NO. SC85234

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. WASIM AZIZ,

Petitioner,

v.

DONNA McCONDICHIE,

Superintendent, Southeast Correctional Center

Respondent.

ORIGINAL PROCEEDING IN HABEAS CORPUS

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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

Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This case is an original proceeding in habeas corpus. This Court has jurisdiction to determine original writs pursuant to Article V, §4, of the Missouri Constitution (as amended 1976). Petitioner Wasim Aziz is currently incarcerated at the Southeast Correctional Center in Charleston, Missouri, pursuant to the judgment and sentence of the Circuit Court of St. Louis County, Missouri. Petitioner pled guilty to one count of first-degree tampering, §569.080, RSMo 1986, and was sentenced to a fifteen-year term in the custody of the Missouri Department of Corrections. Respondent Donna McCondichie, superintendent of the Southeast Correctional Center, is the proper party respondent. Missouri Supreme Court Rules 91.04 and 91.07. The Missouri Board of Probation and Parole is not a proper respondent because the Board does not have physical custody of petitioner Aziz. Id.

STATEMENT OF FACTS

Petitioner Wasim Aziz was convicted of one count of first-degree tampering in the Circuit Court of St. Louis County on March 27, 1991. Resp.App. at A1. Petitioner was sentenced to fifteen years in the custody of the Missouri Department of Corrections on May 10, 1991. Id. Petitioner's tampering sentence was to be served consecutively to all sentences that he was serving at that time. Id.

Petitioner was released on parole on July 28, 2000. Resp.App. at A8. On January 31, 2002, petitioner was arrested in the City of St. Louis on one count of possession of a controlled substance and one count of possession of drug paraphernalia. Resp.App. at A4-A5. Petitioner was arrested on a parole violation warrant on April 15, 2002. Resp. App. at A3. Petitioner was charged with violating three conditions of his parole: #1 Laws, based on the arrests; #5, Association, for being found with Clark Newsome, a convicted felon, on the night of the arrests; and #6, Drugs, for a positive urinalysis and possession of the drugs on the night of his arrest. Resp.App. at A3-A7.

Petitioner received a preliminary revocation hearing on April 30, 2002, at the St. Louis Community Release Center. Id. Three witnesses testified at this hearing: St. Louis City Police Officers William Noonan and Sue McClain and Probation Officer John Buck. Id. Petitioner cross-examined all three witnesses. Id. Officer

Noonan testified that while executing a search warrant at a residence on January 31, 2002, he saw petitioner try to open a window, place a plastic bag in his mouth, and drop a crack pipe. Resp.App. at A4. Officer McClain testified that on January 31, 2002, she observed petitioner try to open a bedroom window, drop a crack pipe, place a plastic bag in his mouth, and eventually spit the bag out at the officer's direction. Resp.App. at A5. The plastic bag was believed to contain crack cocaine. Resp.App. at A5. Both police officers, as well as Officer Buck, testified that petitioner was associating with Clark Newsome, a convicted felon, on the night that petitioner was arrested. Resp.App. at A4-A5. Officer Buck testified that petitioner submitted a urine sample on April 1, 2002, that tested positive for marijuana. Resp.App. at A6. The hearing officer in the preliminary revocation hearing found probable cause to believe that petitioner had committed all three charged violations. Resp.App. at A7.

Petitioner had a final parole revocation hearing on June 21, 2002. Resp.App. at A8. The Board of Probation and Parole revoked petitioner's parole on all three charged violations and based its decision on petitioner's testimony, the field violation reports prepared by the probation officer, and the lab reports confirming petitioner's urinalysis results. Id.

Petitioner filed for a writ of habeas corpus challenging his parole revocation in the Circuit Court of Pike County, case no. 03CV859044, and the court denied his petition on May 13, 2003. Petitioner then filed a petition for writ of habeas corpus in this Court. This Court issued its preliminary writ of habeas corpus on October 28, 2003.

The Missouri Board of Probation and Parole rescinded the revocation of petitioner's parole on February 27, 2004. Resp.App. at A10-A12. The Board restored petitioner to parole status, kept him in custody based on the preliminary hearing, and scheduled a new revocation hearing for March 16, 2004. Id.

ARGUMENT

I.

This case is moot because the Board of Probation and Parole has set aside its revocation of petitioner's parole and scheduled petitioner for a new final revocation hearing on March 16, 2004, and thus will cure any irregularities that may have existed in petitioner's previous final revocation hearing.

