COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2022-SC-0198
(2020-CA-1495)

LANCE CONN, ET AL **APPELLANTS**

v. **APPEAL FROM FRANKLIN CIRCUIT COURT**
HON. PHILLIP SHEPHERD
INDICTMENT NO. 2013-CI-1118

KENTUCKY PAROLE BOARD **APPELLEE**

BRIEF FOR APPELLANTS

Respectfully Submitted,

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Certificate required by RAP (C)(1)(b) & (c):

The undersigned does hereby certify that a copy of this Brief was served on the following named individuals, on February 6, 2023:

- Hon. Angela Dunham, Hon. Amy Barker, and Seth E. Fawns, Ky Parole Board, Justice and Public Safety Cabinet, 125 Holmes St, Second Floor, Frankfort, KY 40601, by first class mail;
- Kem Marshall, Clerk, Franklin Circuit Court 222 St Clair St, Frankfort, KY 40601, by first class mail; and
- Rebecca Combs Lyon, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort KY, 40601, by messenger mail.

The record on appeal was not checked out from the Kentucky Supreme Court.

Timothy G. Arnold

INTRODUCTION

This case is about whether the Kentucky Parole Board has authority to convert a life sentence with the possibility of parole to a life sentence without the possibility of parole. This Court granted discretionary review of a to-be-published Kentucky Court of Appeals' Opinion to determine whether the practice of imposing life sentences without parole upon persons that the legislature and courts have deemed eligible for parole violates the separation of powers doctrine or otherwise contravenes existing statutory law.

STATEMENT CONCERNING ORAL ARGUMENT

This Court granted oral argument upon taking the case for review. Oral argument is necessary to facilitate the discussion on the issue of separation of powers between the legislative and executive branches as it pertains to the arguments presented in this case.

STATEMENT REGARDING CITATIONS TO THE RECORD

The record consists of one (1) volume of Court of Appeals record, seven (7) bound volumes of circuit court record and six (6) spiral bound volumes that include the Motion and Memorandum for Summary Judgment, or Alternatively, to Permit Discovery or Set for Trial and the accompanying appendix filed on June 11, 2019. The bound volumes will be cited as "TR" with the volume number and page number directly following (e.g. TR Vol 1, 1). The June 11, 2019 Motion for Summary Judgment and the corresponding appendices will be cited separately (e.g. June 11, 2019 Motion for Summary Judgment, 1; e.g. June 11, 2019 Motion Apx. Vol. 1, 1). Any cited proceedings contained on video will be cited in conformance with 31(E)(4).

WORD LIMIT CERTIFICATE

This document complies with the word limit of RAP 31(G)(2)(a) because, excluding the parts of the document exempted by RAP 15(E) this document contains 6956 words.

Timothy G. Arnold

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

From the advent of the current Penal Code, until 1998, Kentucky did not have a punishment of life without parole. Then it became a lesser penalty than death and authorized by statute only for those crimes that were also death eligible.[1] This means that Kentucky's modern criminal law has only ever authorized a court to impose a sentence of life without the possibility of parole if it complies with the constrictions of the controlling statute, in this case KRS 532.030. A court has never been authorized to impose a sentence of life without the possibility of parole for someone convicted of a non-aggravated offense.

Procedural History:

Appellants were convicted of non-aggravated offenses; none of those non-aggravated offenses qualified any of the Appellants to receive a sentence of life without parole according to the Legislature. Accordingly, the Judiciary never imposed an aggravated sentence, but rather imposed life with the possibility of parole. However, all were served out on their life sentences by the Kentucky Parole Board (the "Board"), effectively converting the non-aggravated sentence to the aggravated sentence of life without the possibility of parole.

Mr. Conn was an accomplice to a murder and robbery, who was served out after the Board mistakenly believed he had a prior felony when he did not.[2] Mr. Sholler and Mr. Roberson were served out on life sentences imposed for non-homicide offenses.[3] Mr. Dewitt was convicted of a single count of murder in 1980

[1] KRS 532.030.
[2] TR Vol. 3, 311.
[3] T Vol. 3, 309-10.

and is a low-risk inmate who had been successfully classified down to a community custody level when he was served out on his life sentence.[4]

Appellants originally filed this action in 2013, alleging the Board's regulations failed to comply with the requirements of HB 463, and were arbitrary and deficient in several ways.[5] As related to this appeal, Claim V of the complaint was that the Board did not have the authority to serve out a life sentence.[6] The Board moved to dismiss the complaint, which the circuit court denied.[7] Following the denial, the case was held in abeyance so the Board could promulgate new regulations to address some of the issues in the complaint.[8] When the Board did not promulgate new regulations, the case was taken out of abeyance, the complaint was amended, and deposition testimony was taken from multiple witnesses.[9] Additionally, in lieu of certifying a class action, the parties agreed to an order, which stated in relevant part that, "With respect to Claim V [i.e., serve outs on a life sentence] the parties agree that any relief granted will be afforded to all offenders who have been served out on a life sentence."[10]

