THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0198

Petition of Pamela Smart

APPEAL PURSUANT TO RULE 11 FROM AN ACTION BY THE GOVERNOR AND COUNCIL

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Oral argument not requested)

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II. Whether the Court should deny Petitioner's request that a writ of mandamus issue to Governor and Council compelling Governor and Council to take further action on Petitioner's Petition for Commutation because Petitioner fails to demonstrate a right to the requested relief, namely, an opportunity to demonstrate her fitness to return to society under unspecified procedures not set forth in the State Constitution.

STATEMENT OF THE CASE AND FACTS

Petitioner, Pamela Smart, was convicted in 1991 of accomplice to first degree murder, conspiracy to commit murder, and tampering with a witness. *State v. Smart*, 136 N.H. 639, 643 (1993). She is currently serving a legislatively-mandated life-without-parole sentence for her conviction as an accomplice to first-degree murder. PB3.[1]

On or about August 16, 2021, Petitioner submitted to Governor and Council a Petition for Commutation in which she petitioned the Council for a hearing on her petition and petitioned the Governor for commutation of her sentence. IA1. In her petition, Petitioner requested that her sentence "be modified to eliminate the 'without possibility of parole' condition, and commuted to time served." IA26. She attached to her petition numerous letters and documents in support of her petition for commutation. *See* IA and IIA. In addition, she submitted a Memorandum in Further Support of Pamela Smart's Petition for Commutation. IIIA4.

The Governor placed Petitioner's petition for commutation on the agenda for the March 23, 2022 meeting of Governor and Council. PB3. After minimal discussion at the meeting, lasting less than two and one-half minutes, the Council voted to deny Petitioner's hearing request. PB5-6.

Petitioner filed the instant petition requesting that "this Court issue a writ of mandamus ordering the Governor and Council to accept

[1] "PB" refers to Petitioner's Brief; and "_A_" refers to the three-volume appendix filed with Petitioner's Brief, preceded by volume number and followed by page number.

resubmission of her petition and schedule a hearing on that petition." Petition for Writ of Mandamus, p. 2.

SUMMARY OF THE ARGUMENT

Part II, Article 52 of the State Constitution demonstrably commits to the Governor the power of pardoning offenses, which includes the lesser power of commutation. Placing this power in the hands of the Governor is consistent with the origins of the clemency power as an executive branch function separate from adjudicatory proceedings within the judicial branch. Part II, Article 52 does not require the Governor and Council to follow any particular process in considering a commutation application. Because the clemency power is an executive branch power and there is no constitutionally-mandated procedure dictating how Governor and Council must exercise that power, the question Petitioner raises in her petition for writ of mandamus is a non-justiciable political question. Therefore, this Court should dismiss the petition for lack of jurisdiction.

Even if Petitioner's claim were justiciable, her request for a writ of mandamus should be denied because she is not entitled to the relief she requests. The only authority Petitioner cites in support of her claim that she is entitled to further process on her commutation petition is *State v. Farrow*, 118 N.H. 296 (1978). That case, however, does not entitle a prisoner to any particular process when seeking a commutation from the Governor. Because Petitioner fails to demonstrate that she has an apparent right to any additional process relating to her commutation petition, her petition for a writ of mandamus must be denied.

ARGUMENT

I. THIS COURT SHOULD DISMISS THE PETITION FOR WRIT OF MANDAMUS FOR LACK OF JURISDICTION BECAUSE IT RAISES A NONJUSTICIABLE POLITICAL QUESTION.

"[J]usticiability is essentially a jurisdictional issue." *Baines v. New Hampshire Senate President*, 152 N.H. 124, 128 (2005). If a question is not justiciable, it is not for this Court to review. *Id*. Whether a controversy is nonjusticiable presents a question of law, which this Court reviews de novo. *Burt v. Speaker of the House of Representatives*, 173 N.H. 522, 525 (2020).

"Courts lack jurisdiction to decide political questions." *Richard v. Speaker of House of Representatives*, __ N.H. __ (decided July 6, 2022), No. 2021-0325, 2022 WL 2445245, at *2. "The nonjusticiability of a political question derives from the principle of separation of powers." *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276, 283 (2005). "The justiciability doctrine prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government." *Id.* "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the [State] Constitution." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)) (ellipsis omitted). "Where there is such commitment, [this Court] must decline to adjudicate the matter to

avoid encroaching upon the powers and functions of a coordinate political branch." *Id.*

This Court has observed that cases that raise nonjusticiable political questions have the following characteristics:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Richard, 2022 WL 2445245, at *2 (quoting *Baines*, 152 N.H. at 129 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (internal quotation marks omitted).

