IN THE SUPREME COURT OF THE STATE OF OREGON

STATE ex rel TREVOR TROY WALRAVEN,	)	
Plaintiff-Relator,	)	
	)	S Ct S062747
v.	)	
DEPARTMENT OF CORRECTIONS,	)	
Defendant.	)	

BRIEF ON THE MERITS OF RELATOR, TREVOR TROY WALRAVEN

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RELATOR'S BRIEF ON THE MERITS

Question Presented

Does the stay provision in ORS 138.160 apply to the Department of Corrections (DOC) in an appeal by the State of Oregon (the State) from an order issued pursuant to ORS 420A.206(1)(a) that directs DOC to submit a release plan?

Relator's Proposed Rule of Law

ORS 138.160 does not stay DOC's obligation to timely submit a release plan that has been ordered by a circuit court pursuant to ORS 420A.206(1)(a) during the pendency of an appeal by the State of the circuit court's order.

Nature of the Action

This mandamus proceeding arises from the State's appeal from an order by the Josephine County Circuit Court directing DOC to prepare and submit a release plan pursuant to ORS 420A.206(1)(a). DOC refused to timely comply with the circuit court's order, claiming that, by virtue of the State's filing of a notice of appeal, its obligation to comply with the circuit court's order was stayed pursuant to ORS 138.160. Motions to certify the State's appeal in that case to this court and to determine appellate jurisdiction are currently under advisement by the Court of Appeals. *State v. Walraven*, CA AA158001.

On March 5, 2015, this court issued an alternative writ directing DOC to either comply with the circuit court's order or show cause for not doing so. DOC has failed to comply with the circuit court's order and has not shown cause for not doing so.

Summary of Facts

In 1998, Relator killed and was subsequently convicted of multiple homicides that ultimately merged into a single conviction for aggravated murder. *State v. Walraven*, 214 Or App 645, 647, 167 P3d 1003 (2007), *rev den* 344 Or 280 (2008). Relator, who was 14 years when he murdered was sentenced by the Josephine County Circuit Court to life imprisonment with a 30-year mandatory minimum period of incarceration.

This is the second time this case is before this court in mandamus. After serving roughly half of his mandatory minimum period of incarceration, Relator asked the Department of Corrections (DOC) to send a notice and request for Second Look Hearing, as required by ORS 420A.203, to the Josephine County Circuit Court. DOC declined.

Relator then submitted a motion to the Josephine County Circuit Court, asking that court conduct the required Second Look Hearing pursuant to ORS 420A.203, notwithstanding DOC's failure to send the required notice. The circuit court denied that motion.

Relator then filed two petitions in this court for writs of mandamus. One was directed at DOC, seeking to compel it to send the required notice and request for a hearing to the Josephine County Circuit Court. The other was directed at the circuit court itself, seeking to compel that court to conduct the hearing.

Relator argued that this court had mandamus jurisdiction, because the order denying his motion for a Second Look Hearing was not directly appealable. Specifically, Relator argued that appeals from orders relating to Second Look Hearings were governed by chapter 420A of the Oregon Revised Statutes and that neither ORS Chapter 19 nor ORS Chapter 138 granted appellate jurisdiction relating to Second Look proceedings.

On May 8, 2014, this court granted both of Relator's petitions and issued alternative writs of mandamus to DOC and to the Honorable Lindi Baker of the Josephine County Circuit Court. With respect to DOC, this court ordered:

> "Wherefore, in the name of the State of Oregon, you are commanded to file in Josephine County Circuit Court a notice and request for that court to schedule a Second Look Hearing pursuant to ORS 420A.203 for relator Trevor Troy Walraven or, in the alternative, to show cause for not doing so within 14 days from the date of this order."

With respect to the circuit court, this court ordered:

> "Wherefore, in the name of the State of Oregon, you are commanded to vacate the order, dated September 23, 2013, denying relator Trevor Troy Walraven's motion for a Second Look Hearing pursuant to ORS 420A.203, to grant that motion, and to conduct the requested hearing for relator or, in the alternative, to

> show cause for not doing so within 14 days from the date of this order."

