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.	)	

REPLY BRIEF OF RELATOR, TREVOR TROY WALRAVEN

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RELATOR'S REPLY BRIEF

In its Answering Brief on the Merits, the Department of Corrections (DOC) refers to what it characterizes as "the broad and unambiguous text of ORS 138.160." (Defendant's Brief at 8). DOC frankly acknowledges that ORS 138.160 had its "genesis" in the Deady Code when the authority for appeals by the State was limited to the contemporaneous predecessor of ORS 138.060. *Id.*

DOC does not dispute that Second Look hearings did not exist when the Deady Code was enacted. Nor does DOC dispute that the legislature could not possibly have envisioned the concept of Second Look hearings, which did not exist for another century and a half. Nonetheless, DOC contends:

> "when the legislature enacted the 'second look' provisions, it was not necessary to amend ORS 138.160 to incorporate or to cross-reference the new appeal provisions in ORS 420A.203(6) and ORS 420A.206(6), because the text of ORS 138.160 already is broad enough to encompass those new provisions."

(Defendant's Brief at 10).

DOC appears to contend that, by promulgating such "broad text"[1] in Section 235 of the Deady Code in 1864, the legislature at that time intended some expanding realm of state's appeals that would be perpetually encompassed by Section 235, despite the narrow (by today's standards) scope of Section 227, to which it applied.

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[1] Defendant's Brief at 11.

Nonetheless, DOC also appears to acknowledge that the scope of ORS 138.160 is not without bounds. Although the phrase "criminal action" does not appear in the text of ORS 138.160, DOC puts emphasis on that phrase when it asserts that:

> "The only text-based limitation on the scope of application of the statute is that it appears to apply only to an appeal taken by the state in a *criminal action*, given its placement in ORS chapter 138 and its express references to 'the state,' to 'the defendant,' and to the release provisions in 'ORS 135.230 to 135.290.' Because *State v. Walraven* is a criminal action, it is not necessary for this court to consider whether ORS 138.160 applies when the state appeals in a proceeding that is not a criminal action."

(Defendant's Brief at 7 n 6; emphasis in original).

The legislature's omission from ORS 138.160 of the phrase "criminal action" has some relevance here, and ORS 138.160's placement in Chapter 138 of the Oregon Revised Statutes does provide important context. When viewed together, they should dispense with any residual plausibility there may be in DOC's contention that it is not authorized to comply with Judge Gerking's order to prepare and submit a release plan.

In construing ORS 138.160, the court can neither insert what the legislature has omitted from the statute nor omit what the legislature has included in it. ORS 174.010; *Sather v. SAIF*, 357 Or 122, 140, 347 P3d 326 (2015). DOC attempts to insert the phrase "criminal action" into ORS 138.160

in order for that statute to reach outside of Chapter 138 of the code to capture proceedings conducted pursuant to Chapter 420.

If the legislature intended ORS 138.160 to reach beyond Chapter 138, its omission of the phrase "criminal action" necessarily evinces its intention that ORS 138.160 encompass appeals from decisions that are authorized in Chapter 138 other than the limited set of decisions that are made appealable by ORS 138.060. That is where DOC's argument expends its final breath.

In 1959, the legislature enacted the Post-Conviction Hearing Act as the statutory procedure for vindicating the substantive right of *habeas corpus*. Or Const, Art I, § 23; *Bartz v. State*, 314 Or 353, 361-62, 839 P2d 217 (1992).

ORS 138.520 authorizes a post-conviction court to grant various forms of relief in response to a collateral challenge to a conviction. *State v. Smith*, 339 Or 515, 528, 123 P3d 261 (2005) (identifying post-conviction as a collateral challenge). ORS 138.530 establishes the circumstances when relief "shall be granted." When a post-conviction court renders judgment, either the petitioner (the former criminal defendant) or the defendant may appeal. ORS 138.650(1). The "defendant" in a post-conviction proceeding is the State of Oregon if the petitioner is not imprisoned, but if the petitioner is incarcerated, then the "defendant" is "the official charged with the confinement of [the] petitioner." ORS 138.570.

ORS 138.650(3) provides, in part, "An appeal under this section taken by the defendant stays the effect of the judgment."

If the text of ORS 138.160 was as "broad and unambiguous" as DOC contends,[2] the legislature would not have had any need to insert a stay provision in ORS 138.650. But it did.

The legislature's inclusion of a stay provision in ORS 138.650 cannot be viewed as "serv[ing] no purpose." *State v. Ofodrinwa*, 353 Or 507, 525, 300 P3d 154 (2013) (quoting *State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011), for the proposition that "an interpretation that renders a statutory provision meaningless should give us pause").

By including a stay provision in ORS 138.650(3), the legislature's purpose was to establish an automatic stay when the State (or State official charged with an inmate's imprisonment) appeals from an order or judgment other than those authorized by ORS 138.060.

That the legislature intended the stay provision of ORS 138.160 to be limited to State appeals under ORS 138.060 is further confirmed by the context of the release provision in ORS 138.160. DOC points to what it calls the "escape clause" in ORS 138.160, under which "the trial court generally has the discretion to order that the defendant will be released pending [an appeal by the State], subject to appropriate conditions." (Defendant's Brief at 16).

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[2] Defendant's Brief at 8.

Here, the court should recall that ORS 138.160 provides, in part:

> "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."

DOC acknowledges that release pending a State's appeal is subject to ORS 135.230 to ORS 135.290, but DOC ignores what that actually means. ORS 135.230(8) provides:

> "'Release' means temporary or partial freedom of a defendant from lawful custody before judgment of conviction or after judgment of conviction if defendant has appealed."

The State's appeal in this case is not "before judgment of conviction." Nor is it an appeal "after judgment of conviction if defendant has appealed." It is an appeal by the State after the judgment of conviction. It is an appeal under ORS 420A.203(6).

Regardless of what the legislature intended in the Deady Code of 1864, this case is about what the legislature intended when it enacted the Second Look process. It did that in 1995, thirty-six years after it enacted the Post-Conviction Hearing Act. 1995 Or Laws, ch 422. Appeal provisions in the Second Look statutes are codified at ORS 420A.203(6) and ORS 420A.206(6).

Context for the enactment of the Second Look proceedings includes the statutory framework within which it was enacted. *Powerex Corp. v. Dept. of Revenue*, 357 Or 40, 47, 346 P3d 476 (2015) (citing *Stevens v. Czerniak*, 336 Or 392, 84 P3d 140 (2004)). When the legislature enacted the Second Look

process in 1995, that context included what the legislature had done 36 years earlier when it enacted the Post-Conviction Hearing Act -- it had expressly included a stay provision when it intended the filing of a notice of appeal by the State to automatically stay the order that was the subject of the appeal.

It was in that context that the legislature enacted the Second Look provisions in 1995. The legislature knew to create an automatic stay when it authorized a State's appeal, and it chose not do so.

DOC asserts that Relator's "argument has no merit." (Defendant's Brief at 8). DOC is wrong.

CONCLUSION

Judge Gerking's order to DOC was not stayed when the State filed its notice of appeal. For the foregoing reasons, and for the reasons expressed in Relator's Brief on the Merits, a peremptory writ should issue. DOC should be required forthwith to comply with Judge Gerking's order to prepare and submit a release plan.

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

I certify that (1) this Reply Brief 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 1,367 words.

I certify that the size of the type in this Reply Brief 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 June 1, 2015, I filed this Reply Brief 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 Reply Brief by electronic service on the attorney listed below by using the court's electronic filing system:

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