No. 19-6032

IN THE

SUPREME COURT OF THE UNITED STATES

EARNEST LEE LANGSTON ___ PETITIONER

vs.

MISSOURI BOARD OF PROBATION
AND PAROLE _____ RESPONDANT

ON PETITION FOR WRIT OF CERTIORARI TO

THE MISSOURI SUPREME COURT

PETITION FOR WRIT OF CERTIORARI
Supplemental Brief

Earnest Lee Langston

South Central Correctional Center
255 W. Hwy 32
Licking, MO 65542

N/A
(Phone Number)

TABLE OF CONTENTS

INDEX TO APPENDICES

QUESTION(S) PRESENTED

PETITIONER ADOPTS PREVIOUS QUESTION PRESENTED

LIST OF PARTIES

THE PARTIES ARE THE SAME AS STATED IN THE PETITION

TABLE OF AUTHORITIES CITED

JURISDICTION

JURISDICTION OF THIS COURT IS NOW BEING INVOLVED PURSUANT TO UNITED STATES SUPREME COURT RULE 15, FOR FILING OF SUPPLEMENTAL BRIEF ON AN INTERVENING MATTER NOT AVAILABLE AT THE TIME OF PETITIONER'S LAST FILING

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED HAS PREVIOUSLY BEEN STATED IN THE ORIGINAL PETITION FOR CERTIORARI WHICH PETITIONER ADOPTS HEREIN

STATEMENT OF CASE

Appellant states that since the filing of his Petition for Certiorari, and as a result of filing said Petition, the Mo. Bd. of Probation & Parole rescinded ~~his~~ petitioner's 2080 parole hearing date, and re-scheduled him for the year 2075 (Appendix -A).

Appellant was also imformed in a letter from one of the parole managers that application of the Board's 75-Year Rule would not be considered in calculating petitioner's parole elgibility because his offenses was not at or near the saame same time (Appendix-B).

A) Petitioner restates, that his argument is that the Board committed "fraud" in a Declaratory Judgment Action in Cole County Circuit Court, when the Board's attorney drafted a Proposed Judgment stating that in reaching the 2080 parole calculation, that petitioner was given benefit of the 75-Year Rule.

Petitioner points out, that any Judge in Missouri would know that this was a lie, under Phillips v. Dept of Corr., 323 SW3d 790 (Mo. App. 2010) where the appellate court found that Section 558.019 (RSMo 1994) expressly stated that 558.019 shall apply to offenses occuring on or after Aug. 28, 1994, and that the legislature was clear in their intent that 558.019 should not be applied retroactively.

B) This fraud was carried over into appellant's appeal, causing the appellant court to reach an erroneous decision, therefore, this intervening matter where the parole manager now admits that 558.019.4(2) 75-Year Rule was never used or considered in reaching the 2080 parole calculation date; the Board Manager is correct, petitioner do not qualify under that Rule, but in deciding petitioner's declaratory judgment action, May, 2012 the Judgment drafted by the Board's attorney stated that petitioner was Appendix-C)

C) Petitioner also attaches a copy of case, **State Langston, 889 SW2d 93 (Mo. app. 1993)** at p. 7, where the State of Missouri argued that petitioner's crimes were committed **at or near the same time (Appendix-D).**

The State's argument confirms **Section 558.019.5 (now repealed)** which gave the Board authorization to convert consecutive sentences to concurrent, for purpose of calculating parole elgibility **(Appendix-E)**

D) Section 558.019.4(2) **75 Year Rule** took the place of 558.019.5 in **year 2005**, the same year that the Board cancelled petitioner's **2005 parole hearing date and extended it to 2080,** which makes it even more manifest that the Board was relying upon the newly enacted **558.019.4(2) 75 Year Rule.**

Missouri Parole Laws

E) Petitioner concludes by stating that no inmate in Missouri has ever recieved a parole hearing date **90-years from the date of his offenses on sentences that was paroleable; and it mattered not if those sentences was concurrent or consecutive,** because in Missouri a Life sentence has it's own calculation, i.e., **Section 217.490.4 RSMo ~~that~~ supercedes Section 558.019,** and under Section 217.690.4 no aggregating of mandatory minimums can be greater than the mandatory minimum of a Life sentence, plainly stated in **Wolfe,** where the Court stated: **"theorectically, Wolfe beomes parole elgible after the 85% of his Life sentence is served." (Appendix-F)**

REASON FOR GRANTING THE PETITION

A) Petitioner states that there now is good reaSon for granting the petition. **U.S. Const. art. I, Sec. 10, cl. 1** bars enactments which, by retroactive operation, increases the punishment for a crime. Under **Jones v. Garner, 529 US 244 (2000) and Cal. Dept of Corr., v. Morales, 115 S.Ct. 1547 (1995)**, the inquiry is whether the retroactive application of Rules and Statutes creates a significent risk of increasing the measurement of punishment.

