DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO	
PASTOR MICHAEL DANIELSON, COLORADO CRIMINAL JUSTICE REFORM COALITION, AND COLORADO-CURE Plaintiffs, v. GIGI DENNIS, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF COLORADO, Defendant.	▲ COURT USE ONLY ▲
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***AMICI CURIAE* BRIEF OF CERTAIN CRIMINOLOGISTS IN OPPOSITION TO THE SECRETARY'S MOTION TO DISMISS**	

INTRODUCTION

The individuals subscribing to this brief, whose names appear in Appendix A, are all social scientists and criminologists with national reputations in the study of community corrections. They oppose the motion of Gigi Dennis, the Colorado Secretary of State (hereinafter "Secretary") to dismiss the complaint in this action, and support the Plaintiffs' motion for summary judgment. The language of Article VII, Section 10 of the Colorado

Constitution deprives felons of the right to vote only while they are "confined in public prison." Colo. Const. art VII, § 10. This excludes time on parole. The Framers of the Constitution chose language for this provision that restores the right to vote to those who had completed serving a term in public prison, explicitly rejecting language that would disenfranchise a felon for the full term of a sentence. This was not an unthinking or arbitrary choice.

The Framers' demonstrable intent in enacting this provision, and the intent of the people of the State of Colorado in ratifying it, was to serve a particular penological purpose that is present during incarceration, but absent during release – including the supervised release of parole. They recognized that the purpose of disenfranchising felons was purely retributive – to punish them and show society's contempt for the offenses they had committed. Parole, by contrast, has no retributive purpose. Rather, as acknowledged by the Colorado legislature, the Colorado courts, and social scientists with expertise in the field of community corrections, its primary purpose is to rehabilitate, with lesser purposes being protection of the public (incapacitation) and deterrence. *See, e.g.,* C.R.S.A. § 17-22.5-102.5(1)(c); *People v. McCullough*, 6 P.3d 774, 779-80 (Colo. 2000). To construe this provision as empowering the legislature to enact laws like Section 1-2-103(4) of the Colorado Revised Statutes, which disenfranchises felons after the retributive purpose of punishment has been satisfied, runs contrary to both the text of the Constitution and the purpose of the Framers of serving legitimate penological objectives. Beyond this, depriving these individuals of the most basic right accorded to citizens of a democratic society actually discourages rehabilitation, frustrating both the purpose of the Framers and the central function of the parole system.

FACTS

The *amici curiae* criminologists adopt the statement of facts in the Plaintiffs' Combined Motion for Summary Judgment and Response to Motion to Dismiss.

ARGUMENT

I. THE PLAIN MEANING OF THE TERM 'IMPRISONMENT' IN ARTICLE VII, SECTION 10 IS 'CONFINEMENT IN A PUBLIC PRISON.'

In reading Article VII, Section 10 of the Colorado Constitution [hereinafter "Section 10"] as a whole, it is clear that the words "term of imprisonment" are synonymous with the term of confinement in a public prison. The full text of the section reads:

> No person while confined in any public prison shall be entitled to vote; but every 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.

Colo. Const., art. VII, § 10 (emphasis added). Taking the first two clauses 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 the word "imprisonment" as used in that clause meant the term of the sentence in which the felon was both incarcerated and under supervised release, the word "such" would be rendered superfluous. That interpretation would defy the canon of constitutional interpretation to give effect to every word contained in a constitutional provision.[1] *Bd. of County Comm'rs v. Vail Assocs.*, 19 P.3d 1263, 1273 (Colo. 2001).

[1] As the Plaintiffs' Brief in Response indicates, the fact that no statute disenfranchised felons on parole in Colorado until 1995, *see* Pltfs. Br. at 5 n.1, is further indication that C.R.S.A. 1-2-103(4) is a recent distortion of the Framers' intent.

The word "imprisonment" in the phrase "full term of imprisonment," which is at issue in this lawsuit, should be assigned the same meaning as "imprisonment" in the phrase "prior to such imprisonment" twenty-two words earlier in the provision. In fact, the Colorado Supreme Court has stated, in construing a statute, that "[i]t is a well settled rule that 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." *Colorado Common Cause v. Meyer*, 758 P.2d 153, 161 (Colo. 1988) (terming this the "rule of consistent usage," a corollary of the principle of giving "consistent and harmonious effect" to all the parts of a statute).

This rule applies to constitutional provisions for the same reason. Thus, the meaning of "full term of imprisonment" in Section 10 means the full term for which an individual is confined to any public prison. This meaning of the word "imprisonment" accords with the dictionary definition of the word. To "imprison" means "to put into or confine in a prison; detain in custody" or "to hold in restraint." *Random House College Dictionary* 669 (Rev. Ed. 1980).

