

No. _____

In The
Supreme Court of the United States

JEROME BERRY,

Petitioner,

v.

TERI LAWSON, Warden,
Farmington Correctional Center,

Respondent.

**On Petition For A Writ Of Certiorari To the
Supreme Court of Missouri**

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. SCHRIENER
COUNSEL OF RECORD FOR THE PETITIONER
LAW & SCHRIENER LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
314-721-7095 – telephone
314-863-7096 – fax
kschriener@schrienerlaw.com

QUESTION PRESENTED FOR REVIEW

Petitioner Jerome Berry is serving an aggregate forty-five year sentence for rape, kidnaping, and attempted robbery. He has served over thirty-nine years of his sentence, and has completed his thirty-year sentences for rape. His presumptive parole and conditional release dates have passed. He has long ago served the retributive portion of his sentence. But for the Missouri Board of Probation and Paroles arbitrary, capricious and discriminatory application of the Missouri Sexual Offenders Program, he would be a free man. The state circuit court, court of appeals, and Missouri Supreme Court denied Petitioner habeas relief.

The question presented is:

Did the Missouri courts err in failing to find that Petitioner was entitled to immediate release due to the Missouri Board of Probation and Paroles arbitrary, capricious and discriminatory application of the Missouri Sexual Offenders Program to him violating his rights to due process, and equal protection under law?

LIST OF PARTIES

All parties appear in the case caption on the cover page of this petition.

TABLE OF CONTENTS

QUESTION PRESENTED.....	ii
LIST OF PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES CITED.....	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF CASE.....	2
REASON FOR GRANTING THE WRIT	6
THE COURT SHOULD GRANT THE WRIT TO STOP THE STATE OF MISSOURI FROM APPLYING THE MISSOURI SEXUAL OFFENDERS PROGRAM IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY MANNER.	
CONCLUSION.....	10
INDEX TO APPENDICES	i

TABLE OF AUTHORITIES CITED

CASES	PAGES
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	8
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	8
<i>Massachusetts Board of Retirement v. Murgia</i> , 427 U.S. 307 (1976).	9
STATUTES	
28 U.S.C. § 1257	1
MO. REV. STAT. § 589.040	3, 7, 8, 9
MO. REV. STAT. § 589.015	4
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. CONST. amend V, §1	2
U.S. CONST. amend XIX, §1	2
SUPREME COURT RULES	
13.3	2

In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerome Berry respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court entered in this case.

OPINIONS BELOW

The final judgment and mandate by the Missouri Supreme Court on September 1, 2020, denying Petitioner's habeas petition is attached as Appendix A. The order of the Missouri Court of Appeals, Eastern District, denying Petitioner's state habeas petition on April 29, 2020, is attached as Appendix B. The December 12, 2019, judgment of the 24th Judicial Circuit (St. Francois County, Missouri) denying Petitioner's petition for writ of habeas corpus is attached as Appendix C.

JURISDICTION

The Missouri Supreme Court issued its denial of Petitioner's petition for writ of habeas corpus on September 1, 2020, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition. This petition, postmarked January 29, 2021, is timely filed pursuant to SUP. CT. R.

13.3, and this Court's March 19, 2020, Order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, § 1.

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

After a jury trial, Petitioner was found guilty in Cause No. 21CCR-461160 in the St. Louis County Circuit Court (21st Judicial Cir.) of two counts of rape, one count of kidnaping, and one count of attempted robbery. In June 1982, the circuit court sentenced him to concurrent terms of thirty years for two counts of rape and fifteen years for one count of kidnaping, and a consecutive term of fifteen years for attempted robbery for an aggregate sentence of forty-five years.

Because Petitioner is a sex offender convicted of a sexual assault crime, he is required under Missouri law to complete the Missouri Sexual Offenders Program (MOSOP) before he is eligible for early release. *See* Mo. Rev. Stat. §

589.040. Section 589.040 states as follows:

1. The director of the department of corrections shall develop a program of treatment, education and rehabilitation for all imprisoned offenders who are serving sentences for sexual assault offenses. When developing such programs, the ultimate goal shall be the prevention of future sexual assaults by the participants in such programs, and the director shall utilize those concepts, services, programs, projects, facilities and other resources designed to achieve this goal.
2. All persons imprisoned by the department of corrections for sexual assault offenses **shall be required to successfully complete the programs developed pursuant to subsection 1 of this section prior to being eligible for parole or conditional release.**

(emphasis added).

