

IN THE MISSOURI SUPREME COURT

SHIRLEY LUTE,)
)
 Petitioner,)
)
vs.)
)
MISSOURI BOARD OF PROBATION)
AND PAROLE; DANA THOMPSON,)
IN HIS OFFICIAL CAPACITY AS)
CHAIRMAN, MISSOURI BOARD OF)
PROBATION AND PAROLE; and)
JENNIFER MILLER, IN HER)
OFFICIAL CAPACITY AS)
SUPERINTENDENT, CHILLICOTHE)
CORRECTIONAL CENTER)
)
 Respondents.)

Case No. SC88026

PETITIONER’S BRIEF
In Support of Writ of Habeas Corpus

Jane H. Aiken MBE# 49411
Stephen M. Ryals MBE# 34149
Washington University School of Law
Civil Justice Clinic
One Brookings Drive
St. Louis, Missouri 63130-4899
(314) 935-7238 telephone
(314) 935-5171 facsimile

ATTORNEYS FOR PETITIONER SHIRLEY LUTE

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	4
JURISDICTIONAL STATEMENT	7
STANDARD OF REVIEW	8
STATEMENT OF FACTS	9
Sentence, Commutation, and Parole Denial	9
Facts Evaluated by Governor Holden in His Commutation	11
Petitioner’s Transition Plan	15
POINTS RELIED ON	16
ARGUMENT	20
I. Petitioner is entitled to an order that Respondents deliver her to this Court and that thereafter she be released because Respondents unlawfully hold and confine Petitioner in that the Governor of Missouri commuted the sentence of Petitioner from life without the possibility of parole to life with the possibility of parole and thereafter the respondent Board of Probation and Parole acted contrary to the intention of the Governor and denied Petitioner parole.	20

II. Petitioner is entitled to an order that Respondents deliver her to this Court and that thereafter she be released because Respondents unlawfully hold and confine Petitioner in that Petitioner was denied due process of law because the Board of Probation and Parole, in positing a reason for denying Petitioner parole, relied upon regulations promulgated after the date of Petitioner’s sentence and not those extant at the time of sentencing and under the former regulations, the Board had no discretion to deny Petitioner’s parole application. 28

III. Petitioner is entitled to an order that Respondents deliver her to this Court and that thereafter she be released because Respondents unlawfully hold and confine Petitioner in that Petitioner suffered a violation of the constitutional prohibition against the enactment of ex post facto laws because the Board of Probation and Parole, in denying parole to Petitioner relied upon RSMo § 217.690 (1982) and that statute retrospectively increased Petitioner’s punishment. 36

IV. Petitioner is entitled to an order that Respondents deliver her to this Court and that thereafter she be released because Respondents unlawfully hold and confine Petitioner in that Petitioner was denied due process of law because the Board of Probation and Parole, in positing a reason for denying Petitioner used mere boilerplate language as the rationale for denial of parole and Missouri law requires that the Board set forth the reasons for denial with specificity...41

CONCLUSION 42
CERTIFICATE OF COMPLIANCE 44
CERTIFICATE OF SERVICE..... 45
APPENDIXSeparately Bound

TABLE OF AUTHORITIES

CASES

<i>California Dept. of Corrections v. Morales</i> , 514 U.S. 499 (1995).....	36
<i>Cavallaro v. Groose</i> , 908 S.W.2d 133, (Mo.banc 1995).....	18, 34, 36, 37, 38, 39, 40
<i>Collins v. Youngblood</i> , 497 U.S. 37 (1990).....	36
<i>Cooper v. Missouri Bd. of Probation and Parole</i> , 866 S.W.2d 135, 138 (Mo.banc 1993).....	19, 41, 42
<i>Ex parte Reno</i> , 66 Mo. 266, 269 (1877).....	22
<i>Ex parte Webbe</i> , 30 S.W.2d 612(Mo. banc 1929).....	22
<i>Parker v. Corrothers</i> , 750 F.2d 653, 659 (8th Cir. 1984).....	19, 30, 31, 41
<i>Parrish v. Wyrick</i> , 589 S.W.2d 74, 78 (Mo. App. W.D. 1979).....	16, 23
<i>Parton v. Atkins</i> , 641 S.W.2d 129, 130-31 (Mo. App.W.D. 1982).....	32
<i>People v. Morris</i> , 219 Ill. 2d 373 (Ill. 2006).....	16, 25, 26
<i>Scharff v. State</i> , 551 S.W.2d 671 (Tenn. 1977).....	28
<i>State ex rel. Murphy v. Wolfer</i> , 148 N.W. 896, 897 (Minn. S.C. 1914).....	28
<i>State ex. rel. Shields v. Purkett</i> , 878 S.W.2d 42 (Mo.banc 1994).....	30, 33, 34
<i>State v. Cerny</i> , 248 S.W.2d 844, 845 (Mo. 1952).....	28
<i>Theodoro v. Department of Liquor Control</i> , 527 S.W.2d 350 (Mo. Banc 1975)...	24
<i>Watley v. Missouri Bd. of Probation and Parole</i> , 863 S.W.2d 337 (Mo.App. W.D. 1992).....	17, 29, 34, 37

<i>Weaver v. Graham</i> , 450 U.S. 24 (1981).....	18, 37
<i>Williams v. Gammon</i> , 912 S.W.2d 80 (Mo.App. W.D. 1995).....	17, 18, 29, 34, 40
<i>Williams v. Missouri Board of Probation and Parole</i> . 661 F.2d 697 (8 th Cir. 1981) <i>cert. denied</i> , 455 U.S. 993 (1982).....	29, 35

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. 1, § 10, cl. 1.....	36
MO. CONST. art. 1, § cl. 13.....	36
MO. CONST. art. 4, § 1.....	22
MO. CONST. art. 4, §7.....	23

STATUTES

RSMo §217.690 (1982).....	29, 37, 38, 40
RSMo. § 217.800 (2000).....	10, 23
RSMo. § 532.010.....	8
RSMo. §532.380.....	8
RSMo. § 549.261 (1978).....	29, 30, 33, 37, 39, 40
RSMo. § 565.033.....	15

REGULATIONS

13 C.S.R. 80-2.010 (1980).....	30, 32, 40
13 C.S.R. 80-2.020(1980).....	30, 31

SUPREME COURT RULES

Rule 91.02(a).....8

OTHER REFERENCES

THE FEDERALIST NO. 74 (Alexander Hamilton).....22

Missouri Department of Corrections, *A Profile of the Institutional
and Supervised Offender Populations* (June 30, 2005), available at

<http://www.doc.missouri.gov/Offender%20Profile%20FY05.pdf>.14

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, by Shirley Lute, an inmate incarcerated in the Chillicothe Correctional Center, who was granted commutation by Governor Robert Holden on November 24, 2004. Petitioner's Exhibit ("Ex.")A, p. A-1. Anyone who has been restrained of her liberty, and who may be relieved from such restraint, may petition for a writ of habeas corpus, in order to request inquiry into the cause of her confinement. RSMo. § 532.010. Ex. N, p.A-3. If no legal cause can be shown for the imprisonment, the court shall discharge the person from the restraint under which she is held. RSMo. §532.380. Ex. O, p. A-32.

