

IN THE SUPREME COURT OF PENNSYLVANIA
No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,

v.

DEREK LEE,

Petitioner.

**BRIEF OF FORMER PARDONS BOARD SECRETARIES BRANDON
FLOOD AND CELESTE TRUSTY AS *AMICI CURIAE* IN SUPPORT OF
PETITIONER DEREK LEE**

On appeal from a decision of the Superior Court, 1008 WDA 2021, entered June 13, 2023, affirming a judgment of sentence imposed by the Court of Common Pleas of Allegheny County, CP-02-CR-16878-2014, dated Dec. 19, 2016

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INTEREST OF THE AMICI

Celeste Trusty served as Secretary of the Pennsylvania Board of Pardons during the final year of Governor Wolf and Lieutenant Governor Fetterman's administration. During her tenure as Secretary, Ms. Trusty oversaw the Commonwealth's clemency process. While at the Pennsylvania Board of Pardons, Ms. Trusty advocated establishing and expanding avenues for relief for people deserving of a second chance, but were precluded from the opportunity by life without parole sentences.

Brandon Flood served as the Secretary of the Board of Pardons for roughly three years. During his tenure, he helped make the executive clemency process as accessible as it has ever been since its inception in 1872 – increasing executive clemency requests by 400 percent. Before his appointment, Secretary Flood spent nearly a decade working for the Pennsylvania House of Representatives.

RULE 531(B)(2) CERTIFICATION

Pursuant to Rule 531(b)(2), *amici* certify that no person or entity was paid in whole or in part to prepare this brief. Only *pro bono* counsel authored this brief.

SUMMARY OF THE ARGUMENT

On February 16, 2024, this Court granted Mr. Lee’s Petition in Allowance of Appeal regarding two questions:

(1) Is [Petitioner’s] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under Article I, § 13 of the Constitution of Pennsylvania where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically diminished culpability, and where Article I, § 13 should provide better protections in those circumstances than the Eighth Amendment to the U.S. Constitution?

(2) Is [Petitioner’s] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under the Eighth Amendment to the U.S. Constitution where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically diminished culpability under the Eighth Amendment?

This amicus brief addresses the first of these questions, which involves the question of comparable protections for related clauses between the state and federal constitution. Any assessment of such a question must necessarily be evaluated by the dictates of *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), which notes that the federal Constitution establishes certain minimum levels which are “equally applicable to the [analogous] state constitutional provision,” but that each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution. *Commonwealth v. Sell*, 470 A.2d 457 at 466-467 (Pa. 1983). In determining whether the Pennsylvania Constitution provides those broader standards, *Edmunds* identifies four factors to be considered:

- 1) text of the Pennsylvania constitutional provision;
- 2) history of the provision, including Pennsylvania case-law;
- 3) related case-law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

This amicus brief focuses entirely on the fourth factor, and argues that the Pennsylvania Parole Board has historically and more than satisfactorily protected the community, and that incarcerating for life without parole those convicted of second-degree murder with categorically diminished culpability is not necessary for public safety. The mission of the Parole Board and the statistics obtained from the Pennsylvania Department of Corrections fully support this conclusion. In contrast, the Pardons Board has a very different mission, and historically has not been and is not now a satisfactory alternative to parole.

ARGUMENT

I. The laws of pardons, commutations, and parole make it clear that clemency is not designed to satisfy the requirements of the Eighth Amendment or Article I, §13 of the Pennsylvania Constitution.

The Governor's power to pardon and commute sentences is constitutional, and articulated in Article IV, § 9(a):

In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant

Governor in a docket kept for that purpose.

The concept of parole, on the other hand, is not reflected in the Pennsylvania Constitution, and indeed was unknown at the time our constitution was adopted. Thus, the concepts of parole, pardon, and commutation are historically distinct, and serve very different purposes in our jurisprudence. As noted in *PA Prison Society v. Cortes*, 622 F.3d. 215 (3rd Cir. 2010):

[T]here is a radical difference between a pardon and a parole. A pardon is the exercise of the sovereign's prerogative of mercy. It completely frees the offender from the control of the state. It not only exempts him from further punishment but relieves from all the legal disabilities resulting from his conviction. It blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense. A parole, on the other hand, does not obliterate the crime or forgive the offender. It is not an act of clemency, but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state and under the control of its agents, subject at any time, for breach of condition, to be returned to the penal institution. Neither is a parole a commutation of sentence within the meaning of that term in the constitutional provision. When our present constitution was adopted, parole, as a penological expedient, was unknown to American jurists and legislators, and commutation was then generally understood as meaning a reduction in the length of the sentence, effecting a discharge of the prisoner without any further supervision over him by the state authorities. *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 584–85, 28 A.2d 897 (1942) (citations omitted).