For the purposes of § 589.040.2, sexual assault is defined as:

- (a) The acts of rape in the first or second degree, forcible rape, rape, statutory rape in the first degree, statutory rape in the second degree, sexual assault, sodomy in the first or second degree, forcible sodomy, sodomy, statutory sodomy in the first degree, statutory sodomy in the second degree, child molestation in the first, second, third, or fourth degree, deviate sexual assault, sexual misconduct, sexual misconduct in the first, second, or third degree, sexual abuse, and sexual abuse in the first or second degree, or attempts to commit any of the aforesaid, as these acts are defined in chapter 566;
- (b) The act of incest, as this act is defined in section 568.020;
- (c) The act of abuse of a child under section 568.060, which involves sexual contact;
- (d) The act of use of a child in a sexual performance; and
- (e) The act of enticement of a child, as defined in section

566.151, or any attempt to commit such act.

Mo. Rev. Stat. § 589.015 (2011). Petitioner was convicted of rape in the first degree which is a crime of sexual assault.

MOSOP is composed of two phases which an inmate must complete. Petitioner completed Phase I of MOSOP but voluntarily left Phase II in 2007 due to issues beyond his control. Before leaving MOSOP, Petitioner had a presumptive parole date of August 2, 2008. Because Petitioner did not complete MOSOP, the Missouri Board of Probation and Parole (Board) cancelled this date, and has cancelled all subsequent presumptive parole dates. Although, at the time, the Missouri Department of Corrections (“DOC”) had two years to place Petitioner back into the MOSOP program after he had voluntarily left, it has been over thirteen years and the DOC has not placed Petitioner back into Phase II. On August 25, 2015, Petitioner was transferred back to the Farmington Correctional Center (FCC) and at that time, he had a conditional release date of August 2018. FCC is a facility which has MOSOP classes. On June 28, 2018, the Board issued its decision regarding Petitioner’s release consideration and cancelled his August 2, 2018, conditional release date due to his failure to complete MOSOP. The Board extended Petitioner’s release date to August 2, 2026, which is his maximum release date. At that time, Petitioner will have served 100% of his sentences.

Prior to seeking habeas relief in the Missouri Supreme Court, Petitioner discovered on information and belief that another sexual offender convicted of a sexual assault offense had been released without successfully completing MOSOP. TY M. Lincoln (Reg. No. 1289447) has been released from the FCC without receiving an extension of his conditional release date or completing MOSOP. It is unknown whether Mr. Lincoln is or was participating in a sexual offender program on the street. A review of Mr. Lincoln's criminal docket sheet in *State v. Lincoln*, No. 15PR-CR00055-01 (32nd Cir.), indicates, however, that Mr. Lincoln entered a guilty plea to a sexual assault crime (one count of statutory rape in the first degree and one count of statutory sodomy in the first degree.). The circuit court initially sentenced Mr. Lincoln to a suspended imposition of sentence and five years supervised probation. On July 20, 2018, the circuit court revoked Mr. Lincoln's probation and sentenced him to five years imprisonment on both counts to run concurrently. *Id.* Given that he received an aggregate five-year sentence, Mr. Lincoln would be entitled to conditional release after serving two-thirds of his sentence. *See* Mo. Rev. Stat. § 558.011.1.4(1)(a). With a maximum release date of September or October 2022, his conditional release date would be in 2021. Mr. Lincoln, however, has been released from prison prior to his conditional release date. Because Mr. Lincoln has been released prior to his conditional release, he

could not have completed the MOSOP program. If Mr. Lincoln had participated in MOSOP his conditional release date would have been extended. Mr. Berry believes there are additional inmates convicted of sexual assault crimes who have been released early prior to completion of MOSOP.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO STOP THE STATE OF MISSOURI FROM APPLYING THE MISSOURI SEXUAL OFFENDERS PROGRAM IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY MANNER.

As set out above, both the Board and DOC have applied the MOSOP completion requirement arbitrarily, capriciously, and in a discriminatory manner to Petitioner preventing him from receiving early release after completing his concurrent sentences for sexual assault.

