No. SC85725

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. JEREMIAH W. (JAY) NIXON,

Relator,

v.

THE HONORABLE DAVID RUSSELL,

Respondent.

ORIGINAL PROCEEDING IN PROHIBITION

RELATOR'S REPLY BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

DEBBIE DANIELS
Chief Counsel, Criminal Appeals Division
Missouri Bar No. 26514

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346
P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

Attorneys for Relator

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES 2

ARGUMENT 4

I. Respondent exceeded his jurisdiction in releasing offender Harold Estes on parole under §558.016.8, RSMo Cum.Supp. 2003, because §558.016.8 is a substantive law 4

A. §558.016.8 is a substantive law 4

B. §558.016.8 is vastly different in purpose from §217.690 9

II. This case is not moot because the controversy in this case is based solely on whether the respondent circuit judge exceeded his jurisdiction to release offender Estes on parole 12

A. This case turns solely on respondent's order 12

B. This case is not moot because offender Estes may be returned to prison 13

C. Estes does not have a liberty interest in remaining on parole 17

D. This case is not moot because this situation may recur 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE AND SERVICE 22

TABLE OF AUTHORITIES

PAGE

Cases

Doe v. Roman Catholic Diocese of Jefferson City,
862 S.W.2d 338 (Mo. banc 1993) 5

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,
442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) 13

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999)(en banc) 15

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)..... 17

Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed.2d 288 (1937)..... 14

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 106 S.Ct. 507,
88 L.Ed.2d 523 (1985)..... 14

State ex rel. Cavallaro v. Groose,
908 S.W.2d 133 (Mo. banc 1995) 10, 11, 13, 14

State ex rel. Chastain v. City of Kansas City,
968 S.W.2d 232 (Mo.App., W.D. 1998) 18

State ex rel. County of Jackson v. Missouri Public Service Comm'n,
985 S.W.2d 400 (Mo.App., W.D. 1999) 18

State ex rel. Director of Revenue v. Mobley, 49 S.W.3d 178 (Mo. banc 2001)..... 12

State ex rel. Nixon v. Kelly, 58 S.W.3d 513 (Mo. banc 2001) 4

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)..... 7

State ex rel. Wagner v. Ruddy, 582 S.W.2d 692 (Mo. banc 1979) 7

State v. Harris, 705 S.W.2d 544 (Mo.App., E.D. 1986)..... 9

State v. Thornton, 651 S.W.2d 164 (Mo.App., W.D. 1983)..... 9

Wilkes v. Missouri Highway and Transportation Comm'n,

762 S.W.2d 27 (Mo. banc 1988) 5

Statutes

§1.160, RSMo 2000 4

§1.160(1), RSMo 2000..... 8

§217.655, RSMo 2000 7

§217.690, RSMo 2000 ..... 5, 7, 9-11, 13

§545.140(2), RSMo 1986..... 9

§549.261, RSMo 1959 10

§557.036.5, RSMo Cum.Supp. 1981..... 9

§557.036, RSMo Cum.Supp. 2003 9

§558.016.8, RSMo Cum.Supp. 2003.....4-8, 10-12, 16, 19, 20

§559.100, RSMo 2000 8

ARGUMENT

I.

Respondent exceeded his jurisdiction in releasing offender Harold Estes on parole under §558.016.8, RSMo Cum.Supp. 2003, because §558.016.8 is a substantive law.

A. §558.016.8 is a substantive law

Section 1.160, RSMo 2000, states the general rule that the penalty for any offense shall be governed by the law in effect at the time of the offense. State ex rel. Nixon v. Kelly, 58 S.W.3d 513, 518 (Mo. banc 2001). Section 1.160 contains two exceptions to this general rule: first, that all proceedings take place according to existing procedural laws, §1.160(1), and second, that an offender may benefit from a reduction in punishment caused by an alteration of the law creating the offense prior to original sentencing, §1.160(2). There is no dispute in this case that respondent applied §558.016.8 retroactively; offender Estes was sentenced seventy-eight months, or six and one-half years, prior to the effective date of the amended §558.016.8. Thus, in order for §1.160 to apply, one of the exceptions must exist in Estes' case. Respondent does not contest that the second exception is not applicable in this case. Respondent's case thus stands or falls solely on the argument that §558.016.8, RSMo 2000, is a procedural law.

