Pursuant to Court order

FILED
JAN 26 2015
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NUMBER: 2013-SC-000558-DG

(On Review from Ky. Court of Appeals No. 2009-CA-000734)

LAWRENCE PATE *APPELLANT*

Appeal from the Franklin Circuit Court
VS. Case No: 08-CI-02031
Judge Thomas Wingate

COMMONWEALTH OF KENTUCKY *APPELLEE*

AMENDED BRIEF FOR APPELLANT

Respectfully Submitted,

MARGARET A. IVIE
LaGrange Post Conviction Supervisor
Department of Public Advocacy
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
Phone: (502) 222-6682

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, the foregoing "Amended Brief for Appellant" was served by first-class mail upon the following:

- Hon. Thomas D. Wingate, Judge, Franklin County Judicial Center, 222 St. Clair Street, Frankfort, KY 40601;
- Hon. J. Todd Henning, Justice & Public Safety Cabinet, Office of Legal Services, P.O. Box 2400, Frankfort, KY 40602-2400; and
- Mr. Lawrence Pate, #164306, Little Sandy Correctional Complex, 505 Prison Connector, Sandy Hook, KY 41171

I also certify that the record has been returned to the Supreme Court of Kentucky.

COUNSEL FOR APPELLANT

INTRODUCTION

Appellant was convicted of manufacturing methamphetamine, second offense, in 2005 for an offense committed in 2003. In an opinion of the Kentucky Court of Appeals, the lower court affirmed the dismissal of his Petition for Declaration of Rights and determined that Appellant's reclassification as a violent offender in 2007 was not in contravention of the law, did not result in an *ex post facto* violation under the U.S. and Kentucky Constitutions and did not deny him due process, despite the classification being contrary to the testimony at his trial, sentencing, and his initial classification by the Department of Corrections.

STATEMENT OF ORAL ARGUMENT

Appellant requests oral argument to assist the Court in understanding not only the procedural and substantive facts involved, but more importantly the legal arguments in support of his requests for relief.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Lawrence Pate, Appellant, comes before this Court convicted of manufacturing methamphetamine, first offense, and manufacturing methamphetamine, second or subsequent offense. (TR, 2, 26). It is the later offense that is the basis for his conviction in Bracken County, Indictment No. 03-CR-00008, and the basis for his present appeals to this Court. (TR, 26); Pate v. Ky. Dept. of Corrections, 2011-CA-000465, 2009-CA-002110, 2009-CA-000734, p. 3 (Ky. App. Jul. 19, 2013) (slip opinion)[1].

On September 17, 2002, Lawrence was arrested in Bracken County, Kentucky, and later indicted for manufacturing methamphetamine, second or subsequent offense. (TR, 2); Pate, slip op. at 3-4. The offense was alleged to have been committed while Lawrence was out of custody and awaiting sentencing for a conviction for manufacturing methamphetamine, first offense, occurring in Pendleton County, for which Lawrence received a twenty-year sentence. Id. Based upon counsel's advice, Lawrence believed that the Bracken County and Pendleton County sentences could be served concurrently and that both carried twenty-percent parole eligibility. Id. at 12-13. Contrary to counsel's advice, any sentence received in the Bracken County case would be required by law to be served consecutively to his Pendleton County sentence. KRS 532.110.

Prior to trial in the Bracken County case, the Commonwealth offered Lawrence two plea deals, each modifying the manufacturing charge to criminal attempt to manufacture methamphetamine, first offense, with a recommendation of five years consecutive to the Pendleton County conviction, which Lawrence rejected based upon the above-noted advice of counsel. Pate, slip op. at 12-13. A trial was held June 8-9, 2005,

[1] This opinion is part of the Evidentiary Appendix, Tab 1, pursuant to CR 76.12(4)(c)(vii).

and Lawrence was found guilty of manufacturing methamphetamine, second offense, and sentenced to serve another twenty-year term. Id. at 4; *see also*, Pate v. Commonwealth, 134 S.W.3d 593 (Ky. 2004).

During the penalty phase of Lawrence's trial, the Commonwealth presented testimony of a probation and parole officer that informed the jury that that Lawrence would be sentenced as a non-violent offender, would be eligible to receive statutory good time credits in the amount of twenty-five percent (25%) of his total sentence, as well as other types of sentence credits, all of which would operate to reduce Lawrence's minimum sentence. Pate, slip op. at 5. This testimony reflected the understanding of the Department of Corrections (DOC) and the Commonwealth's Attorney at this time; that is, KRS 439.3401 did not apply to all Class A felony convictions. Id. at 10-11[2].

