

No. SC88111

**IN THE
SUPREME COURT OF MISSOURI**

LYNDA RUTH BRANCH,

Petitioner,

v.

JENNIFER MILLER, et al.,

Respondents.

RESPONDENTS' BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704**

**P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Attorneys for Respondent**

TABLE OF CONTENTS

| | |
|---------------------------------------------------------------------------------------------------------|----|
| TABLE OF CONTENTS | 1 |
| TABLE OF AUTHORITIES..... | 2 |
| JURISDICTIONAL STATEMENT | 4 |
| ARGUMENTS | 8 |
| 1.Branch does not have a liberty interest in parole release under 14 C.S.R. 80-2.02010(4)(H)(2005) or a | |
| 2.The denial of parole based on the Board’s opinion that release at this time would depreciate the se | |
| commutation | 12 |
| CONCLUSION | 18 |
| CERTIFICATE OF SERVICE AND COMPLIANCE | 19 |

TABLE OF AUTHORITIES

Cases

| | |
|----------------------------------------------------------------------------------------------------|----|
| <i>Blackburn v. Missouri Board of Probation and Parole</i> , 83 S.W.3d 585 (Mo. App. W.D. 2002) .. | 7 |
| <i>Burnside v. White</i> , 760 F.2d 217 (8 th Cir. 1995)..... | 9 |
| <i>Cooper v. Bd. of Probation and Parole</i> , 866 S.W.3d 135 (Mo. banc 1993) | 12 |
| <i>Gettings v. Missouri Department of Corrections</i> , 950 S.W.2d 133 (Mo. App. W.D. 1997)..... | 6 |
| <i>Kinder v. Holden</i> , 925 S.W.3d 793 (Mo. App. W.D. 2002) | 14 |
| <i>King v. Laclede Glass Co.</i> , 648 S.W.2d. 113 (Mo. banc 1983)..... | 12 |
| <i>Maggard v. Wyrick</i> , 800 F.2d 195 (9 th Cir. 1986) | 9 |
| <i>Marshall v. Mitchell</i> , 57 F.3d 671 (8 th Cir. 1995)..... | 6 |
| <i>McKown v. Mitchell</i> , 869 S.W.2d 765 (Mo. App. W.D. 1993) | 9 |
| <i>Shaw v. Missouri Board of Probation and Parole</i> , 937 S.W.2d 771 (Mo. App. W.D. 1997)..... | 8 |
| <i>Spencer v. Kemna</i> , 523 U.S. 1 (1998)..... | 8 |
| <i>State ex rel. Cavallaro v. Goose</i> , 908 S.W. 133 (Mo. banc 1993)..... | 6 |
| <i>State v. Beck</i> , 167 S.W.3d 767 (Mo. App. W.D. 2005) | 12 |
| <i>State v. Branch</i> , 757 S.W.2d 595 (Mo. App. W.D. 1988) | 4 |
| <i>State v. Branch</i> , 811 S.W.2d 11 (Mo. App. W.D. 1991) | 5 |
| <i>Theodoro v. Department of Liquor Control</i> , 527 S.W.2d 350 (Mo. banc 1975)..... | 13 |
| <i>Watley v. Missouri Board of Probation and Parole</i> , 863 S.W.2d 42 (Mo. banc 1994) | 9 |

Other Authorities

| | |
|---------------------------------------------|-----------|
| Missouri Constitution ,Article IV, §7 | 15 |
| 14 C.S.R. 80-20.2010(4)(H)(2005) | 8 |
| 14 C.S.R. 802.020(1) | 7 |
| Supreme Court Rule 91 | 4 |
| Supreme Court Rule 84 | 4 |
| § 217.690, RSMo 2000..... | 9, 10, 14 |
| § 532.020, RSMo 2000..... | 4 |

JURISDICTIONAL STATEMENT

This is an original action in habeas corpus under §532.020, RSMo 2000 and Missouri Supreme Court Rules 84 and 91.

Lynda Branch is confined in the Chillicothe Correctional Center. Branch is serving a life sentence for first degree murder. The sentence has been commuted from life imprisonment without the possibility of parole to life imprisonment with the possibility of consideration for parole. The superintendent of the Chillicothe Correctional Center is the sole proper party respondent in a habeas corpus action challenging confinement in that facility. Missouri Supreme Court Rule 91.

STATEMENT OF FACTS

The Missouri Court of Appeals found the following facts in rejecting a sufficiency of the evidence challenge to the deliberation element after Branch's initial trial.