B) The measurement of petitioner's punishment was increased, because parole is part of the sentence, and under Missouri pre-1994 parole laws petitioner was only required to serve 40% of a Life sentence. In Parolebooks issued in Year **1992, 2001 and 2005, it states: "In the Board's discretion offenders serving life or multiple life or concurrent or consecutive sentences that total more than forty-five (45) years may be elgible for parole after a minimum of 15 years."** The only exception would be offenders that has to serve 40, 60, or 80% mandatory minimum, but once those minimums exceed that of an ordinary life sentence, the calculation on the Life sentence apply.

C) Petitioner believes that the Board did not take into consideration that petitioner would challenge their proposed Judgment, and once petitioner did, the Board resorted to a **cover-up** by trying to convience the Courts that they complied with State statute, and still is-- **by virtue of the attached letter from the parole manager (FRAUD IS ACTIONABLE IN THIS COURT).**

CONCLUSION

This Court should find that the Missouri court was wrong in their judgment, which was unsupported by evidence, and that the fraud has now been made more manifest, therefore the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

Earnest Lee Langston

Earnest Lee Langston #23783
South Central Correctional Center
255 W. Hwy 32
Licking, MO 65542

Dated this 9th day of November, 2019

PROOF OF SERVICE

I, Earnest Lee Langston, hereby declare that on this date, November 19, 2019, as required by Supreme Court Rule 29, I have served the enclosed **SUPPLEMENTAL PETITION FOR CERTIORARI** on each party to the above proceeding, or the party's counse, and on every other person required to be served, by depositing the same in the United States Mail, properly addressed to each party with first class postage prepaid.

The names and addresses of those served are as follow:

Missouri Attorney General Office
Stephen D. Hawke
P.O. Box 899
Jefferson City, MO 65102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 2019

Earnest Lee Langston
EARNEST LEE LANGSTON

APPENDIX

Attached hereto are petitioner
Appendix A thru F

DOC ID: 23783 **Cycle:** 19730511
DOC Name: LANGSTON, EARNEST L

Institution/Housing Unit SCCC/003

Minimum Mandatory Release Date N/A

RELATING TO RELEASE CONSIDERATION

X 1. You have been scheduled for a parole hearing 09/00/2075.

___ 2. At your request, your case has been closed to further parole consideration.

___ 3. You have been given parole consideration in a parole hearing . You will be scheduled for a reconsideration hearing .

___ 4. You have been scheduled for release from confinement on .

Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

Special Conditions of release are:

Strategy Stipulation Date:

___ 5. Your previously set release date has been cancelled.

___ 6. Your conditional release date has been extended to .

___ 7. The Board has reviewed your appeal. It is the decision of the Board to your appeal.

___ 8. You have been scheduled for a Conditional Release Extension hearing on .

The reasons for the action taken are:

**THIS DECISION IS NOT SUBJECT TO APPEAL.

MPT review. Change in sentence structure. Hearing rescheduled.

APPENDIX - A

State of Missouri
DEPARTMENT OF CORRECTIONS
Missouri Parole Board
3400 Knipp Drive • Jefferson City, MO • 65109
Phone 573-751-8488 • Fax 573-751-8501

EARNEST LANGSTON 23783
SOUTH CENTRAL CORRECTIONAL CENTER

October 29, 2019

RE: Hearing Date

In response to your letter dated 09-26-19, we conducted a review of your minimum eligibility calculation. Application of the 75 year rule is limited to those offenses that are impacted by RSMo 558.019. Offenses must also be at/near the same time. In reviewing your sentence structure, it was determined that sequences 3-9 was a separate offense from sequence 10 and 11. Sequence 12, Robbery 1st was an additional offense that occurred on the following day. Sequences 3-12 were three separate crimes occurring on different dates. In calculating your statutory minimums per 558.019 and adding the additional 15 year regulatory minimum eligibility on the consecutive sequences 4, 6, 8 and 13 for sentences of 45 years or more, your minimum eligibility for release has been calculated to be 01-07-2076. Your hearing will be scheduled 4 months prior to this date in September of 2075.