The difference between substantive laws and procedural laws is that "[s]ubstantive laws relate to the rights and duties giving rise to a cause of action; procedural laws relate to the machinery for processing the cause of action." Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338, 341 (Mo. banc 1993); Wilkes v. Missouri Highway and Transportation Comm'n, 762 S.W.2d 27, 28 (Mo. banc 1988). The 2003 amendment to §558.016.8 is a substantive statute for two reasons: first, the statute substantively changes the criteria for parole eligibility, and second, the statute arguably grants subject-matter jurisdiction to the circuit judge following the entry of judgment and sentence.

Section 558.016.8 is a substantive law because it changes the criteria for parole eligibility. Prior to June 27, 2003, parole for an inmate in the Missouri Department of Corrections was determined solely by the State Board of Probation and Parole. Section 217.690, RSMo 2000, governed the criteria for parole release:

> 1. When in [the Board's] opinion there is reasonable probability that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law. All paroles shall issue upon order of the board, duly adopted.

> 2. Before ordering the parole of any offender, the board shall have the offender appear before a hearing panel and shall conduct a personal interview with him, unless waived by the offender. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. An offender shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every offender while on parole shall remain in the legal custody of the department but shall be subject to the orders of the board.

Thus, in order to receive parole from the Board, the seven-member Board of Probation and Parole has to believe that the offender "can be released without detriment to the community or to himself" and that the offender "is able and willing to fulfill the obligations of a law-abiding citizen."

Section 558.016.8 does not place these requirements on the circuit judge who sentenced the offender. Section 558.016.8 merely requires that, after receiving a report from the Department of Corrections, that the court shall follow the recommendations of the Department of Corrections "if the court deems it appropriate." In short, a circuit judge does not have to consider the statutory requirements imposed on the Board of Probation and Parole. A circuit judge is

guided simply by his own definition of "appropriate." As the circuit judge does not have to make the same findings that the Board had to make, §558.016.8 has relaxed the substantive standard for granting parole. Therefore, §558.016.8 is a substantive law.

Further, §558.016.8 is a substantive law because it grants circuit judges a new power: the power to grant parole, without any statutory restraints, for an inmate in the Department of Corrections who files a motion. This Court's jurisprudence is well-settled that "once judgment and sentencing occur in a criminal proceeding, the trial court has exhausted its jurisdiction. It can take no further action in that case except when otherwise expressly provided by statute or rule." State ex rel. Simmons v. White, 866 S.W.2d 443, 445 (Mo. banc 1993); State ex rel. Wagner v. Ruddy, 582 S.W.2d 692, 695 (Mo. banc 1979). Prior to 2003, the Missouri State Board of Probation and Parole was the sole body charged with "determining whether a person confined in the department [of corrections] shall be paroled." §217.655, RSMo 2000; *see also* §217.690, RSMo 2000. However, the 2003 amendment to §558.016.8 grants a circuit judge the power to parole an inmate in the custody of the Missouri Department of Corrections if the judge deems the release "appropriate." Thus, §558.016 grants a new power to the circuit courts: the

power to parole an inmate in the Department of Corrections.[1] This change affects the rights and duties of the circuit court with regard to granting parole to offenders in the Department of Corrections. Therefore, the amendment to §558.016.8 is substantive, and §1.160(1) does not apply to this case.

Further, Section 558.016.8 is a substantive law because it directly affects the penalty and the punishment for an offense in that §558.016.8 directly and substantively affects how much of a criminal sentence an inmate may serve in prison. Parole is a far different type of custody than imprisonment in that parole allows for an offender to have freedom to work outside the prison walls and make a gainful living, to reside outside a correctional facility, and to make and maintain relationships with family and friends. An offender's release on probation or parole thus creates a substantive change in that offender's status. The amended §558.018 for the first time specifically allows offenders to receive parole from a circuit court, making a substantive change in their status. Section 558.016.8 thus is a substantive law and is not a procedural law.

---

[1]The circuit courts previously had the power to parole inmates in cases over which the circuit courts had jurisdiction. *See* §559.100, RSMo 2000.