Due to his conviction in Pendleton County and the law requiring the two convictions run consecutively, Lawrence was facing a forty-year sentence. (TR, 26-27). After Lawrence was sentenced in 2005 under the Bracken County indictment, he received statutory and meritorious good time credit awards and work time credits. (Id.). He received these sentence credits until he was reclassified in 2007 as a violent offender under KRS 439.3401. (Id. at 2). DOC noted on Lawrence's Resident Record Card (RRC) that "all Class A felonies committed after 7/15/98 are violent." (Id. 26).

On December 15, 2008, Lawrence filed a *pro se* action for declaratory judgment against DOC in Franklin Circuit Court asserting that imposition of the violent offender statute violated his constitutional rights to due process and the constitution's prohibition against *ex post facto* law. (Id. at 1-29, 43-48). DOC responded to the Petition stating that

[2] The Court of Appeals references an affidavit by Johnathan Hall, which explains DOC's change in its interpretation and the change in Lawrence's classification.

KRS 439.3401 had always applied to all Class A felonies, regardless of a finding that the victim suffered death or serious physical injury and any claim that it had interpreted KRS 439.3401 otherwise was "false and is unsupported by any citation to evidence or authority." (Id. at 39-40). The circuit court granted DOC's motion to dismiss and Lawrence appealed. (Id. at 55-57[3], 73-74).

Lawrence also filed a *pro se* motion in the Bracken Circuit Court to clarify his judgment and, then separately, through counsel, a motion for relief pursuant to RCr 11.42 and CR 60.02. Pate, slip op. at 5-7. As a basis for relief pursuant to CR 60.02, Lawrence asserted that his reclassification as a violent offender, despite everyone's assurances that such a classification would not apply, constituted an extraordinary circumstance necessitating equitable relief. Id. at 21-22. The circuit court rejected all of these motions without a hearing and Lawrence appealed. Id. at 7.

On appeal, Lawrence's three separate appeals were consolidated for review and resolution. *See generally,* Pate, slip opinion. In its opinion affirming the Franklin Circuit Court's dismissal of the declaratory action, the Court of Appeals cited Garland v. Commonwealth, 997 S.W.2d 487 (Ky. App. 1999), and the proposition that the *Ex Post Facto* Clause does not apply to statutes imposing a condition precedent to completion of the sentence. Pate, slip op. at 25. The Court of Appeals also rejected Lawrence's CR 60.02 claim, finding that it had been litigated in the RCr 11.42 motion, that there was no prejudice since Pate received the minimum sentence, and that the testimony regarding parole eligibility at that time was not false. Pate, slip op. at 23.

[3] This order is part of the Evidentiary Appendix, Tab 3, pursuant to CR 76.12(4)(c)(vii).

The Court of Appeals did reverse in part and remand a single claim raised in Lawrence's RCr 11.42 Motion for an evidentiary hearing. Pate, slip op. at 18-19. The remanded claim alleged that trial counsel failed to properly advise Lawrence during plea negotiations that any sentence he received in his Bracken County case would be required by law to be served consecutively to his twenty-year sentence out of Pendleton County. Id. After this Court granted Lawrence's Motions for Discretionary Review, no review was sought by the Commonwealth on that ruling per CR 76.21.

It is from this consolidated opinion and discretionary review that the present case and Case No. 2013-SC-000559-DG come before this Court.

ARGUMENT

From the record[4], it remains unclear whether DOC is applying KRS 439.3401 as enacted since July 2006 to Lawrence's sentence or if it is applying the previous version and is simply applying a different interpretation then it did at the time of trial and sentencing.[5] However, what is clear, is that all parties to this conviction believed prior to trial, during trial, and for the two years following his sentencing that a conviction for manufacturing methamphetamine, second offense, a Class A felony, did not render him a violent offender subject to the punitive restrictions of KRS 439.3401, and so informed him. So too is the record equally clear that DOC changed its interpretation of KRS

[4] The record on appeal below was supplemented with a copy of the Bracken County, 03-CR-00008, record on appeal, and thus, resolution of the merits of this claim below was based upon a review of the record in this case, as well as, Case No. 2013-SC-000559. Appellant requested the record again be supplemented before this Court, but was denied the request in an Order entered December 15, 2014.

[5] Lawrence's Resident Record Card and communications with Offender Information indicates that DOC has only applied this new interpretation as far back as offenses committed after July 15, 1998. (TR, 21, 26-27). This is inconsistent with the Affidavit of Johnathan Hall, Pate, slip op. at 10-11, wherein he states under oath that DOC changed its interpretation of KRS 439.3401, finding that the language of the statute always applied to all Class A felonies. See Evidentiary Appendix Tabs 4-13 providing the prior versions of KRS 439.3401and reflecting no substantive changes to this portion of the statute and thus an interpretation of the language in 2002 would be the same interpretation to be applied in 1986.