Thereafter, on June 11, 2019, Appellants sought summary judgment pursuant to CR 56.01, or in the alternative to permit additional discovery or to set the matter for trial.[11] The circuit court granted in part and denied in part summary

[4] T Vol. 3, 311.
[5] July 11, 2019 Motion for Summary Judgment, 1.
[6] *Id.* at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 3, July 11, 2019 Appendix Vol IV: Deposition of Lelia VanHoose (Vanhoose Depo); Apx. Vol. V: Deposition of Angela Tolley (Tolley Depo).
[10] July 11, 2019 Motion for Summary Judgment, 3.
[11] T Vol. IV, 842.

judgment on October 1, 2020.[12] Relevant to the current appeal, the circuit court found that the Board has the authority to grant a serve-out on a life sentence.[13] Following the ruling, Appellants filed a motion to issue a final and appealable judgment on Claim V of the Second Amended Complaint (Claim V).[14] On October 7, 2020, the circuit court granted this motion and severed the claims set forth in Claim V from the other claims raised by the Appellants.[15]

Appellants appealed the October 7, 2020 Order denying summary judgment on Claim V.[16] Arguing that "this case raises a question of exceptional importance . . .", the Attorney General sought and was granted leave to file an amicus brief in support of the Parole Board. In a published decision rendered April 22, 2022, the Court of Appeals affirmed the trial court.[17] The Court noted that until *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), is overruled, the Court is bound by its decision.[18] This Court granted discretionary review with oral argument December 7, 2022.

Background on the Kentucky Parole System and its impact on Appellants:

Kentucky has had a parole system since before the turn of the 20th century,[19] and parole eligibility is now a central part of the criminal justice process.

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[12] *Id.* at 852.
[13] *Id.* at 850.
[14] *Id.* at 855.
[15] *Id.* at 859.
[16] *Id.*
[17] *Conn, et. al v. Commonwealth of Kentucky*, 2020-CA-1495 (Ky. App. Apr. 22, 2022).
[18] *Id.* at *4.
[19] *See, e.g.*, *George v. Lillard*, 106 Ky. 820, 51 S.W. 793 (1899) (describing the early history of parole in Kentucky).

Attorneys are expected to provide accurate information about parole eligibility to individuals who are pleading guilty.[20] For those who go to trial, information on when the defendant will be parole eligible is given to the jury at the time of sentencing.[21] The defense is generally prohibited from introducing statistical evidence demonstrating the actual likelihood of release at the initial appearance before the Kentucky Parole Board.[22] As a result, it is likely that many juries have imposed longer sentences than what they believed the crime warranted, based on their belief that if the defendant behaved appropriately in prison he or she would be paroled when the opportunity arose.

The process for evaluating inmates for parole is designed around processing a high volume of cases rather than ensuring consistent results. For example, in FY 2015, Board members averaged eighty-five (85) decisions a week, every week, for fifty-two (52) weeks, meaning they averaged approximately twenty (20) minutes with each file per decision.[23] The Chair of the Board thought that number was "plausible," and that this amount of time was adequate to review all the information required.[24]

Notably, serving out life sentences is a relatively recent change in the 120+ year history of parole in Kentucky. The Board did not claim any authority to serve

[20] *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2013).
[21] KRS 532.055(2)(a)1.
[22] *Abbott v. Commonwealth*, 822 S.W.2d 417 (Ky. 1992).
[23] *Id.*, 82.
[24] *Id.*, 82, 83-84. Things have only gotten more intense since then. In FY 2017, the latest year for which comprehensive data is available, the Board decided 23,470 cases, meaning each member averaged just over 100 decisions every week, for 52 weeks (*see* FY 17 Annual Data Report, A-I, 7, 0062). That means that average time spent per decision was a mere 16.7 minutes.

out a life sentence until 1992, when it changed its regulation to expressly permit serve outs of a life sentence.[25] Prior to that, no inmates with a life sentence were given a serve out. At the time the regulation changed, the maximum available sentence from a court was life without parole for 25 years (LWOP/25). As noted above, life without parole (LWOP) was not an available sentence in Kentucky until 1998.[26]

The proceedings for life-sentenced inmates are handled no differently than proceedings for any other inmate who is statutorily entitled to a face-to-face hearing with the Board. At the outset of a parole release hearing, the Board is provided with a single sheet of paper.[27] One side of the paper is the parole decision sheet, on which the panel is to indicate its decision and the reasons for that decision.[28] On the other side of the paper is the inmate's risk assessment instrument that is prepared by the Parole Board staff.[29] The Board's regulations require it to review "[o]ffender files and materials related to the offender's case," but do not define which documents must be reviewed, just that it is required to review "the results of the risk and needs assessment prepared by the Board's staff or by the Department of Corrections pursuant to KRS 439.335 and 439.340(1) before the hearing for the offender."[30]

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[25] *See Simmons v. Commonwealth*, 232 S.W.3d 531, 535 (Ky. App. 2007), describing the change in regulation.
[26] See 1998 Ky.Acts Chapter 606, § 77, eff. July 15, 1998.
[27] VanHoose Depo., 28, 96.
[28] *Id.*, 96, 186.
[29] *Id.*
[30] KyPB 10-01 K.(1). A-I, 23, 0205-0210.