Petitioner Shirley Lute filed this same petition for writ of habeas corpus in the Circuit Court of Livingston County on May 22, 2006. More than three months after the petition was filed, the court issued a denial on September 1, 2006. In its denial, the Circuit Court failed to address the issue of first impression raised by the Petition. Ex. D, p. A-5.

This Court has jurisdiction to review a petition for writ of habeas corpus and grant an original writ pursuant to Article I, Section 12 of the Missouri

Constitution. Ex. J, p. A- 27. Petitioner brings this petition before the Missouri Supreme Court because one of the claims in this petition raises an issue of first impression in the State of Missouri. The Missouri courts have not ruled on whether a parole board has the authority to make a parole determination that is contrary to the intent of the Governor of Missouri exercising his constitutional clemency power. Because this is a novel issue, involving issue of intra-executive branch powers in light of the gubernatorial clemency power there is good cause for this petition to be heard by the Missouri Supreme Court. Supreme Court Rule 91.02(a). Ex. S, p. A-110.

STANDARD OF REVIEW

This is an original writ.

STATEMENT OF FACTS

A. Sentence, Commutation, and Parole Denial

Petitioner is the oldest female inmate in the Missouri Department of Corrections having served nearly 29 years. Ex. V, p. A-115. On June 11, 1981, Ms. Lute was convicted of aiding and abetting the murder of her abusive husband who physically tortured and psychologically tormented her throughout their relationship. She was sentenced to life without possibility of parole for fifty years. Ex. U, p. A-113.

Petitioner filed an application for clemency on October 18, 2000. Ex. R, p. A-37. The petition was reviewed by the Board of Probation and Parole as required by Missouri law.RSMo. §217.800 (2000) Ex. Q, p. A-36. The Board made its recommendation to the Governor. After serving more than twenty-six years in prison, Ms. Lute was granted a commutation by Governor Holden in December of 2004. Ex. A, p.A-1.. Governor Holden's commutation made Ms. Lute immediately eligible for parole consideration. Her petition for clemency had been in the Governor's office for five years. Of 992 applications for clemency, Ms. Lute's petition was one of only forty-five granted by Governor Holden. Ex. B, p.A-2 at ¶ 6. The Governor's action made Ms. Lute immediately eligible for a hearing before the Board. Ex. A, p. A-1.

Governor Holden intended for the Board to address only one issue: whether Ms. Lute had an adequate exit plan. If she did, then she should be paroled. Ex. B, A-2, at ¶¶ 5, 10-13. The Governor had already determined Ms. Lute had served sufficient time in prison for her offense and the State's interests in retribution, public safety, and deterrence had been met. *Id.* Moreover, the Governor had also determined Ms. Lute's release would not depreciate the seriousness of her offense. *Id.* at ¶¶ 5-11.

Rather than giving her immediate parole consideration as intended by the Governor, the Board set the hearing for six months after her commutation. Ex. B, A-2, at ¶ 7. The composition of the Board had changed, reflecting Missouri's new administration. A new chairman had been seated along with a new member of the Board. *Id.* at ¶ 8. Ms. Lute expected to demonstrate to the Board her plan for release and transition into the community. However, the Board interrogated Ms. Lute about the night of the crime. The Board ignored Ms. Lute's superb institutional record and well-documented plan to transition back into the community. The Board repeatedly asked about Ms. Lute's role in the offense and the evidence the State used to convict her of the crime.

In August 2005, the Board denied parole to Ms. Lute. It considered only one factor: Ms. Lute's culpability. Ex. C, p. A-4. The Board's decision cited a single reason for its denial: "release at this time would depreciate the seriousness of the present offense based upon...the circumstances surrounding the present offense." *Id.* The Board's denial contravened the Governor's commutation and

his intent regarding the scope of the Board's inquiry. Because of the Board's decision, Ms. Lute remains confined at Chillicothe. The Board set her next parole hearing for June 2007. *Id.*

Once alerted to her denial, Governor Holden provided an affidavit making clear that the acts of the Parole Board were inconsistent with his intent and exceeded their authority. Ex. B, p. A-2 Even though the Governor who granted the commutation has made his intent clear, the Board of Probation and Parole continues to resist releasing Petitioner.

B. Facts Evaluated by Governor Holden in His Commutation

In granting commutation, Governor Holden had fully evaluated the circumstances surrounding Ms. Lute's offense and incarceration. Ex. B, p A-2 at ¶¶ 2-3, 12. Ms. Lute's clemency petition documented how her husband, Melvin Lute, subjected her to physical, emotional, and psychological abuse of the cruelest nature. *Id.* at A-48. Ms. Lute married Melvin Lute in 1976. Like the other men in Ms. Lute's life, he abused her from the beginning of their relationship.¹ During the marriage, he moved her and the family to Middle Grove, Missouri, a small, rural community. She lived there in isolation, without relatives or friends nearby. Neighbors were too far away to witness the abuse or call the police. *Id.* at A-52.

¹ Ms. Lute's clemency petition detailed how she had first been physically abused as a small child and adolescent and also experienced domestic violence in adulthood. Ex. R, p. A-46.

Mr. Lute's abuse began with blame. Mr. Lute blamed his wife for everything including circumstances beyond Ms. Lute's control. He then began to accuse her of having extramarital affairs.*Id.* at A-49. The blame and emotional abuse quickly escalated to physical violence. Ms. Lute never knew what circumstance would trigger a beating. Mr. Lute punched her in the face and ribs, leaving her with severe bruising. He bent her fingers back and kicked her in the kneecaps. Mr. Lute bit and struck her breasts. He would place her in chokeholds until she would acquiesce to sex. Mr. Lute also used a shotgun to terrorize his family.*Id.* at A-49-53.