This construction also accords with case law and the evolution of the language of Section 10 as evidenced by the Proceedings of the Constitutional Convention. The Colorado Supreme Court stated categorically that "[t]he constitutional prohibition [in Section 10] is limited to the disenfranchisement of persons *while confined in a public prison*." *Sterling v. Archambault*, 138 Colo. 222, 224-25, 332 P.2d 994, 995 (1958) (emphasis in original).[2]

[2] This case is discussed in fuller detail in Section I.B.1 of the Plaintiffs' Combined Motion for Summary Judgment and Response to Motion to Dismiss.

There is further support for this construction in the rejection by the Framers of language that disenfranchised an offender for the duration of the offender's sentence in favor of the language now in Section 10. The language initially proposed 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) [hereinafter "*Proceedings*"]. This language was rejected in favor of the phrase "full term of imprisonment" that has been present in Section 10 since its enactment. This substitution is highly significant. A "sentence" could, and arguably does, 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 are being punished with incarceration should be disenfranchised.[3] When the incarceration ends, however, as it does for

[3] Colorado's Constitution appears to be unique for its time in that it automatically restored the right to vote to felons who had completed their sentences of imprisonment. Of the thirty-seven state constitutions in force in 1876, the twenty-seven we reviewed, being the only ones available either on the internet or in the Colorado Supreme Court library, fell into one of four other categories:

Disenfranchising felons permanently: Ala. Const. of 1875, art. VIII, § 3; Cal. Const. of 1849, art. II, § 5; Del. Const. of 1831, art. IV, § 1; Ill. Const. of 1870, art. VII, § 7; Ga. Const. of 1868, art. II, § 6; Iowa Const. art. II, § 5; Ky. Const. of 1850, art. VIII, § 4; Miss. Const. of 1868, art. VII, § 2.

Disenfranchising felons permanently in the absence of an individual pardon or restoration of civil rights: Conn. Const. of 1818, art. VI, § 3, *as amended by* art. XVII (1875); Kan. Const. of 1859, art. V, § 2; Md. Const. of 1867, art. I, § 2; Minn. Const. of 1857, art. VII, § 2; N.H. Const. of 1792, art. 11; N.J. Const. of 1844, art. II, § 1; N.C. Const. of 1868, art. VI, § 5.

Granting legislature broad discretion to pass laws to disenfranchise felons: Ark. Const. of 1874, art. 3, § 1; Fla. Const. of 1868, art. XIV, § 4; Ind. Const. of 1851, art. II, § 8; Mo. Const. of 1875, art. VIII, § 2; N.Y. Const. of 1846, art. II, § 2; Ohio Const. of 1851, art. V, § 4; Tenn. Const. of 1870, art. IV, § 2; Tex. Const. of 1876, art. VI, § 1, cl. 4 (establishing default law of felon disenfranchisement but authorizing legislature to provide for restoration of rights).

Addressing other voting qualifications without addressing the question of felon disenfranchisement: Mass. Const. of 1780, part II, ch. 1, § 3, art. IV; Mich. Const. of 1850, art. VII, § 1; Pa. Const. of 1874, art. VIII, § 9 (n.b., absolutely deprives franchise for a four year period to those convicted of willful violation of the election laws); Vt. Const. of 1793, Ch. 2, § 21.

felons on parole, the full term of imprisonment is completed and the parolees should be automatically re-enfranchised.

II. THE FRAMERS' ONLY PURPOSE IN DISENFRANCHISING FELONS – THE RETRIBUTIVE DEMONSTRATION OF SOCIETY'S CONTEMPT FOR THEIR OFFENSES – IS INAPPLICABLE AND INIMICAL TO PAROLE.

The Proceedings of the Constitutional Convention demonstrate that the Framers of the Colorado Constitution sought to disenfranchise felons only to show the condemnation of society for the crimes that they had committed. Although most of the Proceedings only record the alterations and amendments to various Constitutional provisions without recording any of the discussions, there are isolated portions of the Proceedings in which the thoughts and the intentions of the Framers are evident. One of these portions is the Minority Report of the Committee on Rights of Suffrage and Elections. *Proceedings* at 266-71. This report, issued by two of the five members of the Committee on Rights of Suffrage and Elections, Judge Henry P.H. Bromwell and Agipeta Vigil, protested the failure to extend suffrage to women. In the report, Judge Bromwell wrote:

> The undersigned know of no reason why any portion of our citizens should be disenfranchised except in case of crime, and even in that case this Convention has already voted to remove the badge of infamy, which disenfranchisement inevitably fixes, from any criminal who shall serve out his time of punishment. . . . . [S]aid vote was and is based on the recognized truth that among a body or community who stand upon a general equality, any particular distinction by way of deprivation or disqualification . . . operates . . . as a badge of inferiority, degradation, and reproach, and can not operate otherwise. And it is only because it does so operate that there is any foundation for the sympathy toward criminals who have endured the penalties of the law.