The Board's policies do not provide structured guidance to Board members about deciding whether or not to parole an inmate. Rather, the policies only require the Board to apply one of several enumerated factors to an inmate before recommending or denying parole, including: offense, prior record, conduct in prison, attitude toward authority, history of substance abuse, education, employment skills, mental status, terminal illness, victim impact, community attitude toward accepting an inmate back in the county, review of the parole discharge plan, etc.[31] Beyond a wide-ranging list of potential considerations, there is no policy or written document that defines these terms or how much weight to give each one.[32] For example, if one Board member believes that having a single category 1 write up (the lowest level of violation/write up) from ten years prior constitutes "poor institutional adjustment," that member can vote to deny parole based on that finding, even if the rest of the Board would not agree with that characterization.[33]

If the two panel members hearing the case do not agree on a decision, or if the decision they agree on is one that requires the approval of the full Board – such as the decision to serve out a life sentence – then the case must be referred to the full Board for review.[34] A full Board review does not consist of a new hearing. Rather, the panel members describe what they learned through the panel hearing process, both from the documents they were provided in KOMS, and from the

[31] KyPB 10-01 L. A-I, 23, 0205-0210.
[32] July 11, 2019 Apx. Vol. V: Tolley Depo., 17-18.
[33] *Id.*, 97.
[34] VanHoose Depo., 16.

interviews (if there were any) with the inmate or with the victims.[35] Other Board members may review KOMS information on their own, but they are not required to do so.[36]

Once a decision is reached, that decision is recorded on the parole decision sheet. If the Board either defers the inmate or orders a serve out, the decision must include the grounds for that decision under KRS 439.330(4). The grounds listed on the decision sheet are based upon the grounds agreed upon by a majority of the Board, if a full Board decision, or by both panelists, in a panel review.[37] Each ground is stated as a brief entry (*e.g.*, poor institutional adjustment, prior felony, etc.), and there is no document that defines those terms other than the words themselves.[38]

The hasty nature of the parole process is evident in Mr. Conn's case. Mr. Conn was first heard by the Kentucky Parole Board in 2006 and deferred 96 months (8 years). By the time Mr. Conn returned to the Board he was a good candidate for parole, with a risk assessment indicating a low risk to reoffend, a strong track record of program completion, and clear conduct since his prior hearing. However, the Board disagreed and served him out. A majority of the Board members identified "seriousness, violence, life taken, prior felony" as the reasons for the decision to serve out the sentence. However, Mr. Conn – who was 21 at the time of the offense – had no prior criminal record. He submitted a request for reconsideration noting the mistake, and Parole Board member Carolyn Mudd,

[35] *Id.*, 107.
[36] *Id.*
[37] VanHoose Depo., 28, 31, 132; Tolley Depo., 94.
[38] Tolley Depo., 94-95.

acting on behalf of the entire Board, and without consulting with them, agreed that the information had been incorrect. She then unilaterally directed the "prior felony" reason to be removed from Mr. Conn's decision sheet, but otherwise denied reconsideration.[39] After then-Parole Board Chair VanHoose indicated in her deposition that the reconsideration decision would not be made in the same way today as it was at the time, Mr. Conn asked the Chair to reconsider his case.[40] That request was also denied.[41]

Mr. Conn's case also provides a good example of the inconsistency in decisions by the Board. As noted above Mr. Conn was an accomplice to Stephen Marshall in a robbery-homicide case. Mr. Marshall, the principal in the offense, was given an aggravated sentence of life without parole for twenty-five (25) years, while Mr. Conn was sentenced to life.[42] After Mr. Conn's decision was "corrected" to remove the phantom prior felony, the only grounds that remained for serving out Mr. Conn were "seriousness," "violence," and "life taken" – factors that applied to an even greater extent to Mr. Marshall. However, contrary to Mr. Conn, in 2019, Mr. Marshall saw the Board for the first time and was given a ten-year deferment.[43]

Similarly, consider the disparate treatment given to inmates Kevin Murtaugh and Claude Plummer. Mr. Murtaugh was convicted of a single homicide,

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[39] *Id.*, 139-40; July 11, 2019 Apx. Vol. II, Lance Conn Review for Reconsideration, 220; Lance Conn Parole Denied Order (Amended 8/13/14), 217.
[40] Apx. Vol. II, Lance Conn 8/22/16 Request for Reconsideration to Chair VanHoose, A 222-96.
[41] Apx. Vol. II, Lance Conn Sept. 21, 2016 Order Denying Reconsideration, 297.
[42] *See* July 11, 2019 Motion, 56, Stephen Marshall 6/5/19 KOOL, http://kool.corrections.ky.gov/KOOL/Details/236236).
[43] *Id.*

and five previous parole boards deferred him.[44] Mr. Murtaugh's LS/CMI results stated that his score placed him "in the Very Low risk/need level. Based on past research with other inmates in the Very Low risk/need level, KEVIN MURTAUGH 078457 has approximately a 1% chance of recidivating (i.e., being re-incarcerated within one year)."[45] The Parole Board's risk assessment reached the same result.[46] Mr. Murtaugh's Case Management Plan noted his strengths as "Accepts Responsibility/Motivated to Change; Education; Employment Skills; Good Communication; Good Health."[47] When Mr. Murtaugh was seen by the Board, he was given a serve out. By contrast, Mr. Plummer was convicted of a triple homicide in Boyd County, followed by an additional murder at the Kentucky State Penitentiary over an $18 debt.[48] He had a high risk to reoffend, with the LS/CMI declaring that 45% of inmates at his risk level would reoffend within one year.[49] He was given a deferment.