622 F.3d at 222.

The power of commutation is an adjunct of the pardoning power, and is “the exercise of the sovereign's prerogative of mercy.” *Commonwealth v. Sutley*, 378

A.2d 780, 789 n.12 (Pa. 1977); *see also*, *Grzegorzcyk v. United States*, 142 S. Ct. 2580, 2586 n.7 (2022), statement dissenting from the denial of a vacate, grant or remand order (“[W]hile Presidential pardons and commutations may be granted as acts of mercy, to address changes in society or personal circumstances, or for other reasons, they have never been understood as mechanisms for correcting errors, whether by courts or by the Government.”); *Herrera v. Collins*, 506 U.S. 390, 413 (1993) (“A pardon is an act of grace...”).

Parole, on the other hand, is primarily focused on protecting the public’s safety. This priority was made explicit in the 1996 amendment to the Parole Act¹, which “established that the goal of the Parole Act is the protection of public safety.” *Broadus v. Pennsylvania Bd. of Prob. & Parole*, No. 416 M.D.2009, 2010 WL 9519012 (Pa. Cmwlth. Apr. 30, 2010); *Barge v. Pennsylvania Bd. of Prob. & Parole*, 39 A.3d. 390 (Pa. Cmwlth. 2012).

It is clear that commutations and paroles are motivated by different purposes and factual determinations. It is equally clear that commutations are not designed to address the possible reentry of prisoners into the community, or to assess possible violations of Article I, §13 of the Pennsylvania Constitution. Parole, however, is specifically designed to assess possible reentry, and is explicitly and

¹ The Parole Act is now codified in Title 61, Section 6102. 6102 (2), and its main purpose is clear: “In providing these benefits to the criminal justice system, the board and any other paroling entity shall first and foremost seek to protect the safety of the public.”

statutorily tasked with the primary concern to public safety. Thus, from a policy perspective identified in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), parole rather than commutation is the proper mechanism for careful, fair, and just reentry into the community.

II. Pennsylvania’s commutation and clemency laws and policies are insufficient to satisfy Article I § 13 of the Pennsylvania Constitution or the Eighth Amendment for those people convicted of second-degree murder who did not kill or intend to kill.

Because there is no parole for life sentences in Pennsylvania, commutation has historically been perceived as a release valve for Pennsylvanians serving a life sentence without the possibility of parole. Commutation, however, has always served a different purpose than parole, and for close to five decades, commutations have not worked as a substitute mechanism of release. Indeed, a 1997 change to the Governor’s constitutional pardoning power made access to commutation a rarity for those serving life without parole.

a. The Clemency Process in Pennsylvania

Article IV, §9 of the Constitution of Pennsylvania gives the Governor, upon the recommendation of the Board of Pardons, the power to pardon crimes and change criminal sentences through commutation. The Pardons Board consists of the Lieutenant Governor, the Attorney General, and three members appointed by the governor and confirmed by the Senate: a “crime victim,” a “corrections expert,” and a “doctor of medicine, psychiatrist or psychologist.” Pa. Const. Art.

IV, §9. Regulations for the operations of the Pardons Board are articulated in 37 Pa. Code 81.1, et seq.

When someone serving a sentence of incarceration applies for the reduction of their sentence through commutation, an investigation is undertaken, after which the Pardons Board votes on whether to hold a public hearing. 37 Pa. Code § 81.231. For crimes of violence, a majority of Board members must vote to hold a hearing. *Id.* Board members then vote on whether to recommend commutation to the Governor. 37 Pa. Code § 81.301. If the applicant is serving a sentence of life without parole or death, a recommendation to the Governor must be unanimous. *Id.* If recommended, the Governor will review the application and decide whether to issue a Warrant of Commutation. 37 Pa. Code § 81.303. If commutation is granted, a prisoner may be released if they have served their new maximum sentence, or will serve the minimum term of their new sentence before becoming eligible to be paroled.

b. Commutation is not a satisfactory alternative to parole.