Here, the State Constitution demonstrably commits to the Governor the power of pardoning offenses, which includes the lesser power of commutation.[2] Part II, Article 52 provides,

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[2] Generally speaking, a "pardon" is "[t]he act or instance of officially nullifying punishment or other legal consequences of a crime." *Pardon*, Black's Law Dictionary (11th ed. 2019). "Commutation" refers to "[t]he executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant." *Commutation*, Black's Law Dictionary (11th ed. 2019). Pardons and commutations are both forms of clemency. *See Herrera v. Collins*, 506 U.S. 390, 412 n.12 (1993) ("The term 'clemency' refers not only to full or conditional pardons, but also commutations, remissions of fines, and reprieves.") (citation omitted).

> The power of pardoning offenses, except such as persons may be convicted of before the senate, by impeachment of the house, shall be in the Governor, by and with the advice of council: But no charter of pardon, granted by the Governor, with advice of the council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offense or offenses intended to be pardoned.

Placing the clemency power in the hands of the Governor is consistent with the origins of the power as an executive branch function. "[T]he genesis of executive clemency in the United States is found in the English common law." *Bacon v. Lee*, 549 S.E. 2d 840, 846 (N.C. 2001). "Traditionally, the exercise of clemency authority has been considered 'a matter of grace,' or 'an act of grace.'" *Id.* (citations omitted); *see also Doe v. State*, 114 N.H. 714, 718 (1974) (describing the Governor's pardoning power as "an act of executive grace"). The United States Supreme Court has "reaffirmed the traditional conception of clemency as an Executive Branch function separate from adjudicatory proceedings within the Judicial Branch." *Bacon*, 549 S.E. 2d at 846 (citing *Herrera v. Collins*, 506 U.S. 390, 411-13 (1993)). "Consequently, 'pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.'" *Id.* (quoting *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981)).

Nevertheless, "concluding that the State Constitution commits to a coordinate branch of government certain authority does not necessarily end the justiciability inquiry." *Richard*, 2022 WL 2445245, at *2 (citing *Burt*, 173 N.H. at 525-26). "[W]hen the question presented is whether or not a violation of a mandatory constitutional provision has occurred, it is not only

appropriate to provide judicial intervention, [this Court is] mandated to do no less." *Id.* (quotation marks and citation omitted) (holding justiciable question of whether the Speaker of the House and Senate President failed to comply with constitutional provision establishing right to petition for redress of grievances); *see also Burt*, 173 N.H. at 528 (holding justiciable question of whether internal House rule violated members' constitutional right to bear arms); *Baines*, 152 N.H. at 132 (holding that although the authority to adopt internal procedural rules has been demonstrably committed to the legislature, the question of whether a constitutionally-mandated procedure has been followed is justiciable).

In *Richard*, the plaintiff sought, among other things, a writ of mandamus to compel the Speaker of the House and the Senate President to assemble the legislature to hear the petitioner's remonstrances, claiming that Part I, Articles 31 and 32 of the State Constitution required the legislature to hold a public hearing on his petition for remonstrance. 2022 WL 2445245. "The trial court ruled that the dispute was justiciable, but dismissed the complaint on the ground that the plaintiff was not entitled to his requested relief." *Id.* at *2. The plaintiff appealed, and on the issue of justiciability, this Court concluded that the question of whether the Speaker and Senate President failed to comply with constitutional mandates was justiciable; however, to the extent the constitution vested the Speaker and Senate President with discretion to take certain actions, the question of whether they erred in the manner in which they exercised that discretion was a nonjusticiable political question. *Id*. at *3, *9.

In the context of a governor's clemency power, "[e]ven though courts may not review the substantive decision of the Governor on whether

to exercise clemency in a particular case, courts may consider whether constitutionally authorized limitations on the clemency power have been respected." *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 n.3 (1994); *see Makowski v. Governor*, 852 N.W.2d 61 (Mich. 2014) (where State Constitution provided Legislature the power to regulate the process by which commutations are granted, the interpretation and exercise of the Governor's commutation powers were justiciable). The only limits on the clemency power, however, are those specifically authorized by a state's constitution; "the Governor's exercise of discretion in using the clemency power is not subject to judicial review." *Maurer*, 644 N.E. 2d at 373.