Ms. Lute tried to leave, which caused more violence and threats. On one occasion, Mr. Lute pushed her out of their moving truck and onto a gravel road, leaving her with bloody scrapes and burns on her knees. *Id.* at 51. Ms. Lute told Mr. Lute that she was leaving him. He responded by tying her to their bed for an extended period. He refused to allow her to use the bathroom, and she was forced to urinate on herself. While Ms. Lute was restrained, Mr. Lute choked her and burned her with cigarettes. Mr. Lute was a non-smoker. He bought cigarettes for the sole purpose of her torture. *Id.* at A-53.

Ms. Lute made another attempt to run away several days later, in the winter of 1978. She had made plans with someone in a nearby Amish community to drive her to Columbia, Missouri where she could stay with a friend. Mr. Lute located Ms. Lute before she could reach her Amish ally, took her back to their house, and confined her in the basement. The basement was not heated and Ms.

Lute crawled into empty boxes to stay warm. She remained in the basement for two days, without food, water, or heat, until her sons drove up to the house and heard her crying for help. With her sons' assistance, she escaped out of the basement window. At that moment, Mr. Lute arrived. She told her sons to flee, knowing and fearing the violence that Mr. Lute would inflict upon them and her. He dragged Ms. Lute into the house and spent the day choking her and yelling at her. *Id.* at A-50. The next day Mr. Lute forced her to accompany him while he made a store delivery. Upon their return from the delivery, on February 6, 1978, Roy Welch, Ms. Lute's son, stabbed and shot Melvin Lute, killing him. Ms. Lute was convicted of aiding and abetting capital murder. *Id.* at 53-54. Roy Welch pled guilty to second-degree murder and received a sentence of thirty years. *Id.* at 54.

Evidence of Ms. Lute's abuse was never presented to the trial judge or jury hearing her case. Her defense attorney did not highlight her long history of domestic violence or present it as a defense or mitigating factor. There was no expert testimony on Battered Women's Syndrome. *Id.* at 56. Ms. Lute's trial occurred at a time when there was little understanding of domestic violence.² It

² The earliest Missouri case to address battered women's syndrome occurred in 1984, three years after Ms. Lute's trial and conviction. *See State v. Martin*, 666 S.W.2d 895 (Mo. App. E.D. 1984).

was many years later, in 1987, that Missouri enacted RSMo. § 565.033³ which permitted a defendant to present evidence regarding Battered Spouse Syndrome to establish that she acted in self-defense. Ms. Lute's personal history of enduring violence from early childhood through her marriage to Mr. Lute would likely play a significant role in the assessment of her culpability if she were tried today. She would probably receive a significantly lighter sentence.⁴ Indeed, the copious and powerful evidence of Ms. Lute's abuse formed the basis of her successful clemency petition.

³ "Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another." RSMo. § 565.033 (1987).

⁴ Moreover, her sentence, would likely be consistent with the sentences of other Missourians convicted of a Class A violent felony. According to the latest available data from the Missouri Department of Corrections, persons convicted of class A and B violent felonies receive an average aggregate sentence of 170.0 months and serve 59.4% of that sentence, or 100.9 months. Ms. Lute has served 344 months, more than three times the average amount served for a violent felony in Missouri. See Missouri Department of Corrections, *A Profile of the Institutional and Supervised Offender Populations* (June 30, 2005), at 27, available at <http://www.doc.missouri.gov/Offender%20Profile%20FY05.pdf>.

B. Petitioner's Transition Plan

At her June 2005 parole hearing Ms. Lute was fully prepared to resume her life in society, which was the sole consideration the Governor had intended for the Board to review. She had a stellar institutional record. Ex. W, p. A-127. Her family was ready and willing to guide her through the adjustment period post-incarceration. *Id.* at 126. She had already secured housing in Columbia, Missouri, with her daughter Cody Baker and her son-in-law. The Bakers had committed to providing Ms. Lute with financial support in order to facilitate her transition back into the community. *Id.* In addition, Ms. Lute has numerous job skills that would enable her to seek gainful employment. While incarcerated, she has learned to sew, worked in the prison's clothing factory, and received positive reports from her supervisor. Despite her advanced age, Ms. Lute intended to utilize her seamstress skills to obtain employment. *Id.* at 127-129. Furthermore, Ms. Lute had demonstrated her dedication to rehabilitation, evidenced by her numerous achievements and her outstanding institutional record. Ms. Lute was ready to reenter the community and posed no meaningful risk of recidivism. In light of the Governor's commutation, the facts of her case, and the applicable parole statutes and regulations, Ms. Lute should have been released on parole.

POINTS RELIED ON

I. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT THE GOVERNOR OF MISSOURI COMMUTED THE SENTENCE OF PETITIONER FROM LIFE WITHOUT THE POSSIBILITY OF PAROLE TO LIFE WITH THE POSSIBILITY OF PAROLE AND THEREAFTER THE RESPONDENT BOARD OF PROBATION AND PAROLE ACTED CONTRARY TO THE INTENTION OF THE GOVERNOR AND DENIED PETITIONER PAROLE.

Mo. CONST. art. 4, §7

RSMo. § 217.800 (2000)

***Parrish v. Wyrick*, 589 S.W.2d 74, 78 (Mo. App. W.D. 1979)**

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

II. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER WAS DENIED DUE

PROCESS OF LAW BECAUSE THE BOARD OF PROBATION AND PAROLE, IN POSITING A REASON FOR DENYING PETITIONER PAROLE, RELIED UPON REGULATIONS PROMULGATED AFTER THE DATE OF PETITIONER'S SENTENCE AND NOT THOSE EXTANT AT THE TIME OF SENTENCING AND UNDER THE FORMER REGULATIONS, THE BOARD HAD NO DISCRETION TO DENY PETITIONER'S PAROLE APPLICATION

RSMo. § 549.261 (1978)

13 C.S.R. 80-2.010 (1980)

13 C.S.R. 80-2.020 (1980)

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

Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697 (8th Circuit

1981) *cert. denied*, 455 U.S. 993 (1982)

Williams v. Gammon, 912 S.W.2d 80-81 (Mo.App. W.D. 1995)

Watley v. Missouri Bd. Of Probation and Parole, 863 S. W. 2d, 337 (Mo. App.

W.D. 1992)

III. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER SUFFERED A

VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST THE ENACTMENT OF EX POST FACTO LAWS BECAUSE THE BOARD OF PROBATION AND PAROLE, IN DENYING PAROLE TO PETITIONER RELIED UPON RSMo. § 217.690 (1982) AND THAT STATUTE RETROSPECTIVELY INCREASED PETITIONER'S PUNISHMENT.

