

No. SC88026

**IN THE
SUPREME COURT OF MISSOURI**

STATE ex rel. SHIRLEY LUTE,

Petitioner,

v.

MISSOURI BOARD OF PROBATION AND PAROLE, et al.,

Respondents.

RESPONDENT'S 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 3

JURISDICTIONAL STATEMENT 5

ARGUMENTS 9

1. The order of commutation making Lute eligible for parole consideration could not, and did not implicitly order that Lute be released on parole despite the determination by the Board that releasing Lute would depreciate the seriousness of her offense and therefore be detrimental to the community 9

2. Lute has no liberty interest in the use of any particular regulations in considering her for parole. But it is not necessary to reach that level of analysis because no inmate may be paroled under the current or former Missouri parole statutes when as in this case paroling the inmate would in the opinion of the Board be detrimental to the community 13

3. Because releasing Lute on parole at this time would, in the opinion of the Board, depreciate the seriousness of the offense and therefore be detrimental to the community, Lute cannot be released under the current or former parole statute and the denial of parole does not violate the Ex Post Facto Clause 16

4. Lute has no liberty interest in a particular level of detail in the explanation of the reason she was denied parole. Further, the reason given for the parole denial properly tracks the analysis required by the statute and was sufficiently detailed 18

CONCLUSION 21
CERTIFICATE OF SERVICE AND COMPLIANCE 22

TABLE OF AUTHORITIES

Cases

Burnside v. White, 760 F.2d 213 (8th Cir. 1985) 10, 17

Cooper v. Missouri Board of Probation and Parole, 866 S.W.2d 135 (Mo. banc 1993) 18

Kinder v. Holden, 925 S.W.3d 793 (Mo. App. W.D. 2002) 11

King v. Laclede Glass Co., 648 S.W.2d. 113 (Mo. banc 1983) 9

Maggard v. Wyrick, 800 F.2d 195 (8th Cir. 1986) 11

McKown v. Mitchell, 869 S.W.2d 765 (Mo. App. W.D. 1993) 14

People v. Morris, 219 Ill 2.d 373 (Ill. 2006) 12

State ex rel. Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995) 10, 13, 17, 18

State ex rel. Shields v. Purkett, 878 S.W.2d 42 (Mo. banc 1994) 14, 15

State v. Beck, 167 S.W.3d 767 (Mo. App. W.D. 2005) 9

State v. Lute, 641 S.W.2d 80 (Mo. banc 1982) 7, 19

Theodoro v. Department of Liquor Control, 527 S.W.2d 350 (Mo. banc 1975) 11

Watley v. Missouri Board of Probation and Parole, 863 S.W.2d 337 (Mo. App. W.D. 1993)
. 14

Other Authorities

Constitution of Missouri Article IV, Section 7 11

Missouri Supreme Court Rule 84 5

Missouri Supreme Court Rule 91 5

§217.690, RSMo 2000 10, 17

§532.020, RSMo 2000 5

§549.261, RSMo 1959 10, 13, 14, 17

JURISDICTIONAL STATEMENT

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

Shirley Lute is confined in the Chillicothe Correctional Center. Lute is serving a sentence of life imprisonment for capital murder. The sentence has been commuted from life imprisonment without eligibility for parole for fifty years to life imprisonment with eligibility for parole consideration. The superintendent of the Chillicothe Correctional Center is the proper party respondent in a habeas corpus petition challenging confinement in the Chillicothe Correctional Center. *See* Missouri Supreme Court Rule 91.

STATEMENT OF FACTS

This Court found the following facts when it affirmed the judgment of conviction and sentence for the underlying offense.

Appellant does not question the sufficiency of the information or the sufficiency of the evidence. Therefore, a brief recitation of the facts will do. Between August, 1976 and January, 1978, appellant told several people she wanted her husband killed, proposing various methods of his disposal. On February 5, 1978, the day before appellant's husband Melvin Lute was murdered, appellant promised her son's wife \$5,000 from the insurance proceeds if the wife could persuade him to kill Melvin Lute. Appellant then suggested to her son Roy Welch several ways to kill Lute, including throwing acid in his face, and a robbery scenario in which Roy would beat appellant and force her to open the safe in the trailer where he would murder his stepfather. On February 6, 1978, Melvin Lute was murdered, having died from knife wounds and gunshot wounds. Appellant told police an unidentified person had robbed and murdered her husband. Upon learning that her son Roy had been arrested and charged with the murder and after hearing his taped statement to the police, appellant changed her story. Continuing to deny any

involvement in the robbery or murder, appellant stated she had lied to cover up for her son.

State v. Lute, 641 S.W.2d 80, 81 (Mo. banc 1982).