439.3401 after the amendment to the statute in 2006 and re-classified Lawrence as a violent offender two years into his sentence. (TR, 21, 25); Pate, slip op. at 10-11. "[T]he Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment" in reliance on the bargain. Lynce v. Mathis, 519 U.S. 433, 440 (1997) (internal citation omitted).

Whether this Court concludes that DOC is applying the post-2006 version of KRS 439.3401 or the pre-2006 version, but interpreting it differently in relation to Lawrence's sentence, such is unconstitutional as it has denied Lawrence due process of law under the United States and Kentucky Constitutions' and violated the prohibitions against *ex post facto* laws. Further, the applicable statutory version, KRS 439.3401(2002), does not by its plain language apply to all Class A felonies, and the continued imposition of this classification on Lawrence is unconstitutional and inequitable.

I. KRS 439.3401, AS AMENDED IN 2002, IS THE RELEVENT AND CONTROLLING AUTHORITY FOR DETERMINING WHETHER LAWRENCE SHOULD BE CLASSIFIED AS A VIOLENT OFFENDER.

A. Statement of Preservation

This claim is preserved by Lawrence's Petition for Declaration of Rights, his Reply to DOC's Response and Motion to Dismiss, and the circuit court's order denying relief. (TR, 1-29, 43-48, 55-57).

B. Standard of Review

When reviewing a circuit court's dismissal of a complaint for failure to state a claim, the appellate court should conduct a *de novo* review. Miller v. Currie, 50 F.3d 373, 377 (6th Cir. 1995); Anderson Dev. Co. v. Travelers Indem. Co., 49 F.3d 1128, 1131 (6th Cir. 1995); Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987). Further, the determination of whether a law is in violation of the constitution is a legal question subject to *de novo* review. U.S. v. Ristovski, 312 F.3d 206, 210 (6th Cir. 2002).

C. The Parole Board's Parole Eligibility Regulation is Consistent with Application of KRS 439.3401(2002) to Lawrence's Sentence and Conviction.

The Kentucky Parole Board has set forth, through 501 KAR 1:030[6], when an inmate is to be initially reviewed for parole. 501 KAR 1:030, Section 3(1)(e), states in relevant part,

> (e) For a crime:
> 1.Committed on or after July 15, 1998, which is a capital offense, Class A felony, or Class B felony where the elements of the offense or the judgment of the court demonstrate that the offense involved death or serious physical injury to the victim or Rape 1 or Sodomy 1.
> 2.Committed on or after Jul 15, 2002, which is:
> a.Burglary in the first degree accompanied by the commission or attempted commission of a felony sexual offense in KRS Chapter 510;
> b.Burglary in the first degree accompanied by the commission or attempted commission of an assault described in KRS 508.010, 508.020, 508.032, or 508.060;
> c.Burglary in the first degree accompanied by commission or attempted commission of kidnapping as prohibited by KRS 509.040; or
> d.Robbery in the first degree;
> 3.Committed on or after July 12, 2006, which is:
> a. A capital offense;
> b. Class A felony;
> c. Complicity to a Class A felony;
> d. Class B felony involving the death of the victim or serious physical injury to a victim; …

[6] A copy of this regulation is a part of the Evidentiary Appendix, Tab 14, pursuant to CR 76.12(4)(c)(vii).

The above-quoted language of 501 KAR 1:030 clearly tracks the evolution of KRS 439.3401.[7] Because Lawrence's offense was committed on September 17, 2002, the relevant portion of the regulation being applied by the Parole Board is that which defines offenses committed after July 15, 1998, which is based upon the version of KRS 439.3401(1) enacted in 1998 and 2002. Because the Parole Board, for purposes of establishing his parole eligibility at 85%, has applied its interpretation of KRS 439.3401 (2002), it follows then that this Court should conclude that that version of the statute is the relevant statute subject to interpretation for determination of whether Lawrence's conviction falls within the definition of a violent offender.

D. Imposition of the Statute, as Amended in 2006, *et seq.*, to Lawrence's Conviction Violates the Constitutional Prohibitions Against *Ex Post Facto* Laws.