U.S. CONST. art. 1, § 10, cl. 1.

Mo. CONST. art. 1, § cl. 13.

RSMo § 217.690 (1982)

RSMo § 549.261 (1978)

13 C.S.R. § 80-2.010 (1980)

13 C.S.R. § 80-2.020 (1980)

***Cavallaro v. Goose*, 908 S.W.2d 133, 136 (Mo.banc 1995)**

***Weaver v. Graham*, 450 U.S. 24 (1981)**

***Williams v. Gammon*, 912 S.W. 2d 80 (Mo. App. W.D. 1995).**

IV. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE BOARD OF PROBATION AND PAROLE, IN POSITING A

REASON FOR DENYING PETITIONER USED MERE BOILERPLATE LANGUAGE AS THE RATIONALE FOR DENIAL OF PAROLE AND MISSOURI LAW REQUIRES THAT THE BOARD SET FORTH THE REASONS FOR DENIAL WITH SPECIFICITY.

Cooper v. Missouri Bd. of Probation and Parole, 866 S.W.2d 135, 138 (Mo.banc 1993);

Epperson v. Missouri Bd. of Probation and Parole, 81 S.W.3d 540, 545 (Mo. App. W.D. 2002)

Parker v. Corrothers, 750 F.2d 653, 662 (8th Cir. 1985)

ARGUMENT

I. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINED PETITIONER IN THAT THE GOVERNOR OF MISSOURI COMMUTED THE SENTENCE OF PETITIONER FROM LIFE WITHOUT THE POSSIBILITY OF PAROLE TO LIFE WITH THE POSSIBILITY OF PAROLE AND THEREAFTER THE RESPONDENT BOARD OF PROBATION AND PAROLE ACTED CONTRARY TO THE INTENTION OF THE GOVERNOR AND DENIED PETITIONER PAROLE.

On the 28th day of December 2004, Governor Bob Holden commuted Shirley Lute's sentence from life without parole to life with possibility of parole. Ex. A at A-1. Governor Holden's decision to grant this commutation was made after the Missouri Board of Pardons and Parole advised him about the appropriateness of this particular act of clemency, having itself carefully considered 992 applications for clemency. Ex. Q, P. A-36. The Governor, acting on that advice, and exercising the unique and unfettered constitutional power to grant clemency, commuted Petitioner's sentence. Ex. A, p. A-1. Grants of clemency by Governor Holden were rare with only 45 of the applicants -- a mere four percent -- receiving some form of clemency. Ex. B, p. A-2.

Governor Bob Holden, by affidavit, offers uncontroverted evidence of his intent when he granted Ms. Lute's commutation. Ex. B, p. A-2. Governor Holden intended for the Board merely to address whether Petitioner had a sufficient exit plan and, if she did, to grant her parole. *Id.* at ¶¶ 5, 10-13. Rather than have her walk out of prison on December 28th after 27 years in prison with no place to go, he commuted her sentence to life with possibility of parole. It was appropriate to leave the details of her exit plan to the Parole Board to assess. The Governor determined that Ms. Lute, at seventy-five years old, had served sufficient time in prison for her offense. He felt the state's interests in retribution, public safety, and deterrence had been met. *Id.* at ¶ 5. Moreover, the Governor had also determined that Petitioner's release would not depreciate the seriousness of her offense. *Id.* at ¶ 11. The only question was whether she had a place to go and a plan for re-entry. The Board, disregarded the Governor's intent and reexamined the events surrounding Mr. Lute's death in 1978. The Board denied parole to Ms. Lute, citing a single reason for denial: "release at this time would depreciate the seriousness of the present offense based upon...the circumstances surrounding the present offense." Ex. C, p. A-4.

The circumstances of her crime, of course, had been fully investigated when the Parole Board had made their recommendation to the Governor. Nothing about the crime had changed. What had changed was the Parole Board, itself. In the six months after the commutation, a new Governor from a different party had come into office and had appointed a new Chairman, and a new member of the

Board. Ex. B, p. A-2. The party affiliation shifted with those changes. Apparently, the Parole Board's view of Shirley Lute shifted as well.

. The Board was obligated to follow Governor Holden's intent and its failure to do so was an unlawful usurpation of executive authority. Article 4, Section 1 of the Missouri Constitution vests supreme executive power in the governor. MO. CONST. art. 4, § 1, Ex. L, p. A-29. At its core, this power entitles the governor to exercise unlimited discretion in the execution of his duties, subject only to permissible limits that may be established by statute or constitutional provision. Even more than other powers, the governor's power to grant a commutation and to establish the terms thereof are long-established and fundamental elements of supreme executive power.⁵

In a commutation, the governor unilaterally modifies the punishment that has been imposed on a defendant by the judicial process. According to the Missouri Supreme Court, the power to grant commutation 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 (1877); *see also Ex parte Webbe*, 322 Mo. 859, 30 S.W.2d 612, 615 (banc

⁵ *See, e.g.*, THE FEDERALIST NO. 74 (Alexander Hamilton) (describing the constitutional pardon power as a "benign prerogative" by which the executive could dispense "the mercy of the government").

1929). This power extends from Article 4, Section 7, which establishes that the governor has the 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) Ex. M, p.A-30.

Section 7 gives the governor unlimited discretion – discretion that is beyond the reach of the other branches of government and persons within the executive branch as well. The governor can also fix the terms and conditions of a commutation. *Parrish v. Wyrick*, 589 S.W.2d 74, 78 (Mo. App. W.D. 1979).

Moreover, 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.

Rather, the only limitation placed on the governor is procedural, not substantive. The legislature may establish what process must be used for commutation applications. *See* RSMo. § 217.800 (2000) Ex. Q, p. A-36. But only the governor has the power to decide whether to commute a sentence, what factors ought to be considered in making that determination, and what limitation, if any, ought to attach to the commutation. *Id.* In denying Ms. Lute parole, the Board unlawfully disregarded Governor Holden's order of

commutation and thereby exceeded its lawful authority. Ms. Lute's continued confinement is therefore unlawful and she should be released immediately.

Respondents cite the Missouri Constitution to argue that the power to pardon does not include the power to parole. Respondents' Return at 5. Governor Holden's act was entirely consistent with the pardon power. As his affidavit confirms, he commuted her sentence because he believed that "Shirley Lute had served sufficient time in prison to pay for her offense and that the state interest in retribution, public safety, and deterrence had been met. The only question that remained was whether she had an acceptable exit plan. I therefore commuted her sentence to life with possibility of parole." Ex. B, P. A-2, ¶ 5. He left the details of the parole to the Board acting well within his constitutional powers.

