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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80202	
Plaintiffs-Appellants: PASTOR MICHAEL DANIELSON, COLORADO CRIMINAL JUSTICE REFORM COALITION, COLORADO-CURE **Defendant-Appellee:** GIGI DENNIS, in Her Official Capacity as Secretary of State for the State of Colorado	▲ COURT USE ONLY ▲
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Application for Appeal of District Court's Decision Under C.R.S. § 1-1-113

Plaintiffs-Appellants seek review under section 1-1-113(3), C.R.S., of the district court's decision denying relief on this important question of constitutional law: whether under Article VII, Section 10, of the Colorado Constitution, a person released from prison and placed on parole is entitled to vote.

Table of Contents

Introduction 1

The Parties 3

The Court Below 3

Ruling Complained Of and Relief Sought 3

Why No Other Adequate Remedy Is Available 4

The Issue Presented 4

The Facts 5

Argument 6

A. The plain and clear language of Section 10 must be applied: "confinement" and "imprisonment" do not include "parole." 9

B. This Court's decisions accord with the plain and ordinary meaning of Section 10. 15

1. *Sterling* and *Moore* control the disposition of this issue. 15

2. The trial court improperly relied upon the *obiter dictum* in *Monroe*. 20

3. The Colorado Supreme Court's mandatory-parole cases make it clear that parole is not part of any term of imprisonment. 23

C. The constitutional history of Section 10 forecloses the possibility that "full term of imprisonment" includes parole. . . 25

Conclusion 30

Table of Authorities

Cases

Alexander v. People,
7 Colo. 155, 2 P. 894 (1884) 24

Board of Educ. of School Dist. No. 1 v. Booth,
984 P.2d 639 (Colo. 1999) 9

Bolt v. Arapahoe County School Dist. No. 6,
898 P.2d 525 (Colo. 1995) 9, 10

Colorado State Civil Serv. Employees Ass'n v. Love,
167 Colo. 436, 448 P.2d 624 (1968) 10, 12

Itin v. Ungar,
17 P.3d 129 (Colo. 2000) 21

Johnston v. City Council of City of Greenwood Village,
177 Colo. 223, 493 P.2d 651 (1972) 11

Krutka v. Spinuzzi,
153 Colo. 115, 384 P.2d 928 (1963) 14, 28-29

Lidke v. Industrial Comm'n,
159 Colo. 580, 413 P.2d 200 (1966) 15

Lorenz v. State,
928 P.2d 1274 (Colo. 1996) 22

Martin v. People,
27 P.3d 846 (Colo. 2001) 23, 24

McGrath v. United States,
20 F.3d 1066 (10th Cir. 1994) 13
Moore v. MacFarlane,

642 P.2d 496 (Colo. 1982) .... *passim*

Pearce v. People,
53 Colo. 399, 401, 127 P. 224 (1912) 9, 14-15

People ex rel. Colorado Bar Association v. Monroe,
26 Colo. 232, 57 P. 696 (1899) .... *passim*

People ex rel. Colorado Bar Association v. Weeber,
26 Colo. 229, 57 P. 1079 (1899) 20

People in Interest of Clinton,
762 P.2d 1381 (Colo. 1988) 21

People v. Johnson,
13 P.3d 309 (Colo. 2000) 24

People v. Luther,
58 P.3d 1013 (Colo. 2002) 23

People v. Lybarger,
700 P.2d 910 (Colo. 1985) 21

People v. May,
9 Colo. 80, 10 P. 641 (1886) 10, 15, 28

People v. Rodriguez,
112 P.3d 693 (Colo. 2005) 9, 24-25

Prior v. Noland,
68 Colo. 263, 188 P. 729 (1920) 9, 15

Sterling v. Archambault,
138 Colo. 222, 332 P.2d 994 (1958) .... *passim*

Town of Eagle v. Scheibe,
10 P.3d 648 (Colo. 2000) 21

Constitution and Statutes

Colorado Constitution, Article VII, Section 10 . . . . *passim*

Colo. Gen. Stats. § 937 (1883) 26

Colo. Rev. Stats. § 1-1-113. . . . . 7, 10

Colo. Rev. Stats. § 1-2-103 . . . . *passim*

1861 Colo. Terr. Laws 333 26

1870 Colo. Terr. Laws 85 27

1872 Colo. Terr. Laws [iii]-[v] 26

1874 Colo. Terr. Laws 204 . . . . 26, 27

1874 Colo. Terr. Laws 208 27

1899 Colo. Sess. Laws 418-27 . . . . 2, 25

1963 Colo. Sess. Laws 366 7

1970 Colo. Sess. Laws 170 7

1980 Colo. Sess. Laws 299 7

1991 Colo. Sess. Laws 608 8

1995 Colo. Sess. Laws 821 8

2005 Colo. Sess. Laws 1395, 1430 8

Colo. Gen. Laws §§ 799, 2027-2033 (1877) 14, 27, 26

Other Authorities

RULES FOR THE GOVERNMENT OF THE CONVENTION TO FORM A STATE CONSTITUTION FOR THE TERRITORY OF COLORADO, at [i]-[iii] (1875-1876) 26

THE LEGISLATIVE MANUAL OF THE STATE OF COLORADO 222-30 (1st ed. 1877) 26

Introduction

This is an expedited, special proceeding under section 1-1-113(3) of the Colorado Revised Statutes.

