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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	
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REPLY BRIEF OF PLAINTIFFS-APPELLANTS	

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INTRODUCTION

Defendant-Appellee, Gigi Dennis, in her official capacity as Secretary of State of Colorado ("Secretary") notes at the outset of her Answer Brief that appellants have not appealed the district court's decision rejecting their equal protection argument. However, this is an expedited discretionary appeal under § 1-1-113(3), C.R.S., which appears not to authorize appeal of issues except those brought directly under the statute. Appellants' equal protection argument was brought under 42 U.S.C. § 1983. Appellants have not waived their right to appeal the district court's decision dismissing that claim.

ARGUMENT

I. SECTION 1-2-103(4) VIOLATES THE COLORADO CONSTITUTION'S GUARANTEE OF THE RIGHT TO VOTE FOLLOWING RELEASE FROM CONFINEMENT IN A PUBLIC PRISON.

A. The plain and clear language of Section 10[1] must be applied: "confinement" and "imprisonment" do not include parole.

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[1]For the convenience of the Court, the text in Section 10 is repeated in this Reply:

> 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.)

The Secretary argues that "the full term of imprisonment" in Article VII, Section 10 ("Section 10") of the Colorado Constitution includes parole, but throughout the Answer Brief, the Secretary continually must cite to sources that state that a criminal "*sentence*" includes parole.[2] The Secretary's reliance on the term "sentence," which was not used by the framers of our constitution, is revealing. The framers understood the difference between sentence and imprisonment and thus specifically rejected using the broader concept of sentence for the narrower term "imprisonment" which meant and means, in the context of Section 10, confinement in a public prison.

Tellingly, the Secretary's brief all but ignores the initial clause in Section 10—"no person **while confined in any public prison** shall be entitled to vote"—which makes the meaning of that section and the intent of the framers clear. That initial clause obviously limits and narrows the subsequent reference to "full term of imprisonment." Persons who are convicted of a crime resulting in a sentence to imprisonment are disenfranchised while "confined." Upon their

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[2]The amicus brief of the Governor is devoted almost exclusively to the same theme—that parole is part of a defendant's "sentence" or "punishment" and detailing the restrictions of parole. That discussion, while interesting, is not germane to the issue presented in this appeal. The amicus brief does not and cannot show that a person on parole is "confined" in a "public prison" and is therefore disenfranchised under Section 10.

release from confinement "such person[s]"—those "confined" in "public prison[s]"—have their right to vote automatically restored.

Other canons of constitutional interpretation confirm that the Secretary's desired reading of Section 10 is incorrect. Every word contained in a constitutional provision should be given effect. *Bd. of County Comm'rs. v. Vail Assocs.*, 19 P.3d 1263, 1273 (Colo. 2001). Taking the first two clauses of Section 10 together, the use of the term "such imprisonment" in the second clause can only refer to confinement "in any public prison" used in the first clause. If, as the Secretary urges, imprisonment means more than incarceration, the word "such" is rendered superfluous.

Similarly, the word "imprisonment" in the phrase "the full term of imprisonment," should be assigned the same meaning as "imprisonment" in the earlier phrase "prior to such imprisonment." The "well settled rule" of statutory construction set forth in *Colorado Common Cause v. Meyer*, 758 P.2d 153, 161 (Colo. 1988), is applicable here: "when ... the legislature employs the same words or phrases in different parts of a statute, then, in the absence of any manifest indication to the contrary, the meaning attributed to the words or phrases in one part of the statute should be ascribed to the same words or phrases found elsewhere in the statute." Thus, the meaning of "full term of imprisonment" in

Section 10 means the full term for which an individual is confined in any public prison.

The Secretary posits that the argument that disenfranchisement occurs only during the period of physical incarceration renders the latter part of Section 10—"term of imprisonment"—superfluous, but the same could be said of the framers' insertion of "pardon" into that part of Section 10. By definition, a person pardoned would no longer be confined in prison; yet the framers saw fit to say that a person pardoned is automatically re-enfranchised. The same is true for the prisoner released from the prison walls. And the penalogical framework in which the framers were working shows that neither reference is superfluous. In 1874 there were only four ways to leave a prison—escape, death, pardon, or discharge. The framers were simply referring to the two methods of departure from prison that resulted in re-enfranchisement.

