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SUPREME COURT

PCOMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2013-SC-000558-DG
(2009-CA-000734)

LAWERENCE PATE — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
NO 08-CI-02031
HON. THOMAS WINGATE

DEPARTMENT OF CORRECTIONS,
COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

Respectfully submitted,

J. TODD HENNING
JUSTICE & PUBLIC SAFETY CABINET
Office of Legal Services
125 Holmes Street, 2nd Floor
Frankfort, KY 40601
(502)564-4001 Ext. 346 Fax (502)564-5037
E-Mail: Todd.Henning@ky.gov
COUNSEL FOR APPELLEE

CERTIFICATE

This is to certify that the original and nine (9) copies of the foregoing Brief for Appellee was hand-delivered to the Clerk of Supreme Court of Kentucky, State Capitol, 700 Capitol Avenue, Frankfort, KY 40601-3415; and copies mailed to the Clerk of Court of Appeals, Democrat Drive, Frankfort, KY 40601; Hon. Thomas Wingate, Franklin County Courthouse, 214 St. Clair Street, Frankfort, KY 40602-0678; and to Margaret Ivie, Assistant Public Advocate, Department of Public Advocacy, 207 Parker Drive, Suite 1, LaGrange, KY 40031 on this 8th day of January, 2015.

J. TODD HENNING
COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Department of Corrections, does not request oral argument.

COUNTER-STATEMENT OF THE CASE

In Appeal Number 2009-CA-000734 the Court of Appeals found the following facts to be relevant to Appellant's Argument involving the Department of Corrections ("DOC'):

> In Pate's final appeal, he contends that the circuit court should have held a hearing before granting the DOC's motion to dismiss Pate's petition for a declaration of rights. In his petition for a declaration of rights filed in the circuit court, Pate alleged that the DOC had committed an *Ex Post Facto* violation when it re-classified him as a violent offender with an eighty-five percent parole eligibility requirement after initially classifying him as a non-violent offender when he first came to the DOC. The DOC responded to his petition and moved to dismiss it on the basis that Pate's offense of manufacturing methamphetamine, second or subsequent offense, had long been classified as a Class A felony, and all Class A felony offenders are considered to be violent offenders pursuant to KRS 439.3401. The circuit court granted the DOC's motion to dismiss.
> [Court of Appeals Opinion affirming in part, pp. 26-27].

ARGUMENT

I. KRS 439.3401, HAS ALWAYS CLASSIFIED ALL CLASS A FELONIES AS VIOLENT OFFENSES.

Effective July 12, 2006, KRS 439.3401(1) was amended to read in the following manner:

> "(1) As used in this section, "violent offender" means any person who has been convicted of or pled guilty to the commission of:
> (a) A capital offense;
> (b) A Class A felony;
> (c) A Class B felony involving the death of the victim or serious physical injury to a victim;..."

All versions of KRS 439.340(1) enacted prior to July 12, 2006 states that, "As used in this section, "violent offender" means any person who has been convicted of a capital offense, Class A felony or Class B felony involving the death of the victim or serious physical injury to a victim..."

This change in the textual format caused the DOC to review its application of the statute. The DOC realized that it had incorrectly applied KRS 439.3401 to only Class A felonies involving the death of the victim or serious physical injury to a victim. The Department correctly determined that KRS 439.3401 had always defined every Class A felony as a violent offense. (Appendix B of Appellee's Supplemental Brief 2009-CA-000734).

Regardless; prior to the legislative changes, this Court had already determined the applicability of the pre-2006 enactments of KRS 439.3401 to Class A felons. On February 3, 2006 this Court issued an opinion[1] in *Fambrough v. Department of Corrections,* 184 S.W.3d 561 (Ky.App. 2006). The court unequivocally held that "[t]he statute applies to all convictions for sodomy in the first degree; just as it applies to all convictions for any capital offense, **for any Class A felony** and for rape in the first degree regardless whether the victim suffered death or serious physical injury." *Citing Jackson v. Taylor,* 153 S.W.3d 842 (Ky.App.2004) (emphasis added).