Respondents further suggest that the Governor did not have the power to limit the Board's discretion by curiously citing to *Theodoro v. Department of Liquor Control*, 527 S.W.2d 350 (Mo. banc 1975). In that case, the Governor attempted to "pardon" or force the retraction of a revocation of a liquor license. *Id.* at 352. *Theodoro* stands for the proposition that the Governor does not have the power to pardon within the administrative process but rather that the power to pardon is limited to the criminal process. Since this commutation clearly deals with the criminal process, Respondent's reliance on *Theodoro* is inapt.

The gubernatorial, constitutional based clemency power is not subject to the vicissitudes of changing administrations. Even though the act of clemency can

be quite controversial, a change in the political make-up of the Parole Board should not render the exercise of that power moot. The new Board may not understand what the Governor intended since its Chair and some members did not participate in advising him. Nevertheless, the new Board is obligated to follow that intent once it is made clear. Governor Holden's stated intent is controlling as to the meaning of his own commutation. The Illinois Supreme Court was recently asked to determine the precise scope of a commutation issued by a governor who had since left office. See *People v. Morris*, 219 Ill. 2d 373 (Ill. 2006), Ex. E, p.A-6.-16. Not only did the court in *Morris* look to the Governor's commutation order for part of its analysis, but the justices also relied on a speech the Governor delivered about the grant of commutation as well as an amicus brief filed by the former Governor in which he clarified and affirmed his original intent in granting commutation. The *Morris* court's conclusion bears repeating in full:

The cardinal rule of construction when interpreting a clemency order is to ascertain and give effect to the intent of the Governor. Former Governor Ryan's intent is unequivocal in this case. As explained in his speech and reaffirmed in his representations to this court, he issued clemency to "relieve defendant of the death penalty as a legal consequence of the offense he had committed." To ignore that intent would be an inappropriate intrusion by this court upon the clemency power granted exclusively to the Governor under the Illinois Constitution. *Id.* at 384, Ex. E, p.A-10 (internal citations omitted)(emphasis added).

These same principles apply equally under Missouri's Constitution and to the case at bar. Governor Holden's affidavit makes it unequivocally clear that he intended for the Parole Board to assess only Petitioner's exit plan. He stated:

The denial of her parole by the Board was inconsistent with my clear intent as I had already given detailed consideration of the circumstances surrounding her offense....In reviewing Ms. Lute's application, I had deemed her release would not depreciate the seriousness of her offense....In reviewing Ms. Lute's application, I considered the circumstances surrounding the offense, the inadequate defense presented in Ms. Lute's trial, the lack of knowledge at the time of Battered Women's Syndrome, the length of time she had spent in prison, her exemplary behavior while incarcerated, the age and health, and the fact that Ms. Lute had served the retributive and deterrent portion of her sentence....Therefore, having determined that Shirley Lute's release would not depreciate the seriousness of her crime, and given that she also had an exit plan and an exemplary prison record, I believe that the Parole Board exceeded its authority when it denied parole for Shirley Lute. Pet. Ex. B, p. A-2-3, ¶10-13.

The Court should reject Respondents' suggestion that Governor Holden's intent is irrelevant and should instead, as did the *Morris* court, honor the chief executive's intent. Whether the language of Governor Holden's grace to Ms. Lute appears clear, he later asseverated his intention. There is no question what his intent was and there is no question but that it should be given its effect. Unless the

Board takes the position that the Governor's clear and unambiguous intent should be ignored – a remarkable proposition – the inquiry ends.

The alignment of the parties in this case is unsettling. Why is the Attorney General, a member of the executive branch, so zealously resisting on behalf of the Parole Board and the administration at Chillicothe, each too, of the executive branch, the assertion by the former Governor and chief of the executive branch? There can be little doubt that if Governor Holden were in office today, he could simply correct the incorrect interpretation of his grant of clemency by issuing a new order that Ms. Lute be immediately released. The State makes no argument that the governor's grants of clemency are somehow nullified when he leaves office. It is untoward to have the government, acting through its present agents and employees, resisting – worse, refusing to honor – the effect of Governor Holden's grant of grace which is a limitless constitutional prerogative of the chief executive. One would expect that having been informed that they misunderstood the Governor's intention, the Board would have acted to correct their error. The posture of the Respondents suggests that they do not misunderstand. It suggests that they understand and choose to ignore the Governor's grant. Constitutionally, they are prohibited from doing so.

The Court should therefore now order Ms. Lute to be released from Respondents' custody.

II. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE BOARD OF PROBATION AND PAROLE, IN POSITING A REASON FOR DENYING PETITIONER PAROLE, RELIED UPON REGULATIONS PROMULGATED AFTER THE DATE OF PETITIONER’S SENTENCE AND NOT THOSE EXTANT AT THE TIME OF SENTENCING AND UNDER THE FORMER REGULATIONS, THE BOARD HAD NO DISCRETION TO DENY PETITIONER’S PAROLE APPLICATION

The commutation of Ms. Lute’s sentence, caused the commuted sentence to replace the original sentence. A commutation by the governor relates back to the date of conviction. *State v. Cerny*, 248 S.W.2d 844, 845 (Mo. 1952)(“the commuted sentence has the same legal effect and the status of the prisoner is the same as though the original sentence had been for the commuted term”); *see also Scharff v. State*, 551 S.W.2d 671 (Tenn. 1977); *State ex rel. Murphy v. Wolfer*, 148 N.W. 896, 897 (Minn. S.C. 1914)(noting that “[a]fter commutation, the commuted sentence is the only one in existence, and the only one to be considered.”). At the time of Governor Holden’s commutation, therefore, Petitioner had served over

twenty-eight years of a life sentence with the possibility of parole. Ex. V, p. A-116.

An inmate has a liberty interest in the application of the parole statutes and regulations in effect at the time of her offense if those statutes and regulations entitle her to release. *Williams v. Gammon*, 912 S.W.2d 80-81 (Mo.App. W.D. 1995). Ms. Lute's offense was committed in 1978. At that time, the governing parole statute was RSMo. § 549.261 (1978). The section stated:

When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release on parole any person confined in any correctional institution administered by the state authorities. RSMo. § 549.261 (1978)(emphasis added) Ex. F, pp. A-17.