At issue, and of critical importance to parolees who want to participate in the electoral process in this election year, is whether under Article VII, Section 10, ["Section 10"] of the Colorado Constitution they are entitled to vote. Section 10 disfranchises only those persons "confined in any public prison" but refranchises them upon service of their "full term of imprisonment." Section 1-2-103(4), C.R.S., by contrast, bars parolees from voting notwithstanding their discharge from prison. Appellants contend that section 1-2-103(4) conflicts with Section 10 and must be invalidated.

The constitutional language is plain. The constitutional history of Section 10, which was a part of the originally enacted 1876 Colorado Constitution and has never been amended, is not in dispute. As the trial court recognized, "the concept of parole did not exist in Colorado when the Colorado Constitution was ratified in 1876." A004. The question before the trial court, and presented in this appeal, is, what does "full term of imprisonment" mean?

The trial court ruled that "imprisonment" under Section 10 includes parole, because parole is a constraint on "liberty" and therefore is included within

the term of imprisonment. The ruling is at odds with the plain words of Section 10, which does not mention restraints on "liberty"—only confinement in a public prison—as a disfranchising condition. It is also at odds with what the People of the State of Colorado would have understood "imprisonment" to mean when they approved the 1876 constitution, since parole from a prison did not exist for another 23 years.

Central to the parties' disagreement over the meaning of Section 10, and to the trial court's decision, are three discordant Colorado Supreme Court cases. In *People ex rel. Colorado Bar Association v. Monroe*, 26 Colo. 232, 57 P. 696 (1899), decided the same year the 1899 parole act was enacted,[1] the court in *dictum*—and without any analysis—suggested that parole was part of a criminal defendant's "full term of imprisonment." Two, more recent, cases from this Court—*Sterling v. Archambault*, 138 Colo. 222, 332 P.2d 994 (1958), and *Moore v. MacFarlane*, 642 P.2d 496 (Colo. 1982)—suggest that Section 10's language, given its plain and ordinary meaning, draws a firm line between "confined in a[] public prison" and *not* confined in a public prison: if one is so confined, she is disfranchised; when she has been released from a public prison, she is refranchised. Notably, the *Sterling* court appeared to reject the position taken by

[1] 1899 Colo. Sess. Laws 418-27.

the trial court at bar—that restraint of the "liberty" of a person who is *not* confined in a prison can disfranchise that person.

Given this state's century-old tradition—reaffirmed in *Sterling* and *Moore*—of preserving electoral rights against encroachment from hypertechnical and strained constructions of the law, this Court should give plenary review of the trial court's decision.

The Parties

Appellants are Pastor Michael Danielson, Colorado Criminal Justice Reform Coalition ["CCJRC"], and Colorado-CURE.

Appellee is the Colorado Secretary of State, Gigi Dennis ["Secretary"].

The Court Below

District Court for the Second Judicial District, the Honorable Michael A. Martinez presiding, *Danielson et al. v. Dennis*, Civil Action No. 06CV954.

Ruling Complained Of and Relief Sought

Appellants complain of the district court's ruling on May 26, 2006, which is reprinted in the Supporting Documents and numbered A001-A008. The court ruled that section 1-2-103(4) is constitutional and accords with Section 10.

Appellants seek a determination by this Court that section 1-2-103(4)

violates Section 10 and that parolees are constitutionally entitled to vote upon their discharge from a "public prison," Colo. Const. Art. VII, § 10.

Why No Other Adequate Remedy Is Available

The Secretary has agreed that section 1-1-113(3) is the proper mechanism for a determination of the constitutionality of section 1-2-103(4). Section 1-1-113(3) gives this Court original jurisdiction over appeals of trial court decisions made under that statute and provides for an expedited, special appeal.[2] This is an election year. If this Court declines this appeal, there is no means for an appellate court to review the district court's decision in time for parolees to vote should they prevail in this action and, accordingly, they would be deprived of a fundamental constitutional right.

The Issue Presented

Whether section 1-2-103(4) violates Article VII, Section 10, of the Colorado Constitution by disfranchising eligible electors who have been released from confinement in a public prison and placed on parole.

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[2]Section 1-1-113(3) provides that application for review must be filed with this Court within three days of the district court's decision. The district court issued its decision on May 26, 2006. Therefore, this appeal is timely.

