Pursuant to Court order

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-000770

ANTHONY EDWARDS — **APPELLANT**

V.

Appeal from Franklin Circuit Court
Hon. Phillip J. Shepherd, Judge
Case No. 08-CI-01955

MELISSA HARROD, ADMINISTRATOR OFFENDER INFORMATION SERVICES; LaDONNA THOMPSON, COMMISSIONER, DEPARTMENT OF CORRECTIONS — **APPELLEE**

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REPLY BRIEF FOR APPELLANT

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, a true and accurate copy of this Reply Brief was served by state messenger mail or by first class mail, postage prepaid to Hon. Todd Henning, Justice and Public Safety Cabinet, Office of Legal Services, 125 Holmes Street, Second Floor, Frankfort, Kentucky 40601.

La Mer Kyle-Griffiths

PURPOSE OF THIS REPLY BRIEF

The purpose of this Reply Brief is to respond to the arguments in the Brief for Appellee to the extent space permits.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This Court dealt with the issues raised by the Department of Corrections in its opinion in Commonwealth. v. Merriman, 265 S.W.3d 196 (Ky. 2008). That opinion starts with the framing of the relevant inquiry as, "(t)he sole question at issue in these two cases (Merriman and Hickman) is whether a juvenile, convicted as a youthful offender, is *subject to the provisions* of KRS 439.3401, the Violent Offender Statute." Merriman at 197 (Emphasis added). This Court at that time made no difference between the consideration for probation and the consideration for parole. Further to make such a distinction would create a ridiculous result and frustrate the clear legislative intent to treat children as different and uniquely capable of rehabilitation.

ARGUMENT

I. THE CLEAR INTENT OF THE LEGISLATURE WAS TO TREAT PROBATION AND PAROLE EQUALLY, THUS YOUTHFUL OFFENDERS ARE ELIGIBLE FOR EARLY PAROLE REVIEW

The Commonwealth argues that youthful offenders with charges that would qualify their adult counterparts for treatment as a violent offender are not eligible for parole earlier than 85% as a separation of powers issue implicating the difference in the roles between the executive and judicial branches. The legislature intended the ability to receive either probation or parole as being equivalent as applied to those who could potentially be labeled violent offenders under KRS 439.3401. In all of the sections where the prohibitions to probation are discussed, parole follows immediately after. These prohibitions for review and early release for adults are explained in subsections (2) and (3):

(2) A violent offender who has been convicted of a capital offense and who has received a life sentence (and has not been sentenced to twenty-five (25) years without parole or imprisonment for life without benefit of *probation or parole*), or a Class A felony and receives a life sentence, or to death and his sentence is commuted to a life sentence shall not be released on *probation or parole* until he has served at least twenty (20) years in the penitentiary. Violent offenders may have a greater minimum parole eligibility date than other offenders who receive longer sentences, including a sentence of life imprisonment.

(3) A violent offender who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on *probation or parole* until he has served at least eighty-five percent (85%) of the sentence imposed.

(Emphasis added) KRS § 439.3401.

The legislature clearly intended probation and parole to be treated exactly the same as they relate to violent offenders. Therefore, as the juvenile code exempts youthful offenders from treatment as violent offenders for the purposes of probation, it must also exempt youthful offenders from any prohibitions contained therein against parole. "It is elementary that each section of a legislative act should be read in light of the act as a whole; with a view to making it harmonize, if possible, with the entire act, and with each section and provision thereof, as well as with the expressed legislative intent and policy." Holland v. Com., 192 S.W.3d 433, 437 (Ky. Ct. App. 2005) *citing* Frankfort Publ. Co., Inc. v. Kentucky State Univ. Found., Inc., 834 S.W.2d 681, 682 (Ky.1992).