A Governor's decision to commute a life sentence, while requiring a unanimous vote of the Pardons Board, is historically viewed as an act of mercy, and as such, has an element of arbitrariness to it. Neither the Pennsylvania Constitution nor the laws or regulations governing the Pardons Board establish minimum eligibility requirements or a specific list of factors that the Pardons

Board must consider in evaluating applications. As a result, the number of commutations granted to those serving life sentences has plummeted over the past half century.

In 1997, the Pennsylvania Constitution was amended to require that those serving life sentences seeking commutation needed to receive a unanimous vote for recommendation to the Governor. This has resulted in far fewer recommendations, as the Board can no longer recommend clemency with a majority vote. Life-sentenced prisoners who had been recommended by a majority of the Board before 1997 were now not making it to the Governor's desk.

During his eight years in office, Governor Milton Shapp commuted the sentences of 257 individuals serving life without parole, an average of 32 per year. The nine governors that followed, in contrast, have commuted only 94 life-without-parole sentences, an average of two per year.² Due in large part to the demise of clemency as a viable avenue of relief for those sentenced to life without parole, the lifer population in Pennsylvania has ballooned from 650 in 1976 to a current population of over 5,000.³

² <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx>.

³

<https://www.cor.pa.gov/About%20Us/Statistics/Documents/Old%20Statistical%20Reports/1976%20Annual%20Statistical%20Report.pdf>;

<https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/2023-Inmate-Profile.pdf>.

This history has demonstrated that Pennsylvania’s commutation process does not serve as an alternative to parole. By law and in practice, commutation serves a different purpose – mercy – that does not render a life sentence without parole constitutional.⁴

III. The Parole Board is well equipped to assess whether individuals like Mr. Lee can serve the remainder of their sentences in the community under the supervision of the Pennsylvania Department of Corrections.

The Pennsylvania parole process, overseen by the Parole Board since 1942, is designed to assess whether someone who has served the minimum term of their criminal sentence in a corrections facility is suited to serve the remainder of their sentence in the community. The Parole Board has demonstrated that it is well equipped to make such assessments even in the most serious cases, including sentences for serious felonies up to and including third degree murder and first-degree murder committed by juveniles.

⁴ It must be noted that parole is also considered a “matter of grace and mercy shown by the Commonwealth to a convict who has demonstrated his ability to function as a law-abiding member of society.” *Bradshaw v. Pennsylvania Bd. of Prob. & Parole*, 461 A.2d 342 (Pa. Cmwlth. Ct. 1983). But the purpose of parole “is to help individuals reintegrate into society as constructive individuals.” *Scott v. Pennsylvania Bd. of Prob. & Parole*, 668 A.2d 590 (Pa. Cmwlth. Ct. 1995). Commutation, on the other hand, modifies an actual sentence based on equitable or extenuating circumstances. “The Board of Pardons is primarily a tribunal of *clemency*; and by recommending to the Governor of Pennsylvania the reduction or commutation of a sentence or the grant of a pardon, the Board of Pardons does not overrule a Court, but because of equitable or extenuating circumstances, recommends clemency.” *Commonwealth ex. rel. Elliott v. Baldi*, 96 A.2d. 122, fn. 7 (Pa. 1953). A petition for commutation, like an appeal for clemency, “is simply a unilateral hope.” *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 at 459 (1981).

c. *The Parole Process in Pennsylvania*

As detailed below, parole in Pennsylvania is a highly defined and structured process with the primary goal being the protection of the public.

The Parole Board consists of nine members appointed by the governor and confirmed by the Senate. 61 Pa. C.S. § 6111. Members must have at least six years of professional experience in parole, probation, social work or related areas, including one year in a supervisory or administrative capacity, and a bachelor's degree. *Id.* These are full-time, salaried positions which Board members hold office for terms of six years. *Id.* Decisions are generally made by panels of two Board members, or one Board member and one hearing examiner, with a tiebreaker appointed if necessary. 61 Pa. C.S. § 6113. For specific enumerated offenses, including third-degree murder, however, the panel makes a recommendation to the full Board, and a majority vote of five members is required.⁵

The Parole Board has the power to parole a person, except for those serving a life without parole or death sentence, only when it believes that “(i) [t]he best interests of the offender justify or require that the offender be paroled; and (ii) [i]t does not appear that the interests of the Commonwealth will be injured by the

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<https://www.pardone.pa.gov/Information/procedures/Documents/Board%20Designated%20Majority%20Vote%20Offenses.pdf>.

offender's parole." 61 Pa. C.S. § 6137. Pursuant to 42 Pa. C.S. § 2154.5, the Parole Board's decision-making process must be facilitated by guidelines which:

- (1) Give primary consideration to the protection of the public and to victim safety.
- (2) Provide for due consideration of victim input.
- (3) [Are] designed to encourage inmates and parolees to conduct themselves in accordance with conditions and rules of conduct set forth by the department or other prison facilities and the board.
- (4) [Are] designed to encourage inmates and parolees to participate in programs that have been demonstrated to be effective in reducing recidivism, including appropriate drug and alcohol treatment programs.
- (5) Provide for prioritization of incarceration, rehabilitation and other criminal justice resources for offenders posing the greatest risk to public safety.
- (6) Use validated risk assessment tools, be evidence based and take into account available research relating to the risk of recidivism, minimizing the threat posed to public safety and factors maximizing the success of reentry.

When a person applies for parole, the Parole Board solicits input from anyone registered to receive victim services, recommendations from the prosecutor and trial judge, and reports of the person's conduct while incarcerated from prison officials. 61 Pa. C.S. §§ 6134-6136. The Parole Board is also tasked with investigating the circumstances of the offense, the person's physical, mental, and behavioral health, their complete criminal record, and any other background and family information. *Id.*

The Parole Board conducts an interview with the applicant to examine factors that affect the person's risk of re-offending, including whether they have

insight into why they committed a crime, whether they have taken responsibility for their conduct, and whether they have demonstrated preparedness for life in the community.⁶

Along with the guidelines established by the decisional instrument, Board members consider the following factors in casting their votes:

- a. The nature and circumstances of the offense committed.
- b. Any recommendations made by the trial judge and prosecuting attorney.
- c. The general character and background of the inmate.
- d. Participation by an inmate sentenced after February 19, 1999, and who is serving a sentence for a crime of violence as defined in 42 Pa. C.S. § 9714(g) (relating to sentences for second and subsequent offenses) in a victim impact education program offered by the Department of Corrections.
- e. The written or personal statement of the testimony of the victim or the victim's family submitted under section 6140 (relating to victim statements, testimony and participation in hearing).
- f. The notes of testimony of the sentencing hearing, if any, together with such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available.
- g. The conduct of the person while in prison and his physical, mental and behavioral condition and history, his history of family violence and his complete criminal record.

61 Pa. C.S. §6135.

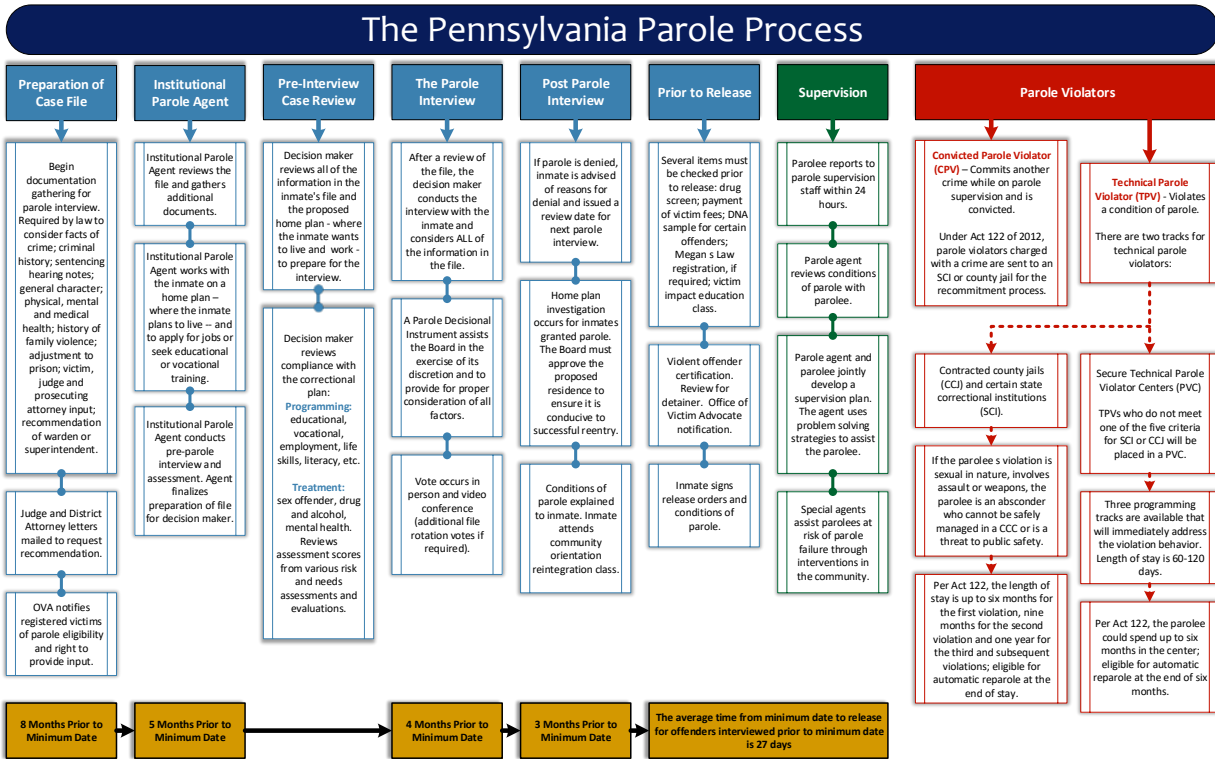
The Parole Board currently uses Parole Decisional Instrument 361. The Instrument does not bind the Parole Board or replace its discretion, but any deviation from guidelines must be explained in writing. 61 Pa. C.S. § 6137(b).