The evidence and inferences here allow the conclusions that the weapon was taken from a closet, that the victim was shot twice at close range, that his body was dragged by defendant down the stairs, that she attempted to conceal her involvement in the crime, that she attempted to dispose of the weapon outside the house, that she washed her clothes and put new sheets on the bed to conceal blood on the mattress, that she deliberately delayed calling for assistance until after her husband was dead, that she fabricated the story she told police, that victim and defendant had quarreled throughout the day, and that their marital relationship had deteriorated to a point where defendant was intending to leave and had made a list of the personal property and how it was to be divided. This is sufficient to establish that defendant killed her husband after deliberation.

State v. Branch, 757 S.W.2d 595, 598 (Mo. App. W.D. 1988).

It was only after it became apparent that Branch had dragged the victim's body down the stairs and planted the murder weapon on the lawn that Branch abandoned her original story that the victim had been killed by an intruder who came to the door, and she then fell back on a new story that the victim had come at her with the gun and the gun discharged in the resulting struggle, killing him. *Id.* at 596-598.

Branch's initial conviction was overturned because battered spouse evidence prior to 1980 was excluded as too remote in time from the 1986 murder. *Id.* at 598-601. Branch was then re-convicted, and her appeal was dismissed based on the escape rule after she failed to appear for sentencing and had to be arrested on a *capias* warrant. *State v. Branch*, 811 S.W.2d 11 (Mo. App. W.D. 1991).

On November 24, 2004 Branch received a commutation from the then-governor which reads in pertinent parts as follows. "This commutation eliminates from the sentence the prohibition against probation or parole and makes Lynda Branch eligible for probation or parole consideration"(Petitioner's Appendix A3).

Branch received a parole hearing on June 1, 2005 (Petitioner's Appendix at A6). The Board declined to release Branch on parole for the following reason.

"Release at this time would depreciate the seriousness of the present offense based on the following:

- A. Circumstances of the present offense;
- B. Use of a weapon;
- C. Use of excessive force or violence."

(*Id.* at 6).

On May 2, 2006 former Governor signed an affidavit stating 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 of her use of a weapon.”
(*Id.* at 4).

Branch sought a writ of habeas corpus from the Circuit Court of Livingston commanding the Board of Probation and Parole to discharge her on parole. The Circuit Court of Livingston County denied the petition on September 1, 2006 citing *State ex rel. Cavallaro v. Goose*, 908 S.W. 133, (Mo. banc 1993); *Gettings v. Missouri Department of Corrections*, 950 S.W.2d 133 (Mo. App. W.D. 1997); and *Marshall v. Mitchell*, 57 F.3d 671 (8th Cir. 1995) (Petitioner’s Appendix at 7).

Branch then sought a petition for habeas corpus from the Missouri Court of Appeals Western District. The Missouri Court of Appeals denied the petition citing 14 C.S.R. 802.020(1) (Petitioner’s Appendix at 8).

Branch now seeks a writ of habeas corpus from this Court ordering that she immediately be discharged on parole.

ARGUMENT

I.

BRANCH DOES NOT HAVE A LIBERTY INTEREST IN PAROLE RELEASE UNDER 14 C.S.R. 80-20.2010(4)(H)(2005) OR ANY OTHER PAROLE REGULATION AND THE PAROLE DENIAL WAS PROPER.

Branch argues that she is entitled to release on parole. Her reasoning is the following. She was denied parole because release at this time would depreciate the seriousness of her offense. 14 C.S.R.2.010(4)(H)(2005) defines the deterrent and retributive of a life sentence as fifteen years. Branch has served more than fifteen years on her life sentence. Therefore parole denial based on the seriousness of the offense was improper, and Branch is entitled to immediate release on parole (Petitioner's Brief at 14-37).

It is well established that the current parole statute creates no liberty interest in parole release. Even after the statutory prerequisite that the inmate can be released without detriment to himself or the community is met, the Board retains almost unlimited discretion to grant or deny parole. *Gettings v. Missouri Department of Corrections*, 950 S.W.2d 7, 9 (Mo. App. W.D. 1997) (holding that the Missouri parole regulations state in multiple places that they are simply intended to provide guidelines as to the customary time to be served, but they do not remove the Board's discretion to consider individual factors in each case and thus create no constitutional right to a particular parole date); *Blackburn v. Missouri Board of Probation and Parole*, 83 S.W.3d 585 (Mo. App. W.D.

2002) (claim that Parole board failed to follow its own regulations in denying parole failed to state on which relief could be granted); *see also* 14 C.S.R. 80-2.010(4)(H) is in 14 C.S.R. 80-2.010(4) a provision that by its on terms defines “Minimum Parole Eligibility”. 14 C.S.R 80- 2.010 as a whole has been held not to create limits on the discretion of the Board to deny parole. *Shaw v. Missouri Board of Probation and Parole*, 937 S.W.2d 771, 772 (Mo. App. W.D. 1997) (“The regulations in 14 C.S.R. 80-2.010 do not limit the broad scope of discretion given by the Board by 217.690".) It is cited by the United States Supreme Court in *Spencer v. Kemna*, 523 U.S. 1, 14 (1998) for the proposition that the Missouri parole statute gives the Board almost unlimited discretion in whether to grant parole. Although the specific subparagraph, 14 C.S.R. 80-2.010(4)(H), does not appear to have been alleged to create an enforceable interest in release in a case that resulted in a published opinion,¹ its predecessor regulation 13 C.S.R. 80-2.010(5)(A) which also defined the deterrent and retributive portion of a life sentence has been held not to create an entitlement to release but rather to define a minimum time in which the deterrent and retributive portion of a sentence could be considered to have been served.