On May 15, 2014, Judge Baker wrote a letter to this court indicating that the circuit court would "schedule the hearing upon receipt of such notice and request" from DOC. Attached to Judge Baker's letter was a copy of the circuit court's order vacating its prior order of denial and instead granting Relator's motion for a Second Look Hearing.

The State then took the position that the writ directed at DOC was moot. Relator initially asserted that the matter was not moot, because Judge Baker had indicated that she would schedule the hearing only upon receipt of the required notice from DOC. Once Judge Baker indicated that the hearing would be conducted in any event, notwithstanding the fact that DOC had not provided the notice, Relator moved to dismiss the writs. This court granted that motion.

On September 11 and 12, 2014, the Josephine County Circuit Court conducted the Second Look Hearing. Judge Baker had recused herself, and the Honorable Timothy Gerking presided.

Petitioner presented testimony from 13 witnesses. They included three corrections officers: Captain Watson, Captain Long and Sergeant Hinkle. A retired corrections officer, Captain Duren, provided a sworn video statement. OSP's recreation specialist, Marion, testified on behalf of Relator. Relator's work supervisor at OSP, Plattner, testified for Relator. A 14-year old whom Relator mentored, testified on his behalf. College professors

Inderbitzen, Cohen and McCormack, with whom Relator had worked while incarcerated, testified. Psychologists Sly and Zorich testified for Relator. Two former inmates, and testified about the positive impact Relator had on their rehabilitation.

The state presented no witnesses.

At the conclusion of the Second Look Hearing, Judge Gerking ruled from the bench. In announcing his decision, Judge Gerking made these express findings:

> "[The Court]: The witnesses, I think one witness Marion characterized Mr. Walraven as a unique young man who has greatly profited from his years in incarceration. And I would say that not only he has profited by taking the right course after his incarceration by seeking every conceivable means of bettering himself, he's also bettered the lives of those who have been around him and those that he is concerned for. In that regard we heard testimony from former inmates, educators, psychologists, staff at the Oregon Department of Corrections, many of these folks testified that they had agreed to testify totally voluntarily. They weren't under subpoena, and that they have never testified before in a proceeding of this nature. They've never testified on behalf of an inmate before. Nevertheless they had agreed to come forward because they felt so strongly that Mr. Walraven deserved this second look and deserves this, this conditional release that he's requesting. And these folks have come forward because of all of the various things that Mr. Walraven has done during the course of his incarceration to better himself and the lives of others around him by obtaining his high school diploma, by being involved in a president, by being involved in this Lifer's Club, becoming it's youngest president which he is now in his second term, by gaining the trust and confidence of the prison system, by placing him in the laundry where he has achieved kind of a second in command responsibility. And during that period he's acquired mechanical skills, electrical skills, computer skills, he's worked in the Inside

> Outside Program as a teaching assistant, and he's also been involved in co-teach, co-teaching several of the classes. He's been in the Family First Program, parenting classes, the Freedom Road Program, he helped teach a course on divided society as a teaching assistant. He was involved in the ACE Program, the Another Chance at Education. He took a class on non-violent communication skills in which he had to, I believe come to terms verbally with the crimes that he's committed. He's even head of a grant writing team to assist some of these programs in getting aid, financial aid so that those programs can continue. He's served as a positive influence in the life of his formal, former girlfriend's daughter And he's been an informal mentor for many of the inmates in the institution. These are all extraordinary achievements. So I, I can only conclude that Mr. Walraven is unique. He's unusual, remarkable in regard to the efforts he's displayed to make himself a better person, and, and to help others."

(Tr 340-42).

Judge Gerking explained:

> "[The Court]: I thought of one other factor that the Court should consider and that is for those inmates, for those juveniles who are still in prison. What kind of message would be sent to them if Mr. Walraven is not granted the relief requested? I mean if not him, then who would be eligible?"

(Tr 346).