(Responds to petitioner's Points I, II, III, and IV.)

A. Petitioner's claims attack the final revocation hearing

Petitioner Aziz in his brief complains that his final parole revocation hearing violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner specifically alleges that the Board of Probation and Parole impermissibly relied on hearsay in the parole violation reports to find him in violation on parole condition one (Point I) and parole condition 5 (Point III), that the Board erred in not making specific findings of fact regarding the laws violation and also that an arrest does not constitute a violation of the law (Point II), that the Board did not permit any inquiry of witnesses relating to the violation of parole condition five and that petitioner did not associate with a convicted felon (Point III), and that the Board erred in basing its decision to revoke on a violation of parole condition six based solely on a laboratory report without allowing petitioner

to cross-examine the laboratory personnel who created the report and without giving petitioner a copy of the report to prepare for the final revocation hearing (Point IV).

B. Petitioner's claims attacking the preliminary revocation hearing, in addition to being improperly pled, are without merit

All of petitioner's claims, as pled in his Points Relied On, attack the constitutionality of his final revocation hearing. Petitioner also, in passing, attacks the preliminary revocation hearing. Pet.Br. at 23-25. However, petitioner does not raise any claims attacking the preliminary revocation hearing in his Points Relied On. This Court has held that "an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." Brizendine v. Conrad, 71 S.W.3d 587, 593 (Mo. banc 2002). All of petitioner's claims attacking the preliminary revocation hearing, therefore, are abandoned in this Court as they were not raised in the Points Relied On.

Further, petitioner's claims attacking the preliminary hearing are without merit. Petitioner contends that the preliminary hearing was not recorded. Pet.Br. at 24. However, there is no due process obligation for the Board to record the hearing. Petitioner contends that the right to an audio recording of his preliminary hearing is

mandated by the "red book," a publication of the Board of Probation and Parole that is given to offenders to explain the parole revocation process. Pet.Br. at 24; *see also* Pet.App. at A13. However, the "red book" is not the law. The "red book" is not a rule written by the Department of Corrections pursuant to §217.040, RSMo 2000, and §217.710.6, RSMo 2000. The "red book" also is not a statute or a decision of any court. Thus, the "red book," as stated in its introduction, is a derivation from statutes, court decisions, opinions of the Attorney General, court rules, and policies of the Board of Probation and Parole. Pet.App. at A12. The "red book" thus is not the law. The statutes, court decisions, and court rules are the law. None of these sources of law grant petitioner the right to a audio recording of his preliminary hearing.

The law does not state that an inmate has a right to a taped preliminary revocation hearing. 14 C.S.R. 80-4.020, the Department rule governing preliminary hearings, does not grant such a right. Resp.App. at A17. This Court's decision in State ex rel. Mack v. Purkett, 825 S.W.2d 851 (Mo. banc 1992), does not contain such a right. The United States Supreme Court did not create such a right in Morrissey v. Brewer, 408 U.S. 471, 485-87, 92 S.Ct. 2593, 2602-03, 33 L.Ed.2d 484 (1972). A right to an audio recording of a preliminary hearing would not advance justice, especially considering that a petitioner will have a final

hearing with an opportunity to cross-examine witnesses. Morrissey, 408 U.S. at 489. The preliminary hearing exists only to determine if probable cause exists to continue custody until a final revocation proceeding. Morrissey, 408 U.S. at 487. Thus, petitioner had no right to an audio recording of his preliminary hearing. Further, petitioner's rights in this case were fully protected by the fact that the hearing officer provided the Board with a detailed summary of the preliminary hearing, indicating all questions by petitioner and the witnesses' answers. *See* Resp.App. at A3-A7. Morrissey requires no more than what the hearing officer did in this case. 408 U.S. at 487.

Petitioner also contends that his inability to take notes prohibited him from effectively cross-examining any witnesses at the preliminary hearing. Pet.Br. at 24. However, the record belies petitioner's contention. Petitioner was able to effectively cross-examine police officer William Noonan. Resp.App. at A4. Petitioner also cross-examined probation officer John Buck and police officer Sue McClain. Resp.App. at A5. Petitioner also does not establish anything not already in the accounts of the cross-examination that he could have elicited from the police offers or the probation officer if he been able to take notes. Thus, petitioner fails to show that he was prejudiced in the least.