In their unconvincing effort to equate the broad concept of sentence with the much narrower concept of imprisonment as used in Section 10, the Secretary also misreads Colo. Gen. Laws, § 799. The operative language of that section is that the prisoner may be "kept at hard labor during the *term of such imprisonment*" (emphasis added). The use of the italicized phrase makes clear what the framers'

contemporaries, and the framers themselves, meant by "imprisonment"—incarceration behind bars.

The various dictionary definitions of parole and the treatises on parole cited by the Secretary are irrelevant and add nothing to the Secretary's argument. Parole certainly can be part of a "sentence" or part of a person's "punishment" and certainly there are restrictions on the liberty of one on parole. But a person on parole is most certainly not one who is "confined" in a "public prison."

The Secretary's discussion of parole also ignores that the framers did not have parole in mind when they drafted Section 10—it did not exist at that time in Colorado. Additionally, the Secretary's argument, which gives the legislature the ability to unilaterally alter the meaning of Section 10, ignores that the section is fully self-executing, by definition precluding the legislature from taking any action to disenfranchise ex-prisoners contrary to its express terms.

Finally, what the General Assembly did in 1899 when it first enacted parole and what the legislature has done with parole over the intervening years is irrelevant to Section 10 and the re-enfranchisement of those prisoners who have completed their term of imprisonment. Although the jurisdiction and the power of the state may continue over them and the conditions of parole may change, they are no longer "confined" in a "public prison." Thus, under the express terms of

Section 10, those ex-prisoners are automatically re-enfranchised upon their release from imprisonment.

B. This case and Section 10 deal with the subject of suffrage, not other constitutional rights.

The Secretary argues that if parole is not part of the term of imprisonment, parolees would be invested with all rights of citizenship, including the right to travel and the right of free association. This, says the Secretary, would defeat the purpose and usefulness of parole.[3] Since the framers were not concerned with the purposes of parole—it did not exist when Section 10 was enacted—this parade of horribles argument could be dismissed as beyond this Court's concern and its duty to interpret the plain and common meaning of the words and phrases used in Section 10.

However, the Secretary's argument is also not valid. It is well recognized that correctional agencies may infringe on a parolees' right to travel and right to association by imposing conditions of parole. Disenfranchisement, on the other

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[3]The Secretary's footnoted suggestion that this argument is somehow supported by *Moore v. MacFarlane*, 642 P.2d 496 (Colo. 1982), reflects her misunderstanding of the issue *Moore* decided. *Moore* holds that material witnesses can vote notwithstanding their detention in "prison" because the framers did not intend that class of persons to be disenfranchised. That begs the question presented here; whether the framers could have intended to ensure the utility of parole when parole *did not yet exist.*

hand, serves no reasonable penalogical or administrative purpose and may not be used as a condition of parole. The Secretary's slippery slope argument fails.

Contrary to the Secretary's argument, a prisoner's location in prison is a crucial component of the prisoner's disenfranchisement. Section 10 is addressed to the prisoner who has been convicted of a crime worthy of a prison sentence and, in fact, actually sentenced to and serving the sentence in prison.

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

In only two previous cases has this Court been called upon to analyze the language and scope of Section 10. *People ex rel. Colorado Bar Association v. Monroe*, 26 Colo. 232, 57 P. 696 (1899), inaccurately described in the Secretary's papers as directly on point, is not one of them.

Section 10 is one of the constitution's 12 provisions addressed to the subject of suffrage and elections. *Monroe* has nothing to do with suffrage or elections—it is an attorney disbarment case. There is indeed a citation to Section 10 in *Monroe*: attorney Monroe had hoped the provision might provide him a defense against disbarment. This Court rejected the defense without engaging in substantial analysis of Section 10, deferring instead to its opinion in a companion

case (*Case of Weeber*) which held that the privilege of practicing law was not a "right" addressed by this constitutional provision.

