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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1882**

Gary L. Roby, petitioner,  
Appellant,

vs.

Tom Roy, Commissioner of Corrections,  
Respondent.

**Filed July 11, 2011  
Appeal dismissed  
Wright, Judge**

Washington County District Court  
File No. 82-CV-10-2486

Gary L. Roby, Bayport, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, St. Paul,  
Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and  
Larkin, Judge.

**UNPUBLISHED OPINION**

**WRIGHT**, Judge

Appellant challenges the district court's denial of his petition for a writ of habeas corpus, arguing that he is entitled to a new supervised release review hearing or an evidentiary hearing. Because respondent conducted a new supervised release review

hearing and issued a decision after appellant filed his habeas corpus petition, we dismiss this appeal as moot.

## **FACTS**

In August 1989, a jury found appellant Gary L. Roby guilty of two counts of first-degree murder and one count of second-degree murder. The district court sentenced Roby to life imprisonment, with eligibility for supervised release in 2006. Minn. Stat. § 244.05, subd. 4 (1988) (providing that inmate serving life sentence shall not have supervised release without serving a minimum term of 17 years imprisonment). In a separate trial, a jury found one of Roby's co-defendants guilty of first-degree murder; she was sentenced to life imprisonment and ordered to pay restitution. In 1992, the district court amended her sentence to reflect that her liability for restitution is joint and several with her co-defendants, including Roby.

Respondent Commissioner of Corrections (commissioner) conducted a supervised release review hearing regarding Roby's eligibility for supervised release on May 13, 2003.<sup>1</sup> The commissioner continued Roby's incarceration for review in seven years and directed Roby to remain discipline free, complete a chemical-dependency program, and pay restitution pursuant to the 1992 order. Specifically, the commissioner and her advisory panel found that Roby continues to deny responsibility for his 1989 offense and

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<sup>1</sup> Commissioner of Corrections Joan Fabian conducted the May 13, 2003 supervised release review hearing. Because Commissioner of Corrections Tom Roy now serves in this capacity, the case caption reflects a change in the name of the respondent. Minn. R. Civ. App. P. 143.04 (providing that if public officer who is party to an appeal in an official capacity ceases to hold office during pendency of appeal, the successor in office is automatically substituted as a party).

his chemical dependency. The commissioner subsequently deducted \$510.68 from Roby's prison-wage account to satisfy the 1992 restitution order.

Roby disputed the application of the 1992 restitution order to him and, on February 27, 2006, a district court advised the parties by letter that the 1992 restitution order did not amend Roby's sentence because the district court that issued the restitution order was without legal authority to order Roby to pay restitution. The department of corrections returned \$510.68 to Roby's prison-wage account in 2008.

Roby filed a petition for a writ of habeas corpus in district court on April 22, 2010. Roby alleged that the commissioner (1) erroneously deducted \$510.68 from his prison-wage account in violation of the separation of powers, due process, equal protection, and the prohibition against double jeopardy; and (2) applied an impermissible "blanket policy" denying supervised release to inmates serving a sentence of life imprisonment. Roby sought an evidentiary hearing and an order directing the commissioner to either immediately release him or vacate the 2003 supervised release review decision and conduct a new supervised release review hearing.

While this petition was pending in the district court, the commissioner conducted a second supervised release review hearing regarding Roby's eligibility for supervised release. The commissioner observed that Roby has remained mostly discipline free in the preceding seven years and has made progress in the chemical-dependency program. The commissioner continued Roby's incarceration for four years so that he can complete the chemical-dependency program, at which point he "will be in a more realistic position in [his] transition to a future release."

On September 24, 2010, the district court denied Roby's petition for a writ of habeas corpus. The district court found that Roby had been reimbursed in 2008 for the funds erroneously withdrawn from his prison-wage account and that there is no evidence that the restitution issue tainted the outcome of Roby's 2003 supervised release review hearing. The district court concluded that the commissioner properly denied Roby supervised release in 2003 based on permissible grounds, namely, Roby's need to assume responsibility for his 1989 offense and his chemical dependency. This appeal followed.

### **DECISION**

As a threshold matter, the commissioner argues that Roby's appeal is moot because the commissioner conducted a second supervised release review hearing and issued a decision during the pendency of this case. A mootness issue must be considered, even if it is raised for the first time on appeal, because it addresses "'a constitutional prerequisite to the exercise of jurisdiction.'" *City of W. St. Paul v. Kregel*, 768 N.W.2d 352, 355 n.2 (Minn. 2009) (quoting *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989)). An issue on appeal is moot when an event occurs that makes an award of effective relief impossible or a decision on the merits unnecessary. *In re Inspection of Minn. Auto Specialties, Inc.*, 346 N.W.2d 657, 658 (Minn. 1984).

Roby challenges the validity of the 2003 supervised release review decision, arguing that the commissioner based the decision to deny supervised release on impermissible grounds. Our careful review of Roby's arguments on appeal establishes that the only relief that Roby seeks is either a new supervised release review hearing before the commissioner that is not influenced by the erroneous restitution order or an

evidentiary hearing in the district court. The commissioner conducted a second supervised release review hearing in April 2010, however, and subsequently continued Roby's incarceration in a May 4, 2010 decision, which does not refer to the erroneous restitution order. And the evidentiary hearing Roby alternatively seeks in the district court on his habeas petition relates only to the validity of the 2003 supervised release review hearing. Because the April 2010 supervised release review hearing renders a decision on the merits unnecessary, Roby's appeal is moot, and we need not reach the arguments he raises in this appeal.

Even in the absence of mootness, however, we would not reverse the district court's denial of Roby's habeas corpus petition. Roby contends that the district court erred by finding that Roby's claims lack evidentiary support and concluding that the commissioner denied him supervised release based on permissible grounds. But our careful review of the record establishes that Roby did not proffer any evidence to support his claims. Although in 2003 the commissioner erroneously advised Roby that he must pay court-ordered restitution, the commissioner provided specific grounds for denying Roby supervised release that are unrelated to restitution—Roby's continued denial of responsibility for his 1989 offense and his chemical dependency. The district court properly concluded that these were permissible grounds in light of the commissioner's discretion. *See* Minn. Stat. § 244.05, subd. 5 (2010) (providing that “commissioner of corrections *may* . . . give supervised release” to inmate serving life imprisonment (emphasis added)). Moreover, there is no evidentiary support for Roby's contention that

the commissioner applied a blanket policy of denying supervised release to inmates serving life imprisonment.

Roby's constitutional challenges also lack merit. Because Roby was not sentenced under a sentencing scheme that created a presumption that he would be released on a target date, Roby does not have a liberty interest in release, and his due-process argument fails. *See Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005) (holding that release date only qualifies as liberty interest if inmate establishes a "legitimate claim of entitlement to being released from prison on" the target release date); *State v. Morse*, 398 N.W.2d 673, 679 (Minn. App. 1987) (concluding that person serving life imprisonment does not have liberty interest in being assigned a target release date), *review denied* (Minn. Feb. 18, 1987). When an inmate becomes eligible for supervised release, the decision to grant supervised release rests within the discretion of the commissioner. Minn. Stat. § 244.05, subd. 5. The commissioner must follow the procedures set forth in Minn. R. 2940.1800 (2010), and Roby does not dispute that the commissioner followed these procedures here. Thus, were we to reach the merits of Roby's appeal, we would affirm the district court's denial of his habeas corpus petition.

**Appeal dismissed.**