Despite the clear differences in their candidacies for parole, Chair VanHoose, when asked, could not explain why Mr. Murtaugh, who appeared to be an ideal candidate for parole, was served out, while Mr. Plummer, who in addition to his high-risk score committed a homicide in prison, was given a deferment during the same time frame.[50]

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[44] Kevin Adrian Murtaugh – KOOL Offender Information printed 8/14/16, Apx. IV, 5, 871-72.
[45] Murtaugh LS/CMI Report, Apx. II, 300.
[46] Murtaugh Parole Guidelines Risk/Needs Assessment, Apx. II, 302.
[47] Murtaugh 8/15/15 Case Management Plan, Apx. II, 298-301.
[48] Claude E. Plummer – KOOL Offender Information printed 8/15/16, Apx. IV, 877-78.
[49] Plummer LS/CMI, Apx. II, 446-47.
[50] VanHoose Depo, Apx. IV: 123-31.

Further facts will be developed in the argument section as needed.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Coomer v. CSX Transp. Inc.*, 319 S.W.3d 366, 370 (Ky. 2010). The Appellate Courts operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 905 (Ky. 2013), *corrected* (Nov. 25, 2013).

ARGUMENT

The Kentucky Parole Board violates the separation of powers doctrine by issuing a serve out on a life sentence and effectively imposing a sentence beyond the lawful range the Legislature established.

This issue is properly preserved for appellate review. The matter was included in the complaint, argued in a motion for summary judgment, and ruled upon by the circuit court.[51] The Court then made the order final and appealable, finding that there was no just cause for delay in the appeal of this issue.[52]

The Kentucky Parole Board does not have authority to serve out a life sentence. Allowing the Board to impose a life without the possibility of parole sentence violates the separation of powers doctrine because it converts a lesser sentence to a greater one, one that is beyond the lawful range that the legislature established for non-aggravated murders and Class A felonies.

[51] TR 842-59.
[52] TR 859.

"Kentucky is a strict adherent to the separation of powers doctrine."[53] The separation of powers doctrine, explicitly set forth in Sections 27 and 28 of the Kentucky Constitution, requires separation of powers between the three branches of government:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them are to be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another [footnote omitted].
>
> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted [footnote omitted].[54]

In *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010), this Court reaffirmed the principle that "[u]nder our Constitution, it is the legislative branch that by statute establishes the ranges of punishments for criminal conduct."[55]

Furthermore, the *McClanahan* Court made it clear that where a court attempts to impose a sentence outside the statutory range, that sentence is void, regardless of circumstance.[56] This is true whether the illegal sentence is imposed by the jury or accepted by a judge through a plea agreement.[57] The Court further

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[53] *Diemer v. Commonwealth*, 786 S.W.2d 861, 864 (Ky. 1990); *see also Sibert v. Garrett*, 246 S.W. 455 (Ky. 1922) ("Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution.").
[54] *Simmons v. Commonwealth*, 232 S.W.3d 531, 535 (Ky. Ct. App. 2007) (citing *Prater v. Commonwealth*, 82 S.W. 3d 898, 901 (Ky. 2002).
[55] *McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010); *see also Hoskins v. Maricle*, 150 S.W.3d 1, 11-12 (Ky. 2004) ("The power to define crimes and assign their penalties belongs to the legislative department.).
[56] *Id.* (describing such a sentence as "illegal").
[57] *Id.*

held that imposing an illegal sentence is an inherent abuse of discretion, finding that "[o]ur courts must not be complicit in the violation of the public policy embedded in our sentencing statutes by turning a blind eye to an unlawful sentence."[58] The Constitution and established case law make it clear the legislative branch establishes the law, and that when the judiciary encroaches upon this function of the legislature, it abuses its discretion.