Finally, §558.016.8 is not similar in the least to procedural laws that have been declared retroactive under §1.160(1). The Missouri Court of Appeals has determined that §545.140(2), RSMo 1986, adopting a more liberal policy for joinder of criminal cases, is retroactive because it is a procedural law. State v. Harris, 705 S.W.2d 544, 547-48 (Mo.App., E.D. 1986). Likewise, the Missouri Court of Appeals has held that §557.036.5, RSMo Cum.Supp. 1981, which stated that the judge must determine persistent offender status prior to delivering the case to the jury, is a procedural law that may be applied retroactively. State v. Thornton, 651 S.W.2d 164, 168 (Mo.App., W.D. 1983). Both these statutes talk about clear procedures: the time for a determination of persistent offender status, the process of joining cases. Similar issues, such as rules of evidence, severance, time limits for endorsing witnesses, and the new bifurcated trial system, §557.036, RSMo Cum.Supp. 2003 (also a part of Senate Bill 5), also would be procedural in that they dictate only the manner in which a proceeding is held. In contrast, §558.016.8 for the first time allows offenders incarcerated in the Department of Corrections to receive parole from a circuit judge without considering the criteria in §217.690, a substantive change in the offender's status. Therefore, §558.016.8 is not a procedural law.

B. §558.016.8 is vastly different in purpose from §217.690

Respondent argues that §558.016.8 should apply retroactively because this Court has held that Missouri's parole statute, §217.690, RSMo 2000, applies to inmates who committed their offenses prior to the effective date of the statute. Respondent bases his argument on State ex rel. Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995). Respondent attempts to convince this Court that offender Estes should be entitled to the parole release because of the "new" parole law contained in the 2003 amendment to §558.016.8.

This Court's decision in Cavallaro is inapposite to the case at bar. Cavallaro dealt with a situation in which a change in Missouri's parole statute allegedly prejudiced the offender. 908 S.W.2d at 134. The change in the parole statute from §549.261, RSMo 1959, to §217.690, RSMo 2000, extinguished a liberty interest in the granting of parole and introduced procedural changes in the parole process. Id. at 135-136. This Court held that because the General Assembly acted within its power to terminate the state-created liberty interest in parole created by §549.261, RSMo 1959, Cavallaro had no liberty interest in parole consideration under the repealed statute. Id. at 136. Cavallaro thus stands for the principle that when the General Assembly chooses to terminate a legislatively-created liberty interest, that liberty interest ends when the repealing statute is enacted. The statute at issue in

Cavallaro thus acts only prospectively in extinguishing the state-created liberty interest in Missouri's prior parole statute.

The case at bar, in contrast, does not deal with a case in which the legislature acted to take away a state-created liberty interest. The amended §558.016.8 does not purport to take away a state-created liberty interest, and no state-created liberty interest similar to §558.016.8 existed prior to June 27, 2003. Thus, the reason that §217.690 applies to sentences prior to its effective date is nonexistent in this case. Cavallaro is inapposite to this case, and respondent's arguments thus fails.

II.

This case is not moot because the controversy in this case is based solely on whether the respondent circuit judge exceeded his jurisdiction to release offender Estes on parole.

A. This case turns solely on respondent's order

Respondent argues that this case is moot because offender Harold Estes cannot be returned to inmate status in the Department of Corrections. Resp. Br. at 6-8. Thus, respondent maintains that offender Estes' release from the Department of Corrections under §558.016.8 freezes this Court's ability to determine whether respondent exceeded his jurisdiction in releasing offender Estes on parole

However, this case does not turn on whether offender Estes can be returned to the Missouri Department of Corrections. This case in prohibition is limited to deciding whether respondent acted within his jurisdiction when he ordered Estes released on judicial parole. Prohibition is, after all, available only in cases where the trial court completely lacks jurisdiction, where the trial court exceeded its jurisdiction or where appeal is an inadequate remedy. State ex rel. Director of Revenue v. Mobley, 49 S.W.3d 178, 179 (Mo. banc 2001). Thus, the controversy at issue in this prohibition action, and the only matter that this Court need decide in this case, is whether respondent exceeded his jurisdiction by ordering Estes

released on judicial parole. The controversy surrounding the judge's order is still live because the judge's order still stands, and absent action from this Court, will continue to stand. Therefore, this case is not moot.