Thus, petitioner's contentions regarding the preliminary hearing are without merit. Petitioner received a preliminary hearing that was in compliance with law and the hearing officer found probable cause that petitioner had violated the conditions of his parole, Resp.App. at A7. Therefore, probable cause exists to hold him in a correctional facility pending a final revocation hearing. Morrissey, 408 U.S. at 487.

C. This case is moot because petitioner will receive a new revocation hearing

The Board of Probation and Parole, upon learning about petitioner Aziz' petition, rescinded its order of revocation. Resp.App. at A10-A12. The Board, relying on the fact that petitioner had a valid preliminary hearing, ordered that petitioner be placed back on parole status, but that he be kept in custody based on the preliminary hearing and receive a new final revocation hearing on March 16, 2004. Resp.App. at A10-A12. Thus, any error in the final revocation hearing that petitioner complains of will be addressed at a new revocation hearing on March 16, 2004. The previous hearing that petitioner received is now a legal nullity. This Court cannot grant petitioner more relief than the Board of Probation and Parole already has: reinstatement to parole status and a new final parole revocation hearing. *See* Mack, 825 S.W.2d at 858.

"A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322, 325 (Mo. banc 2000). Petitioner seeks this Court's review of whether he received due process in his final parole revocation hearing. The Board of Probation and Parole has decided to rescind its order revoking petitioner's parole and grant petitioner a new revocation hearing. Thus, the first revocation hearing has no legal significance. Petitioner is not being held due to the first hearing, but while awaiting a new hearing on March 16, 2004. Any ruling on the first hearing thus would have no effect on petitioner's current custody status. Petitioner desires a new revocation proceeding, which he has obtained. Thus, a decision in this case is unnecessary. "When an event occurs which renders a decision unnecessary, the appeal will be dismissed." C.C. Dillon Co., *supra*. This proceeding therefore should be dismissed as moot.

II.

Petitioner is not entitled to a writ of habeas corpus because the Board of Probation and Parole properly revoked parole in that the Board determined that petitioner violated condition six, drugs, by testing positive for marijuana based on a laboratory report. (Responds to Points I, II, III, and IV in appellant's brief)

Even if this Court determines that this case is not moot, petitioner is not entitled to a writ of habeas corpus. The United States Supreme Court has held that in a final parole revocation hearing, a petitioner is entitled to certain due process rights. These rights include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972). The Court emphasized that these procedures do not equate the parole hearing with a criminal proceeding. Id. This Court has required the same minimum due process requirements. State ex rel. Mack v. Purkett, 825 S.W.2d 851, 854 (Mo. banc 1992). Section 217.720.2, RSMo 2000, requires that the Board of Probation and Parole set rules for the conduct of parole revocation hearings. The Board of Probation and Parole's rule governing revocation hearings largely follow the language in Morrissey and Mack. *See* 14 C.S.R 80-4.030.

The Supreme Court has been very clear that Morrissey does not "prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5, 93 S.Ct. 1756, 1760 n.5, 36 L.Ed.2d 656 (1973). This Court likewise has stated that evidence that would violate the Sixth Amendment right to confrontation or the hearsay rule may be properly considered under certain circumstances in a parole revocation hearing. Mack, *supra*, at 855.

A. Petitioner was properly revoked on the drug violation

This Court has employed a three-factor balancing test in order to determine whether a parolee has a due process right to confrontation in a parole revocation hearing. Id. The three factors are whether confrontation is impractical or

undesirable, whether the hearsay evidence bears substantial elements of reliability, and whether the parolee challenges the accuracy of the hearsay evidence. Mack, *supra*, at 855-56. An analysis of these three factors as applied to the violation of condition 6, drugs, shows that petitioner's due process rights were not violated.

The second factor, the reliability of the hearsay evidence, is determinative in this case because the report has a very high indicia of reliability. The Board of Probation and Parole relied on the lab report, independent of any other testimony, to find that petitioner had used marijuana. Resp.App. at A8. The lab report and its accompanying chain of custody document show that petitioner had a urine sample taken on April 1, 2002, that was taken at the local parole office and delivered to the Missouri Department of Corrections Toxicology Laboratory in St. Louis. Resp.App. at A14-A15. The sample was taken by John Buck and received by Sal Paez at the laboratory. Resp.App. at A15. The toxicology report bears Paez's initials, the time and date of the toxicology tests, and reference ranges for the tests. Resp.App. at 5. The laboratory report on petitioner's urine shows that petitioner tested negative, or less than 300 nanograms[1] per milliliter, for cocaine and opiates,

[1]One nanogram is equivalent to one-billionth ($1x10^{-9}$)of one gram.

and positive, or more than 50 nanograms per milliliter, for THC.[2] Resp.App. at A14.