The Facts

Pastor Danielson served out his full term of imprisonment and was discharged. Following his release, he began and is now serving a period of parole. A015.[3] Except for his status as a parolee, Pastor Danielson is an eligible elector of the State of Colorado. *Id.* He wants to register to vote and to cast ballots in municipal, state and national elections. *Id.* He cannot do so because section 1-2-103(4), and the Secretary of State implementing that statute, forbids parolees from voting or registering to vote. *Id.*

CCJRC is a not-for-profit Colorado corporation. *Id.* It is a statewide membership organization that promotes alternatives to incarceration and advocates policies that reduce or eliminate the barriers faced by former prisoners who are reintegrating into society. *Id.* Its membership includes Colorado citizens who are currently on parole and who would be eligible to vote but for the proscription of section 1-2-103(4) and the Secretary's application of that statute. *Id.*

Colorado-CURE is a not-for-profit Colorado organization of families of

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[3]The separately filed Supporting Documents contains sequentially numbered substantive pleadings, orders and papers filed in the district court. Appellants have ordered transcription of the May 5, 2006, oral argument before the district court. The transcript is not available as of the date this Application was filed. No evidence was offered or received at the May 5 hearing.

prisoners, prisoners, former prisoners and other citizens concerned with reform of prisons and the criminal justice system. *Id.* Colorado-CURE engages in public education and advocacy on criminal justice issues, and, along with the national CURE organization with which it is affiliated, advocates that parolees as well as probationers should be entitled to vote. *Id.* The membership of Colorado-CURE includes Colorado citizens who are on parole and who would be eligible to vote but for the proscription of section 1-2-103(4) and the Secretary's application of that statute. A015-16.

Pastor Danielson and parolee-members of CCJRC and Colorado-CURE are Colorado electors eligible to vote but for section 1-2-103(4)'s disfranchisement of parolees. A015-16. The Secretary of State enforces section 1-2-103(4)'s disfranchisement provision. A002, A015-16.

Argument

Section 1-2-103(4) violates the Colorado Constitution's guarantee of the right to vote following release from confinement in a public prison.

Article VII, Section 10, of the Colorado Constitution provides:

> No person while *confined in any public prison* shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or *by virtue of having served out his full term of imprisonment*, shall without further action, be invested with all the rights of citizenship, except as otherwise

provided in this constitution.

(Emphasis supplied.) In contrast, section 1-2-103(4), as amended,[4] provides:

> No person while serving a sentence of detention or confinement in a correctional facility, jail, or other location for a felony conviction or *while serving a sentence of parole* shall be

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[4]Section 1-2-103(4)'s disfranchisement of parolees has been in existence for only a decade. For nearly 90 years, from the first General Assembly in 1876 until 1963, the statute setting the qualifications for voters mirrored the language of Section 10.

In 1963, the legislature modified the statute to provide that no person "under sentence to or confined in any public prison shall be entitled to register or to vote" but "[e]very person who was a qualified elector prior to such sentence of imprisonment, and who is released . . . by having served his full term of imprisonment, shall be vested with all the rights of citizenship." 1963 Colo. Sess. Laws 366. It was amended in 1970 to delete the references to "under sentence" and "such sentence." 1970 Colo. Sess. Laws 170.

In 1980, the statute was repealed and reenacted. This version omitted entirely the phrase "full term of imprisonment" and provided that no person "confined as a prisoner" in a prison or jail was eligible to vote. 1980 Colo. Sess. Laws 299.

In 1991, the statute was amended to disfranchise any prisoner confined in a prison or jail "or serving any part of their [sic] sentence under mandate." 1991 Colo. Sess. Laws 608.

In 1995, the statute was amended to disfranchise any person "serving a sentence of detention or confinement in a correctional facility, jail, or other location or while serving a sentence of parole." 1995 Colo. Sess. Laws 821.

In 2005, the statute was amended to its present form: it added "for a felony conviction," and the second clause relating to pretrial confinement. 2005 Colo. Sess. Laws 1395, 1430.

> eligible to register to vote or to vote in any election; however, a confined prisoner who is awaiting trial but has not been tried shall be certified by the institutional administrator and shall be permitted to register to vote by mail registration pursuant to part 5 of this article.

(Emphasis supplied.)

The trial court ruled that the statute—withholding the right to vote to those released from imprisonment and placed on parole—does not contravene Article VII, Section 10 [hereinafter "Section 10"], because parole is part of a prisoner's "full term of imprisonment." A006. So long as a parolee has not completed her parole, the trial court ruled, she has not "served out [her] full term of imprisonment" and may be precluded by statute from voting. A006-7.

The trial court's ruling is constitutional error. First, it ignores the plain and clear language of Section 10, which never mentions "parole," only "confinement" and "imprisonment," neither of which could be or can be understood as including "parole." Second, this Court, applying and determining the scope of Section 10, has implicitly rejected the argument. Third, it attempts to shoehorn "parole" into Section 10, even though parole from a penitentiary did not exist in Colorado until *23 years* after ratification of the Colorado Constitution. Finally, in construing the contemporary parole statutes, it ignores this Court's decisions which have repeatedly held that mandatory parole is *not* part of the term

of imprisonment and that a felon's release from imprisonment constitutes the discharge of his full term of imprisonment.

A. The plain and clear language of Section 10 must be applied: "confinement" and "imprisonment" do not include "parole."

The first and most fundamental rule of constitutional construction is that where a constitutional provision contains plain, clear language, the burden of constitutional construction is over. Indeed, the rules of constitutional construction are irrelevant: the court must simply apply the language as it is written. *E.g.*, *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005); *Board of Educ. of School Dist. No. 1 v. Booth*, 984 P.2d 639, 647 (Colo. 1999); *Bolt v. Arapahoe County School Dist. No. 6*, 898 P.2d 525, 532 (Colo. 1995); *see Pearce v. People*, 53 Colo. 399, 401, 127 P. 224, 225 (1912) ("The [constitutional] language interprets itself. There is no occasion for construction."). "The presumption is in favor of the natural and popular meaning in which the words are usually understood by the people who have adopted them." *Prior v. Noland*, 68 Colo. 263, 267, 188 P. 729, 730 (1920), *quoted with approval in Rodriguez*, 112 P.3d at 696.