B. This case is not moot because offender Estes may be returned to prison

Further, even if respondent's assertion that mootness must be viewed in the light of the possibility of offender Estes' return to imprisonment in the Department of Corrections, this case is not moot because the Department of Corrections has the power to reincarcerate Estes if this Court invalidates respondent's orders. If respondent's order releasing Estes on parole is not valid, Estes' parole becomes invalid as well, and the Department of Corrections would be fully entitled to return offender Estes to incarceration in prison, §217.690.2, RSMo 2000, and there is not valid order authorizing his release from confinement.

Offender Estes has no constitutional right to early release from confinement. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Estes also does not have a liberty interest in parole under Missouri statute. State ex rel. Cavallero v. Groose, 908 S.W.2d 133 (Mo. banc 1995). Thus, any liberty interest that Estes may have in his release on judicial parole is found only in respondent's order releasing him on judicial parole. If this Court determines that respondent lacked jurisdiction to issue his orders, any

liberty interest that Estes may have is found only in respondent's invalid order releasing him on judicial parole.

Offender Estes has no liberty interest in parole based on an invalid order under the substantive component of the Due Process Clause. Under Missouri law, "the substantive component of the Due Process Clause protects 'fundamental' rights, that is, those 'implicit in the concept of ordered liberty.'" State ex rel. Cavallaro v. Groose, 908 S.W.2d 133, 135 (Mo. banc 1995), *quoting* Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed.2d 288 (1937). Further, fundamental rights may be created "only by the Constitution." Cavallaro, *supra*, *quoting* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). The right to continued parole release under an invalid judicial order is not in the Constitution.

The Department of Correction's act of returning offender Estes to confinement after this Court's decision that respondent had no authority to release him on parole does not shock the conscience. Returning an individual to the penitentiary to serve a valid sentence after judicial error in releasing him is what the people of this State would expect Missouri officials to do.

The United States Court of Appeals for the Fourth Circuit, in holding that a prisoner had no right to continued parole release after North Carolina parole authorities determined that the prisoner was released in error, stated that

> We do not believe the Parole Commission's decision can be declared one meeting that stringent threshold constitutional test. Nothing about it suggests any element of vindictiveness or of power exercised simply to oppress. There were legitimate governmental interests and objectives a-plenty to justify the act. It rectified an error in administering applicable state parole law, thereby furthering the state's fundamental interest in correct application of its laws. In doing so it avoided the precedential risk of acquiescing in irregular enforcement of state law.

Hawkins v. Freeman, 195 F.3d 732, 746 (4th Cir. 1999)(en banc). The same reasoning applies to the case at bar. The State of Missouri, in returning Estes to prison after his judicial parole is declared invalid, would be ensuring that all offenders in the Department of Corrections are treated fairly with respect to parole release. The State is motivated in this case not by any vindictiveness against Estes but in the correct and fair application of its parole laws to all offenders in the Department of Corrections.

Further, returning offenders to prison when they have been released without a valid order of release is good policy. If an offender was released from prison simply because he was placed on the wrong prison bus, surely that offender could be returned to prison. Likewise, if the Department of Corrections, in their paperwork, released an inmate on parole when the Board of Probation and Parole had dictated that the inmate not receive parole, that offender also could be returned to prison. Also, if a parole ineligible person, such as one convicted of first-degree murder, were released due to clerical error, that offender could be returned to a correctional facility.

Perhaps the best example why the Department of Corrections should be able to return offenders to the Department of Corrections after a parole order is held invalid is when an offender convicted of a Class B felony, such as first-degree assault, or an unclassified felony, such as forcible rape, is mistakenly released under §558.016.8. Relief under §558.016.8 clearly would not be available to such an offender. After the order granting parole is held to be invalid, the offender must be placed back in prison. Any other outcome would grant the offender a windfall based on a judicial error. The law should not support such an outcome.

The case at bar is not different in any meaningful way from these examples. If this Court determines that respondent exceeded his jurisdiction in releasing

offender Estes, the order releasing Estes will be invalid. The Department of Corrections will then have the power to return Estes to confinement. Thus, this case is not moot.