Based on the foregoing argument the Franklin Circuit Court held:

> The instant petition is without merit. As correctly pointed out by the Respondents, a defendant automatically becomes a violent offender at the time of his conviction of an offense specifically enumerated in KRS 349.3401(1), regardless of whether the final judgment of conviction contains any such designation. *Benet v. Commonwealth,* 253 S.W. 3d 528, 533 (Ky. 2008), citing *Wathal v Harrod,* 229 S.W.3d 599, 600 (Ky. App. 2007). It is of no legal significance that the Bracken Circuit Court did not

[1] On December 23, 2003, the trial court sentenced Fambrough to a total of ten years in prison.

> designate the Petitioner as a violent offender in its final judgment of conviction for a Class A Felony. See *Benet v. Commonwealth,* 253 S.W. 3d at 533. Even if there were no victims in the Petition's case, who may have suffered death or serious physical injury, the fact that he committed and was convicted of a Class A Felony after July 15, 1998, brings him within the class of violent offenders as defined in KRS 349.3401(1). [RE 56].

The Court of appeals upheld the decision of the Franklin Circuit Court and added that even had there been a change in law:

> [A] statute imposing a condition that must be met before a prisoner may be eligible for parole is not an *Ex Post Facto* law because prisoners do not have a right to be paroled and because the Parole Board is not required to release a prisoner prior to the completion of his maximum sentence. *See Garland v. Commonwealth*, 997 S.W.2d 487, 489-90 (Ky. App. 1999). Therefore, the fact that Pate is statutorily required to serve eighty-five percent of his sentence before becoming eligible for parole is not an *Ex Post Facto* violation. [Court of Appeals Opinion affirming in part, p. 27].

As such, KRS 439.3401 has always classified Class A felonies as violent offenses and the Court of Appeals correctly upheld the Franklin Circuit Court's dismissal of the Petition for Declaration of Rights.

II. THE APPELLANT CANNOT RELY UPON THE DOC'S INCONSISTENT INTERPRETATION OF KRS 439.3401.

The Court of Appeals held that it "need not address the Commonwealth's argument concerning the doctrine of contemporaneous construction." [Court of Appeals Opinion affirming in part, p. 28]. However, Appellant appears to continue relying upon the DOC's initial application of KRS 349.3401. The doctrine of contemporaneous construction is a judicial tool for statutory construction. The doctrine of contemporaneous construction means that where an administrative agency has the responsibility of interpreting a statute that is in some manner ambiguous, the agency is restricted to any

long-standing construction of the provisions of the statute it has made previously. "Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight." *See Hagan v. Farris,* Ky., 807 S.W.2d 488 (1991); *Grantz v. Grauman,* Ky., 302 S.W.2d 364 (1957); *Paducah Marine Ways v. Revenue Cabinet,* Ky.App., 730 S.W.2d 956 (1987).

However, contemporaneous construction cannot be founded upon an administrative agency's failure to correctly apply the law. *Delta Air Lines, Inc. v. Revenue Cabinet,* Ky., 689 S.W.2d 14, 19–20 (1985). "Nor can the [agency] change the law through mistake." *Revenue Cabinet v. Lazarus, Inc.*, 49 S.W.3d 172 (Ky. 2001). In the present case, the legislature and the courts disagreed with the DOC's interpretations of KRS 349.3401. An erroneous interpretation of the law will not be perpetuated. (citations omitted). *Delta Air Lines, supra.* In *Kentucky Bd. of Tax App. v. Citizens Fid. B. & T. Co.,* Ky., 525 S.W.2d 68 (1975), the Court specifically rejected the notion that contemporaneous construction can be based upon an administrative agency's mistakes. The court was "no more disposed to hold that an administrative body can change the law by mistake than to hold that it can do so on purpose." *Id.* at 75; *see also Beth–Elkhorn Corp. v. Ross,* Ky., 552 S.W.2d 656, 659 (1977). Therefore, in light of the textual changes made by the legislature and the decisions of this Court, DOC is without discretion to classify the Appellant as anything other than a violent offender since his offense has always been a violent offense under all versions of KRS 439.3401.

CONCLUSION

WHEREFORE, based on the foregoing, Appellee DOC respectfully requests this Court to affirm the decisions of the Franklin Circuit Court and the Kentucky Court of Appeals.

Respectfully submitted,

J. TODD HENNING
DEPARTMENT OF CORRECTIONS
Office of Legal Services
P.O. Box 2400
Frankfort, KY 40602-2400
Phone: (502) 564-4726 Ext. 22346
E-Mail: Todd.Henning@ky.gov
COUNSEL FOR APPELLEE