This Court has repeatedly held that legislative enactments cannot alter the plain meaning of constitutional provisions. "That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add

to or take away from that meaning." *People v. May*, 9 Colo. 80, 85, 10 P. 641, 643 (1886) (internal quotations omitted); *see Colorado State Civil Serv. Employees Ass'n v. Love*, 167 Colo. 436, 451-52, 448 P.2d 624, 630 (1968) ("The governing principle, long adhered to in this state, is that legislative construction cannot abrogate the plain meaning of the Constitution. . . . [W]e repeat, no rule of construction can change or distort clear constitutional language.").

The context of Section 10. "Confinement" and "imprisonment" are plain and ordinary words. The People in ratifying the Colorado Constitution would have given the words their "ordinary and popular meaning," *Bolt*, 898 P.2d at 532. That is, they would have understood the words to refer to physical restraint of a person. They would *not* have understood those words to mean or include "parole," which by definition is not confinement in a prison.

The word "parole" is found nowhere in the Colorado Constitution, let alone in Section 10. The language of Section 10 recognizes two statuses for a convicted felon: either the felon has been "released," or she has been "confined" under a "term of imprisonment." There is no oxymoronic third status of "released from prison while still serving a term of imprisonment."

A plain-meaning reading of Section 10. Section 10 provides in pertinent part that "[n]o person while *confined in any public prison* shall be entitled to vote;

but every *such* person who was a qualified elector prior to *such* imprisonment, and who is released therefrom . . . by virtue of having served out his full term of imprisonment, shall without further action . . . be invested with all the rights of citizenship." Art. VII, § 10 (emphasis supplied).

There is nothing technical or legalistic in these words. The italicized words are critical to understanding what Section 10 means:

1. ***"Confined in any public prison"*** must mean physical incarceration behind bars.
2. ***"Such"*** is intended to ensure that the reader makes reference to a specific, antecedent word.[5] Accordingly, "such person" refers to the previously described "confined" person. And "such imprisonment" refers to "confinement in a[] public prison"—that is, physical incarceration behind bars.
3. ***"Released therefrom"*** must mean released from "confinement in a public prison."
4. ***"Served out his full term of imprisonment"*** must mean serving out the full *duration* of the confinement in a public prison (or physical

[5] *See Johnston v. City Council of City of Greenwood Village*, 177 Colo. 223, 228, 493 P.2d 651, 654 (1972).

incarceration behind bars), since "term" is a word connoting time. *See* 1874 Colo. Terr. Laws 208.

This is precisely how this Court construed these words and phrases in Section 10:

> [W]e find that the *initial clause of the provision* which provides that "No person while confined in any public prison shall be entitled to vote," *is given meaning by the remaining clause which pertains only to those incarcerated to serve a term of imprisonment. See Sterling v. Archambault*, 138 Colo. 222, 332 P.2d 994 (1958).

Moore v. MacFarlane, 642 P.2d 496, 497 (Colo. 1982) (emphasis supplied).

There is nothing in Section 10 so much as hinting that a person can be released from confinement after serving out the full term of imprisonment—physical incarceration behind bars—and yet continue to be disfranchised. Indeed, Section 10 specifically provides that refranchisement occurs "without further action" upon such release.

By definition, parole means the release of a person from "confinement in a[] public prison." It is true, as the trial court noted, that a parolee is subject to various parole conditions, but it is an "abrogat[ion of] the plain meaning of the Constitution"[6] to conclude that a person's release on parole from "confinement in

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[6] *Love*, 167 Colo. at 451, 448 P.2d at 630.

a[] public prison" does not result in refranchisement under Section 10.

"Full term of imprisonment" cannot mean "full term of the sentence." The trial court, citing *McGrath v. United States*, 20 F.3d 1066 (10th Cir. 1994)—which contains no analysis of Section 10—ruled that Section 10 "applies to the entire *sentence*" and not just the period during which a person is confined in a public prison. A006. This was error.

Nowhere does Section 10 use the word "sentence," let alone the phrase "full term of the entire sentence." Even if the framers "meant" to but somehow failed to use "full term of the entire sentence," the only "sentences" the framers could have contemplated were corporal punishment, fine, and imprisonment, since those were the only punishments that had ever been authorized in Colorado prior to and at the time of ratification of the constitution. *See generally* Argument C, below. This Court in *Sterling v. Archambault*, 138 Colo. 222, 332 P.2d 994 (1958), rejected the view that Section 10 applied to the "entire sentence." As discussed more fully in Argument B.1., in *Sterling* the respondent Archambault had served his full term of imprisonment, and was released on probation. That is, he had not completed his "entire sentence." This Court held that Archambault's discharge from confinement in a prison refranchised him under Section 10, and he was automatically reinvested with all his civil rights. *Sterling*, 138 Colo. at

224-25, 332 P.2d at 995.