Likewise, this Court has repeatedly rejected any attempt by the legislature to permit the judicial branch to exercise the executive branch functions of the parole board.[59] In *Prater v. Commonwealth*, this Court differentiated between probation, which suspended imposition of a sentence, and "parole" which suspended execution of a sentence.[60] Based on that finding, this Court struck down a statute which authorized the court to suspend execution of a sentence at any point while it was being served, finding that this intruded upon the exclusively executive branch function of parole. Similarly, in *Jones v. Commonwealth*, this Court differentiated between the judiciary, which "determines guilt and selects or implements a sentence within the legislative range", and the executive, which "is vested with the execution of the sentence, including executions, incarceration, parole, and clemency."[61] There, this Court stuck down a statute which required the judiciary to supervise a period of post-incarceration supervision, finding that it essentially required the court to conduct a parole revocation proceeding.[62]

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[58] *Id.*
[59] *See, e.g., Prater v. Commonwealth*, 82 S.W.3d 898 (Ky. 2002); J*ones v. Commonwealth*, 319 S.W.3d 295, 299 (Ky. 2010).
[60] *Prater*, *supra* at 904.
[61] *Jones*, *supra* at 299.
[62] *Id.*

In this case, the executive branch is exercising the judicial function of deciding upon and imposing a new judgment of life without parole. As discussed in greater detail below, the sentence of life without parole is recognized as a distinct sentence. Authority for deciding whether a person should be given a life without parole sentence is exclusively a judicial function, and so the Board's exercise of that function is unconstitutional.

Furthermore, as the sentence of life without parole for non-aggravated and non-homicide offenses has never been authorized by the General Assembly, the Kentucky Parole Board's actions are imposing upon the legislature's prerogative as well. No statute expressly authorizes the Board's actions. "An administrative agency cannot by its rules and regulations, amend, alter, enlarge or limit the terms of a legislative enactment", as the Board has attempted to do here.[63]

A. A sentence of life without the possibility of parole is inherently different and greater than a sentence of life with the possibility of parole.

In 2010, the United States Supreme Court firmly established that life without the possibility of parole (LWOP) is constitutionally distinct from the sentence of life with the possibility of parole.[64] As the Court held in *Graham v. Florida*, a sentence of life without the possibility of parole irrevocably alters an offender's life:

> It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the

[63] *Appalachian Racing, LLC v. Family Tr. Foundation of Kentucky, Inc.*, 423 S.W.3d 726, 739 (Ky. 2014).
[64] *Graham v. Florida*, 560 U.S. 48 (2010).

> sentence. This sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.[65]

Graham treated an LWOP sentence as a constitutionally and legally distinct sentence from one which carries parole eligibility, even if distant.[66]

Since then, this Court held in *Phon v. Commonwealth,* that a person cannot be given an LWOP sentence when the Legislature has not deemed that an appropriate penalty for his or her crime.[67] In *Phon*, as in *Graham*, the Court painstakingly differentiated a sentence of life without parole from any other sentence. Additionally, as explained above, in *McClanahan*, this Court reaffirmed the principle that "[u]nder our Constitution, it is the legislative branch that by statute establishes the ranges of punishments for criminal conduct."[68] Therefore, the *Phon* Court concluded that "a sentence imposed beyond the limitations of the legislature as statutorily imposed is unlawful and void."[69]

The General Assembly has never legislated the penalty of a life sentence without parole for offenders who are guilty of Class A felonies and non-aggravated capital offenses. From the advent of the current Penal Code, until 1998, Kentucky did not have a punishment of life without parole. Then it became a lesser penalty than death and authorized by statute only for those crimes that were also death

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[65] *Id.* at 69-70 (internal citations and punctuation omitted).
[66] *Id.* at 70 (noting that the Court had previously treated a term of years sentence without parole eligibility as more severe than a life sentence with parole).
[67] *Phon v. Commonwealth*, 545 S.W.3d 284 (Ky. 2018).
[68] *McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010); *see also Hoskins v. Maricle*, 150 S.W.3d 1, 11-12 (Ky. 2004) ("The power to define crimes and assign their penalties belongs to the legislative department.).
[69] *Id.* at 304.

eligible.[70] This means that Kentucky's modern criminal law has only ever authorized a court to impose a sentence of life without the possibility of parole if it complies with the constrictions of the controlling statute, in this case KRS 532.030. A court has never been authorized to impose a sentence of life without the possibility of parole for someone convicted of a non-aggravated offense.

KRS 532.025 provides that special notice of aggravating circumstances must be given in a case before a sentence of life without the possibility of parole, or without the possibility of parole for twenty-five (25) years may be imposed by a sentencing court. The jury must be instructed on those circumstances, and the aggravated sentence can only be imposed upon a finding of guilt of the aggravating circumstance beyond a reasonable doubt.[71] The regulations on which the Board bases its authority "exceed the scope of the statutory provisions on which they are based," and are therefore unconstitutional.[72]

Finally, any attempt by the General Assembly to authorize the Board to serve out a life sentence would be unconstitutional as well, for reasons similar to those identified in *Prater, supra* and *Jones*, *supra*. In effect, by serving out an inmate the Board is imposing a new sentence upon the defendant, and encroaching on a function exclusive to the Judicial Branch. Just as the legislature cannot give to the judiciary functions properly assigned to the Parole Board, it cannot give to the Parole Board functions properly assigned to the judiciary.

