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

~ Electronically Filed ~

LANCE CONN, ET AL **APPELLANTS**

v.

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

KENTUCKY PAROLE BOARD **APPELLEE**

REPLY 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 Reply Brief was served on the following named individuals, on April 26, 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;
- Rebecca Combs Lyon, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort KY, 40601, by messenger mail; and
- Daniel Cameron, Victor B. Maddox, Matthew F. Kuhn, Jeffrey A. Cross, and Alexander Y. Magera, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601, by messenger mail

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

Timothy G. Arnold

Purpose of Reply Brief

The purpose of this reply brief is to respond to the arguments from the Parole Board, and from the Attorney General as amicus curiae. The Appellants continue to rely upon their original brief, and any statements in either the Appellee's brief or the amicus brief filed by the Attorney General are not conceded, even if they are not discussed in this reply brief.

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 3091 words.

Timothy G. Arnold

Statement of Points and Authorities

Argument

The Parole Board Violates Separation of Powers When it Exercises What it Believes to Be its Unfettered Discretion to Serve Out a Life Sentence, Without Express Statutory Authority.

The act of serving out a life sentence is an almost uniquely Kentucky phenomenon. Search Westlaw, Lexis or any other legal database for cases discussing the terms "serve out," "parole board," and "life sentence," and the results you will get are almost exclusively Kentucky cases.[1] The reason for this is not that Kentucky inmates are more litigious than inmates in other states, it is that almost all jurisdictions have rejected the practice of serving out a life sentence. *See, e.g.*, Mich. Comp. Laws Ann. § 791.234(8)(b) (requiring review every five years until the prisoner is "paroled, discharged or deceased"); Va. Code Ann. § 53.1-154 (requiring review every 1-3 years after initial review); W. Va. Code Ann. § 62-12-13(e) (requiring review every three years for life sentenced inmates).

Even Kentucky has not formally adopted this practice through express legislation. Both the Parole Board and amicus agree that the source of the Board's authority is not the express language of a statute – neither has cited to such language – it is the Board's own regulations. In defending the use of this authority, the Board is at pains to emphasize the nearly unlimited nature of its discretion, arguing that included within this discretion is the discretion not to ever hear the case again after the initial parole hearing.[2] However, neither the Board nor the

[1] For example, a search of Westlaw's All States and All Federal database using the string "Adv: "serve out" /s "parole board" /s "life sentence"" yields 37 cases, 34 of which (91%) are from Kentucky. The three remaining cases do not address the situation at issue here.

[2] Brief for Appellee, pg. 4.

Attorney General has disputed that the Board has often used its discretion to simply re-litigate the sentencing proceeding. The Brief for Appellant discussed several cases where the Board acknowledged that the only basis for serving out the person's life sentence was the Board's belief that life without parole was an appropriate punishment for the crime. Kevin Murtaugh, for example, was served out in spite of a sterling record of accomplishment in prison and a "very low" risk assessment score.[3] Lance Conn was likewise served out based on the seriousness of the offense, though admittedly that might have been in part because of a mistaken belief that he was also a serial offender.[4] These examples are not the only cases where the Board's actions were merely punitive. For example, John Orthober was convicted of murder and given a life sentence, which carried a parole eligibility of 12 years. After seeing the Board, in spite of a being a low-risk inmate with clear conduct, he was given a 13-year deferment, which mathematically implies that the Board felt a more appropriate sentence for him was LWOP/25.[5]

Rather than expressing concern that the Board is disregarding the General Assembly's sentencing policy and performing quintessentially judicial functions, the Attorney General believes that the Board's supposed sentencing authority is not a bug but a feature, spending several pages emphasizing the serious nature of the Plaintiffs' offenses, implicitly commending the Board for having fundamentally altered the nature of the sentence the Plaintiffs were required to serve.[6] However, this argument ignores the fact that the General Assembly considered the serious

[3] Apx. IV, 871-72; Apx. II, 298-302.
[4] TR Vol. 3, 311.
[5] Vanhoose Deposition, Apx IV, pg. 176.
[6] Amicus Brief, pp. 4-6.

nature of these offenses in adopting the sentencing structure in the first instance, and the judiciary, often aided by a jury, considered the specific facts of the case in arriving at a sentence for the offense. As the Attorney General's factual argument suggests, in many of these cases the Board's decision can be based solely on its independent assessment of what the appropriate sentence should be – authority the Board has made no effort to restrict through its regulations. It is, constitutionally speaking, an impermissible power grab by an administrative agency.