Contrary to the trial court's implicit suggestion, the framers of our constitution and the People of the State of Colorado knew the difference between "imprisonment" and "sentence." The first General Assembly in 1876, within months after the Colorado Constitutional Convention was dissolved, enacted a law providing:

> Whenever any person shall be lawfully *sentenced* for crime by the judge of any district court in this state, to *imprisonment in the state prison*, . . . it shall be competent for the court awarding such sentence, to incorporate therein a provision that the person so sentenced shall be kept at hard labor during the *term of such imprisonment* . . . .

Colo. Gen. Laws § 799 (1877) (emphasis supplied). As this statute illustrates, lawmakers and the People at the time the Constitution was written and adopted drew a clear distinction between "imprisonment" and "sentence." This fact significantly undermines the trial court's construction of Section 10. *See, e.g., Krutka v. Spinuzzi*, 153 Colo. 115, 124, 384 P.2d 928, 933 (1963).

The trial court's conclusion that Section 10 applies to a criminal defendant's entire sentence is the kind of "strained construction" and "unnatural use of words" that this Court long has condemned, *Pearce v. People*, 53 Colo.

399, 402, 127 P. 224, 226 (1912). *See, e.g., Lidke v. Industrial Comm'n*, 159 Colo. 580, 583, 413 P.2d 200, 202 (1966) (when constitutional language is clear and plain, "[f]orced, subtle, strained or unusual definitions should never be resorted to"). It improperly "add[s] to [and] take[s] away from"[7] the plain meaning of words as they were "understood by the people who . . . adopted them."[8]

B. This Court's decisions accord with the plain and ordinary meaning of Section 10.

1. *Sterling* and *Moore* control the disposition of this issue.

The Colorado Supreme Court on two occasions has analyzed the language and scope of Section 10: *Sterling v. Archambault*, 138 Colo. 222, 332 P.2d 994 (1958), and *Moore v. MacFarlane*, 642 P.2d 496 (Colo. 1982). These cases are factually analogous, and their analysis is instructive.

In *Sterling*, Archambault was convicted of three counts of violating the federal Food, Drug and Cosmetic Act's prohibition against the introduction into interstate commerce of misbranded or adulterated food or drugs. On the first two counts he was sentenced to a term of 10 months imprisonment; on the third count, his sentence was suspended and he was placed on three years probation to

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[7] *May*, 9 Colo. at 85, 10 P. at 643.

[8] *Prior*, 68 Colo. at 267, 188 P. at 730

commence upon service of the prison sentences on the first two counts. *Id.* at 224, 332 P.2d at 995; *see id.* at 225-26, 332 P.2d at 996 (Sutton, J., concurring).

After serving out the full term of his imprisonment but before completing his probation, Archambault ran for office. An elector filed an original proceeding in the Colorado Supreme Court seeking to strike Archambault's name from the ballot.

The question before the court was whether Archambault had "'served out his full term of imprisonment,'" and was "'invested with all the rights of citizenship'" "'without further action,'" *id.* at 995 (quoting Section 10), including the right to run for office. The Colorado Supreme Court unanimously held that he had—even though he had not completed the full term of his sentence—since he was still on probation on the third count:

> Archambault "having served out his full term of imprisonment" has become "without further action . . . invested with all the rights of citizenship." Hence he is eligible to be a candidate for State Senator from the Sixth Senatorial District. The constitutional prohibition is limited to the disenfranchisement of persons *while confined in a public prison.* Having completed his term of imprisonment, Archambault is no longer "confined", hence he is eligible to run for office.

Id. at 224-25, 332 P.2d at 995 (italics in *Sterling*; underscoring supplied).

Considered with the majority's holding, Justice Sutton's concurrence in

Sterling is a categorical rejection of the trial court's conclusion that Section 10's phrase "full term of imprisonment" encompasses the "entire sentence," A0006, including parole. Justice Sutton recognized that in other jurisdictions and in non-electoral contexts "one on probation is not at large nor at liberty except within the circumscribed limitations permitted by his probation and is in fact in custody and under the control of the court." *Id.* at 225-26, 332 P.2d at 996. Indeed, he said, "[p]robation is a substitute for imprisonment; a conditional suspension of sentence." *Id.* at 226, 332 P.2d at 996 (citing 24 C.J.S. Crim. Law § 1618, at 175).

Justice Sutton's view of probation was the same as the trial court's view of parole—i.e., a parolee is "in fact in custody and under the control of the court," to use Justice Sutton's words. Notwithstanding his views of probation, Justice Sutton acknowledged that "the majority opinion here is correct because the constitution requires that one to be ineligible *must be 'in prison.'*" *Id.*, 332 P.2d at 996 (emphasis supplied). Although he expressed disbelief that "law abiding people" would have wanted probationers to be eligible to run for office, Justice Sutton acknowledged that Section 10's words were "plain" and the court's holding was "compelled . . . [as a] result of the words used." *Id.*, 332 P.2d at 996. Notably, Section 10 has never been amended, notwithstanding Justice Sutton's concluding statement, "[W]e should also point out that it is within [the People's]

province to effect a change if they care to do so." *Id.*, 332 P.2d at 996.