On December 28, 2004 the then-Governor of Missouri issued an order of commutation that read in pertinent part as follows: "...I hereby grant Shirley Lute a commutation of the above sentence in the following respect. This commutation eliminates from the sentence the prohibition against eligibility for parole for 50 years, and makes Shirley Lute eligible for parole consideration" (Petitioner's Appendix at 1).

Following a parole hearing held on June 2, 2005 the Missouri Board of Probation and Parole declined to place Lute on parole finding that "Release at this time would depreciate the seriousness of the present offense based on the following: A. Circumstances surrounding present offense" (*Id.* at 4).

On May 6, 2006 the former Governor signed an affidavit stating, among other things, that he had determined Lute's release would not depreciate the seriousness of her offense and that he believed the Parole Board "exceeded its authority when it denied parole for Shirley Lute" (*Id.* at 2-3).

Lute filed a petition for habeas corpus in the Circuit Court of Livingston County where she is confined and the Circuit Court denied the petition on September 1, 2006 (*Id.* at 5).

Lute without seeking relief in the Missouri Court of Appeals Western District now seeks relief in this Court. Lute seeks a writ of habeas corpus ordering her discharge on parole.

ARGUMENT

I.

THE ORDER OF COMMUTATION MAKING LUTE ELIGIBLE FOR PAROLE CONSIDERATION COULD NOT AND DID NOT IMPLICITLY ORDER THAT LUTE BE RELEASED ON PAROLE DESPITE THE DETERMINATION BY THE BOARD THAT RELEASING LUTE WOULD DEPRECIATE THE SERIOUSNESS OF HER OFFENSE AND THEREFORE BE DETRIMENTAL TO THE COMMUNITY.

Lute argues that the then-Governor by issuing an order of commutation on December 28, 2004 intended that the Parole Board consider Lute for parole without taking into account the seriousness of her crime and parole her, if her home plan was acceptable and that the Board violated this order of commutation by not paroling Lute (Petitioner's Brief at 20-27).

But the order of commutation says nothing of the kind, stating "This commutation eliminates from the sentence the prohibition against eligibility for parole for 50 years, and makes Lute eligible for parole consideration" (Petitioner's Appendix at 1). 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 Lute eligible for parole, like other parole-eligible inmates. The

order does not direct the Parole Board to parole Lute nor does it direct the Board to ignore the statutory command of §549.261, RSMo 1959 and §217.690, RSMo 2000 that an inmate cannot be paroled when doing so would be detrimental to the inmate or the community.

Lute has now produced an affidavit from the former Governor dated May 2, 2006 stating that the denial of parole was inconsistent with his clear intent as he had already considered the circumstances surrounding the offense in granting the commutation (Petitioner's Appendix at 2-3). The affidavit does not change the plain wording of the order of commutation, nor does it purport to change that wording.

The Parole Board denied Lute parole because in light of the circumstances of her offense parole at this time would depreciate the seriousness of the offense, capital murder (Petitioner's Appendix at 4). Both the parole statute in force at the time of the offense §549.261, RSMo 1959 and the current parole statute §217.690, RSMo 2000 forbid releasing an inmate on parole if doing so would be detrimental to the community. Releasing an inmate on parole is necessarily detrimental to the community if the release would depreciate the seriousness of a serious crime, and therefore such a release is barred by both the current and former parole statute. *See State ex rel. Cavallaro v. Goose*, 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); *Burnside v. White*, 760 F.2d 213, 221-223 (8th Cir. 1985) (holding that a finding that release at this time would depreciate the seriousness of the offense necessarily includes a finding of detriment to the community); *Maggard v. Wyrick*, 800 F.2d 195, 197 (8th Cir. 1986). In this case the Board was commanded by statute to determine if Lute, in its opinion, could be

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

Although the former Governor could have commuted the sentence to time served and placed conditions on that commutation, he could not have himself placed Lute 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 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 Lute 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).

Lute is legally held and her parole was legally denied. There is no basis for a grant of the writ of habeas corpus.¹

¹ *People v. Morris*, 219 Ill 2.d 373 (Ill. 2006) cited by Lute (Petitioner's Brief at 26-28) 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. Further, *Morris* dealt with a true commutation, whereas Lute is trying to turn a commutation to life with the possibility of parole into an order within the executive branch, directing the Board to grant parole.

II.

LUTE HAS NO LIBERTY INTEREST IN THE USE OF ANY PARTICULAR REGULATIONS IN CONSIDERING HER FOR PAROLE. BUT IT IS NOT NECESSARY TO REACH THAT LEVEL OF ANALYSIS BECAUSE NO INMATE MAY BE PAROLED UNDER THE CURRENT OR FORMER MISSOURI PAROLE STATUTES WHEN AS IN THIS CASE PAROLING THE INMATE WOULD, IN THE OPINION OF THE BOARD, BE DETRIMENTAL TO SOCIETY.