Judge Gerking ordered:

> "[The Court]: I am requiring that the Department of Corrections pursuant to ORS 420A.206 provide a plan of release within 45 days of this hearing."

(Tr 349).

On September 15, 2014, the court issued its written order memorializing Judge Gerking's oral ruling. In the order, the court required:

> "That the Department of Corrections, in accordance with ORS 420.206(1)(a), [sic] shall prepare a proposed release plan and submit the release plan to the Court no later than 45 days following the completion of the hearing."

(Order at 1).

The court's written order recommended a set of conditions to be included in DOC's proposed release plan. The order added a requirement that:

> "the recommended release date for Defendant shall be immediately following the court's approval of Defendant's final release plan as provided in ORS 420A.206 and entry of the Court's Final Order of Conditional Release."

(Order at 2).

On October 15, 2014, the state filed a notice of appeal from the Order on Second Look Hearing and for Preparation of Release Plan. On October 30, 2014, counsel for Relator contacted counsel for DOC to inquire whether the required release plan was forthcoming. DOC's response was:

> "I understand that DOJ's position is that the circuit court's dispositional order directing ODOC officials to prepare and submit a proposed conditional release plan in this case has effectively been stayed as a result of the State's filing of the notice of appeal. Consequently, ODOC will not be submitting a proposed conditional release plan to the court until the appeal is decided. Please contact Jamie [Contreras] or Tim [Sylwester] on this if you have any questions."

(Email from AAG Van Valkenburgh to Simrin 10/30/14).

Counsel for Relator then contacted Assistant Attorney General Jamie Contreras to ascertain whether the state could identify any authority for its position that the notice of appeal "effectively" stayed Judge Gerking's order. Ms. Contreras responded that:

> "The statutory authority for DOC's position that the notice of appeal stayed the order directing it to prepare a release plan for Mr. Walraven is ORS 138.160, which provides:
>
> "'An appeal taken by the state stays the effect of the judgment or order in favor of the defendant, so that the release agreement and, if applicable, the security for release, is held for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal.'"

(Email from AAG Contreras to Simrin 10/30/14).

Summary of Argument

When the legislature first enacted authority for the State to appeal orders or judgments relating to criminal cases, children weren't prosecuted as adults and Second Look proceedings did not exist. The universe of orders relating to criminal cases that were appealable by the State was small, and the legislature at that time could not have anticipated the Second Look proceedings that it authorized a century and a half later.

When the legislature created authority for Second Look hearings, it did not amend ORS 138.160 (the statute currently authorizing state appeals in criminal cases) or any other provision in Chapter 138 in relation to Second

Look hearings. Instead, the legislature created appellate jurisdiction separately in ORS 420A.203 and ORS 420A.206. The appeal provisions in Chapter 138 and its antecedents have never had anything to do with Second Look proceedings. A circuit court order issued pursuant to ORS 420A.203 or ORS 420A.206 is not stayed when a notice of appeal from that order is filed.

Argument

On September 11 and 12, 2014, the Honorable Timothy Gerking presided over the Second Look hearing that this court ordered in a previous alternative writ of mandamus. At the conclusion of that hearing, Judge Gerking found that Relator is rehabilitated, and he directed DOC to submit a release plan pursuant to ORS 420.206(1). Subsequently, Judge Gerking issued a written order memorializing that directive.

DOC appealed that order and has, since filing its notice of appeal, refused to comply with it. DOC points to ORS 138.160 as the purported authority relieving it of its obligation to comply with the circuit court's order. It provides:

> "An appeal taken by the state stays the effect of the judgment or order in favor of the defendant, so that the release agreement and, if applicable, the security for release, is held for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal."

The question of whether ORS 138.160 has the effect that DOC purports requires construction of that statute. On that matter, the statute's text and its context are the best evidence of the legislature's intended meaning. *Doyle v. City of Medford*, 356 Or 336, 356-57, 337 P3d 797 (2014).