The trial court's ruling improperly dismissed as irrelevant Justice Sutton's concurrence. Although his concurrence is not controlling, it is nonetheless important because it makes clear that all seven justices who voted to discharge the order to show cause were made aware of—and rejected—the argument that a person under probation (or, here, parole) remained disfranchised because he was not at liberty "except within the circumscribed limitations permitted by his probation and is in fact in custody," *id.* at 225-26; 332 P.2d at 996.

Sterling was cited with approval more than two decades later in *Moore*. In that case, the United States District Court for the District of Colorado certified this question:

> Do the provisions of . . . Section 10 . . . apply to qualified electors . . . who, at the time of any election[] are confined in a county or municipal jail as pretrial detainees, who at said time have not been convicted of a crime with which they have been charged or *who have not at said time been determined to be in violation of the terms of their probation granted by a court upon a previous conviction of a crime*?

Moore, 642 P.2d at 497 (emphasis supplied). The Colorado Supreme Court (with Justice Erickson not participating) unanimously answered "no." Noting the "fundamental principle of this state's election statutes[] that no law should be so

strictly construed as to prohibit from voting those otherwise qualified to exercise the privilege" and citing *Sterling*, the supreme court held:

> In interpreting the provision in this manner, we are guided by a longstanding rule of constitutional construction that provisions contained in this state's constitution are to be interpreted as a whole with effect given to every term contained therein. In this case, we find that the initial clause of the provision which provides that "No person while confined in any public prison shall be entitled to vote," is given meaning by the remaining clause which pertains only to those incarcerated to serve a term of imprisonment.

Id. As *Moore* makes clear, the phrase "full term of imprisonment" clarifies that disfranchisement occurs only when a person is "confined" in a prison following conviction, and the disfranchisement ends when she no longer is confined.

2. The trial court improperly relied upon the *obiter dictum* in *Monroe.*

The trial court distinguished *Sterling* and *Moore* because neither case involved parolees and chose to rely on the only other Colorado decision construing Section 10: *People ex rel. Colorado Bar Association v. Monroe*, 26 Colo. 232, 57 P. 696 (1899).

The trial court's approach suffers from three flaws. **First,** *Sterling* and *Moore* cannot be distinguished on the ground that they do not involve parolees. This is because the Secretary of State advanced, and the trial court adopted, a legal

argument in which probationers and parolees are indistinguishable—are interchangeable. The argument is that parolees have not completed their "term of imprisonment" so long as they are on parole; while they are on parole, the argument continues, they remain, in the trial court's words, "in [the] legal custody and under control of the warden [such] that the period of parole [i]s in legal effect, imprisonment." A004 (internal quotations omitted). As Justice Sutton pointed out to the other justices in *Sterling*, the *exact same view* could be taken of the liberty-depriving effect of probation so that Archambault, who was on probation, could be disfranchised and barred from running for office under Section 10. Yet, the *Sterling* court unanimously rejected that view of probation and adopted a plain-meaning construction of Section 10: disfranchisement occurs only during the period of physical incarceration.

Second, *Monroe* issued two dispositive holdings, only one of which was necessary to deciding the case. In *Monroe*, a disbarment proceeding, an attorney convicted of a felony argued he should not be disbarred because the right to practice law was a "right[] of citizenship" guaranteed under Section 10 and he had served out his full term of imprisonment. The court rejected the argument. It noted that it had held earlier that term in *People ex rel. Colorado Bar Association v. Weeber*, 26 Colo. 229, 230, 57 P. 1079, 1080 (1899), that the practice of law was

not a "right of citizenship" and accordingly Section 10 was not a defense to disbarment. In *dictum*, the court stated, without any analysis or citation to authority, "it is not shown either that respondent has been pardoned, or that he has served out his full term of imprisonment, but, on the contrary, it does appear that he is simply released from confinement on parole." 26 Colo. at 233, 57 P. at 696.

Setting aside that the *Monroe* court offered no constitutional analysis and that Section 10 says nothing about "confinement on parole," it is well settled that "*obiter dictum* . . . is unpersuasive as precedent." *Itin v. Ungar*, 17 P.3d 129, 135 (Colo. 2000); *accord Town of Eagle v. Scheibe*, 10 P.3d 648, 652 (Colo. 2000); *see, e.g., People in Interest of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988) (refusing to be bound by statement in earlier case because statement "was not necessary to the disposition of the issues [in that case] and should be recognized as *dictum* without precedential effect"). The *Monroe* court's throwaway remark on Section 10 was *dictum*. That the *dictum* is entitled to no weight may be inferred from this Court's decision not to cite *Monroe* in *Sterling* and *Moore*.

The *obiter dictum* nature of *Monroe*'s alternative holding is underscored by the longstanding principle that this Court does not reach constitutional issues unless it is necessary to do so. *See, e.g., People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985) ("Axiomatic to the exercise of judicial authority is the principle that a

court should not decide a constitutional issue unless and until . . . the necessity for such decision is clear and inescapable."); *see also Lorenz v. State*, 928 P.2d 1274, 1284 (Colo. 1996) (principle of judicial restraint when constitutional issue is not squarely presented "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy" and "assures . . . that the issues before it will be concrete and sharply presented") (internal quotations omitted).

