome evidence (now called battering and its effects evidence), which was inadmissible at the time of Lynda Branch's trial. Therefore, Respondent's description of the crime does not include the unadmitted evidence that caused the Appellate Court to reverse Lynda Branch's trial, i.e. the torture (deceased's 4 point restraint of Lynda and his simultaneous insertion of a burning candle into her vagina, *Lynda Branch's Petition for Clemency*, Exhibit 8, p. A31,

A42.), or her decision to separate from the decedent immediately after that torture (Exhibit 8, p. A31, A43.), or the effects of the deceased's abuse (Lynda's temporary blindness from one of deceased's beating of her as detailed in intensive care unit medical records never admitted, Exhibit 8, p. A73-A74.), or an eyewitness account (the babysitter who observed but did not testify to one of deceased's beatings of Lynda, Exhibit 8, p. A75-A79.), or deceased's abusive patterns (the former wife who did not testify that the deceased had also threatened to kill her with a gun, Exhibit 8, p. A90-A93.).

Lynda Branch's Clemency petition documented those unadmitted facts to the satisfaction of Governor Holden, and his affidavit indicates that those circumstances factored into his commutation. The Governor had information at his disposal that the MBPP did not and does not have, and therefore cannot properly factor into a parole determination. It is not the job of the MBPP to factor unadmitted evidence into parole decisions; it is the job of the Governor in clemency decisions to consider facts not in evidence where the justice system worked an unduly harsh or unjust result.

Respondent's factual recitation of only those facts about the crime that were admitted at trial underscores the very reason that clemency power historically arose – to remedy justice system wrongs. "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Ex Parte Grossman*, 267 U.S. 87, 121, 45 S.Ct. 332, 337 (1925). Since her trial, the Missouri legislature has enacted a law allowing

admission of Battered Women's Syndrome evidence in trials like Lynda Branch's, and thus it has fixed the justice system error. Mo. Rev. Stat. § 563.033 (2005) And, Governor Holden's clemency righted the specific wrong as it operated in Lynda Branch's case to preclude evidence of material facts. Missouri's system was working just as it was supposed to work – until the MBPP changed composition and subverted the clemency order. Governor Holden obtained a recommendation from the MBPP, as it was composed under his administration before its party affiliation changed, regarding Lynda Branch's clemency petition. He balanced the recommendation with the information in Lynda Branch's clemency petition before commuting her sentence.

Respondents cite *Theodoro v. Department of Liquor Control*, 527 S.W.2d 350 (Mo. banc 1975) in which this Court invalidated a gubernatorial pardon from the administrative revocation of a liquor license, because Art. IV, Sec. 7, Mo. Const. 1945 grants the governor power to grant pardons after conviction. *Theodoro*, 527 S.W.2d at 352. Respondents seem to suggest that because the *Theodoro* decision left the revocation in the hands of Supervisor of Liquor Control and not the governor, then the Branch decision should be left with the MBPP. The *Theodoro* Court indicated that revocation of a liquor license was not a criminal proceeding and was in the nature of a civil act, and therefore the governor's pardon power did not extend to the Supervisor of Liquor Control. *Theodoro*, 527 S.W.2d at 353. Respondents also seem to suggest that since this Court stated that the Supervisor of Liquor Control must obey that board's standards and guidelines

for the regulation of intoxicating beverages rather than follow an unconstitutional pardon, *Theodoro*, 527 S.W.2d at 354, then the MBPP should not have to obey the Governor's intent in the commutation of Lynda Branch's sentence. The striking differences between *Theodoro* and the instant writ are that Governor Holden's commutation followed a conviction, and therefore did not exceed his clemency power with MBPP as Governor Hearnes did with the Board of Liquor Control. And, Lynda Branch requests that MBPP honor the commutation by adhering to its parole regulations in effectuating the commutation – not violate its regulations as the Supervisor of Liquor Control was directed to do by Governor Hearnes' pardon in *Theodoro.*

C. A writ of habeas corpus is the appropriate remedy in this case.

Under Mo. Rev. Stat. § 532.010, any person confined or restrained of his liberty within this state may prosecute a writ of habeas corpus. Mo. Rev. Stat. § 532.010 (2000). If no legal cause can be shown for the imprisonment or restraint, or continuation thereof, the Court shall discharge that party from the custody or restraint under which he is held. Mo. Rev. Stat. § 532.380 (2000).

Lynda Branch has been confined and restrained of her liberty for the past twenty years by the Missouri Department of Corrections, and is currently being held at the Chillicothe Correctional Center in Chillicothe, Missouri. Lynda Branch may prosecute a writ of habeas corpus due to her confinement subsequent to her only parole hearing. If Respondents cannot show legal cause for the

continuation of her imprisonment, the Court shall order the superintendent to discharge Lynda Branch from the custody under which she is held. Lynda Branch has no other remedy available to her. Her next parole hearing is not until June, 2008, and without a writ of habeas corpus she will be held at least until that date, if not longer.