The mandatory language of section 549.261 required release of an inmate when that inmate had satisfied the applicable statutory and regulatory guidelines for parole. *Williams v. Missouri Bd. of Probation and Parole*, 661 F.2d 697 (8th Circuit 1981).⁶ The statute therefore created a liberty interest in parole. *Watley v. Missouri Bd. of Probation and Parole*, 863 S.W.2d 337, 338 (Mo.App. W.D. 1992); *Williams*, 661 F.2d 697. The Board adopted detailed regulatory guidelines

⁶ Superseded by virtue of the new parole statute, §217.690, which was enacted in 1982, and which remains in place today. See RSMo. § 217.690 (2000), Ex. P, p. A-36..

interpreting Section 549.261. At the time of Ms. Lute's conviction, 13 C.S.R. 80-2.010(5) (1980), which emanated from § 549.261, applied. 13 C.S.R. 80-2.010(5)(1980), Ex. G, p. A-18. Accordingly, §549.261 and 13 C.S.R. 80-2.010(5) together govern Ms. Lute's eligibility for parole release. *See State ex. rel. Shields v. Purkett*, 878 S.W.2d 42 (Mo.banc 1994) (reviewing parole decision by reference to both parole statute and parole regulations). A liberty interest can arise out of parole regulations, as well as parole statutes. *Parker v. Corrothers*, 750 F.2d 653, 659 (8th Cir. 1984) ("A regulation or policy statement need not necessarily be a 'rule of law' in order to create a liberty interest"). Petitioner, therefore, has a protected liberty interest if the parole statute and the regulations applicable in 1981 entitle her to release.

The parole regulations applicable to Petitioner permitted the Board to deny parole on a number of grounds. First, the Board might have decided that "[t]here does not appear to be a reasonable probability...that the inmate would live and remain at liberty without violating the law." 13 C.S.R. 80-2.020(2)(A)(2) (1980). Ex. A-20. Second, the Board might have found that "[t]he inmate has serious repeated disciplinary infraction(s) in the institution." 13 C.S.R. 80-2.020(2)(A)(3) (1980). *Id.* Third, the Board might have concluded that "[a]dditional institutional treatment is required to enhance the inmate's capacity to lead a law-abiding life." 13 C.S.R. 80-2.020(2)(A)(4) (1980). *Id.* Finally, the Board might have based a denial on the belief that "[r]elease at this time would depreciate the seriousness of the offense committed." 13 C.S.R. 80-2.020(2)(A)(1) (1980). *Id.*

When the Board denied Ms. Lute parole, however, it cited only the last potential basis for its decision: that release would “depreciate the seriousness of the offense, based on the circumstances of the offense.” Ex. C, p. A-4. Although, as described more fully below, this basis was not lawfully available to the Board. None of the other three potential grounds for parole denial could have possibly applied to Ms. Lute’s situation. Ms. Lute’s excellent institutional record, her advanced age, her twenty-eight years in prison and her well-developed exit plan provide absolutely no factual basis for any finding that parole was otherwise inappropriate. Accordingly, the Board did not rely on these as grounds for Ms. Lute’s continued confinement. Instead, the Board turned to the only ground it thought available to deny parole: “[r]elease at this time would depreciate the seriousness of the offense committed.” 13 C.S.R. 80-2.020(2)(A)(1) (1980). Ex. G, p.A-20.

Yet, as a matter of law, this ground too was unavailable to the Board. One of the purposes of incarceration is to provide retribution for society when a person has committed an offense. The parole regulations guide the Board in assessing the seriousness of an offense and determining the amount of retributive imprisonment required. The amount of retributive time in prison is a product of the seriousness of the offense. Accordingly, prisoners may be required to serve more time in prison based on the seriousness of their crimes. *Parker v. Corrothers*, 750 F.2d 653, 662 (8th Cir. 1984). Denial of parole based on the seriousness of the offense represents a finding by the Board that service of the retributive and deterrent

portion of a sentence remains unsatisfied. *Parton v. Atkins*, 641 S.W.2d 129, 130-31 (Mo. App.W.D. 1982).⁷

Critically, however, the 1980 Parole Regulations instruct the Board that after a specified time, the Board cannot make an assessment of whether the retributive portion of the offense has been served. It is deemed to have been served. The regulations state:

5. 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, or when twelve (12) years of the maximum sentence has been served by inmates with sentences of life or fifty (50) years or more. 13 C.S.R 80-2.010(5)(A)5 (1980). Ex. G, p. A-20.

Therefore, by operation of law, sufficient retribution is ensured when an inmate with a sentence of life or fifty years or more has served twelve years of the maximum sentence. The State's interests in retribution and deterrence for Ms. Lute were fully satisfied after twelve years of her sentence, in 1993.

⁷ The *Parton* Court referred to the sworn statement of the Chairman of the MBPP, which stated 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." *Parton*, 641 S.W.2d at 130-31.

Consequently, it was impermissible for the Board in 2005 to consider the seriousness of, and the circumstances surrounding, Ms. Lute's offense. The Board had no basis in law to cite the "seriousness of the offense" as grounds for denying parole to Ms. Lute. As a result, the Board failed to establish that releasing Ms. Lute would cause detriment to the community or to herself. The statute applicable to Petitioner's case, RSMo. § 549.261 (1978), mandates that parole be granted when "the prisoner can be released without detriment to the community or to himself." Ex. F, p. A-17. The Board exceeded its authority when it based its decision to deny parole to Ms. Lute on this single and impermissible ground and, in doing so, violated its own regulations.

Respondents cite several cases for the proposition that the regulation only establishes a minimum threshold. Respondent's Return at p. 9. In each of these cases, there were solid and specific reasons for parole denial that are not present here. Further, in the cited cases, the court is assessed the "approximately 25%" portion of the rule, not the 12 year rule that Petitioner relies upon. As stated in *State ex. rel. Shields v. Purkett*, "an approximation cannot be construed as a bright line rule." 878 S.W. 2d 42, 46. The 12 year rule is not qualified by the term "approximately." The cases cited by Respondents, consequently, are not apt. The fact that the regulation has since been changed to permit more discretion for the Board provides further support for the assertion that the prior applicable regulations placed limitations on the Board.

Petitioner has a liberty interest in the application of the relevant parole statutes and regulations. *Williams*, 912 S.W.2d 80; *Watley*, 863 S.W.2d at 338; *Williams*, 661 F.2d 697. Petitioner has demonstrated that the seriousness of the offense is not a valid basis for denying her parole under the pre-1982 parole statutes and regulations. The pre-1982 laws do not permit the Board to deny parole based on the seriousness of the offense in perpetuity. Rather, the pre-1982 parole regulations mandate that after a specified period of time, the Board cannot make an assessment of whether the retributive and deterrent portion of a sentence has been served.