In an earlier era, the General Assembly attempted to give the paroling agency the authority not to enhance sentences, but to reduce them, and the High Court held that such actions violated separation of powers, by granting the Board what was essentially the power to commute sentences. *Board of Prison Com'rs v. De Moss*, 157 Ky. 289, 163 S.W. 183, 188 (1914). During the same period, when the Governor attempted to use his commutation authority under § 77 of the Kentucky Constitution to reduce the period of parole eligibility for a particular inmate from ten years to eight, the High Court again rejected it, again finding that this authority violated separation of powers, as it interfered with the authority of the sentencing court and the General Assembly's power to set sentencing policy. *Alford v. Hines*, 189 Ky. 203, 224 S.W. 752, 753 (1920). In this case, the Board is similarly intruding upon both the General Assembly's authority to determine the range of sentences, and the judge's determination of the appropriate sentence for that individual case. This Court should again find that this approach violates separation of powers.

In response to the arguments laid out above and in Appellants' brief, the Board and the Attorney General collectively argue (1) that the Board's authority is

implicitly authorized by KRS 439.340(14), (2) that the act of serving out a life sentence does not change the nature of the sentence, (3) that caselaw has already resolved this issue, and (4) that the Appellants arguments will require this Court to "superintend" parole decisions moving forward. Each of these arguments is incorrect.

1. The Board's Actions Are Not Implicitly Authorized by the General Assembly: Both the Board and the Attorney General argue that KRS 439.340(14) implicitly authorizes the Board's actions, and that this authorization resolves any constitutional concerns.[7] As discussed in the original Brief for Appellants at pp. 22-24, this is not a fair reading of the statute. To that argument Appellants can only add that it is unlikely not only that the General Assembly would have granted such a significant authority to the Board by mere implication, but would have done so while simultaneously providing the Board with absolutely no standards of any kind in how that power should be used.

Moreover, Kentucky law does not support the argument that the General Assembly can grant power to an administrative agency by implication. It is well established that "Executive Branch agencies or administrative agencies have no inherent authority and may exercise only such authority as may be legislatively conferred." *Herndon v. Herndon*, 139 S.W.3d 822, 826 (Ky. 2004). It is undisputed that the Parole Board is "an administrative agency . . .." *Roach v. Kentucky Parole Board*, 553 S.W.3d 791, 794 (Ky. 2018). The Board therefore has no inherent authority and may only exercise the power to serve out a life sentence

[7] Brief for Appellee, pp. 4-5; Amicus Brief pp. 2-3.

if it is expressly authorized to do so by the General Assembly. As such, the argument that the authority exists because the General Assembly has not otherwise prohibited it – which is essentially what both the Parole Board and Attorney General argue – is diametrically opposed to what this Court's caselaw requires.

A statute delegating authority to an administrative agency must be both intelligible and provide sufficiently specific guidelines to ensure the authority is properly exercised. *Board of Trustees of Judicial Form Retirement System v. Attorney General of Commonwealth*, 132 S.W.3d 770, 778-85 (Ky. 2003). This Court has described the intelligibility requirement this way:

> [W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.

Id. (quotations omitted). The statute the Board relies on fails the intelligibility requirement by not specifying any policy at all for life sentenced inmates. The argument in this case is not about the interpretation of what was said, it is about interpreting what the General Assembly meant by saying nothing. In *Brewer v. Commonwealth*, 478 S.W.3d 363, 375 (Ky. 2015), this Court found a statute to be insufficiently specific where "[t]he General Assembly does not even direct the judiciary *what* misdemeanor a defendant could be convicted of under KRS 508.032, deciding instead simply to say a defendant may be convicted of *a* misdemeanor" (emphasis in original). While this Court found the statutory language too ambiguous to clearly implement, it adopted a saving interpretation intended to give effect to the words on the page as near as possible under the

circumstances. *Id.* Such a saving interpretation in this case would not afford the Board the power they now claim.