The laboratory report bears substantial indicia of reliability. This Court has held that "laboratory reports prepared by those whose business it is to make chemical analysis reports upon which clients of the laboratory are expected to rely" have a substantial indicia of reliability. Mack, 825 S.W.2d at 856. The laboratory report was prepared by the Missouri Department of Corrections Toxicology Laboratory. The business of a toxicology laboratory is to provide toxicology reports based on urine or blood samples. The Board of Probation and Parole is entitled to rely on the laboratory report that a probation officer commissioned and upon which probation officers rely to help parolees and probationers rehabilitate themselves. The laboratory report is therefore reliable evidence.

The fact that the Board relied on reliable evidence in the form of the laboratory reports is determinative in this case. The results of the laboratory tests are deemed reliable. This case is similar to United States v. Bell, 785 U.S. 640 (8th Cir. 1986). In Bell, the inmate appealed after his probation was revoked and alleged that he

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[2]THC, or tetrahydrocannibol, is the psychoactive ingredient in marijuana. *See* State v. McManus, 718 S.W.2d 130 (Mo. banc 1986).

was denied his right to cross-examine the persons who did his laboratory tests for THC. The court determined that Bell had not presented any evidence that denied his use of drugs and that Bell presented "only general, unsubstantiated claims that the laboratory tests may have been defective." Bell, 785 F.2d at 643. The court then noted that "formal testimony" from the persons who test drug samples "rarely leads to any admissions helpful to the party challenging the evidence." Id. Therefore, the court found that production of the chemists from California for cross-examination was not necessary under the due process clause. Id.

Here, as in Bell, petitioner has presented absolutely no evidence that any form of cross-examination would have assisted him as petitioner makes only conclusory statements that the process may have been flawed. Petitioner also did not produce any evidence that he had not used drugs prior to his April 1, 2002, test. In sum, petitioner fails to show that he has any avenue to show that the tests were not reliable. Confrontation is this case would have been impractical and undesirable because, as the Eighth Circuit stated, cross-examination of urinalysis chemists "rarely leads to any admissions helpful to the party challenging the evidence." Id. The balance between the reliability of the laboratory report, the fact that any cross-examination would have been futile, and the fact that petitioner did not produce any evidence that he had not used marijuana, tilts in the Board's favor. Therefore,

the failure to produce the laboratory workers for cross-examination does not constitute a due process violation in this case.

B. Petitioner's other due process claims

Petitioner alleges that the Board's reliance upon the parole violation reports to establish violations of condition 1, laws, and condition 5, association, violated his due process right to confrontation of adverse witnesses. *See* Points I and III, Pet.Br. at 9-10, 12. Petitioner also contends that the Board did not make sufficient factual findings to support revocation on condition one, laws. *See* Point II, Pet.Br. at 26-27. Any error with regard to these claims in harmless because, as explained below, the Board properly found that petitioner violated condition six, drugs.

C. The drug violation is sufficient to sustain the parole revocation

Even though due process problems exist with regard to violations of conditions 1 and 5, the Board's decision to revoke parole is proper because the Board properly determined that petitioner violated condition 6, drugs.

Section 217.720.2, RSMo 2000, provides that "[i]f the violation is established and found, the Board may continue or revoke the parole or conditional release, or enter other such order as it may see fit." Section 217.720.2 thus breaks the revocation process into two parts: first, a fact stage in which the Board must determine, whether sufficient evidence exists to find that a parolee has violated his

parole, and second, after a factual finding is made, a purely discretionary stage in which the Board determines whether to revoke probation. The factual finding that one condition of parole has been violated is therefore sufficient to allow the Board to exercise its discretion and revoke parole or take any other authorized action.

The process under §217.720.2 is similar in its operation to the aggravating factors in a capital murder trial. Once the factfinder makes the factual determinations required to find one statutory aggravating factor, the factfinder has discretion to sentence the defendant to death. Further, in cases where a jury finds several aggravating factors, the fact that one or more aggravating factors are determined to be invalid does not void the death sentence as long as at least one aggravating factor is valid. Stringer v. Black, 503 U.S. 222, 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); Harris v. Bowersox, 184 F.3d 744, 750 (8th Cir. 1999), *cert. denied* 528 U.S. 1097 (2000). As long as one aggravating factor is valid, the factfinder is still able to exercise its discretion. Harris, *supra*.