The United States Constitution prohibits the states from "pass [ing] ... any *ex post facto* law," and the Kentucky Constitution similarly states that "[n]o *ex post facto* law ... shall be enacted." U.S. CONST. art I, § 10, cl. 1; KY. CONST. § 19(1). In Murphy v. Commonwealth, 652 S.W.2d 69 (Ky. 1983), the Kentucky Supreme Court construed the definition of *ex post facto* law in the Kentucky Constitution as the same as the definition of *ex post facto* law under the United States Constitution. Thus, opinions interpreting the U.S. Constitutional provision are applicable and instructive as to violations of the Kentucky Constitutional provision in equal part. Imposition of the post-2006 version of KRS 439.3401 to Lawrence's conviction results in an *ex post facto* violation and thus, further supports Lawrence's contention that the relevant statute at issue is that which was enacted in 2002.

[7] See Evidentiary Appendix Tabs 7, 8, and 9, in relation to Tab 13.

There are two elements necessary for a violation of the *Ex Post Facto* Clause: 1) the law must apply to events that occurred prior to its enactment, and 2) "it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1989) (citing Calder v. Bull, 3 U.S. 386, 390 (1798); Lindsey v. Washington, 301 U.S. 397, 401 (1937)). "The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition...." Weaver, supra, at 30.

"Critical to relief under the *Ex Post Facto* Clause is ... the lack of fair notice ... when the legislature increases punishment beyond what was prescribed when the crime was consummated." Id. This is significant because a statute that "alters penal provisions accorded by the grace of the legislature," such as parole and sentence credits, can still violate the prohibition against *ex post facto* laws when it is retroactively applied and imposes a more onerous punishment than the statute would have at the time the offense was committed. Id. at 30-31.

In Weaver, supra, the United States Supreme Court held that a retrospective change in the number of automatic "gain-time" credits provided to Florida inmates violated the *Ex Post Facto* Clause of the U.S. Constitution. The Court explained that the *ex post facto* prohibition was designed by the Framers "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Id. at 28-29. As the United States Supreme Court noted in Peugh v. U.S., 133 S.Ct. 2072, 2081 (2013), a statute which operates to automatically increase the minimum sentence for offenses which have already been committed constitutes an *ex post facto* law, even though the statute did not increase the maximum sentence that could be imposed. (citing Lindsey, supra). "It is plainly to the substantial disadvantage of

petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the [sentence]." Lindsey, 301 U.S. at 401-02.

> KRS 439.3401 provides the following alterations to a defendant's sentence:
>
> (2) A violent offender who has been convicted of a capital offense and who has received a life sentence ..., or a Class A felony and receives a life sentence ... shall not be released on probation or parole until he has served at least twenty (20) years in the penitentiary. ...
>
> (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.
>
> (4) A violent offender shall not be awarded any credit on his sentence authorized by KRS 197.045(1)(b)1. In no event shall a violent offender be given credit on his sentence if the credit reduces the term of imprisonment to less than eighty-five percent (85%) of the sentence

So not only does one's parole eligibility increase from twenty percent (20%), per 501 KAR 1:030, Section 3(1)(e), to eighty-five percent (85%) or twenty (20) years, whichever is less, the offender also loses sentence credits, which would typically reduce one's sentence by twenty-five percent (25%) or more, depending on the length of the sentence. KRS 197.045; KRS 197.047; Pate, slip op. at 5. Additionally, the offender is prohibited from serving less than eighty-five percent (85%) of his sentence. KRS 439.3401.

In Weaver, the U.S. Supreme Court recognized that "it is the effect, not the form, of the law that determines whether it is *ex post facto*." 450 U.S. at 31 (citing Cummings v. Missouri, 4 Wall. 277, 325, 18 L.Ed. 356 (1867)). Where the language of the statute appears to allow for discretion in the award of the sentence credit, but in practical effect

the regulations established under the statute set forth guidelines which obviate any discretion, the discretionary language won't bar application of the *Ex Post Facto* Clause. See Peugh, supra.

Lawrence was told at trial, his final sentencing and upon his incarceration that he was not a violent offender and that he was eligible to earn every type of sentence credit available. Pate, slip op. at 4-5; (TR, 15-17). By accumulating statutory good time sentence credits, an offender's minimum possible sentence is reduced so that the minimum service on a twenty-year sentence is actually fifteen (15) years. Id. By denying Lawrence the maximum reduction in his sentence through the accumulation of sentence credits, DOC is effectively increasing Lawrence's minimum sentence, because even if he was permitted to earn work, educational, or substance abuse credits, he still cannot earn all that he is otherwise entitled to, because he cannot reduce his sentence by more than fifteen percent (15%). This means that Lawrence's minimum serve-out date has increased by at least ten percent (10%), but more likely a greater percentage, since that only accounts for statutory good time credit deductions. Further, Lawrence is "substantially disadvantaged by being deprived of the opportunity to serve a sentence which could give [him] freedom from custody," Lindsey, 301 U.S. at 401-02, because his parole eligibility has increased from four years to seventeen years.