Third, even if *Monroe*'s *dictum* should be afforded any weight, its rationale was twice rejected implicitly by this Court, in *Sterling* and *Moore*. Monroe stated that the lawyer-felon had not served out his full term of imprisonment because "he is simply released from confinement on parole." 26 Colo. at 233, 57 P. at 696. This view of parole—that a parolee is still "confined" because of restrictions upon her liberty—is identical to the view of probation that was articulated by Justice Sutton in *Sterling*. Yet, all seven justices, including Justice Sutton, rejected the notion that such a view of probation could control the plain-meaning reading of Section 10. In short, *Monroe*'s *dictum* and the holdings in *Sterling* and *Moore* cannot be reconciled.

3. The Colorado Supreme Court's mandatory-parole cases make

clear that parole is not part of any term of imprisonment.

Until 1993 parole was discretionary with the parole board: it was not a part of a term of imprisonment and no person had a right to parole. In 1993, the legislature required that every term of imprisonment, when completed, must be followed by a term of mandatory parole. The Colorado Supreme Court's mandatory-parole cases confirm that parole is no part of a "term of imprisonment." In *Martin v. People*, 27 P.3d 846, 850 (Colo. 2001), the court held that under the mandatory-parole regime "prison terms" and "parole terms" have become "separate components of the penalty imposed by the court," 27 P.3d at 850:

> [U]nder mandatory parole, a convicted offender does not begin serving the period of parole until his prison sentence has been fully served, or the parole board determines that he is ready for parole. *Once an offender is granted release to parole supervision by the state board of parole, he will be deemed to have discharged his sentence to imprisonment in the same manner as if he had been discharged pursuant to law.* Thus, if he violates the conditions of that parole, he may be returned to confinement as a penalty for that parole violation. This new period of confinement is limited only by the board's statutory authority, and *is not related to the offender's original sentence to incarceration.*

Id. at 858 (emphasis supplied); *see People v. Luther*, 58 P.3d 1013, 1016 (Colo. 2002) (holding that upon his release to parole "Luther had *discharged his sentence to imprisonment* on the manslaughter charge, and that sentence was no longer

operable in any sense") (emphasis supplied); *People v. Johnson*, 13 P.3d 309, 313 (Colo. 2000) ("Although mandatory parole is part of the overall 'sentencing regime,' *it is a distinct element of sentencing, separate from the terms of imprisonment* or length of sentence imposed by the trial court.") (emphasis supplied).

Whatever may be said about a parolee's service of his "full term of imprisonment" in the years predating the legislature's 1993 mandatory-parole scheme, there is no doubt that a parolee released on mandatory parole under that scheme has completed his full term of imprisonment or, as the *Martin* court said, "discharged his sentence to imprisonment," 27 P.3d at 858. Accordingly, under these cases, even under the trial court's construction of Section 10 parolees would be entitled to vote because they have completed their "sentence of imprisonment."

C. The constitutional history of Section 10 forecloses the possibility that "full term of imprisonment" includes parole.

"[Our] constitution derives its force . . . from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language, used in the instrument according to the sense most obvious to the common understanding." *Alexander v. People*, 7 Colo. 155, 167, 2 P. 894, 900 (1884), *quoted with approval in Rodriguez*, 112 P.3d 696. In applying the

Colorado Constitution, in addition to affording the language of the Constitution its ordinary and common meaning, courts must give effect to every word and term contained therein, whenever possible. *Rodriguez*, 112 P.3d at 696; *Moore*, 642 P.2d at 497.

There was no parole when the Colorado Constitution was adopted. Neither the People of the State of Colorado nor the framers of the Colorado Constitution, ratified in 1876, ever conceived that "parole" could be a part of a convicted felon's "term of imprisonment." Accordingly, they never intended Section 10 to permit the state to preclude a person from voting who had been released from "imprisonment." That is, in using the phrase "full term of imprisonment," the framers intended, and the People understood, that any person lawfully released from the penitentiary would be "invested with all the rights of citizenship."

This is because, as the trial court found, "the concept of parole did not exist in Colorado when the Colorado Constitution was ratified in 1876," A0004. In fact, persons could not be paroled from a prison until 1899, 23 years after ratification of the constitution. *See* 1899 Colo. Sess. Laws 418-27. From the first Territorial Legislative Assembly in 1861 until the twelfth General Assembly of the State of Colorado in 1899, a period of nearly 40 years, there were three—and only

three—forms of punishment: imprisonment, corporal punishment, and fine. *See, e.g.*, 1861 Colo. Terr. Laws 333; 1874 Colo. Terr. Laws 204; Colo. Gen. Stats. § 937 (1883).

In 1874, the year of the last session of the Territorial Legislative Assembly before the Colorado Constitutional Convention, there were four—and only four—ways to leave a prison: escape, death, pardon or discharge. *See* 1874 Colo. Terr. Laws 204, 689. Similarly, in 1876, the year of the first session of the General Assembly of the State of Colorado, which convened four months after the Colorado Constitution was ratified, there were four—and only four—ways to leave a prison: escape, death, pardon or discharge. *See* Colo. Gen. Laws §§ 2027-2033 (1877).