At first blush, the text of ORS 138.160 could, at least arguably, support DOC's construction. However, by exercising mandamus jurisdiction in *State v. Walraven*, S Ct S061811 and *State ex rel Walraven v. Department of Corrections*, S Ct S062115, this court appears to have already accepted Relator's contention in those cases that the appeal provisions in in Chapter 138 of the Oregon Revised Statutes have no application in appeals authorized by Chapter 420A. ORS 34.110 ("The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law"); *Longo v. Premo*, 355 Or 525, 531, 326 P3d 1152 (2014) (mandamus available to address harm that is not remediable by direct appeal).

To the extent that this court may not already have implicitly resolved the question now explicitly before it, Relator acknowledges that the text of ORS 138.160 plainly stays the effect of an order in favor of a defendant during the pendency of a state's appeal, but only in cases in which ORS 138.160 applies to an appeal of that order.

The question here is whether the stay provision in ORS 138.160 relieves DOC of its obligations under a Second Look order that is appealed by the State. On that specific issue, the text of ORS 138.160 is silent. DOC apparently contends that ORS 138.160 applies to any appeal by the State, whether the order is one that emerges from Chapter 138 in the code or elsewhere.

Alternatively, the reach of ORS 138.160 could be confined to some subset of the universe of State's appeals. In particular, it could be limited to appeals by the State from judgments and orders issued pursuant to Chapter 138, *i.e.*, those listed in ORS 138.060 as being subject to appeal by the state.

Because the text of ORS 138.160 does not expressly address the question at hand, it is necessary to examine the statute's context, which does answer the question dispositively. A statute's context includes its statutory predecessors. *Dep't of Revenue v. Faris*, 345 Or 97, 102, 190 P3d 364, 366 (2008); *Ryerse v. Haddock*, 337 Or 273, 279, 95 P3d 1120, 1123 (2004). It also includes other provisions of related statutes and "the pre-existing statutory framework within which the statute was enacted." *Ogle v. Nooth*, 355 Or 570, 584, 330 P3d 572, 581 (2014).

The stay provision in ORS 138.160 originated in the criminal division of the Deady Code of 1864.§ Section 235 of the Deady Code provided:

> "An appeal taken by the state, if taken within the term at which the judgment or order appealed from is given or made, stays the effect of such judgment or order in favor of the defendant, so

> that his bail or money deposited in lieu thereof, is holden for the appearance and surrender of the defendant, until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant be in custody, he may, in the discretion of the court, be admitted to bail, pending the appeal, on his own undertaking."

The next section assured that only appeals by the state that were contemplated by Section 235 effectuated a stay. It provided:

> "An appeal, taken by the state, does not stay or affect the operation of the judgment or order in favor of the defendant, until the judgment is reversed, except as provided in the last section."

Deady Code § 236 (1864).

A preceding section defined the universe of judgments and orders to which sections 235 and 236 applied. Section 227 of the same enactment provided:

> "An appeal to the supreme court may be taken by the state, from the judgment or order of the circuit court, in the following cases:
>
> "1. Upon a judgment for the defendant, on a demurrer to the indictment;
>
> "2. Upon an order of the court, arresting the judgment."

Taken together, what sections 227, 235 and 236 of the Deady Code made clear is that the only judgments or orders that the legislature intended to be stayed upon the filing of an appeal by the state in a criminal case were judgments on demurrers and orders arresting the judgment.

What originated as section 227 of the 1864 Deady Code eventually became ORS 138.060. It currently provides:

> "(1) The state may take an appeal from the circuit court, or from a municipal court or a justice court that has become a court of record under ORS 51.025 or 221.342, to the Court of Appeals from:
>
> "(a) An order made prior to trial dismissing or setting aside the accusatory instrument;
>
> "(b) An order arresting the judgment;
>
> "(c) An order made prior to trial suppressing evidence;
>
> "(d) An order made prior to trial for the return or restoration of things seized;
>
> "(e) A judgment of conviction based on the sentence as provided in ORS 138.222;
>
> "(f) An order in a probation revocation hearing finding that a defendant who was sentenced to probation under ORS 137.712 has not violated a condition of probation by committing a new crime;
>
> "(g) An order made after a guilty finding dismissing or setting aside the accusatory instrument;
>
> "(h) An order granting a new trial; or
>
> "(i) An order dismissing an accusatory instrument under ORS 136.130."