Lawrence specifically earned work credits every year prior to his reclassification as a violent offender, even after his Bracken County conviction. He earned a total of 184 days for years 2003-2007. (TR, 26-27). At that rate, from work credits alone, over the course of his twenty (20) year sentence, he would have been able to reduce his sentence

by more than two and one half (2 ½) years. However, he has been denied this credit since his reclassification.

Further, KRS 197.045(1)(a)2-3, as enacted since July 2011, provides for a mandatory award of ninety (90) sentence credits for every diploma, degree, or technical education program and drug treatment program or other evidence-based program completed. Prior to July 2011, the statute provided for mandatory sentence credit awards for completion of one (1) educational program and one (1) substance abuse program. Thus, completion of four programs qualifying under KRS 197.045(1)(a)2-3 would reduce Lawrence's sentence by another year.

This court recently held that, "[l]ike deportation, the extended period of parole ineligibility under the violent offender statute (85% vs. 20% for non-violent offender convictions) is a punitive measure meant to enhance the punishment of the serious offenses listed in the statute by ensuring that persons convicted of those offenses serve the lion's share of their sentences in prison and not on parole." Commonwealth v. Pridham, 394 S.W.3d 867, 878 (Ky. 2012). Stated differently, the rule recognized in Miller v. Florida, 482 U.S. 423 (1987), and Lindsey v. Washington, supra, was that a statute which has the effect of automatically increasing the minimum sentence of incarceration constitutes an *ex post facto* law.

In Blondell v. Commonwealth, 556 S.W.2d 682 (Ky. 1977), the Kentucky Supreme Court held that the application of KRS 533.060(1), which prohibits probation for Class A, B, and C felony offenses involving the use of a firearm, to Blondell so as to deny Blondell shock probation for an offense committed before the effective date of the statute constituted an *ex post facto* law. The court stated in part:

> It may be 'legislative grace' for the General Assembly to provide for shock probation but when it expressly removes all hope of shock probation upon conviction and sentence for certain offenses this is in the nature of an additional penalty.

Blondell, 556 S.W.2d at 684. Likewise in Wethington v. Commonwealth, 549 S.W.2d 530, 531 (Ky. App. 1977), the Court of Appeals concluded that the application of KRS 533.060(2) to Wethington, imposing mandatory consecutive sentences for two offenses committed before the effective date of the statute, constituted *ex post facto* law in violation of Lindsey, supra.

Application of KRS 439.3401(2006, *et seq.*) is particularly punitive since Lawrence was sentenced to the minimum and his parole eligibility increased from four years to seventeen years and he will effectively serve out his sentence without ever obtaining the opportunity to become parole eligible, due to earning the maximum reduction in his sentence under the violent offender statute. (TR, 26-29).

In affirming the circuit court, the Court of Appeals based its holding on Garland v. Commonwealth, wherein that court determined that retroactive application of the Sex Offender Treatment Program did not violate the *ex post facto* prohibition. 997 S.W.2d at 490. However, in that context the court noted that the offender was not denied the same initial parole hearing date, the legislature had simply created a condition precedent to obtaining the hearing. Id. at 489. Unlike the circumstances presented in Garland, the law complained of moved Lawrence's initial parole hearing back thirteen years, period. There is no condition precedent prior to obtaining the initial parole review for Lawrence. As this Court also acknowledged in Pridham, 394 S.W.3d at 878, the consequences of the violent offender statute are severe and occur automatically. Thus, while the ultimate

decision as to parole is discretionary, the application of the statute is mandatory and applies automatically if convicted of a delineated offense under KRS 439.3401(1). Id. There is nothing that Lawrence can do or has to do in order to obtain the initial parole review any sooner. His initial review date has been postponed a set amount of time – thirteen years by application of KRS 439.3401. Because the extended period of parole ineligibility is a punitive measure meant to enhance the punishment, Pridham, supra, by increasing the amount of time Lawrence will serve in prison and denying him the opportunity to serve his sentence outside the custody of DOC, application of the violent offender statute, as amended in 2006, *et seq.*, to Lawrence's conviction constitutes a violation of the U.S. and Kentucky Constitutional prohibitions against *ex post facto* laws.