Lute alleges that she had a liberty interest in the application of 13 C.S.R. 80-2.020(2)(A)(1) (1980) in consideration of her case for parole and that this entitlement was violated by the denial of parole for the reason release at this time would depreciate the seriousness of her offense (Petitioner's Brief at 28-35).

This Court has squarely rejected the idea there is a liberty interest in the continued use of §549.261, RSMo 1959 and its supporting regulations because any such interest was extinguished by operation of law in accordance with the Due Process Clause when the new parole statute became effective in 1982. *State ex rel. Cavallaro v. Goose*, 908 S.W.2d 135-136 (Mo. banc 1995).²

² The regulation Lute asserts allegedly entitles her to release under the old law is 13 C.S.R. 80-2.010(5)(A)(5) which defines the deterrent and retributive portion of a life sentence as twelve years. The current regulation 14 C.S.R. 80-2.010(4)(H) defines the deterrent and retributive portion of a life sentence as fifteen years. Lute's sentence with jail-

Further, Lute’s argument of a regulatory entitlement to parole created by the regulation she cites, has been repeatedly rejected. *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 337 (Mo. App. W.D. 1993). This Court in *State ex rel. Shields v. Purkett*, 878 S.W.2d 42, 47 (Mo. banc 1994) upheld the denial of a parole based on the seriousness of the offense holding “that the 25% language [defining the deterrent and retributive portion of a sentence of less than fifty years or life] merely establishes a minimum not only for purposes of parole release in general but also for considering the deterrent and retributive portion of the sentence to be served.”

Lute has no regulatory entitlement to parole. The Missouri Parole regulations are, and have always been, simply an aid to the Board, not a binding system of entitlements to release. *See* 13 C.S.R. 4(A)(5) (stating the Board considers each case on its individual merits); *See Watley v. Missouri Board of Probation and Parole*, 863 S.W.2d 337, 339 (Mo. App. W.D. 1993) (holding that 13 C.S.R. 80.2010(5)(A)(5) creates only a minimum amount of time after which the Board could find the deterrent and retributive portions of the sentence to be satisfied and that to read the regulation otherwise could conflict with §549.261, RSMo,

time credit is calculated as starting on February 8, 1978, over 27 years before her 2005 parole denial. It is difficult to see how the change in regulations matters in Lute’s case, as she has been in prison well past the fifteen years mentioned the current regulation as well as the twelve years mentioned in the old regulation.

which limits parole to cases in which is in the best interest of society to grant parole); *State ex rel. Shields v. Purkett*, 878 S.W.2d 42, 46 (Mo. banc 1994) (same).

When, as in this case, the Board believes that the circumstances of the offense are such that release at this time would depreciate the seriousness of the offense and therefore be detrimental to the community the Board cannot grant parole under either the old or the new statute.³ The regulations aiding the Board have not been and cannot be read to be contrary to this statutory command.

³ Lute assumes that because she was denied parole based on the seriousness of her offense that if this factor were not considered she would necessarily be granted parole (Petitioner's Brief at 35). That is not necessarily a valid inference. Because an inmate cannot be paroled for reason A does not mean that there could not be a reason B for denial that it was not necessary to analyze because reason A was dispositive.

III.

BECAUSE RELEASING LUTE ON PAROLE AT THIS TIME WOULD, IN THE OPINION OF THE BOARD, DEPRECIATE THE SERIOUSNESS OF THE OFFENSE AND THEREFORE BE DETRIMENTAL TO THE COMMUNITY, LUTE CANNOT BE RELEASED UNDER THE CURRENT OR FORMER PAROLE STATUTE AND THE DENIAL OF PAROLE DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

Lute argues that denying her release on parole violated the Ex Post Factor Clause. It did not. Section 549.261, RSMo 1959, the statute in effect at the time of Lute's offense, read impertinent part as follows: "When in its opinion there is a reasonable probability that the prisoner can be released without detriment to the community or himself, the board shall release or parole any person confined in any correctional institution administered by state authorities". Section 217.690, RSMo 2000 was modified, effective in 1982, to read in pertinent part as follows: "When in its opinion, there is a reasonable probability that an offender of a correctional facility can be released without detriment to the community or himself, the board may in its discretion release or parole such a person except as otherwise prohibited by law."