[70] KRS 532.030.
[71] KRS 532.025.
[72] *Faust v. Commonwealth*, 142 S.W.3d 89, 98 (Ky. 2004)

As such, the imposition of an aggravated sentence by an executive branch agency, without a jury finding that an aggravator existed, violates both separation of powers and the Eighth and Fourteenth Amendments to the United States Constitution and Sections Two and Seventeen of the Kentucky Constitution.

B. *Simmons* allowed the Board to impose a greater sentence than the maximum allowed by the legislature, and must be overruled.

There is no statute that directly approves of the practice of serving out a life sentence, and for most of its history, the Parole Board did not claim any authority to serve out a sentence. However, starting in the 1990s, the Board began issuing serve outs, most notably including serve outs of life sentences.[73] At the time, a defendant could not receive a sentence of life without parole from the court. That sentence was adopted in 1998, but only for certain homicide offenses, and, as discussed above, only where the jury found a statutory aggravator that warranted enhanced punishment. The Board's procedures, by contrast, do not provide any specific guidance as to when a serve-out of a life sentence is appropriate, and they have served out many people who did not commit a homicide offense, such as Mr. Sholler and Mr. Roberson.

Thus, the Kentucky Parole Board is exercising authority that violates separation of powers in two ways. First, the Board is imposing a life without parole sentence on those who are not eligible for that sentence under the sentencing statutes adopted by the General Assembly. This Court has already found this to violate separation of powers when taken by the Courts because "[d]etermining

[73] *See Simmons v. Commonwealth*, 232 S.W.3d 531, 535 (Ky. App. 2007), describing the change in regulation.

what should be a crime and setting punishments for such crimes is a legislative function."[74] Only after the legislature sets those parameters does the judiciary determine guilt and select or implement a sentence within that legislative range.[75]

Second, the Parole Board is imposing its own sentence upon the inmate, effectively overruling the sentence imposed by the judiciary. As noted above, this Court has repeatedly found that attempts by the General Assembly to assign the functions of the Parole Board to the judiciary are unconstitutional.[76] The same principle applies in reverse – the Parole Board is not permitted to exercise the authority reserved for the Judicial Branch, such as determining the sentence to be served for an offense.

The Court of Appeals originally grappled with this issue in *Simmons v. Commonwealth*.[77] In *Simmons*, the Court stated "[i]t is well-recognized in Kentucky that the power to grant parole is purely an executive function."[78] Without offering supporting arguments, the Court issued a conclusory finding that the Board's use of its discretionary powers to issue a serve-out did not "invade[] the functions reserved for the judicial or legislative branches of government."[79] Notably, *Simmons* was not well litigated in the Court of Appeals. The Court of Appeals' opinion in that matter addresses briefing failures by appellate counsel, entertaining an argument that it should strike the brief or review the matter for

[74] *Phon v. Commonwealth*, 545 S.W.3d 284, 303 (Ky. 2018).
[75] *Id.* (citing *Jones v. Commonwealth*, 319 S.W.3d 295, 299 (Ky. 2010)).
[76] *See Prater, supra; Jones, supra.*
[77] *Supra*, note 5.
[78] *Id.*, 232 S.W.3d at 535.
[79] *Id.*

manifest injustice only.[80] No Motion for Discretionary Review was ever filed, so the decision became published authority without this Court ever having an opportunity to decide whether to accept review, or de-publish.

Even though it was rendered after the General Assembly amended KRS 532.030 to include the sentence of life without the possibility of parole, *Simmons* relied primarily on case law that existed before the amendment was passed.[81] However, in 1998, in conjunction with KRS 532.025, the Legislature mandated that before a judge or jury could impose a sentence of life without the possibility of parole, it must find beyond a reasonable doubt and reduce to writing at least one aggravating circumstance.[82] This distinction clearly indicates – and case law further establishes[83] – that a sentence of life without the possibility of parole is categorically different than a sentence of life with the possibility of parole. However, the Court of Appeals in *Simmons* did not consider this change in statute in its analysis as evidenced by the fact that the opinion does not mention the sentence of life without the possibility of parole at all. Without identifying the difference in sentences, the Court never properly analyzed the interplay between the three branches of government.

Subsequent events have not clarified this issue. In 2011, four years after *Simmons*, the General Assembly passed 2011 HB 463, landmark sentencing legislation in Kentucky. The goal of this watershed policy was to "focus on

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[80] *Id.*, at 533.
[81] *Commonwealth v. Cornelius*, 606 S.W.2d 172 (Ky.App. 1980). *See also Peck v. Conder*, 540 S.W.2d 10, 12 (Ky. 1976); *Murphy v. Cranfill*, 416 S.W.2d 363, 365 (Ky. 1967); and *Morris v. Commonwealth*, 268 S.W.2d 427, 428 (Ky. 1954).
[82] KRS 532.025(3).
[83] *Graham v. Florida*, 560 U.S. 48 (2010).

rehabilitation rather than incarceration."[84] Specifically, KRS 532.007(1) asserted that sentencing policies should "maintain public safety and hold offenders accountable while reducing recidivism and criminal behavior and improving outcomes for those offenders who are sentenced[.]"[85] The statutory changes in 2011 HB 463 included imposing limits on parole deferments, but notably did not expressly authorize serving out a life sentence.