In addition to being intelligible in general, Kentucky's non-delegation doctrine requires that a statute seeking to delegate power to an administrative agency must contain both "an intelligible principle to guide administrative action, and standards controlling the exercise of administrative discretion." *Board of Trustees, supra*, at 785 (citations and quotations omitted). *Board of Trustees* contained several examples of statutes that failed to meet the requirement, including:

- A statute creating local agencies empowered to preserve and restore economically significant local areas, because "[t]hese powers were granted without "legislative criteria." *Id.* at 782 (citing to *Miller v. Covington Development Authority*, 539 S.W.2d 1, 2 (Ky. 1976).
- A statute delegating authority to the district court to review proposed redistricting plans, because the statute "provide[d] no criteria whatever for such a review." *Judicial Form Retirement*, at 783 (quoting *Fawbush v. Bond*, 613 S.W.2d 414, 415 (Ky. 1981)).
- A statute delegating legislative authority to LRC during legislative adjournment, because the statute lacked "standards controlling the exercise of administrative discretion." *Judicial Form Retirement*, at 783 (quoting *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984).

The non-delegation doctrine continues to apply in Kentucky. *See Beshear v. Acree*, 615 S.W.3d 780, 810 (Ky. 2020) (applying *Judicial form Retirement*, finding

sufficient guidance to permit delegation). Applying this doctrine to the present case, it is clear that here "there are no standards, much less meaningful standards, . . . to govern the exercise of this discretionary power," and therefore any purported delegation attempted by the General Assembly is improper. *Motor Vehicle Com'n v. Hertz Corp.*, 767 S.W.2d 1, 3 (Ky. App. 1989).

2. The Board is Changing the Sentence: The next argument is that the sentence only guaranteed a defendant a single parole hearing; therefore, the decision to serve out a life sentence does not change the character of the sentence for constitutional purposes.[8] Notably, this argument is only relevant if this Court concludes the Board has been properly delegated the authority to serve out a life sentence. If this Court so finds, the Board's argument suffers from both statutory and constitutional infirmities. As a simple matter of statutory construction, it is incorrect to say the General Assembly has only directed a single parole hearing in every case. To the contrary, not only has the General Assembly authorized the use of deferments in KRS 439.340(14), it has directed them to be used in most cases involving a substantial sentence. An inmate serving 70 years for a violent offense will be entitled to a parole hearing at 20, 30, 40, 50, and 60 years – five hearings in all. It would make no sense for the General Assembly to ensure five hearings for that offender, while expecting only one for the life sentenced offender, especially when the difference between the two sentences might come down to the feelings of a single sentencing juror.

[8] Brief for Appellee, pp. 4, 8-9.

The argument that a life-sentenced offender is only entitled to a single parole hearing also ignores the extent to which life without parole is a constitutionally distinct sentence. Almost any criminal case contains a number of "watershed" hearings which might significantly change the course of events for the defendant. What the Supreme Court was concerned with in *Graham v. Florida* was a sentence that "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration." 560 U.S. 48, 69–70 (2010). A life-sentenced offender who loses parole eligibility suffers a "denial of hope; [where] good behavior and character improvement are immaterial; [and] 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." *Id.*

In considering *Graham*, it is important to keep in mind that Florida law generally requires the Board to review a serious offender no less frequently than every seven years after the initial review. Fla. Stat. Ann. § 947.174(1)(b). So, when the G*raham* court was insisting that Florida provide Graham some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," it was considering that question under circumstances where this process may stretch out over several years, not a process where the decision could be made in a single high-stakes hearing, like what occurs in Kentucky.