Respectfully,

Steven D. Mueller
Board Operations Manager
Missouri Parole Board
573-526-6982

Appendix - B

SDM:lag

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

EARNEST LANGSTON, Petitioner,	)	
v.	)	09AC-CC00541-01
MISSOURI BOARD OF PROBATION AND PAROLE, Respondent.	)	

DECISION JUDGMENT AND ORDER

Earnest Langston raises statutory, regulatory, and constitutional challenges to the Parole Board's determination of his parole eligibility date. All of these challenges are based misinterpretations of Missouri law. Langston's parole eligibility date has been correctly calculated by aggregating the ineligibility periods on his consecutive sentences, and where applicable giving him the benefit of the 75-year rule of 558.019.4(2). Wolfe *v. Missouri Dept. Of Corrections*, 199 S.W.3d 219 (Mo. App. W.D. 2006); *Edger v. Missouri Bd. of Probation and Parole*, 307 S.W.3d 718 (Mo. App. W.D. 2010). Langston has no entitlement under Missouri law to have his numerous consecutive sentences all treated as a single 30-year sentence or a single 50-year sentence, for purposes of analyzing parole eligibility, and no right to have all his consecutive sentences converted to concurrent sentences.

Langston's Due Process Clause, Equal Protection Clause, and Ex Post Facto Clause claims are all without legal merit, as are his claims under Missouri statutes and parole regulations. Langston has not been disadvantaged by the use of

Appendix - C

current parole statutes or regulations and he has no liberty interest in the use of earlier versions of the parole statutes or regulations. *See State ex. rel. Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. banc 1995). He fails to set out an Equal Protection Clause claim by alleging that two inmates with life sentences or sentences more than 45 years had parole hearings after 13 years. Langston has many consecutive sentences with statutory or regulatory mandatory-minimum prison terms, and those sentences make his case distinguishable from inmates who become parole eligible after 15 years and therefore receive a hearing after 13 years.

Because all Langston's claims fail as a matter of law and there are no genuinely disputed facts material to that determination summary judgment is granted for the Missouri Board of Probation and Parole.

5/14/12
Date

Circuit Judge

84

The defense was that the witnesses were mistaken in their identification of defendant and that the police coerced him into making the written confession.

***96** In his first point, defendant asserts that the trial court erred when it denied his motion to sever the three offenses and improperly joined the offenses which occurred at the hotel on June 4 and 5 with the incident which occurred on June 11. Defendant concedes that the two incidents in the hotel were properly joined, but argues that the June 11 offense was separate from the hotel offenses both in time and in character.

[1] [2] Joinder and severance are distinct issues for review. Joinder is either proper or improper; severance is discretionary. *State v. Holmes*, 753 S.W.2d 104, 105 (Mo.App.1988). Severance presupposes proper joinder. *Id.*

[3] We first consider whether joinder was proper. Section 545.140(2), RSMo (1986) authorizes joinder of two or more offenses if the offenses charged "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 23.05 also authorizes joinder of related offenses and its language parallels that of § 545.140(2). Liberal joinder of offenses is favored to achieve judicial economy, and the trial court's decision should be based solely on the State's evidence. *State v. Forister*, 823 S.W.2d 504, 509 (Mo.App.1992).

[4] [5] [6] Similar tactics are sufficient to constitute acts "of the same or similar character." *State v. Clark*, 729 S.W.2d 579, 582 (Mo.App.1987). In the case before us, the acts committed in the hotel on June 4 and 5 and the incident on June 11 are similar. The crimes were committed in the same general geographic area of the City of St. Louis, and in close proximity of time. In each instance a robbery was committed, the victim was threatened with a weapon, and the sexual attack on the victim either followed the robbery or, in the case of J.J. in the hotel stairwell, was likely to follow if defendant had not been frightened away. Although there are some dissimilarities between the offenses, identical tactics are not required. *See id.* Tactics which resemble or correspond in nature are sufficient to support joinder. *Id.* Here, the similarities between the offenses in the hotel and the June 11 offense are sufficient to put defendant's signature on the incidents. Joinder was therefore proper.