The legislature is fully vested with the ability to confer powers and duties to the executive and judicial branches as long as it does not confer the power of one branch to another. Thus, when KRS 439.3401 was amended to add the word probation alongside parole, it is clear the legislature intended that probation and parole be treated the same as far as eligibility is concerned without changing in any way which Branch was conferred power to affect either form of release. Therefore, just as a true adult offender is eligible for neither probation nor parole

based on their crime if it falls under the purview of KRS 439.3401, in light of Merriman, a youthful offender is exempt from both the prohibition from probation as well as the prohibition from parole consideration until 85% of the service of their sentence. According to the court in Mullins, one should "begin (their) analysis by recognizing that the legislature has the power to designate what is a crime and the sentences for violations thereof." Ky. Const. Section 29; Hamilton v. Ford, 362 F.Supp. 739 (E.D.Ky. 1973). Included therein is the power to limit or prohibit probation or parole. Mullins v. Com., 956 S.W.2d 222, 223 (Ky. Ct. App. 1997) abrogated by Com. v. Merriman, 265 S.W.3d 196 (Ky. 2008).

The Commonwealth cites a large number of cases that deal with the issue of whether a Youthful Offender should be handled in adult or juvenile court. Cases such as Chipman v. Com., 313 S.W.3d 95 (Ky. 2010), Canter v. Com., 843 S.W.2d 330 (Ky. 1992), and Kozak v. Com. 279 S.W.3d (Ky. 2008), etc. deal with the issue of juveniles who were prosecuted as youthful offenders but subsequent circumstances changed their status such that they should have been sentenced as juveniles and not subject to adult punishments. That is not the issue here. In this case the court is asked to determine how a youthful offender who received an adult sentence should be reviewed. The Court has dealt with this issue clearly in Merriman stating;

> The intent of the Juvenile Code was set forth by the legislature in KRS 600.010: "[P]romoting protection of children"; that "Any child ... under KRS Chapters 600 to 645 ... shall have a right to treatment reasonably calculated to bring about an improvement in his condition"; "providing each child a safe and nurturing home"; and that "all parties are assured prompt and fair hearings," plus other specific intentions. With these goals in mind, KRS Chapter 640, Youthful Offenders, must be read for its purpose as well. This Chapter has no separate introductory statutes, but instead begins with when and how a preliminary hearing shall be conducted. This Chapter makes it clear that if a child qualifies as a youthful offender and is transferred to circuit court, he "shall then be proceeded against in the Circuit Court as an adult, *except as otherwise provided in this chapter.*" KRS 640.010(2)(c) (emphasis added)
>
> Merriman, 265 S.W.3d at 199 (Ky. 2008)

This makes clear that in reading the statutes in the juvenile code together, we are to give juveniles the chance to rehabilitate and become a part of society if the review shows that they have been rehabilitated. This does not mean that there are no situations where a child could be tried as an adult, it means that children due to their lack of maturity and ability to learn should be reviewed regularly.

The purpose of restricting parole eligibility for violent offenders is not for their rehabilitation, but for retribution or incapacitation. Such goals do not fit the rehabilitative intent of the Juvenile Code for youthful offenders. KRS 600.010(f). Nor does a blanket parole restriction correspond with the culpability of individual juvenile offenders. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (U.S. 1987). However, as Roper observed, "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." Roper v. Graham 543 U.S. 551, 571 (U.S. 2005). Thus, subjecting youthful offenders to a parole restriction that seeks only to punish a child for mistakes they made prior to being fully emotionally and psychologically developed is a disproportionate punishment considering the juvenile's limited ability to understand the consequences of their actions and to remove themselves from bad situations.

II. THE LEGISLATURE INTENDED FOR THE PAROLE BOARD TO EXERCISE ITS POWER TO REVIEW A JUVENILE'S REHABILITATION AT REASONABLE INTERVALS

When there is a conflict between two statutes, this Court has the authority to harmonize the interpretation of the law so as to insure the fair administration of both statutes. Ledford v. Faulkner, 661 S.W.2d 475, 476 (Ky.1983). In interpreting a statute, it is paramount for the court to determine the legislative intent of the General Assembly. Intent is derived from looking at the language that the legislature chose, from looking at the statutes as a whole, and from the "object and policy" of the statutes. Cosby v. Commonwealth, 147 S.W.3d 56, 58-59 (Ky. 2004); County of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607, 611 (Ky. 2002); Osborne v. Commonwealth, 185 S.W.3d 645, 648 (Ky. 2006); Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002) ("The seminal duty of a court in construing a statute is to effectuate the intent of the legislature."). "The cardinal rule of statutory construction is that the intention of the Legislature shall be effectuated, even at the expense of the letter of the law.'" Commonwealth v. Rosenfield Bros. & Co., 80 S.W. 1178, 1180 (Ky. 1904).