The decision to serve out a life-sentenced offender is extremely fraught, and virtually every time it has occurred it has been accompanied by the kind of attention that is appropriate for such a serious decision. There is no reason to believe the General Assembly intended to give to the Board sentencing powers that

could not constitutionally be exercised by the judiciary.[9] Given that the consequences of serving out a life sentence and being given a life without parole sentence are identical, this Court should reject the Board's argument and find that serving out a life sentence fundamentally changes the character of the sentence.

3. The Authority Cited by the Board and the Attorney General is Not Binding on This Court: Both the Board and Attorney General cite to a passel of cases, many unpublished, primarily to support the proposition that a serve out on a life sentence is judicially authorized.[10] These cases are all either Court of Appeals cases, or federal cases that rely upon the Court of Appeals cases as a statement of state law, and therefore none of the authority cited is binding upon this Court.

Only three cases from this Court are cited by the Board, and none of them apply to this case. In *Land v. Commonwealth*, 986 S.W.2d 440 (Ky. 1999), this Court considered the validity of a judicially imposed life without parole sentence under pre-penal code statutes. In *Peck v. Conde*r, 540 S.W.2d 10 (Ky. 1976), the Court considered a statute which gave power to local executive branch officials to grant parole to a misdemeanant, finding that the judicial branch had no authority to grant or deny parole to an inmate. In *Prater v. Commonwealth*, 82 S.W.3d 898 (Ky. 2002) this Court considered the validity of a statute that gave parole authority

[9] Although the judiciary has been given broad authority to impose a sentence, this Court has prohibited courts from using that authority to impose a sentence outside the range of available sentences. *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). Further, this Court has also prohibited the judiciary from changing the sentence after imposition, even when the change is to another sentence within the authorized range. *Stallworth v. Commonwealth*, 102 S.W.3d 918 (Ky. 2003).

[10] Brief for Appellee, pp. 3-9; Amicus Brief pp. 8-19.

to the judiciary, finding that statute violated separation of powers. If persuasive, this last case supports the Appellants' position; if it is a violation of separation of powers to grant judges the power to parole, it is also a separation of powers violation to grant the parole board the power to sentence.

The Attorney General leans heavily on *Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky. 2005). In that case, the inmate litigant had been granted parole, and that grant was rescinded before he was released from custody. He was subsequently granted parole upon condition that he first complete the sex offender treatment program, which was being retroactively applied to his case. This Court held the Board has the authority to rescind a grant of parole any time before the inmate is released, and that the retroactive application of the sex offender treatment program to him was not an *ex post facto* violation. Although this case includes a discussion of the generally broad nature of the Board's discretion, it does not inform the decision now before the Court.

In the end, the only decision cited by either body which bears directly on the question before the Court is *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), a decision which was both poorly litigated and incorrectly decided, for reasons explained at pp. 16-22 of the original Brief for Appellant. For the reasons stated there, and for all reasons stated in this Reply Brief, this Court should overrule *Simmons*.

4. This Court Has the Authority to Decide Whether the Board has the Power to Serve Out a Life Sentence: The Attorney General argues that a signature feature of the Board's unlimited discretion over parole cases is that decisions made by the Board are unreviewable by the Courts. Based on these cases

the Attorney General argues that the Appellants are seeking to have the courts "superintend" parole decisions moving forward.[11] The Attorney General is incorrect.

No court may order the Board to parole a prisoner, and nothing in this case will change that. However, that does not mean that the courts have no role to play in the parole process. Parole decisions are reviewable by the courts "as to compliance with the terms of KRS 439.250 to 439.560." KRS 439.330(3). Additionally, the Board is not exempt from the Constitution. The role the courts can and should play is to say what the law is, both in terms of whether the General Assembly has attempted to delegate this power to the Board, and if so, whether that delegation comports with constitutional requirements. All this Court is being asked to do in this case is simply to articulate whether the Board has the authority it is exercising – it is not being asked to grant parole to any inmate, or take any action that will alter any decision that is not a serve out on a life sentence. As such, the Attorney General's concern on this point is without merit.

Conclusion

For the reasons in the original Brief for Appellant, and for all reasons stated herein, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[11] Amicus Brief, pg. 19.