[7] [8] We next consider the trial court's denial of defendant's motion to sever. Rule 24.07 provides in pertinent part:

> When a defendant is charged with more than one offense in the same indictment or information, the offenses shall be tried jointly unless the court orders an offense to be tried separately. An offense shall be ordered to be tried separately only if:
>
> * * * * * *
>
> (b) A party makes a particularized showing of substantial prejudice if the offense is not tried separately; and
>
> (c) The court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense.

In deciding whether to grant a motion for severance, the trial court must weigh the benefits of trying the offenses simultaneously, thereby saving judicial time, against the potential prejudice to the defendant. *State v. Fowler*, 758 S.W.2d 99, 100 (Mo.App.1988). The denial of a defendant's motion will be disturbed only by a clear showing of an abuse of discretion. *Id.* at 101.

[9] Our review of the record reveals no abuse of the trial court's discretion in denying defendant's motion for severance. The offenses arose out of only three incidents and the evidence

APPENDIX - D

4-E

2. The provisions of **subsections 2 to 5 of** this section shall be applicable to all classes of felonies except those set forth in chapter 195, RSMo, and those otherwise excluded in subsection 1 of this section. For the purposes of this section, "prison commitment" means and is the receipt by the department of corrections of a [defendant] **offender** after sentencing. For purposes of this section, prior prison commitments to the department of corrections shall not include commitment to a regimented discipline program established pursuant to section 217.378, RSMo. Other provisions of the law to the contrary notwithstanding, any [defendant] **offender** who has pleaded guilty to or has been found guilty of a felony other than a dangerous felony as defined in section 556.061, RSMo, and is committed to the department of corrections shall be required to serve the following minimum prison terms:

(1) If the [defendant] **offender** has one previous prison commitment to the department of corrections for a felony offense, the minimum prison term which the [defendant] **offender** must serve shall be forty percent of his **or her** sentence or until the [defendant] **offender** attains seventy years of age, and has served at least [forty] **thirty** percent of the sentence imposed, whichever occurs first;

(2) If the [defendant] **offender** has two previous prison commitments to the department of corrections for felonies unrelated to the present offense, the minimum prison term which the [defendant] **offender** must serve shall be fifty percent of his **or her** sentence or until the [defendant] **offender** attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first;

(3) If the [defendant] **offender** has three or more previous prison commitments to the department of corrections for felonies unrelated to the present offense, the minimum prison term which the [defendant] **offender** must serve shall be eighty percent of his **or her** sentence or until the [defendant] **offender** attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first.

3. Other provisions of the law to the contrary notwithstanding, any [defendant] **offender** who has pleaded guilty to or has been found guilty of a dangerous felony as defined in section 556.061, RSMo, and is committed to the department of corrections shall be required to serve a minimum prison term of eighty-five percent of the sentence imposed by the court or until the [defendant] **offender** attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first.

4. For the purpose of determining the minimum prison term to be served, the following calculations shall apply:

(1) A sentence of life shall be calculated to be thirty years;

(2) Any sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years.

5. For purposes of this section, the term "minimum prison term" shall mean time required to be served by the [defendant] **offender** before he **or she** is eligible for parole, conditional release or other early release by the department of corrections. Except that the board of probation and parole, in the case of consecutive sentences imposed at the same time pursuant to a course of conduct constituting a common scheme or plan, shall be authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated.

APPENDIX-E

of the sentence imposed, whichever occurs first. Section 558.019.4(1) explicitly provides that in determining the minimum prison term to be served, a life sentence shall be calculated to be thirty years. Eighty-five percent of thirty years is 25.5 years. Eighty-five percent of his ten-year sentence is 8.5 years. Thus, the circuit court correctly determined that Wolfe's minimum prison term prior to parole eligibility should be calculated as thirty-four years (25.5 years plus 8.5 years).