Based upon the Parole Board's regulation, which clearly indicates that it is applying KRS 439.3401(2002) to determine Lawrence's initial parole review date, and the fact that application of KRS 439.3401(2006 *et. seq.*) constitutes an *ex post facto* violation, the relevant statute for determining whether Lawrence can be classified as a violent offender for his Bracken County conviction is KRS 439.3401(2002).

II. KRS 439.3401, AS ENACTED PRIOR TO 2006, WAS NOT INTENDED TO APPLY TO ALL CLASS A FELONIES.

A. Statement of Preservation

This claim is preserved by Lawrence's Petition for Declaration of Rights, his Reply to DOC's Response and Motion to Dismiss, and the circuit court's order denying relief. (TR, 1-29, 43-48, 55-57).

B. Standard of Review

This claim is purely one of statutory interpretation. The construction and application of statutes is a matter of law. Therefore, this Court reviews statutes *de novo* without deference to the interpretations adopted by lower courts. Wheeler & Clevenger Oil Company, Inc. v. Washburn, 127 S.W.3d 609, 612 (Ky. 2004).

C. The Plain Language of KRS 439.3401 Limits Application of the Statute to Instances Where the Victim Suffered Death or Serious Physical Injury.

Statutory construction rules require construing all sections of a statute to ascertain a statute's meaning. Combs v. Hubb Coal Corp., 934 S.W.2d 250, 252 (Ky. 1984). A court has a duty to accord the words of a statute their literal meaning and carry out the intent of the legislature unless to do so would lead to an absurd or wholly unreasonable conclusion. Samons v. Kentucky Farm Bureau Mut. Ins. Co., 399 S.W.3d 425, 429 (Ky. 2013); see also, Executive Branch Ethics Commission v. Stephens, 92 S.W.3d 69, 73 (Ky. 2002); and Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002).

When interpreting a statute, KRS 446.080 provides:

> (1) All statutes of this state shall be **liberally construed with a view to promote their objects and carry out the intent of the legislature,** and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.
>
> ...
>
> (4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning.

KRS 439.3401(1) (2002) enacted at the time Lawrence's offense was committed read as follows:

> (1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of **a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to a victim,** or rape in the first degree or sodomy in the first degree of the victim, ... The court shall designate in its judgment if the victim suffered death or serious physical injury.

(Emphasis added)[8]. Reading this portion of the statute in context with special attention to the placement of commas suggests that the Legislature intended capital offenses, Class A felonies, and Class B felonies to be considered violent offenses to the extent that the victim either died or sustained a serious physical injury. The use of the indefinite article "a" prior to "capital offense," but not prior to "Class A felony" or "Class B felony" indicates that these three nouns are part of a list that is modified by the language following the last noun. "Phrases and sentences are to be construed according to the rules of grammar, and from this presumption it is not permissible to depart, unless adequate grounds are found either in the context or in the consequences which would result from a literal interpretation." Gilbert v. Greene, 216 S.W. 105, 108 (1919).

D. The Legislature's Intent Demonstrates that Application of KRS 439.3401 was Intended to Limit Application of the Statute to Instances Where the Victim Suffered Death or Serious Physical Injury.

Not only does this analysis make grammatical sense, but it is also consistent with the expressed purpose and language of the statute. See 2/24/1998 – House A and R,

[8] The emphasized language above was only modified slightly from its original form in 1986, when it moved the phrase "or serious physical injury to a victim" to immediately follow the statement regarding death of the victim. See Evidentiary Appendix Tabs 4-13, providing all the versions of KRS 439.3401 as enacted since 1986.

CD1[9]. Representative Mike Bowling was the Chairman of the House Judiciary Committee and the primary sponsor for HB 455, also known as "The Crime Bill," in 1998. Rep. Bowling told the committee that the criminal justice system was "backwards," in that the non-violent criminals were serving long sentences incarcerated, while the violent criminals were not in jail for long. Id. at 6:15-6:55. He further went on to provide insight into the legislature's intent in passing the legislation stating:

> So, in a responsible manner, if we can do alternative sentencing, home incarceration, and take all of these non-violent property, drug use cases that fill up our prison system and take those and deal with them through treatment, through home incarceration, through alternative sentencing, then yes we will have room in our prisons to put our violent criminals in for a long time. And I think that is what the people of Kentucky want. And that is what I would like to see and I think that is what this bill does.

Id. at 10:55-11:32. Thus the plain, grammatical reading of the statutory language is consistent with the intent of the legislature and does not produce an absurd or wholly unreasonable conclusion.