⁶ <https://www.parole.pa.gov/Parole%20Process/Parole%20Interview/Pages/default.aspx>.

Those approved for parole must develop a satisfactory home plan detailing where they intend to live in the community. If a home plan hasn't been approved, they can be placed in a community corrections center before transitioning to an approved home plan. Parolees must also pass a drug screen before release, and those convicted of a crime of violence must complete a course on the impact of crime on victims and the community. 61 Pa. C.S. § 6137(e), (f).

The Department of Corrections supervises people serving the remainder of their sentence on parole, and the Parole Board retains the power to recommit the person to incarceration based on a violation. 61 Pa. C.S. §§ 6171, 6138.

The Parole Board has summarized this thorough and carefully considered process in a flowchart:



b. Parole in Practice

As reflected in the below data, parole in Pennsylvania is far from an automatic release at the minimum sentence. On average, those sentenced in Philadelphia County to more than three years consistently serve 126% of their minimum sentence.⁷

⁷ Data was provided to attorneys for the amici pursuant to a Right to Know request filed in March 2024.

Category of Offense	2011	2014	2024
Murder 3	110%	117%	107%
Aggravated Assault	136%	126%	120%
Burglary	143%	122%	110%
Drugs	125%	115%	116%
Rape	148%	182%	141%
Robbery	127%	122%	120%
Theft	136%	139%	107%
Weapons	128%	118%	119%
Average	129%	127%	122%

The Parole Board is also capable of handling a large influx of newly eligible people. Since *Miller/Batts* created a new class of people eligible for parole, the Board has been able to assess each member of that class when they have served their new minimum sentence. As of this submission, 497 of the juveniles have been resentenced.⁸ The Parole Board has granted parole to 65% of those that have become eligible, refusing the other 34%.

Thus, the Parole Board has demonstrated over decades that it is equipped to assess an individual’s suitability for parole, even in the most serious cases.

⁸ <https://www.parole.pa.gov/About%20PBPP/juvenilelivers/Pages/Statistics.aspx>.

CONCLUSION

This Court should not rely on commutation to ensure that fully rehabilitated prisoners serving life without parole sentences who had categorically diminished culpability will be released back into the community. This is not the purpose of commutation, and has clearly not been the practice of commutation in recent Pennsylvania history. Rather, parole is precisely the correct instrument for ensuring that public safety is protected while those deserving of reentry are given a second chance. From the policy perspective referenced in the fourth *Edmunds* factor, granting the possibility of parole to fully rehabilitated prisoners who had categorically diminished culpability is the safest and fairest way to address the instant Article 1, § 13 question.

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VERIFICATION AND CERTIFICATION

I hereby certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

I, Marc Bookman, am aware of the penalties for perjury and/or false statements and verify that the factual averments above are true.

Dated: April 24, 2024

/s/ Marc Bookman
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CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 4,557 words, exclusive of cover, tables and certifications, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: April 24, 2024

/s/ Marc Bookman

Marc Bookman

Pa. Atty ID No. 37320

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 24, 2024

/s/ Marc Bookman
Marc Bookman
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2024, a true and correct copy of the forgoing Brief of Amicus Curiae was served on the parties via PACfile.

Dated: April 24, 2024

/s/ Marc Bookman
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