VII. Conclusion

This is an unusual case because it involves a gubernatorial clemency, and because it involves a complex multi-step legal analysis synthesizing a parole regulation, a commutation, a protected liberty interest, and a Parole Board denial. Petitioner has proposed two theories supporting her Writ of Habeas Corpus: 1) that MBPP exceeded its authority in denying Lynda Branch's parole based on an enforceable expectation of release on parole found in the applicable parole regulation, and 2) that the MBPP has exceeded its authority by continuing Lynda Branch's incarceration in derogation of Governor Holden's commutation process and intent and his reliance on its own non-discretionary, substantive parole regulations.

The lynchpin of both theories, and the reason either should prevail, is that the MBPP was required to list its reasons for denying parole under 14 C.S.R. 80-2.020(1)(2005*)*, and it listed only one reason. That was the only reason that was unavailable to it by virtue of its own non-discretionary, substantive, and

particularized parole regulation in 14 C.S.R. 80-2.010 (4)(H). Thus, MBPP has no reason to continue incarceration of Lynda Branch.

Governor Holden granted clemency to 45 persons out of 992 applicants prior to his leaving office. His order was made after consulting with the Missouri Board of Probation and Parole (MBPP) and after considering all admitted and unadmitted circumstances of Lynda Branch's case. He commuted Lynda Branch's sentence making her immediately eligible for parole, but MBPP inexplicably delayed Branch's parole hearing for six months. During those six months, the Governorship changed both in person and in political party, and the composition of the MBPP changed with a new chairperson, a new member, and new major party affiliation. The newly constituted MBPP exceeded its authority and subverted the gubernatorial constitutional power properly exercised in Governor Robert Holden's clemency order.

Absent a compelling reason impermissibly not stated by the MBPP in its denial of Lynda Branch's parole, she should have been and should now be released on parole. She has now served more than twenty (20) years of a regular life sentence. She completed the deterrent and retributive portions of her sentence at fifteen (15) years. The only reason stated for denying parole was, "[r]elease at this time would depreciate the seriousness of the present offense." Exhibit 4, p. A6. The Missouri Supreme Court and the Missouri Board of Probation and Parole have acknowledged that the seriousness of the offense correlates to a period of time served calculated to satisfy the deterrent and retributive portions of a

sentence. The MBPP's regulations affirmatively state that the deterrent and retributive portions of a life sentence are considered to have been served at fifteen (15) years. And this fifteen (15) year regulation satisfies the requirements for a parole regulation to create a liberty interest in an inmate for parole. "Administrative agencies must follow their rules," *Stewart*, 120 S.W.2d at 287, and the regulation applicable to Lynda Branch meets the test set forth by the United States Supreme Court in *Olim*, and further explained by the Eighth Circuit in *Parker*, and is therefore one of the very reasons the Missouri Supreme Court said the MBPP has "almost unlimited discretion." *Cavallaro*, 908 S.W.2d at 135. The regulation applicable to Lynda Branch fits into the small area of exceptions to the MBPP's discretion, and creates a liberty interest even under the newer parole statute. The regulation applicable to Lynda Branch is mandatory and provides "particularized standards or criteria which guide the State's decision makers," and therefore meets the test to create a protected liberty interest despite *Cavallaro's* ruling that neither R.S.Mo.§ 549.261 (repealed 1981) nor R.S.Mo. § 217.690 (1994) create a liberty interest. *Olim*, 461 U.S. 238, 249; *Cavallaro*, 908 S.W.2d at 135.

Lynda Branch has a protected liberty interest in expecting parole after fifteen (15) years served on a regular life sentence when her sentence was commuted to a regular life sentence given that MBPP stated no valid reasons to deny parole. In June, 2005, the MBPP stated no other such reasons.

Based on the foregoing reasons, Lynda Branch should have been paroled at her hearing in June, 2005. Despite this fact, Lynda Branch is still incarcerated, and should be immediately released on parole.

Respectfully Submitted,

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Certificate of Compliance

By submitting this brief, the undersigned counsel for Petitioner hereby certifies this brief complies with Mo. Rule of Civil Procedure 55.03. This brief complies with the limitations contained in Mo. Rule of Civil Procedure 84.06(b). This brief contains 13,206 words. The enclosed disc complies with Mo. Rule of Civil Procedure 84.06(g); the disc is a double-sided, high density, IBM-PC-compatible 1.44 MB, 3½" floppy disc; the disc has been scanned for viruses and is virus-free.

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Certificate of Service

I certify that two true copies of the above and foregoing and a floppy disk containing the same were served by the United States Postal Service to the Respondents' Attorney Michael J. Spillane, Assistant Attorney General, at P.O. Box 899, Jefferson City, Missouri 65102 on this 15th day of December, 2006.

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