The title of KRS 439.3401, in relevant part, is "Parole for violent offenders." KRS 439.3401(1) defines who is a "violent offender." When enacted in 1986 and amended in 1998 to greatly heighten the punishment, the legislature expressed clear intent to punish *violent* criminals and not those offenses relating to drugs. Black's Law Dictionary defines "violent" as "moving, acting, or characterized, by physical force, especially by extreme and sudden or by unjust or improper force." Violent, Black's Law Dictionary, 6th Ed. (1990). Further, it defines "violent offenses" as "crimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a

[9] A transcript of this hearing is a part of the Evidentiary Appendix, Tab 3 pursuant to CR 76.12(4)(c)(vii) and CR 98(e)(4)(b).

dangerous weapon." Violent Offense, Black's Law Dictionary, 6th Ed. (1990). Consistent with these definitions, KRS 439.3401 has contained similar language since its inception in 1986 and in its subsequent amendments, describing the offenses as resulting in "serious physical injury or death" to the victim and requesting that such a finding be made by the court and stated in the final judgment.

As noted *infra*, p. 6 fn 8, the language defining a violent offender was only modified slightly from its inception in 1986 through the amendment in 2002. In 1986, at the time KRS 439.3401 was enacted, there were only 8 offenses capable of classification as a Class A felony – murder, kidnapping, first-degree rape, first-degree sodomy, first-degree arson, use of a minor in a sexual performance, promoting a sexual performance by a minor, and unlawful transaction with a minor. Of those 8 offenses, only murder and kidnapping by definition, involved a violent act against a victim in every instance. KRS 507.020 (1986); KRS 509.040 (1986). The other six offenses generally provided for the punishment of the offense to be elevated to a Class A felony under certain circumstances, and only in some of those instances was the increase in punishment related to the violent nature of the act by the offender. KRS 510.040 (1986); KRS 510.070 (1986); KRS 513.020 (1986); KRS 531.310 (1986); KRS 531.320 (1986); KRS 530.064 (1986). Thus, not all of these offenses, when qualifying as a Class A felony, automatically involved injury to a victim, such that a determination of serious physical injury or death of the victim in the record would be unnecessary. Nevertheless, a distinct characteristic of these eight offenses is the ability to identify a victim of the crime.

From 1986 to 1994, there were no new Class A felonies created. However, since 1994, there have been eleven new Class A felonies created by the legislature, nearly half

of which relate to manufacturing methamphetamine. See KRS 507A.020 (fetal homicide, enacted in 2004); KRS 218A.1432 (manufacturing methamphetamine, subsequent offense, enacted in 1998); KRS 218A.992 (gun enhancement for drug offenses, enacted in 1994); KRS 527.200 (use of a weapon on mass destruction in the first-degree, enacted in 2001); KRS 527.080(2)(d) (using restricted ammunition during the commission of a crime, enacted in 1994); KRS 218A.1441 (controlled substance endangerment to a child in the first-degree, enacted in 2005); KRS 514.030(2)(b) (theft by unlawful taking or disposition, anhydrous ammonia, second or subsequent offense, enacted in 2000); KRS 514.110(3)(d) (receipt of stolen property, anhydrous ammonia, second or subsequent offense, enacted in 2000); KRS 530.020(2)(c) (incest, victim under 12 or serious physical injury, enacted in 2006); KRS 529.100 (human trafficking, serious physical injury and victim under 18, enacted in 2007); KRS 250.991 (possession of anhydrous ammonia in an unapproved container with intent to manufacture methamphetamine, enacted in 2000).

Manufacturing methamphetamine became a criminal offense in Kentucky in July, 1998, and classified a subsequent offender as punishable as a Class A felony. KRS 218A.1432. Then in 2000, the legislature created three Class A felony criminal offenses relating to the misuse of anhydrous ammonia with the intent to manufacture methamphetamine. KRS 250.991; KRS 514.110; KRS 514.030. Conspicuously missing from these offenses is the presence of an identifiable victim who has suffered any injury resulting from the offense. Admittedly, the most recent methamphetamine related Class A felony, enacted in 2005, is for causing the death of a child due to the child's presence during the manufacturing of a controlled substance or methamphetamine, and thus clearly qualifies as a violent offense. KRS 218A.1441. However, this still is consistent with

Lawrence's proposed interpretation of the statute and DOC's prior interpretation of the statute, that a Class A felony conviction involving death or serious physical injury to the victim qualifies a perpetrator as a violent offender.