The Juvenile Code, specifically KRS 640.080, expressly states that a youthful offender is eligible for parole solely at the discretion of the parole board:

> Youthful offenders shall be subject to the jurisdiction of the Kentucky Parole Board and may be placed on parole to the Department of Corrections. The Parole Board may, with regard to a youthful offender, exercise any of the **powers** which it possesses pursuant to KRS Chapter 439, except as provided in KRS Chapters 600 to 645.

KRS 640.080 (emphasis added). Chapter 439 delineates the many powers of the parole board in considering whether a person in the custody of the Department of Corrections should be released into the community. Among these powers are: KRS 439.330 directing that the Board shall order

the granting of parole, determine the length of time parole is granted, and grant final discharge to parolees; KRS 439.3405 which gives the parole board the ability to release prisoners with documented terminal medical conditions even if otherwise ineligible for parole; KRS 439.342 which gives the board the power to retain a prisoner on parole for a period of at least one year; and KRS 439.390 which grants the Board the right to issue subpoenas. In contrast, the provisions of KRS 439.3401 act solely as prohibitions on the powers of the parole board. There is nothing in the language of KRS 439.3401 that confers any type of power to the parole board. The juvenile code specifically lays out in KRS 640.080 that the parole board may exercise any of its powers. This statute says nothing of the parole board being subject to any of the prohibitions listed in KRS 439. The clear intent of drafting KRS 640.080 in this manner was to make it clear that the parole board was free to release youthful offenders utilizing any of their powers and ONLY subject to any prohibitions listed in KRS chapters 600 to 645.

The argument that the legislature should have explicitly mentioned that youthful offenders are exempt from prohibitions to parole eligibility is the same as the argument the Commonwealth made in Merriman. "The Commonwealth argues, and one Court of Appeals panel held, that failing to list the Violent Offender Statute in this section excludes it from being a prohibited disposition. This argument is in fact a dodge—the failure to specifically list the Violent Offender statute is equally as consistent with oversight as it is with intention . . ." Com. v. Merriman, 265 S.W.3d 196, 200 (Ky. 2008) Just as with the other provisions in KRS chapter 640, KRS 640.080 is making clear another exception to the treatment of youthful offenders as adults. Specifically, as this Court addressed previously in Merriman, "In order for the Violent Offender Statute to control over the specific language of KRS 640.030(2), it must have express language saying that it applies to youthful offenders." Com. v. Merriman, 265 S.W.3d 196, 200

(Ky. 2008) In that way, the specific language of KRS 640.080 must also be effectuated as it is the more specific statute as well as being consistent with our understanding of adolescent development that this Commonwealth has recognized for decades.

CONCLUSION

To interpret the violent offender statute to be the one area that trumps the intent of legislature as well as the clear holding in Merriman, "By statutory interpretation, logic, and belief in the good sense of the legislature, the Violent Offender Statute cannot be read to apply to youthful offenders." 265 S.W.3d 201 (Ky. 2008), the Commonwealth would mean that only select juveniles would get the coveted "second look" (Appellee's Brief page 12). Based solely on a juvenile's age at the time they are sentenced in circuit court, a Youthful Offender might never receive a chance for a second look after rehabilitation entirely frustrating the legislative intent and leading to a ridiculous and callous result. For all these reasons as well as those cited in Appellant's Brief, Anthony Edwards requests that this Court order the Appellee to remove the "violent offender" label, recalculate his sentence, including parole eligibility dates. The Appellant further requests this court enjoin the Appellee from labeling any youthful offender as a violent offender.

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