A “liberty interest in parole” and therefore a due process right to release can arise for inmates whose offenses occurred before 1982 only when all of the statutory and regulatory conditions in the pre-1982 parole statutes and regulations have been satisfied. *Cavallaro v. Groose*, 908 S.W.2d 133, 137 (Mo.banc 1995)(citing *State ex. rel. Shields v. Purkett*, 878 S.W.2d 42 (Mo. banc 1994)); *Williams v. Gammon*, 912 S.W.2d 80, 85 (Mo.App. W.D. 1995). Had the Board properly applied the parole statutes and regulations, Petitioner would have been granted release. Petitioner has met all of the criteria for release contained in the pre-1982 statutes and regulations. She has served over twice the term that satisfied the State’s interests in retribution and deterrence. The Board is now precluded from denying parole to Ms. Lute based on the seriousness of the offense. The Board’s 2005 decision to deny parole rested wrongfully on this ground. Ms. Lute otherwise qualified for parole in every respect as she has shown

that she meets the statutory and regulatory conditions of the pre-1982 parole standards. Given that there were no other grounds for denial, Ms. Lute had an established liberty interest in parole such that the Board's denial violates due process. *Williams v. Missouri Board of Probation and Parole*. 661 F.2d 697 (8th Cir. 1981) *cert. denied*, 455 U.S. 993 (1982)..

The Court should therefore now order Ms. Lute to be released from Respondents' custody.

III. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER SUFFERED A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST THE ENACTMENT OF EX POST FACTO LAWS BECAUSE THE BOARD OF PROBATION AND PAROLE, IN DENYING PAROLE TO PETITIONER RELIED UPON RSMo § 217.690 (1982) AND THAT STATUTE RETROSPECTIVELY INCREASED PETITIONER'S PUNISHMENT.

The Ex Post Facto Clause of the Missouri Constitution forbids the imposition of any law that, when applied retroactively, disadvantages an offender affected by the law. MO. CONST. art. 1, §13. Ex. K, p. A-28. The U.S. Constitution also forbids any State from enacting an ex post facto law. U.S. CONST. art. 1, § 10. Ex. I, p. A-26. Two elements must be present to establish an ex post facto violation: 1) the law must be retroactive, and 2) the law must either alter the definition of crimes or increase the punishment for criminal acts already committed. *Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo.banc 1995) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995) and *Collins v. Youngblood*, 497 U.S. 37 (1990)). Even if a law does not increase the actual

sentence of imprisonment a defendant originally receives, a law can nevertheless violate the Ex Post Facto Clause if it increases a defendant's punishment by retroactively altering the requirements for parole or early release. *See Cavallaro*, 908 S.W.2d at 136; *see also Weaver v. Graham*, 450 U.S. 24 (1981) (ex post facto violation where law retroactively reduced inmate's "gain-time credits" and thus lengthened the period of his confinement).

Here, to the extent that the Board denied parole to Ms. Lute by relying on the current parole statutes and regulations, the Board retroactively increased Ms. Lute's punishment and therefore violated the prohibition against ex post facto laws. As discussed above, §549.261 (1978) required the Board to grant parole in certain situations and therefore created a potential liberty interest in parole for persons whose offenses occurred before 1982. *See Watley*, 863 S.W.2d at 339.⁸

Insofar as the Board relied on §217.690 for the proposition that it had complete discretion to grant or deny parole to Ms. Lute, §217.690 is an

⁸ In 1982, shortly after Petitioner's offense and sentencing, Missouri substituted the mandatory parole regime of §549.261 (1978) with the current law, §217.690, which reflects a discretionary parole regime "When in its 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." § 217.690 RSMo. (1982). Ex. F, p. A-17 & P, p. A-33.

unconstitutional ex post facto law as applied to Petitioner. Ex. P, p. A-33 Under the parole statutes and regulations in effect at the time of Ms. Lute's offense, she had a liberty interest in parole if she met the requirements for parole. As set forth above, Petitioner did in fact meet these requirements for parole given that the only basis for denying parole cited by the Board – the seriousness of the offense – had been removed as a lawful basis for continuing Ms. Lute's confinement. Petitioner should have been paroled by the Board.

The Board, however, did not apply the parole statutes and regulations in effect at the time of Ms. Lute's offense. Instead, the Board applied the parole laws enacted after her offense, thereby increasing her punishment. That the Board apparently believed it had complete discretion regarding parole and relied on §217.690 (1982) is unmistakable. Ex. P, p.A-33. This is the only plausible explanation for the Board's erroneous belief that the single-sentence, generic reason in its August 2005 denial reflected a legitimate basis for continuing Ms. Lute's confinement.

Respondents cite *Cavallaro v. Goose* as requiring a contrary finding. Respondent's Return at 6. *Cavallaro* is a Missouri Supreme Court decision addressing the intersection of Missouri's parole regimes and the constitutional prohibition against ex post facto laws. 908 S.W.2d 133 (Mo. 1995). There, the Missouri Supreme Court rejected an inmate's claim that deciding his eligibility for parole under the current parole statute – rather than the one in effect at the time of his offense – violated the prohibition against ex post facto laws. *Id.*

Respondent's reliance on *Cavallaro* which endorses a case by case, factually intense, analysis is misplaced. *Id.* at 135. The facts here are distinguishable from *Cavallaro*. Unlike Mr. Cavallaro, who had escaped from prison and committed additional crimes, Ms. Lute's institutional record is excellent. The parole statute in place at the time of her and Mr. Cavallaro's crime only mandated release "[w]hen in [the Board's] opinion there is a reasonable probability that the prisoner can be released without detriment to the community or to himself." RSMO §549.261 (1978). Ex. F, p. A-17. With subsequent crimes and an escape on his record, Mr. Cavallaro did not qualify for release. Ms. Lute, on the other hand, has an excellent institutional record and the Parole Board made no determination that she was a risk to the community or to herself. Nor could the Board do so.