C. Estes does not have a liberty interest in remaining on parole

Respondent argues that this case is moot because the Department of Corrections cannot return offender Harold Estes to a correctional facility even if this Court were to find that respondent's order granting parole was improper and void because Estes has a liberty interest in remaining on parole pursuant to Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Resp. Br. at 7.

Respondent's reliance on Morrissey is misplaced. The Supreme Court in Morrissey determined "whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole." Morrissey, 408 U.S. at 472. The Court stressed that parole rests on a "promise that parole will be revoked only if he fails to live up to parole conditions." Id., 408 U.S. at 482. Thus, a parole revocation, at issue in Morrissey, is based on the idea that the offender has committed some act contrary to the conditions of his parole. The underlying theme of Morrissey is that the offender had been lawfully paroled.

In contrast, in this case, the Department of Corrections would not need to revoke offender Estes based on any misconduct Estes may have committed. Any rescinding of Estes' parole would be based solely on the fact that respondent was without jurisdiction to release him on parole, and that there would be no lawful order releasing Estes on parole. Thus, in contrast to Morrissey, no lawful parole has been issued in this case and the Department would not have to seek to revoke parole based on Estes' behavior.

D. This case is not moot because this situation may recur

Even if this Court determines that this case is moot because the Department cannot return Estes to the penitentiary, this Court should still decide this case on its merits. An exception to the mootness doctrine exists when "[a] case presents an unsettled legal issue of public interest and importance of a recurring nature that will escape review unless the court exercises its discretionary jurisdiction." State ex rel. County of Jackson v. Missouri Public Service Comm'n, 985 S.W.2d 400, 403 (Mo.App., W.D. 1999); State ex rel. Chastain v. City of Kansas City, 968 S.W.2d 232, 237 (Mo.App., W.D. 1998). This exception to the mootness doctrine applies if the issues in the case will not be present in a future live controversy capable of appellate review. Id.

This case presents an unsettled legal issue of public interest and importance: §558.016.8 and its effect on a potentially large number of inmates in the Department of Corrections. If this Court determines that this case is moot because offender Estes cannot be returned to a correctional facility, this case and similar cases that may arise may all be moot because §558.016.8 does not require that a circuit judge notify the State before that circuit judge chooses to parole an offender. As demonstrated in relator's opening brief, relator cannot appeal from respondent's orders. Thus, the State may never encounter a case in which a stay or preliminary writ could be obtained prior to an inmate being released from the Department of Corrections. The window for the State to act may be as short as one day: the time in which the circuit judge receives the report from the Department of Corrections and the date that the circuit judge orders a parole or probation release. In essence, declaring this case, and all other similar cases, moot based on the fact that the offender had been released from the Department of Corrections may lead to a situation in which the State has no avenue to challenge the fact that this law cannot be applied retroactively. Thus, if this Court decides that this case, and all similar cases, are moot, the issue of whether §558.016.8 is retroactive to cases in which the offender committed his offenses prior to June 27, 2003, may never be determined.

Also, this problem will recur. As previously stated, a large number of offenders may be eligible for the application of the amended §558.016.8. The possibility that none of these inmates will attempt to take advantage of the amended §558.016.8 is infinitesimally small, and thus the issue in the case will arise agin in a number of cases. This Court should address this issue in this case in order to give guidance to circuit judges who are receiving many, many requests for release under §558.016.8. Thus, even if this case is moot, this Court would do well to address the retroactivity of the amended §558.016.8 because the issue will recur and may not ever be properly reviewable.

CONCLUSION

For the above reasons, relator prays that this Court make its preliminary writ of prohibition absolute and hold that respondent's orders of November 7, 2003, and December 10, 2003, were in excess of respondent's jurisdiction.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346
P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-3825 Fax

Attorneys for Relator

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and 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 ___ day of _____, 2004, to:

Mr. Michael J. Gunter
CLAYMAN AND GUNTER
1656 Washington, Suite 100
Kansas City, Missouri 64108

Honorable David Russell, Circuit Judge
Clay County Courthouse
11 S. Water Street
Liberty, Missouri 64068

JEREMIAH W. (JAY) NIXON
Attorney General

ANDREW W. HASSELL
Assistant Attorney General
Missouri Bar No. 53346

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-3825 Fax

Attorneys for Relator