Here, Petitioner does not allege that Governor and Council failed to follow a constitutionally-mandated procedure in denying her petition for commutation. Rather, she argues that they acted arbitrarily in the exercise of discretion, complaining that Governor and Council "devoted less than three minutes" to her petition, with "no discussion of the petition or any of its contents." PB10; *see also* PB7 ("The Council engaged in no discussion of the materials contained in Ms. Smart's petition."); PB12 ("There was absolutely no discussion of any of these materials at the March 23, 2022, meeting."); PB14 ("Governor and Council engaged in no discussion about Ms. Smart's petition or its failure to demonstrate her fitness to return to society."). Based on the lack of discussion at the March 23 meeting, Petitioner claims that the Governor and Council "failed to properly address [her] petition for commutation," PB 10, and that their decision was "arbitrary and in bad faith," PB14.

Petitioner does not argue—nor could she—that Part II, Article 52 requires the Governor and Council to follow any particular process in

considering a commutation application.[3] Unlike the plaintiff in *Richard* who claimed that Part I, Articles 31 and 32 entitled him to a public hearing before the legislature, Petitioner concedes that this Court "can neither order the Governor and Executive Council to grant [her] a pardon or commutation, nor can it order them to grant [her] a hearing on her petition." PB13. In other words, Petitioner does not claim that the Governor and Council failed to comply with constitutional mandates; rather, she seeks to challenge the manner in which they exercised their discretion in acting on her petition for commutation.

Because there is no constitutionally-mandated procedure dictating how Governor and Council must exercise the clemency power, the question Petitioner raises is a non-justiciable political question. *See Richard*, 2022 WL 2445245 at *3, *9; *see also Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 672 (2016) (explaining that, because the State Constitution vests the legislature with the authority to adopt procedural rules for enacting legislation, and the "legislature, alone, has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure," the plaintiff's claim alleging that the legislature violated its

[3] To the extent the legislature has enacted statutes relating to the pardon and commutation process, *see* RSA 4:21-:28, those statutes place no limits on the Governor's clemency power, nor could they because Part II, Article 52 does not grant the legislature any constitutional power to impose terms and conditions on the Governor's clemency power. N.H. Const. pt. II, art. 52; *see Schick v. Reed*, 419 U.S. 256, 267 (1974) (holding that "the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself").

own procedural rules was nonjusticiable (quotation omitted)); *Bacon*, 549 S.E. 2d. at 854 (holding, where the State Constitution expressly commits the clemency power to the sole discretion of the Governor, "judicial review of the exercise of clemency power [beyond the minimum safeguards applied to state clemency procedures by *Woodard*][4] would unreasonably disrupt a core power of the executive") (footnote added); *In re Moore*, 31 P. 980, 982 (Wyo. 1893) ("We cannot inquire whether the pardoning power has been exercised judiciously, or whether the proceedings preliminary to the granting of the pardon were irregular, if any such were necessary."); *cf. In re Hooker*, 87 So. 3d 401, 414 (Miss. 2012) (holding, based on separation of powers principles, that a facially valid pardon issued by the governor may not be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement in the state constitution was not met, or that the publication was insufficient).

Because Petitioner's petition for writ of mandamus raises a nonjusticiable political question, it should be dismissed.

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[4] In *Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the United States Supreme Court held that death row prisoners are entitled to some minimal due process protections in petitioning for clemency from a state governor. To the extent that the fractured decision of the Court in *Woodard* provides an exception to the general rule that clemency decisions are nonjusticiable, the *Woodard* decision is not relevant to the instant case because it is limited to capital clemency proceedings. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67–68 (2009) ("We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.") (emphasis in original) (citing *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981)).

II. THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR A WRIT OF MANDAMUS BECAUSE SHE FAILS TO DEMONSTRATE AN APPARENT RIGHT TO THE RELIEF REQUESTED.