The parole revocation procedure under §217.720.2 procedure is very similar. After the Board determines that a condition of parole has been violated, the Board is free to institute any penalty within its discretion. Thus, just as in the capital punishment context, the fact that a violation of parole is erroneously found is inconsequential as long as the Board validly finds one violation. Here, as shown

above, the Board properly found that petitioner violated condition 6, drugs. Thus, the Board was entitled, in its discretion, to determine that petitioner's parole should be revoked. Petitioner's claims thus fail on their merits, and this Court should deny a writ of habeas corpus.

III.

The Board of Probation and Parole properly revoked petitioner's parole because petitioner associated with Clark Newsome, a convicted felon, in that petitioner was involved with drugs at the same residence as Newsome.

(Responds to Petitioner's Point III.)

Parole condition five, association, states that "I will obtain advance permission from my Probation and Parole Officer before I associate with any person convicted of a felony or misdemeanor, or with anyone currently under the supervision of the Board of Probation and Parole. It is my responsibility to know with whom I am associating." Pet.App. at A2.

"Association" is defined as "to keep company." American Heritage Dictionary 112 (3rd ed. 1996). At the time of his arrest, petitioner was "keeping company" in the same room as Clark Newsome and three other individuals, all of whom were engaged in drugs and arrested for various drug offenses. Resp.App. at A4-A6. One of petitioner's parole conditions, read literally, was that it was "[*petitioner's*] responsibility to know with whom [he is] associating." Pet.App. at A2. In other words, under the plain language of the statute, petitioner bore the responsibility of knowing who the people surrounding him were. In this case, as petitioner and the four other men all possessed drugs, it was even more incumbent on petitioner to

inquire for himself as to the backgrounds of his companions, with whom he was sharing a room and drugs. Petitioner should have discovered who his companions were.

Petitioner cites United States v. LanFranca, 955 F.Supp. 1167 (W.D.Mo. 1997), as support for his argument. However, the LanFranca court stated that a literal reading of the parole condition supported the government's position that a person on supervised release has the responsibility to determine the criminal history of his associates. 955 F.Supp. at 1168. The court ultimately decided that a petitioner must know of the associate's criminal history in order to sustain a revocation. 955 F.Supp. at 1169.

With all due respect to the LanFranca court, its reasoning is flawed. Under that reasoning, a person may associate with anyone he pleases as long as he keeps himself from learning about their criminal past. For example, a parolee may choose to live, for a period of years, with another person who has a prior conviction. By simply avoiding the topic and not asking the question about criminal history, the parolee can truthfully say that he never knew about the other person's criminal history. This situation, which LanFranca supports, is the result of a strict knowledge requirement. Thus, the parolee's knowing ignorance may completely undermine the conditions of his parole.

A literal reading of the condition provides a better answer. Requiring a parolee to find out about the criminal backgrounds of the persons with whom he is associating avoids the hypothetical illustrated above. A literal reading of the association condition places the responsibility on the parolee to be sure that he or she is not associating with persons under supervision or convicted of a felony. Thus, a parolee can not use intentional ignorance as a defense.

Petitioner further argues that "he was at his uncle's house as the result of an employment issue." Pet.Br. at 28. However, the police officers testified at the preliminary hearing that petitioner was arrested with a crack pipe, a substance believed to be crack cocaine, and was attempting to escape through a bedroom window. Resp.App. at A4-A5. Petitioner clearly believed that he was doing something wrong or he would not have attempted to escape through a bedroom window. The Board is entitled to disbelieve petitioner's testimony and credit the officers' testimony. Under that analysis, petitioner was clearly doing more than delivering a message: he was doing drugs with Clark Newsome and three others and had the duty to inquire about their criminal records. The evidence thus would support a finding that petitioner associated with Clark Newsome, a convicted felon. Petitioner's third point therefore must be denied.

CONCLUSION

For the above reasons, respondent prays that this Court dismiss the petition for habeas corpus as moot or, in the alternative, deny the petition for writ of habeas corpus.

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 Respondent

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. Joseph Bednar, Jr.
ARMSTRONG TEASDALE, LLP
3405 West Truman Boulevard, Suite 210
Jefferson City, Missouri 65109

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 Respondent

Respondent's Appendix

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