In 1998, when the Legislature created the offense of manufacturing methamphetamine and set the punishment of a second or subsequent offense as a Class A felony, DOC was interpreting KRS 439.3401 as only applying to those offenses involving serious physical injury or death of the victim. Pate, slip op. at 10-11. Additionally, there was no concomitant amendment to the violent offender definition to clearly alter DOC's application of KRS 439.3401 to offenses other than those involving death or serious physical injury. KRS 439.3401(1998). Again, in 2002, after having time to observe the imposition of these statutes imposing Class A felonies, KRS 439.3401 was amended by the Legislature, but there were no steps taken to alter the imposition of the statute towards non-violent Class A felonies, despite DOC continuing to limit application of the statute to Class A felonies involving death or serious physical injury to the victim. KRS 439.3401(2002). Although it is clear that the legislature amended the statute in 2006 and greatly broadened the definition of a violent offender to not just all Class A felonies, but to nearly all felony sex offenses regardless of the class of the felony. Had the Legislature intended such a definition of be enacted previously it would have and could have done so.

As has been noted previously, prior to 2007, DOC interpreted KRS 439.3401 to apply to Class A felony offenses only where the victim either died or was seriously injured. Pate, slip op at 10-11. However, upon reviewing the textual changes made to KRS 439.3401, effective July 12, 2006, DOC determined it had been interpreting KRS 439.3401 incorrectly, and that KRS 439.3401 applied to any Class A felony, and not just

those resulting in death or serious physical injury to the victim. Id. If the intent of the legislature is to punish those individuals who are violent and reserve a harsher punishment for those offenses which result in serious physical injury or death of a victim as indicated by Rep. Bowling's testimony, then the previous interpretation held by DOC of KRS 439.3401 and proposed by Lawrence is the proper one and those who commit Class A felonies prior to 2006 should only be subject to the provisions of the statute when the victim suffers death or serious physical injury. DOC's revised interpretation is not only inconsistent with the plain, grammatical reading of the statute, but it is also inconsistent with the legislative intent, which was to increase the punishment for those offenders who resort to violence in the commission of their crimes. See Pridham, supra; 2/24/1998 – House A and R, CD1.

Manufacturing methamphetamine, second offense, is a Class A felony, but does not involve any type of violence toward another person. KRS 218A.1432. It is solely a drug offense. There are no elements of the offense which identify a victim or suggest that anyone was subjected to violence during the commission of the offense. To label Lawrence a violent offender based upon a conviction for this offense is completely inconsistent with both the methamphetamine statute and the violent offender statute as originally enacted and as amended in 1998 when the parole eligibility was sharply increased to 85%, and is a patently absurd result without any support from the statute when taken as a whole and in light of the legislature's expressed intent.

E. The Parole Board's Regulation Outlining the Determination of an Inmate's Initial Parole Review Date Supports this Interpretation of the Statute.

The Parole Board has defined those who committed Class A felonies prior to July 12, 2006 differently than those who committed the offenses after July 2006. The Parole Board provides a definition of which Class A felonies committed after July 15, 1998 are subject to the regulation, then as is seen in the offenses listed for being committed after July 15, 2002, the Parole Board does not relist the language contained in (e)(1), but simply lists those offenses which were specifically added to the text of KRS 439.3401 by the statutory amendment. However, for the offenses committed after July 12, 2006, the Parole Board redefines each of the offenses. If there was no distinction between Class A felonies committed after July 15, 1998 and those that were committed after July 12, 2006, then the Parole Board would not have re-listed the offense, provided for the various dates of commission, or changed the definition for inclusion of all Class A felonies under the different provision. Lawrence's interpretation of KRS 439.3401(2002) is supported by the plain language of the statute, legislative intent, administrative regulations and DOC's long-standing interpretation of the statute.

CONCLUSION

DOC changed its interpretation of KRS 439.3401(2002) in 2007, two years after Lawrence was convicted and sentenced, and now is either applying a new interpretation to the previous version of the statute or retroactively applying the current version of the statute. The parole board's regulations and the resulting *ex post facto* violation that occurs if KRS 439.3401(2006, *et seq.*) is applied to Lawrence's conviction, dictates that the relevant statute for determining Lawrence's classification is the 2002 statute. Further,

DOC's previous interpretation of KRS 439.3401(2002) is consistent with the plain, grammatical reading of the statute, the legislature's intent and related administrative regulations. It is these conclusions that render the imposition of the violent offender classification unlawful in relation to Lawrence's sentence. For the foregoing reasons, Lawrence respectfully requests that this Court hold that KRS 439.3401(2002) dictates whether he is to be classified as a violent offender and that KRS 439.3401(2002) did not encompass all Class A felonies, relieving him of the improper and unconstitutional classification.

Respectfully Submitted by,

Margaret Ivie
Counsel for Appellant