The statutes enacted contemporaneously with the adoption of the constitution make it clear that the legislators, many of whom were members of the Constitutional Convention,[9] understood "term of imprisonment" to mean just what

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[9]Nearly a third of the 39 members of the Constitutional Convention were members of the two sessions of the Territorial Legislative Assembly immediately preceding the Convention and the State General Assembly immediately following the Convention. *See* THE LEGISLATIVE MANUAL OF THE STATE OF COLORADO 222-30 (1st ed. 1877); *compare* RULES FOR THE GOVERNMENT OF THE CONVENTION TO FORM A STATE CONSTITUTION FOR THE TERRITORY OF COLORADO, at [i]-[iii] (1875-1876) ***with*** 1874 Colo. Terr. Laws [v]-[vii] ***and*** 1872 Colo. Terr. Laws [iii]-[v].

those plain words mean—confinement in a prison. *See, e.g.*, Colo. Gen. Laws § 799 (1877) (providing that any person "sentenced for crime by the judge . . . to imprisonment in the state prison" may be further sentenced to "hard labor during the *term of such imprisonment*") (emphasis supplied); Colo. Gen. Laws §§ 2016 & 2042 (1877) (providing that board of commissioners of "[t]he penitentiary" shall issue report to General Assembly stating, *inter alia*, "[t]he number of convicts confined in the prison" and "their term of imprisonment"); 1874 Colo. Terr. Laws 204 (same); 1870 Colo. Terr. Laws 85 (providing that, upon transfer of prisoners from county jails to penitentiary, "all such persons shall be kept and imprisoned in the said penitentiary . . . during the respective terms of their imprisonment"); *see also* 1874 Colo. Terr. Laws 208 (providing that warden of "the Penitentiary" shall receive any person whose death sentence has been commuted to "a term of years . . . and shall confine such person according to the terms of such condition").

This constitutional history is a compelling rejection of any argument that the People of the State of Colorado approved the Colorado Constitution in 1876 intending—or believing—that release of a person from confinement in a prison would continue the disfranchisement if the person were also placed on parole.

The non-existence of parole in 1876 is dispositive. While acknowledging that "the concept of parole" did not exist when the Colorado

Constitution was adopted, the trial court dismissed this fact and concluded that Section 10's "full term of imprisonment" must include parole because such a construction "is clearly supported by *legislative intent, history, and case law*," *id.* (emphasis supplied). The trial court's conclusion contravenes this Court's explicit holding in *May* that "neither courts nor legislatures have a right to add to or take away from" the plain meaning of constitutional language, 9 Colo. at 85, 10 P. at 643.

The trial court's conclusion is also at odds with another well-settled rule of constitutional construction: "[A] constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them." *Krutka v. Spinuzzi*, 153 Colo. 115, 124, 384 P.2d 928, 933 (1963) (internal quotations omitted).

This Court's application of that rule in *Krutka* is instructive. There, the prosecution appealed the trial court's decision granting Spinuzzi's motion for judgment of acquittal after the jury had been empaneled. Based on this Court's order "disapproving" the decision, the state sought to re-try Spinuzzi over his double-jeopardy objection. The issue before this Court was whether the state's successful appeal could subject Spinuzzi to a second trial. In holding that it could not, this Court said the dispositive question was, "did those who framed and

adopted the Colorado Constitution intend that an 'accused shall not be deemed to have been in jeopardy' in the situation where the People on review by writ of error obtain a reversal of a judgment of acquittal in a criminal proceeding?" *Id.*, 384 P.2d at 933.

The Court's answer to this question bears on the proper construction of Section 10 in light of the undisputed fact that parole did not exist when Section 10 was adopted:

> Quite obviously they did not, for the very simple reason that *as of the date the State Constitution was framed and adopted the People did not even have the right to sue out a writ of error in a criminal proceeding.*
>
> As of 1876 only the defendant had the right to a writ of error in a criminal proceeding. Hence, *when read in this context, Article II, section 18 of the Colorado Constitution was of necessity* only intended to preclude a defendant who on appeal obtained a reversal of his judgment of conviction from thereafter claiming former jeopardy when the state sought to try him again for the same offense. . . .
>
> It was not until 1907 that the People first obtained the right to sue out a writ of error in a criminal proceeding. . . .

Id. at 124-25, 384 P.2d at 933-34 (emphasis supplied).

It was not until 1899 that the legislature authorized parole. "When read in

this context,"[10] it is "[q]uite obvious[]"[11] that "those who framed and adopted the Colorado Constitution"[12] did not understand, or intend, "full term of imprisonment" to include parole, something they had no "concept of"[13] for another 23 years.

Conclusion

This Court should accept this appeal and invalidate section 1-2-103(4) as violative of Article VII, Section 10, of the Colorado Constitution.

Dated: June 1, 2006.

HADDON, MORGAN, MUELLER, JORDAN,
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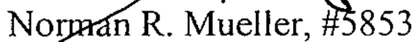

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[10] *Id.* at 124, 384 P.2d at 933.

[11] *Id.*

[12] *Id.*

[13] A004.

Certificate of Service: I certify that on June 1, 2006, a copy of the foregoing *Application for Appeal of District Court's Decision Under C.R.S. § 1-1-113* (without appendix) was served on the following by U.S. mail:

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