Proceedings at 267 (emphasis added).[4]

The Secretary, in her motion, quoted portions of this passage, but missed its import. The Secretary laid emphasis upon the word "punishment" (Secretary's Mot. To Dismiss at 4), and argued that punishment encompassed the entire sentence, including parole (*Id.* at 5). In context, this interpretation does not make sense.

Concededly, the word "punishment" may a take on various meanings. It can denote the entire purpose of sentencing offenders for their offenses, which encompasses the retributive, incapacitative, deterrent, and rehabilitative purposes of corrections. This definition had its beginnings with Jeremy Bentham in the early 19th century and is the definition used by most experts in criminal justice today. *See generally* Jeremy Bentham, The Rationale of Punishment (1830); H.L.A. Hart, Punishment and Responsibility (1968). But the term "punishment" can also be more narrowly defined to mean only the retributive or punitive purpose of sentencing. In this sense, punishment means causing suffering to those who have harmed others. This meaning of punishment – still used today –reflects the biblical definition of the word. *See, e.g., Romans* 13:4 ("[I]f you do wrong, be afraid . . . . He is God's servant, an agent of wrath to bring punishment on the wrongdoer.") In an age when even laypersons were conversant in the passages of the

[4] That this was a Minority Report does not mean that it espoused views unreflective of mainstream thought at the time. The issue of women's suffrage was a divisive one at the Convention and, arguably, only failed to prevail because of the members' fear of alienating the federal government and delaying statehood. Even though the Convention did not extend the franchise generally to women, it did permit women to vote in school elections – an innovation compared to most of the nation at the time. The Minority Report has taken a rightful place in the study of women's history because of its compelling arguments in support of women's suffrage. *See generally* Women and Social Movements in the United States 1600-2000, http://womhist.binghamton.edu/colosuff/doc1.htm.

Bible – and it was the People of the State who ratified the constitution – there is a strong presumption that this limited, punitive meaning of the word "punishment" predominated.

The context of the Minority Report, by referring to disenfranchisement as a "badge of infamy" and terming it as a deprivation that cannot operate other than as a "badge of inferiority, degradation, and reproach," clearly uses the term "punishment" in this latter sense. It was because disenfranchisement only operated in this restrictive, punitive fashion that the authors argued that it was unjust for the franchise not to be extended to women. By analogy, once all the retributive aspects of the sentence of a convicted felon are satisfied, it would be unjust for disenfranchisement not to end.[5] Such a condition occurs when a felon is released from the confinement of a public prison and is placed on parole.

III. THE RETRIBUTIVE ASPECTS OF A FELON'S SENTENCE ARE SATISFIED WHEN THE FELON IS PLACED ON PAROLE, THE REHABILITATIVE PURPOSE OF WHICH IS UNDERMINED BY DISENFRANCHISEMENT.

The primary purpose of parole is rehabilitation. This has been recognized by the Colorado Supreme Court, which has adopted the opinion of the United States Supreme Court that "parole is designed to 'help individuals reintegrate into society as constructive individuals as soon as they are able without being confined for the full term of the sentence imposed.'" *People v. McCullough*, 6 P.3d 774, 779-80 (Colo. 2000) (quoting *Morrissey v. Brewer*, 408 U.S. 471,

[5] The conclusion that disenfranchisement does not serve any of the other purposes of sentencing, i.e. incapacitation, deterrence, or rehabilitation, is still recognized by experts in criminal justice today. A number of the criminologists who have endorsed this brief also submitted a brief for a New Jersey case in which the reasons why disenfranchisement do not and cannot fulfill an incapacitative, deterrent, or rehabilitative function are explained in detail. *See* Brief of Amici Curiae Certain Criminologists at 9-23, 28-32, *New Jersey State Conference-NAACP v. Harvey*, 381 N.J. Super. 155, 885 A.2d 445 (N.J. Super. App. Div. 2005) (No. A-6881-03T5), *available at* http://www.sentencingproject.org/pdfs/nj-crimamicus.pdf.