There was *no* discussion, analysis or citation to authority with regard to that part of the *Monroe* decision on which the Secretary relies, i.e., that "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. The Secretary's protestations notwithstanding, and as more fully addressed in appellant's Opening Brief, this quoted portion of *Monroe* simply "was not necessary to the disposition of the issues [in that case] and should be recognized as *dictum* without precedential effect." *People in Interest of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988).

Also anticipated and fully addressed in the Opening Brief is the Secretary's attempt to distinguish *Sterling v. Archambault*, 138 Colo.222, 332 P.2d 994 (1958) and *Moore v. MacFarlane*, 642 P.2d 496 (1982)—the only two cases in which this Court has engaged in a head-on analysis of Section 10's scope and meaning—from the issue at bar.[4]

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[4]Justice Sutton's concurring opinion in *Sterling* is cited in the Opening Brief not as controlling, but as persuasive confirmation that the entire Court in *Sterling* was made aware of the argument accepted by the district court and pressed by the

The Secretary primarily argues *Sterling* is distinguishable because Archambault was not on parole but on probation. The argument continues that probation is in many respects different from parole. As relates to Section 10, however, this is a distinction that makes no difference, since "[p]robationers, like parolees, do not enjoy 'the absolute liberty to which every citizen is entitled, but only ... the conditional liberty properly dependent on observance of special parole or probation restrictions'." *See People v. Rossman*, 2006 WL 301074, *3 (Colo.App. Feb. 9, 2006) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); brackets omitted).

Finally, if the Court considers *Monroe* in any way relevant to the issue presented in this appeal, appellants submit that the case is in conflict with *Sterling* and *Moore* and should be disapproved.

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

The Secretary uses the history of the constitutional convention and employs flawed logic to argue that the "full term of imprisonment" is synonymous with the

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Secretary here—that a person under probation (or parole, as in this case) remains disenfranchised because she is not at liberty "except within the circumscribed limitations permitted by [her] probation and is in fact in custody," *id.*, at 225-26; 332 P.2d at 996—and that the entire Court rejected it. *See* appellants' Opening Brief at 18.

"full term of the sentence." That history actually undermines the Secretary's argument. It shows that the framers expressly and repeatedly rejected the Secretary's construction that full term of imprisonment means full term of the sentence.[5]

The language initially proposed for Section 10 at the constitutional convention disenfranchised anyone convicted of a crime carrying a penalty of imprisonment in a penitentiary until he "had served out the term for which he was sentenced." *Proceedings of the Colorado Constitutional Convention,* 1875-76 at 60 (1907). This language was rejected in favor of the phrase "full term of imprisonment" that has been present in Section 10 since enactment. This substitution is significant. A "sentence" could include the rehabilitative period of release upon parole. By its plain language, however, a "term of imprisonment" does not. The framers' clear intention was that only those individuals who were being punished with incarceration should be disenfranchised. When the incarceration ends, however, as it does for felons on parole, the term of

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[5]A more thorough analysis of the Secretary's faulty reading of this history is found in the Amicus Curiae Brief of Certain Criminologists, pp. 6-8, filed in the trial court and contained in the supporting documents filed in this case. A076-A090.

imprisonment is completed and the parolee should be automatically re-enfranchised.

CONCLUSION

The Secretary's entire argument hinges on her effort to equate the structure and restrictions of parole to imprisonment. But the plain wording of Section 10 and the clear intent of the framers defeats the Secretary's effort. When a felon is no longer confined in prison, having served the imprisonment component of his sentence, the most basic right of citizenship—the right to vote—is restored to him. Section 1-2-103(4), which seeks to disenfranchise felons on parole, is therefore unconstitutional.

Dated: June 15, 2006.

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Certificate of Service: I certify that on June 15, 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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