MDOC concedes that section 558.019.4(1) **[**9]** requires that, for purposes of determining the mandatory minimum prison term to be served, a life sentence is considered to be thirty years; therefore, Wolfe becomes "theoretically" parole eligible on the life sentence after eighty-five percent of that sentence, or 25.5 years. However, because MDOC interprets a life sentence that is coupled with a ten-year consecutive sentence to be more than seventy-five years, MDOC argues that section 558.019.4(2) applies in this instance. That section provides that "[a]ny sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to be seventy-five years." As a matter of law, asserts MDOC, Wolfe's two sentences are aggregated into a single seventy-five-year sentence under subparagraph (2). Under this method of calculation, MDOC argues, Wolfe's mandatory minimum prison term will be completed on Wolfe's seventieth birthday.

In another twist to its argument, MDOC asserts that Wolfe cannot serve eighty-five percent of his ten-year sentence, as he must under section 558.019.3, until **[**10]** that sentence begins to run. MDOC contends, until a prisoner dies, a life sentence is not completed, thus his second sentence will never begin.

We will not interpret section 558.019 to permit an unreasonable result. *See* *Carroll v. Mo. Bd. of Prob. & Parole*, 113 S.W.3d 654, 658 (Mo.App. W.D. 2003). As previously discussed, section 558.019.4(1) clearly establishes that for the purpose of determining the minimum prison term to be served, a life sentence shall be calculated to be thirty years. MDOC's argument that the provision applicable here is that Wolfe's sentences, in the aggregate, are over seventy-five years and thus should be calculated as seventy-five years is nonsensical in light of the clear language of section 558.019.4(1).

The judgment of the circuit court is affirmed.

Victor C. Howard, Chief Judge

Breckenridge and Hardwick, JJ., concur.

APPENDIX - F

Footnotes

1↑ All statutory references are to RSMo 2000.

5 F

FOOTNOTES

6 Atkins, like Major, was charged under the old law. The old law allowed parole after service of twenty years. Atkins, 303 S.C. at 219, 399 S.E.2d at 763.

Adopting the reasoning of the Atkins' Court, it follows that HN9 if a consecutive life sentence could not nullify parole eligibility on a parolable life sentence, then a five-year consecutive sentence cannot either.

The question now becomes what is HN10 the efficacy of a consecutive sentence? The answer is two fold. First, following the guidance of Mims, the time is aggregated and parole eligibility is calculated on the aggregated sentence. Secondly, if the consecutive sentence is a non-parolable offense then its sentence must be served and credited first against the aggregated sentence. This is necessary to give effect to the legislative grant of parole eligibility on the parole-eligible offense. 7

FOOTNOTES

7 The argument that this approach is contrary to prior practice was made in part by the dissent in Atkins to no avail.

Considering the above discussion, **[*17]** the meaning of "consecutive" needs further attention. HN11 Because this term is not defined in our code of laws, we must employ the rules of statutory construction to ascertain and effectuate the intent of the General Assembly. See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (stating the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation); Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002) ("Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.").

HN12 "Consecutive" means sentences run successively and the service of the sentence cannot run at the same time as the other sentences. See Black's Law Dictionary 304 (6th ed. 1990) (noting that "consecutive" means successive, succeeding one another in regular order, to follow in uninterrupted succession); Webster's **[*18]** Concise Dictionary 150 (2003) ("Following in uninterrupted succession; successive."); see generally R.P.D., Annotation, When Sentences Imposed by the Same Court Run Concurrently or Consecutively; and Definiteness of Direction with Respect Thereto, 70 A.L.R. 1511 (1931 & Supp. 2008) (outlining cases and discussing question of whether sentences on different counts or different offenses were intended to be served concurrently or consecutively and whether the sentence or sentences were sufficiently definite for the purpose intended).

Thus, HN13 a notation that a sentence is "consecutive," for sentencing purposes, does not necessarily delineate that the particular sentence has to run last. It merely indicates that all the sentences are to run successively, and not to run at the same time. See Atkins, 303 S.C. at 219, 399 S.E.2d at 763 (noting that "for purposes of parole eligibility, consecutive sentences should be treated as one general sentence by aggregating the periods imposed in each sentence"). Therefore, despite the fact that the weapons sentence was the last one imposed and it was denoted as "consecutive" there was no indication that the weapons sentence was to be the last sentence to **[*19]** be served. See Tilley, 334 S.C. at 28-29, 511

40