In addition to a shift in legislative policy, the cases after *Simmons* - *Phon*, *Graham*, and *McClanahan* - now firmly establish that a sentence of life without the possibility of parole is constitutionally distinct and greater than a sentence of life with the possibility of parole.

In its opinion rendered in this case, the Court of Appeals determined that having grappled with the issue once in *Simmons*, it was powerless to do so again. The Court of Appeals acknowledged that together, *McClanahan*, *Graham*, and *Phon*, indicate that the Board does not have unrestricted authority. And, the Court noted that "the Board itself has muddied the waters by shifting policy more than once since *Simmons* (and changing when a serve-out may or may not be authorized)."[86] However, even after recognizing the authority of those cases and without reconciling how *Simmons* comports with them, the Court held these do not overturn *Simmons*.[87] Rather, the Court simply stated that "[w]e find *Simmons* to still be the law of the Commonwealth," and having so found, denied relief.[88]

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[84] *Helms v. Commonwealth*, 475 S.W.3d 637, 641 (Ky.App. 2015).
[85] *Id.*
[86] Opinion, at 10-11.
[87] Opinion, at 11.
[88] *Id.*

Simmons was poorly litigated, and never appealed, and so the issue of whether the executive branch has authority to impose a sentence not authorized by the Legislature has never been reviewed by this Court. Notwithstanding the case's intrinsic flaws and the evolving legislative and judicial changes since the case was decided, the Court of Appeals found that *Simmons* was still controlling authority.

Consequently, *Simmons*, to the extent that it allows the executive branch to impose a greater sentence than allowed by the Legislature, must be overturned. As the Court of Appeals acknowledged, and in accordance with the United States and Kentucky Constitutions, *McClanahan*, *Graham*, and *Phon* firmly establish that the Board does not have unfettered authority to grant or deny parole. It is uncontroverted that the legislative branch determines the range of punishments for criminal conduct and any "sentence beyond the limitations of the legislature as statutorily imposed is unlawful and void."[89] Therefore, if a person is convicted of a non-violent, non-sexual Class C or D felony, the Board does not have the authority to defer that person for anything longer than twenty-four (24) months.[90] Likewise, the Board does not have the authority to make a person convicted of a single Class D felony serve twenty (20) years in prison. Finally, the Board does not have authority to release a person sentenced to life without the possibility of parole for twenty-five (25) years if the person has only served two (2) years of his or her sentence. In each of the above circumstances, doing so would be an abuse of the Board's discretion as it would encroach upon both the judiciary's sentencing

[89] *McClanahan*, 308 S.W.3d at 701; *Phon*, 545 S.W.3d at 304.
[90] KRS 439.240(14).

authority, and the legislature's authority to establish sentencing ranges, thus violating the separation of powers doctrine.

Because the Board can encroach upon neither the Judicial Branch's sentencing authority nor the Legislature's authority to establish the sentencing range for criminal conduct, it cannot change a person's sentence of life to a sentence of life without parole. As the Supreme Court noted in *Graham*, a sentence of life without the possibility of parole "deprives the convict of the most basic liberties without giving hope of restoration," and "it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days."[91] Because of this, a sentence of life without parole is legally distinct from a sentence of life.[92]

In Kentucky, a person convicted of a capital offense cannot be sentenced to death, life without the possibility of parole or life without the possibility of parole for twenty-five (25) years unless the trier of fact finds beyond a reasonable doubt and reduces to writing at least one aggravating circumstance.[93] A person convicted of a non-aggravated capital offense must be sentenced to a term of not less than twenty (20) years nor more than fifty (50) years, or life.[94] Moreover, a person convicted of a Class A felony has the same sentencing range as one convicted of a non-aggravated capital offense.[95] Thus, the Legislature has established that the

[91] *Graham*, 560 U.S. 48 at 69-70.
[92] *Id.* at 70.
[93] KRS 532.025(3); *St. Clair v. Commonwealth*, 451 S.W.3d 597, 629 (Ky. 2014).
[94] KRS 532.030(1).
[95] KRS 532.060(2)(a).

maximum sentence one can receive for a Class A or a non-aggravated capital offense is life, with the possibility of parole.

The Legislature, by statute, establishes the ranges of punishments for criminal conduct. The Legislature could, at any point, allow for someone who receives a Class A or non-aggravated capital offense to be eligible for the enhanced punishments of life without the possibility of parole. It has chosen not to do so. Therefore, until the Legislature mandates otherwise, and assuming this Court would find any such legislation constitutional, someone who is convicted of life with the possibility of parole cannot have his or her sentenced enhanced by either the court or the Board.

C. ***Authorization to "Defer" a Sentence in KRS 439.340(14) does not Constitute Authorization to "Serve Out" a Life Sentence.***

As previously stated, the Legislature has proscribed, in part, the Board's guidelines for granting or deferring parole. KRS 439.340(14) provides:

> If the parole board does not grant parole to a prisoner, the maximum deferment for a prisoner convicted of a non-violent, non-sexual Class C or Class D felony shall be twenty-four (24) months. For all other prisoners who are eligible for parole:
>
> (a) No parole deferment greater than five (5) years shall be ordered unless approved by a majority vote of the full board; and
>
> (b) No deferment shall exceed ten (10) years, except for life sentences.