The statutes do not differ on the point that an inmate may not be paroled if in the opinion of the Parole Board doing so would be detrimental to the community. When releasing an inmate at this time would depreciate the seriousness of an offense such a release would necessarily be detrimental to the community and parole cannot be granted under

either §549.261, RSMo 1959 or §217.690, RSMo 2000. See *Burnside v. White*, 760 F.2d 217, 222-223 (8th Cir. 1985) (rejecting Ex Post Facto Clause challenge to parole being denied for the reason that release at this time would depreciate the seriousness of the offense, because implicit in that reason is the finding that there is no reasonable probability the inmate can be released without detriment to the community). In *State ex rel. Cavallaro v. Groose*, 908 S.W.3d 133, 134 (Mo. banc 1995) an inmate who had committed two murders was denied parole in part because “the Board believes that your release at this time would depreciate the seriousness of the offense committed and/or promote disrespect for the law”. The Board also noted that based on the inmate’s criminal history there did not appear to be a reasonable probability that he would live and remain at liberty without again violating the law. *Id.*

In analyzing an Ex Post Facto Clause challenge to the parole denial in *Cavallaro*, this Court focused on the finding that release at this time would depreciate the seriousness of the offense holding the following: “The Board denied Cavallaro parole release based on the seriousness of the offense. This is a valid reason under the old or the new statute”. *Id.* at 136 (citations omitted). *Cavallaro* and *Burnside* control. If the Board believes, as it does, that releasing Lute at this time would depreciate the seriousness of her offense and therefore be detrimental to the community then no *Ex Post Facto* Clause violation could have occurred.

IV.

LUTE HAS NO LIBERTY INTEREST IN A PARTICULAR LEVEL OF DETAIL IN THE EXPLANATION OF THE REASON SHE WAS DENIED PAROLE. FURTHER, THE REASON GIVEN FOR DENYING PAROLE IS PROPER AND SUFFICIENTLY DETAILED.

Lute alleges the Due Process Clause was violated because the reason given for her parole denial lacked sufficient detail (Petitioner's Br. 41-42). Lute ignores the holding of this Court that any liberty interest in the use of particular parole procedures was extinguished by operation of law in accordance with the Due Process Clause when the current parole statute became effective in 1982. *State ex rel. Cavallaro v. Goose*, 908 S.W.2d 133, 135-136 (Mo. banc 1995). Lute's claim is without merit for that reason.

Additionally, the reason given for the denial, "[R]elease at this time would depreciate the seriousness of the offense based upon...[c]ircumstances surrounding the present offense" (Petitioner's appendix at 4) is proper. *See Cooper v. Missouri Board of Probation and Parole*, 866 S.W.2d 135, 138 (Mo. banc 1993) (upholding the sufficiency of the reason given for parole denial against a "boiler plate" Due Process Clause challenge when parole was denied because the victim was killed as a result of gun shot wounds and release at this time would depreciate the seriousness of the offense).

Lute's argument reduces to the claim that the Parole Board rather than stating it was basing its decision on the circumstances of the offense, should allegedly have recited those circumstances in the decision. The circumstances of Lute's offense are presumably well

known to Lute and are set out in detail in this Court's decision affirming the judgment of conviction and sentence. *State v. Lute*, 641 S.W.2d 80, 81 (Mo. ban 1982) (Lute discussed the potential murder various times with several people in the months before the killing suggesting different methods of disposing of her husband, promised her daughter-in-law \$5,000 in insurance proceeds to persuade Lute's son to commit the murder, suggesting throwing acid in the victim's face or killing him in a fake robbery. After the victim was murdered by stabbing and shooting, Lute first blamed the crime on an unidentified robber and then, caught in that lie, tried to blame it on her son while denying participation).⁴

If Lute had a liberty interest in a particular level of detail in the order of parole denial, which precedent dictates that she does not, the decision provided would be more than adequate.

⁴ Lute now alleges that the Board by citing the facts of the crime as the reason for the decision "ignores the facts that Governor Holden noted in his affidavit, the severe acts of violence that Ms. Lute endured, the lack of understanding of the effects of domestic violence that infected her trial and resulted in less than competent representation." (Petitioner's Brief at 42). Leaving aside that the affidavit was produced long after the parole denial, Lute seems to be arguing that the Parole Board is obligated to believe her most recent version of events despite the facts found by the jury and this Court, and despite Lute's history of telling whatever story seems most expedient at the moment. Contrary to Lute's argument, her current version of events need not necessarily be accepted by the Board as true.

CONCLUSION

Lute is held lawfully and the petition for habeas corpus should be denied with prejudice without further judicial proceedings.

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 Respondent

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 3,823 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 4th day of January 2007, to:

Jane H. Aiken
Stephen M. Ryals
Washington University School of Law
Civil Justice Clinic
One Brookings Drive
St. Louis, Missouri 63130

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 Respondent