477 (1972)). The Colorado legislature has also recognized the purpose of parole to be limited to rehabilitation and incapacitation. C.R.S.A. § 17-22.5-102.5(1)(c) ("The purposes of this article with respect to parole are . . . [t]o promote rehabilitation by encouraging the successful reintegration of convicted offenders into the community while recognizing the need for public safety.").[6] Nowhere is retribution listed as a purpose of parole.

The conclusion that the retributive aspects of parole are satisfied when a felon commences parole is bolstered by another section of that statute. The statute specifies that one of the purposes of that article of the statutory scheme is "[t]o assure the fair and consistent treatment of all convicted offenders by eliminating unjustified disparity in length of incarceration, and establishing fair procedures for the imposition of a period of parole supervision." C.R.S.A. § 17-22.5-102.5(1)(b) (emphasis added). In other words, the Colorado legislature recognized that disparity in only the length of incarceration, i.e. the retributive phase of sentencing, would be unfair. The reason for this is that proportionality is a long-recognized component of retribution. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (Scalia, J., concurring) ("Proportionality is inherently a retributive concept, and perfect proportionality is the talionic [retaliatory] law."). Where a phase of sentencing serves a purpose other than retribution – reformation and reintegration into society, for instance – proportionality becomes unimportant. That the Colorado Legislature chose to specify that only unjustified disparity in

[6] Recognizing the purpose of parole as primarily rehabilitative is not a modern-day innovation. In fact, before the first statute authorizing parole was enacted in Colorado in 1899, the Governor of Colorado recommended the adoption of a parole system to the General Assembly because "[a]n intelligent conduct of this system will . . . promote discipline and reformation. . . . The principle is to consider the criminal rather than the crime." S. Journal, 12th Gen'l Assemb. of the State of Colorado 39 (Jan. 4, 1899).

incarceration should be eliminated shows its recognition that the retributive aspects of a sentence are satisfied by the time that parole begins.

Disenfranchisement is not only inconsistent with parole, since it can only serve a retributive purpose and retribution has nothing to do with parole, but it also actively impedes the rehabilitative purpose of parole. The American Bar Association and numerous social scientists and criminologists have voiced concerns that disenfranchisement operates as a barrier between the offender and society and undermines the rehabilitative goal of preparing the offender to re-enter society. ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, at R-7, *available at* http://www.abanet.org/leadership/2003/journal/101a.pdf ("The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may . . . perpetuate [an offender's] alienation from the community."); *see also* Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 Perspectives on Politics 491, 502 (2004) ("Denying voting rights to . . . felons living in their communities on probation and parole, undermines their capacity to connect with the political system and may thereby increase their risk of recidivism.").

Voting, however, does foster rehabilitation and successful community re-entry. The right, and even the obligation, to vote is held out daily to members of our society as one of the privileges and proud duties of being an American. The restoration of the right to vote, therefore, tells the offender that to become aware of political issues in the community and that to participate in voting is a positive pro-social endeavor. As John Stuart Mill wrote nearly 150 years ago, "To take an active interest in politics is, in modern times, the first thing which elevates

the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness . . . ." J.S. Mill, *Thoughts on Parliamentary Reform* (1859) *in* 19 Collected Works of J.S. Mill 322-23 (J.M. Robson, ed. 1977). The message to offenders in restoring the right to vote to them thus has both the psychological and sociological effect of weaving them back into the community — the very goal of rehabilitation.

CONCLUSION

This Court should rely on the plain meaning of the text of Section 10, which indicates that the "full term of imprisonment" means the full term for which a felon is confined in a public prison. This construction also finds support in the purpose of disenfranchisement, recognized by the Framers as being solely retributive. Such a purpose is inconsistent with parole; such a practice undermines the actual, rehabilitative purpose of parole.

For the foregoing reasons, the *amici curiae* request that this Court deny the Secretary's Motion to Dismiss the Complaint and grant the Plaintiffs' Motion for Summary Judgment finding as a matter of law that C.R.S.A. 1-2-103(4) is unconstitutional under Article VII, Section 10 of the Colorado Constitution as it purports to disenfranchise felons on parole.

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APPENDIX A

The following criminologists participate as amici curiae in their own names only and not as representatives of their employer universities or the professional association with which they are affiliated.

Katherine Beckett is an Associate Professor of Sociology at the University of Washington in Seattle.

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Joan Petersilia is a Professor of Criminology, Law and Society at the University of California at Irvine and a Visiting Professor of Law, Stanford Law School. She is the author of *When Prisoners Come Home : Parole and Prisoner Reentry (Studies in Crime and Public Policy).*

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