I. Arbitrary and Capricious Application of MOSOP Requirement

A. No reason for not placing Petitioner back into MOSOP Phase II

If Berry had been placed back into Phase II of MOSOP upon his return to FCC, which was clearly the DOC's intent at that time, he could have completed Phase II in time to be released on his conditional release date which was in August of 2018. If the DOC had followed its own guidelines, Petitioner would have no need to file this petition. Again, Berry has served over thirty-nine years of his

forty-five year sentence, and should have been paroled a long time ago. The DOC's failure to give Berry the opportunity that other inmates have received to be placed back into the MOSOP is arbitrary, and capricious. The exact reasons for the DOC not placing Petitioner in Phase II of MOSOP is unclear. Berry's last major conduct violation occurred over thirty years ago, and since that time Berry has maintained a clean institutional record. Also, Berry has never failed a DOC drug test. Prior to his conviction, Berry had never been convicted of a crime.

The Board's cancelling of Mr. Berry's conditional release date based upon his non-completion of MOSOP was arbitrary and capricious. The DOC never placed Petitioner back into the Phase II of MOSOP ensuring that he would lose his conditional release date. Moreover, the Board gave no other reason to cancel Mr. Berry's release date after he had served almost 37 years in prison. Clearly, the Board has applied § 589.040.2 in violation of his due process rights to conditional release. Given that the Board's decision in extending Mr. Berry's release date for failure to complete MOSOP is wholly arbitrary and capricious, and Mr. Berry's conditional release date has now passed and that Mr. Berry has been waiting over thirteen years to be placed back into Phase II of MOSOP, Petitioner should be released. Mr. Berry can complete any sexual offender program in the free-world. Given that liberty from bodily restraint always has been recognized as

the core of the liberty protected by the Due Process Clause from arbitrary governmental action, Petitioner should be released. *See e.g. Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

B. Board does not follow MOSOP requirement as to all Inmates

As set out above, the Board does not follow § 589.040.2 as to every inmate who fails to complete MOSOP while incarcerated. This is another example that the State of Missouri is arbitrarily, and capriciously applying the MOSOP requirement to Petitioner's detriment.

C. Petitioner has completed the Sexual Assault Sentences

Under the correct calculation of Petitioner's sentence, he would have completed his entire thirty-year term of imprisonment for his forcible rape convictions on August 3, 2011. In fact, Petitioner's July 14, 2017, DOC Face Sheet made such a calculation and set his maximum release date on the forcible rape convictions for August 3, 2011. It was not until after the Board issued its decision in June 2018, regarding Petitioner's release status, that it deferred reactivation of these sentences and calculated their maximum release date for June 22, 2012. Petitioner's remaining fifteen-year consecutive sentence for attempted first degree robbery does not require that he participate in MOSOP for early

release. Thus, releasing Petitioner so that he could complete sex offender therapy on the street would not be inconsistent with Mo. Rev. Stat. § 589.040 even if was being uniformly applied.

D. Discriminatory Application of MOSOP Requirement

Not only has the Board applied the MOSOP requirement in an arbitrary and capricious manner in failing to reenrol Petitioner in MOSOP Phase II and in cancelling Petitioner's conditional release date, it has also applied it in a discriminatory manner based on race. Mr. Lincoln who was released prior to his conditional release date and before completing MOSOP is white. Petitioner is black. The Board has used a suspect classification - Petitioner's race - to cancel his conditional release date. Petitioner has demonstrated that he is similarly situated to those with whom he is comparing himself. Because the identified former prisoner a sex offender who is statutorily required to complete MOSOP prior to early release, Petitioner is similarly situated. Furthermore, Petitioner and Mr. Lincoln, who has received early release without completing MOSOP, cannot be differentiated by their prisoner or conditional release classifications. The only differentiation is their race. Petitioner, who is African-American, is a member of a "suspect class" requiring "strict scrutiny" of any discrimination. *See e.g. Massachusetts Board of Retirement v. Murgia*, 427

U.S. 307, 313 (1976) (a suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process). In cancelling Petitioner's conditional release date for failing to complete MOSOP and releasing a white inmate who has not completed MOSOP prior to his conditional release date, the Board has applied the MOSOP requirement in a racially discriminatory manner and denied Petitioner equal protection of the law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari and issue a writ of certiorari to review the decision of the Missouri Supreme Court.

Respectfully submitted,

KEVIN L. SCHRIENER
Counsel of Record for Petitioner
LAW & SCHRIENER LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
314-721-7095 – telephone
314-863-7096 – fax
kschriener@schrienerlaw.com

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INDEX OF APPENDICES

APPENDIX A – Judgment of the Missouri Supreme Court (September 1, 2020)	1a
APPENDIX B – Order of the Missouri Court of Appeals, Eastern District, Denying State Habeas Petition (April 29, 2020)	3a
APPENDIX C – Circuit Court judgment denying State Habeas Petition (December 12, 2019).	4a