¹ In light of the general case law finding claims that parole regulations create a binding entitlement are frivolous or fail to state a claim on which relief can be granted, and the teaching that 14 C.S.R.80- 2.010 as a whole creates no binding entitlements it is unsurprising that there is a lack of case law analyzing the current version of the single subparagraph Branch relies on.

See 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 42, 47 (Mo. banc 1994) (language in the regulation defining the period when the deterrent and retributive portion of the sentence has been served defines a minimum time period at which the deterrent and retributive portion of the sentence can be found to have been served).

But is not necessary to reach that level of analysis in finding that Branch's claim is without merit. Section 217.690, RSMo 2000 does not allow the Board to use its almost unlimited discretion to release an inmate unless the inmate can be released without detriment to himself or the community. The United States Court of Appeals for the Eighth Circuit has noted in affirming Missouri parole denials in the face of Ex Post Facto Clause challenges that a finding that release at this time would depreciate the seriousness of the offense contains an implicit finding that the inmate cannot be released without detriment to the community. *Burnside v. White*, 760 F.2d 217, 222-223 (8th Cir. 1995); *Maggard v. Wyrick*, 800 F.2d 195, 198 (9th Cir. 1986). This reasoning buttresses the holding of this Court that the denial of the parole based on the seriousness of the offense cannot have violated the Ex Post Facto Clause because that reason was proper under the old parole statute. *See Burnside and Watley v. Missouri Board of Probation and Parole*, 863 S.W.2d 337, 339 (Mo. App. W.D. 1993) (holding that the language in the old parole regulation defining when the deterrent and retributive portion of a sentence is served necessarily creates only a minimum requirement because to read it as a binding

maximum would conflict with the statutory language limiting release to cases in which in the Board's opinion release is in the best interest of society).

In this case, the Board acted properly in denying parole when granting it would depreciate, in its opinion, the seriousness of the offense. Branch is scheduled for another parole hearing in June, 2008 (Petitioner's Appendix at 6). Branch is held legally. No writ of habeas corpus should be granted.²

² As part of her argument that Branch is entitled by regulation to release, she argues that the Board's finding that Branch could not be released without depreciating the seriousness of her offense necessarily means there are no other reasons that would justify denying parole. That does not follow. Because releasing Branch at this time would depreciate the seriousness of the underlying offense based on the circumstances surrounding the offense, the use of a weapon and the excessive force or violence used in the crime she cannot in the Board's opinion be released by an exercise of the Board's discretion, because she has not passed the hurdle that her release would not be detrimental to the community. There is no reason to conclude that the Board would or should release Branch were it able to use its almost unlimited discretion in the case. There is no real support for Branch's argument that the Board must list every possible alternative reason for denying parole in its decision.

II.

THE DENIAL OF PAROLE, BASED ON THE BOARD'S OPINION THAT RELEASE THAT THIS TIME WOULD DEPRECIATE THE SERIOUSNESS OF THE OFFENSE BECAUSE OF THE CIRCUMSTANCES SURROUNDING THE OFFENSE, THE USE OF WEAPON, AND THE USE OF EXCESSIVE FORCE OR VIOLENCE WAS PROPER AND DOES NOT CONFLICT WITH THE ORDER OF COMMUTATION.

Branch argues that the former governor's order commuting her sentence from life in prison without the possibility of parole to life in prison with the possibility of parole consideration really commanded the Board not to take into account the seriousness of her offense in making the parole decision. Branch argues that the former governor did not make his intentions more explicit because he allegedly shared her novel legal position that 14 C.S.R. 80-2.020(4)(H)(2005) bars the Board from taking into account the seriousness of an offense after an inmate serving a life sentence has served fifteen years.³

³ As discussed in argument one, the idea that the regulation defining the deterrent and retributive portion of a life sentence as fifteen years creates an entitlement to release or a limitation on the ability to deny parole is contrary to the long established precedent. It is not really the law that the Board must parole every inmate with a sentence of 45 years or longer or life, who does not have a mandatory-minimum term and who behaves in prison for fifteen years.

Branch also argues that the Board was somehow obligated to accept Branch's current version of the facts of her offense, which she indicates she asserted in her parole obligation. Branch asserts the order of commutation followed by the parole denial entitles her to a writ of habeas corpus (Petitioner's Brief 37-48).