As noted above, what began as section 235 of the Deady Code now appears in ORS 138.160. The last time that the legislature amended ORS 138.160 was in 1973. 1973 Or Laws, ch 836, § 278. In the same bill, the legislature amended ORS 138.060. 1973 Or Laws, ch 836, § 276. One hundred and nine years after the Deady Code, the legislature's amendment of both ORS 138.060 and ORS 138.160 in the same bill evinces the legislature's intent that the reach of ORS 138.160 was still tied to the kinds of appeals enumerated in its

coevolved statute that lists specific judgments and orders that the state could appeal.

Twenty two years after the legislature last amended ORS 138.160, it enacted the Second Look provisions in Senate Bill 1. 1995 Or Laws, ch 422, §§ 52-56. The Second Look provisions were codified not in the criminal code, but in the juvenile code. ORS 420A.203 to ORS 420.206. The legislature could not possibly have intended, in 1973 (or in 1864 when originally enacted), that the stay provision in ORS 138.160 would apply to a type of hearing that wouldn't even be enacted for another 22 years. "This court has stated that subsequent legislative history is irrelevant [to what the legislature intended when it failed] to change a previously-enacted statute." *State v. Cloutier*, 351 Or 68, 103, 261 P3d 1234 (2011) (quoting *Hilton v. MVD*, 308 Or 150, 775 P2d 1378 (1989)).

The only way that the filing of an appeal by the state from a Second Look order could automatically stay that order would be if the legislature intended its 1995 enactment to implicitly amend ORS 138.160 and expand its reach. This court has observed, "Amendment by implication is 'disfavored by this court' and is only recognized 'when the matter is clear.'" *State v. Guzek*, 322 Or 245, 266, 906 P2d 272 (1995) (quoting *State ex rel. Med. Pear Co. v. Fowler*, 207 Or 182, 295 P2d 167 (1956)).

In this case, the legislature's intent when it enacted Second Look Hearings in 1995 was clear, and that intent had nothing to do with ORS 138.160. As noted above, context for Second Look Hearings includes "the pre-existing statutory framework within which the statute was enacted." *Ogle*, 355 Or at 584. That framework included the appeal provisions within Chapter 138 of the code, in which the stay provision in ORS 138.160 had existed in tandem for 131 years with an enumerated list of appealable orders.

Given that historical context, the legislature enacted the Second Look procedure in Senate Bill 1 in 1995. Had the legislature intended State's appeals to be authorized by and regulated by chapter 138, the legislature could easily have amended ORS 138.060 to include appeals from Second Look proceedings. It did not do so. Instead, the legislature enacted new authority for appeals from Second Look orders in both ORS 420A.203(6) and ORS 420A.206(6). Neither of those provisions say anything about an appeal staying an order issued pursuant to the Second Look statutes. Neither provision says anything about ORS 138.160. For that matter, neither says anything at all about chapter 138. In fact, nothing in the sections of Senate Bill 1 that enacted the Second Look procedure said anything about any application of chapter 138 of the code to Second Look proceedings. 1995 Or Laws, ch 422, §§ 52-56.

In contrast, a different portion of Senate Bill 1 expressly made Chapter 138 applicable to certain proceedings involving offenders who were juveniles

when they committed their crimes. Sections 47-49 of the bill amended the newly adopted Measure 11. 1995 Or Laws, ch 422, § 47-49. Section 48 inserted this provision into Measure 11:

> "Unless otherwise provided in section 49 of this Act, ORS chapters 137 and 138 apply to proceedings under section 49 of this Act."

1995 Or Laws, ch 422, § 48(1)(b).

In turn, section 49 of Senate Bill 1 added:

> "Notwithstanding any other provision of law, when a person charged with aggravated murder, as defined in ORS 163.095, or an offense listed in subsection (4) of this section is 15, 16 or 17 years of age at the time the offense is committed, and the offense is committed on or after April 1, 1995, the person shall be prosecuted as an adult in criminal court."