As the Court of Appeals noted, the "fundamental rule of statutory construction is to determine the intent of the [L]egislature[.]"[96] As this Court proscribed,

> In interpreting a statute, we have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. As such, we must look first to the plain language of a statute and, if the language is clear, our

[96] *Beach v. Commonwealth*, 927 S.W.2d 826, 828 (Ky. 1996).

> inquiry ends. We hold fast to the rule of construction that the plain meaning of the statutory language is presumed to be what the [L]egislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source. In other words, we assume that the Legislature meant exactly what it said, and said exactly what it meant.[97]

The Court then found it was bound by the "plain meaning" of KRS 439.340(14)(b), wherein it states, "No deferment shall exceed ten (10) years, except for life sentences."[98] Based on this, the Court stated, "[w]e cannot infer language *not present* in the statute; the statute does not require a deferment be granted for life sentences. Consequently, the Legislature has not prohibited the Board from authorizing a serve-out for life sentences."[99]

Even if the Court of Appeals' construction accurately interpreted the intent of the General Assembly, it is still unconstitutional, as the legislature may not delegate sentencing authority to the Parole Board. It is well established that "[t]he power . . . to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department."[100]

However, the Court of Appeals' interpretation was not correct. By relying only on the fact that the statute does not prohibit a serve out on a life sentence, the Court unwittingly does what it states it cannot – it infers language not present in the statute. There is no language in KRS 439.340(14) referencing a "serve out" of any sentence. A "deferment" is distinctly different. To "defer" generally means "to delay an action or proceeding," and at least "implies a deliberate putting off to a

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[97] *Jones v. Commonwealth*, 636 S.W.3d 503, 505-06 (Ky. 2021) (citation omitted).
[98] Opinion, at 8.
[99] *Id.* Emphasis added.
[100] *Gibson v. Commonwealth*, 291 S.W.3d 686, 690 (Ky. 2009)

later time."[101] That is exactly the meaning the Board gives to the term – the Board defines "deferment" to mean "a decision by the board that an inmate shall serve a specific number of months before further parole consideration."[102]

Consequently, just as clearly as the plain language of the statute does not prohibit a deferment of longer than ten years for a life sentence, neither does it expressly *authorize* a serve-out on a life sentence. An inmate who receives a deferment retains their parole eligibility and has a reasonable expectation of a future parole decision. An inmate who receives a serve out has had their future parole eligibility extinguished. Where that serve out is issued in the context of a life sentence, this means that their sentence has in practice been converted to a sentence of life without parole.

The only way to read KRS 439.340(14)(b) that conforms to the plain meaning of the words on the page is that life sentences can be deferred for longer than ten years, but not served out. This Court should find that KRS 439.340(14)(b) directly contravenes the United States and Kentucky Constitutions and controlling case law and therefore must be struck down.[103]

CONCLUSION

Nearly a decade ago, former Kentucky Supreme Court Justice Cunningham noted:

> In addition to those on death row, there are currently 177 men in our Kentucky prisons who are serving life without parole. Ninety-seven are serving life without parole by judicial sentence in accordance to law. Eighty are serving life without parole by serve-outs on life

[101] https://www.merriamwebster.com/dictionary/defer#:~:text=Synonym%20for%20defer-,Verb%20(1),off%20to%20a%20later%20time. (Last visited 5/27/22).
[102] 501 KAR 1:030 Section 1(2).
[103] *See McClanahan*, 308 S.W.3d at 701.

> sentences imposed upon them by nine non-elective members of the Parole Board. The latter dispositions have been made by our Parole Board in spite of the fact that neither our courts nor our General Assembly have deemed these men ineligible for parole.
>
> We have long concluded that the judicial branch has no authority to direct the executive branch who to parole. We have yet to determine if the executive branch, through the Parole Board, has the authority to impose life sentences without parole upon persons that our legislature and courts have deemed eligible for parole.[104]

Justice Cunningham's observation makes clear that the act of serving out a life sentence is fundamentally different than merely deferring parole consideration to a future date. The case law makes clear that a life sentence without the possibility of parole is constitutionally distinct from a life sentence with the possibility of parole. The Kentucky Constitution make clear that the Legislature establishes the sentencing range for criminal conduct and that judiciary is responsibility for imposing a sentence within that range. The Kentucky Constitution also makes clear that Kentucky adheres to a strict separation of powers doctrine, prohibiting one branch from exercising the powers of another. Putting these together, it is clear the Kentucky Parole Board does not have authority to issue a serve out on a life sentence.

Based on the foregoing, the Appellants respectfully requests that this Court reverse the Opinion of the Court of Appeals.

[104] Bartley v. Wright, 2012-SC-00643-MR, 2013 WL 1188060 (Ky., March 21, 2013)
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