Respondents argue that because Ms. Lute and Cavallaro were both denied parole based on the seriousness of the offense, there can be no Ex Post Facto claim. Respondents err. In *Cavallaro*, the court did not need to assess whether there was an ex post facto violation because under both past and present law, Mr. Cavallaro was ineligible for parole. The *Cavallaro* Court compared the two parole statutes at issue and found that the reason for denial offered by the Board – "the seriousness of the offense" – was a valid reason under both sets of laws. *Id.* at 136. Here, however, unlike in *Cavallaro*, both sets of parole laws do not permit the Board to deny release based on the "seriousness of the offense." As described above, this potential basis for denial in the original parole laws was eliminated

both by Governor Holden's commutation and the operation of RSMo. § 549.261 (1978) and 13 C.S.R 80-2.010(5)(A)5 (1980). Ex. F, p. A-17, Ex. G, p. A-20. Consequently, *Cavallaro* actually confirms the presence of an ex post facto violation in Ms. Lute's case. As the Court of Appeals for the Western District later noted, "*Cavallaro* indicated that if a new parole regulation did increase the punishment for an offense, as by making release dependent on a factor which would not have provided a basis for denying release under the old statute, then the prohibition against ex post facto laws might indeed be implicated." *Williams v. Gammon*, 912 S.W.2d 80, 85 (1995) (citing *Cavallaro*, 908 S.W.2d at 136-37). By not applying the appropriate parole statute combined with the applicable regulation, the Parole Board, in effect, increased Ms. Lute's punishment. The Board's application of §217.690 (1992) to Ms. Lute's case violated the ex post facto clauses of the Missouri and United States Constitutions and requires that she now be released from confinement.

IV. PETITIONER IS ENTITLED TO AN ORDER THAT RESPONDENTS DELIVER HER TO THIS COURT AND THAT THEREAFTER SHE BE RELEASED BECAUSE RESPONDENTS UNLAWFULLY HOLD AND CONFINE PETITIONER IN THAT PETITIONER WAS DENIED DUE PROCESS OF LAW BECAUSE THE BOARD OF PROBATION AND PAROLE, IN POSITING A REASON FOR DENYING PETITIONER USED MERE BOILERPLATE LANGUAGE AS THE RATIONALE FOR DENIAL OF PAROLE AND MISSOURI LAW REQUIRES THAT THE BOARD SET FORTH THE REASONS FOR DENIAL WITH SPECIFICITY.

The Board's decision also violated due process requirements because where a due process liberty interest is involved, the Board "must explain in more than boilerplate generalities why the severity of the particular offense and sentence requires deferral of parole." *Cooper v. Missouri Bd. of Probation and Parole*, 866 S.W.2d 135, 138 (Mo. 1993); *see also Parker v. Corrothers*, 750 F.2d 653, 662 (8th Cir. 1985). Failure to do so constitutes a violation of the parole applicant's right to due process of law. *Id.* Here, the Board provided a one-sentence, non-individualized reason for denying parole to Ms. Lute. This was constitutionally impermissible under the facts of Ms. Lute's case.

Respondents assert that their boilerplate reason for Petitioner's parole denial was constitutionally sufficient. Requiring the Board to state the reason for denial serves as notice to the inmate and as a hedge on abuse of discretion by the

Parole Board. The requirement to be specific about the reasons for denial, therefore, deserves constitutional due process protection. *See Cooper v. Missouri Bd. of Probation and Parole*, 866 S.W. 2d 135 (Mo. 1993). Only now do the Respondents attempt to cure their error by reciting the facts of Ms. Lute's crime and positing them as the reason for their decision. This late and lame effort ignores 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. These are the very facts that influenced the exercise of the clemency power.

Ms. Lute not only had a liberty interest in the application of the 1980 parole statutes and regulations, but had also had received a commutation of her sentence from the Governor that limited the scope of the Board's inquiry regarding parole. The Board's one-sentence, generic denial violated Ms. Lute's due process right to receive more than boilerplate generalities from the Board to justify continued confinement. Ex. C, p. A-4.

CONCLUSION

For all of the foregoing reasons, Petitioner Shirley Lute respectfully requests that the Court grant her Petition for Writ of Habeas Corpus and grant all other relief that is just and proper in the circumstances.

Date: December 12, 2006

Respectfully submitted,

WASHINGTON UNIVERSITY
SCHOOL OF LAW
CIVIL JUSTICE CLINIC

Jane H. Aiken MBE# 49411

Stephen M. Ryals MBE# 34149

Olivia J. Bradbury

Washington University School of Law

Civil Justice Clinic

One Brookings Drive

St. Louis, Missouri 63130-4899

(314) 935-7238 telephone

(314) 935-5171 facsimile

ATTORNEYS FOR PETITIONER SHIRLEY LUTE

CERTIFICATE OF COMPLIANCE

By submitting this brief, the undersigned counsel for Petitioner hereby certifies the following:

1. This brief conforms with Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) relating to length;
3. The number of words used in this brief is 9,102;
4. The number of lines of proportional type in the brief is 911;
5. The disk conforms with Missouri Rule of Civil Procedure 84.06(a);
6. The disk is double-sided, high density and 1.44 mb, 3½" in size;
7. The disk is labeled with the file name of the Word document;
8. The disk has been scanned for viruses and it is virus free.

Jane H. Aiken MBEN 49411
Stephen M. Ryals MBEN 34149
Washington University School of Law
Civil Justice Clinic
One Brookings Drive
St. Louis, Missouri 63130-4899
(314) 935-7238 telephone
(314) 935-5171 facsimile

IN THE MISSOURI SUPREME COURT

SHIRLEY LUTE,)	
)	
Petitioner,)	
)	
vs.)	
)	
MISSOURI BOARD OF PROBATION)	
AND PAROLE; DANA THOMPSON,)	Case No. SC88026
IN HIS OFFICIAL CAPACITY AS)	
CHAIRMAN, MISSOURI BOARD OF)	
PROBATION AND PAROLE; and)	
JENNIFER MILLER, IN HER)	
OFFICIAL CAPACITY AS)	
SUPERINTENDENT, CHILLICOTHE)	
CORRECTIONAL CENTER)	
)	
Respondents.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 8, 2006, a true and accurate copy of the following:

1. **BRIEF OF PETITIONER IN SUPPORT OF WRIT OF HABEAS CORPUS**
2. **CERTIFICATION PURSUANT TO SUPREME COURT RULE 84.06(c)**
3. **PETITIONER SHIRLEY LUTE’S INDEX TO EXHIBITS AND EXHIBITS**

was sent by First Class U.S. Mail, postage prepaid and via facsimile and via email

to:

Michael J. Spillane
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Attorney for Respondents

Jane H. Aiken MBEN 49411
Stephen M. Ryals MBEN 34149
Washington University School of Law
Civil Justice Clinic
One Brookings Drive
St. Louis, Missouri 63130-4899
(314) 935-7238 telephone
(314) 935-5171 facsimile