1995 Or Laws, ch 422, § 49(1).

The context that sections 47 to 49 of Senate Bill 1 give to the Second Look provisions enacted by sections 52 to 56 in the same bill should definitively answer the question at issue here. The legislature knew how to make chapter 138 applicable to juvenile offenders, and it expressly did so with 15, 16 and 17 year-old offenders who were subject to Measure 11. The inclusion of a chapter 138 applicability provision in sections 47 to 49, coupled with the omission of such a provision from sections 52 to 56 represent a conscious choice by the legislature to exclude application of chapter 138 from Second Look proceedings. *See, e.g.*, *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 353, 898 P2d 1333 (1995).

By enacting the Second Look provisions in Senate Bill 1, the legislature did not implicitly amend ORS 138.160 to encompass orders that were not already covered under that statute.

Further proof that the legislature did not intend an appeal by the State from a Second Look order to stay DOC's obligations under such an order is provided by the text of the Second Look appeal provisions themselves. ORS 420A.203(6) provides, in part, that "The person or the state may appeal an order entered under this section." (Emphasis added). In contrast, ORS 420A.206(6) provides, in part:

> "(a) The state, the Department of Corrections or the person may appeal from an order of the court entered under subsection (4) or (5) of this section. The appellate court's review is limited to claims that the court failed to comply with the requirements of the law in ordering the conditional release.
>
> "(b) The state, the Department of Corrections or the person may appeal from an order of the court entered under subsection (4) or (5) of this section."

(Emphases added).

The emphasized portions of ORS 420A.206(6) make clear that the legislature intended DOC to have a right of appeal from certain Second Look orders. DOC is a state agency. As such, it might generally be considered to be synonymous with the state. However, the legislature's inclusion of DOC as an entity authorized to appeal an order issued pursuant to ORS 420A.206, coupled with its exclusion of DOC from ORS 420A.203(6) establishes that the

legislature chose to treat DOC as a separate entity for certain appellate purposes.

Subsections (4) and (5) of ORS 420A.206 relate to orders relating to an offender's alleged violation of release conditions after the offender has been conditionally released. Since Relator has not yet been conditionally released, those subsections have no application here.

Subsection (1), however, does apply. It provides, in part:

> "(a) If, after the hearing required by ORS 420A.203, the court determines that conditional release is the appropriate disposition, the court shall direct the Department of Corrections to prepare a proposed release plan. The Department of Corrections shall submit the release plan to the court no later than 45 days after receipt of the court's direction to prepare the plan. The Department of Corrections shall incorporate any conditions recommended by the court and shall consider any recommendations made by the Oregon Youth Authority."

(Emphasis added).

That is the very sort of order that the state has appealed in Relator's case -- an order directing DOC to prepare a release plan and submit it to the circuit court. Assuming *arguendo* that DOC had a statutory right to appeal that order, it chose not to.

It is inconceivable that the legislature gave DOC the right to appeal an order but did not intend for DOC to be required to comply with that order during an appeal when DOC elected not to exercise its own right of appeal.

DOC's reliance on ORS 138.160 is misplaced. The Josephine County Circuit ordered DOC to submit a release plan within 45 days following the September 12 conclusion of Relator's Second Look hearing. In the absence of a stay, DOC had a non-discretionary duty to comply with that order. DOC has failed to do so.

Conclusion

For the foregoing reasons, a peremptory writ should issue requiring DOC to immediately comply with the circuit court's order to prepare and submit a release plan for Relator.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05
AND PROOF OF FILING AND SERVICE

I certify that (1) this Brief on the Merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a) is 4,647 words.

I certify that the size of the type in this Brief on the Merits is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

I certify that, on April 16, 2015, I filed this Brief on the Merits electronically with the State Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that, on the same date, I served the foregoing Brief on the Merits by electronic service on the attorney listed below by using the court's electronic filing system:

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