But the order of commutation on its face refutes the contention that it does anything but make Branch eligible for parole consideration like any other inmate (see Petitioner's Appendix at A3 "This commutation eliminates from the sentence the prohibition against probation or parole and makes Lynda Branch eligible for probation or parole consideration"). It is a basic rule of construction that words are given their plain and ordinary meaning. *See King v. Laclede Glass Co.*, 648 S.W2d. 113, 115 (Mo. banc 1983). If the intent of a provision is clear and unambiguous then courts are bound by it and cannot resort to other methods of construction. *See State v. Beck*, 167 S.W.3d 767, 781 (Mo. App. W.D. 2005).

There is no reasonable way to read the order of commutation as anything other than what it is, an order making Branch eligible for parole, like other parole-eligible inmates. The order does not direct the Parole Board to parole Branch, nor does it direct the Board to ignore the statutory command of *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo. banc 1995), *citing Cooper v. Bd. of Probation and Parole*, 866 S.W.3d 135, 138 (Mo. banc 1993); *Maggard v. Wyrick*, 800 F.2d 195, 197 (8th Cir. 1986) (same). In this case the Board was commanded by statute to determine if Branch, in its

opinion, could be released without detriment to the community. The Board fulfilled its duty by making a determination that Branch could not be released at this time without detriment to the community, and denying parole as it must in light of that determination.⁴

Although the former Governor could have commuted the sentence to time served and placed conditions on that commutation, he could not have himself placed Branch on parole through his power to pardon, as this is explicitly prohibited by Article IV, §7 of the Missouri Constitution which states that “[t]he power to pardon shall not include the power to parole.” An attempt to grant a pardon or commutation beyond the Governor’s power is not and cannot be read as an order to the official with the power to grant the relief sought to grant such relief. *See Theodoro v. Department of Liquor Control*, 527

⁴ Branch appears to assert the Board was obligated to accept Branch’s current version of events. This is not so. Branch apparently shot the victim with a weapon that had been hidden in a closet as the victim lay in bed, set up a false crime scene and fabricated a story for the police about an intruder, then shifted to a self-defense story with the victim coming at her with a gun and being shot in the struggle. *State v. Branch*, 757 S.W.2d 595, 596-598 (Mo. App. W.D. 1988). After being convicted in two trials she absconded rather than appearing at sentencing. *State v. Branch*, 811 S.W.2d 11 (Mo. App. W.D. 1991). It is not inconceivable that Branch is now telling a version of events selected because it is calculated to be the one most likely to obtain her release, as opposed to being selected based on objective truthfulness.

S.W.2d 350, 354 (Mo. banc 1975) (ineffective order attempting to use the pardon power to restore an administratively revoked liquor license could not be read as an order to the Supervisor of Liquor Control to restore the license because that was not what the order said, and because the power to restore the license rested with the Supervisor not the Governor). Therefore were the commutation read, as it cannot reasonably be read, as some sort of directive to the Parole Board to release Branch on parole, such an order would be ineffective. Such an order would also not be enforceable by the courts. *See Kinder v. Holden*, 925 S.W.3d 793, 806 (Mo. App. W.D. 2002) (Executive orders that are communications to subordinate executive branch officials regarding the execution of their executive duties are not legally enforceable through the courts).

Branch is legally held and her parole was legally denied. There is no basis for a grant of the writ of habeas corpus.⁵

⁵ *People v. Morris*, 219 Ill.2d 373 (Ill. 2006)*People v. Morris*, 219 Ill.2d 373 (Ill. 2006), cited by Branch, has nothing to do with this case. In *Morris* the Illinois governor commuted Morris' sentence from death to life without parole while his case was on appeal. The conviction was overturned on appeal and Morris was re-convicted and re-sentenced to death despite the commutation. There was at least ambiguity in *Morris* as to how the original order's plain words applied to his new sentence. No such ambiguity is present in this case. What Lute is asking is the same as asking that a lower court be ordered to decide a case based on what an appellate judge claims by affidavit, months or

years after the fact, that he intended to write in a precedential opinion, although that purported intention is contrary to the actual opinion.

CONCLUSION

The petition for writ of habeas corpus should be denied.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Counsel of Record
Assistant Attorney General
Missouri Bar No. 40704

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
Fax (573) 751-5391
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 3,737 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 8th day of January 2007, to:

Mary Beck
University of Missouri - Columbia
School of Law
104 Hulston Hall
Columbia, Missouri 65211

Richard Kroeger
University of Missouri - Columbia
School of Law
104 Hulston Hall
Columbia, Missouri 65211

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321
Fax (573) 751-5391
mike.spillane@ago.mo.gov
Attorneys for Respondents