Even if Petitioner's claim were justiciable, her request for a writ of mandamus should be denied because she is not entitled to the relief she requests. Contrary to Petitioner's suggestion in her brief, *State v. Farrow*, 118 N.H. 296 (1978), does not entitle a prisoner to any particular process when seeking a commutation from the Governor, and Petitioner does not identify any other authority—constitutional or otherwise—entitling her to the relief she seeks.

"Mandamus is an extraordinary writ[.]" *Rockhouse Mountain Prop. Owners Ass'n, Inc. v. Town of Conway*, 127 N.H. 593, 602 (1986). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." *In re CIGNA Healthcare, Inc.*, 146 N.H. 683, 687 (2001). "This court will, in its discretion, issue a writ of mandamus only where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." *Id.* "When an official is given discretion to decide how to resolve an issue before him, a mandamus order may require him to address the issue, but it cannot require a particular result." *Rockhouse Mountain Prop. Owners Ass'n,* 127 N.H. at 602.

Petitioner claims that "she is entitled to have the Governor and Executive Council [] review her petition and engage in good faith discussion about why the materials do or do not warrant the granting of a

hearing on her petition." PB10. The only authority Petition cites in support of this assertion is *Farrow*, 118 N.H. 296. In *Farrow*, this Court addressed, among other issues, (1) whether a sentence of life imprisonment without parole for first degree murder constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution, and (2) whether Part I, Article 18 of the New Hampshire Constitution creates a right to parole. 118 N.H. at 302-05.

With respect to the Eighth Amendment claim, the Court concluded that paroleless life sentences for first degree murder did not constitute cruel and unusual punishment because they are both proportionate to the crime and comport with basic concepts of human dignity. *Id.* at 303-04. On the issue of proportionality, the Court observed that "the State could exact the death penalty for such a crime," and that the "State could also conclude that a person who acts in the manner proscribed by the statute is incapable of rehabilitation and must be isolated from society for the remainder of h[er] life." *Id.* at 303. In rejecting the defendants' argument that paroleless life sentences do not comport with basic notions of human dignity, the Court relied on *Schick v. Reed*, 419 U.S. 256, 267 (1974), in which the United States Supreme Court upheld such a sentence imposed as a condition to presidential commutation of a death sentence, holding that such a sentence did not offend the Constitution. *Id.* at 303-04.

The *Farrow* Court further observed the following with respect to the defendants' argument about basic concepts of human dignity:

> Moreover as the State demonstrates, the defendants have the hope of increased privileges and responsibilities inside the prison through good conduct. The defendants will have the opportunity to obtain educational and vocational training

> within prison ***and could ultimately receive an executive pardon***. Thus the defendants' outlook is far from the bleak future they attempt to paint. We find that paroleless life sentences comport with basic concepts of human dignity.

Id. at 304 (emphasis added). Contrary to Petitioner's suggestion, this language cannot reasonably be read to stand for the proposition that paroleless life sentences are constitutional under the Eighth Amendment *only because* such prisoners may seek an executive pardon or commutation.

Nor does the *Farrow* Court's discussion of Part I, Article 18 of the State Constitution support Petitioner's claim that the constitutionality of paroleless life sentences is dependent on a prisoner's ability to seek an executive pardon or commutation. In *Farrow*, the defendants argued that under Part I, Article 18 "parole cannot be legislatively denied." 118 N.H. at 304. This Court disagreed, concluding that "[w]hether the language of part I, article 18, that '[t]he true design of all punishment being to reform, not to exterminate mankind,' is directory … or mandatory, that language does not create a right to parole." *Id.* (quoting N.H. Const. pt. 1, art. 18). The Court observed that the meaning of the provision "could not have included parole when written or ratified[,]" and further noted that "the language itself seems primarily directed only at execution, and this court has never held that article 18 invalidates a capital punishment statute." *Id.* at 305. The Court then went on to state the following:

> The State's important goals in confining someone for life are all well served by withholding the possibility of parole; ***and the punishment is not a sentence of extermination because the prisoner has many opportunities to improve his life, culminating with a pardon if he can demonstrate to the Governor and Council his fitness to return to society***

> ***without being a threat to it***. We cannot say that the legislature is powerless to make the judgment that certain heinous crimes merit imprisonment for life without parole.

Id. (emphasis added).

Petitioner relies on this language to suggest that a paroleless life sentence constitutes a "sentence of extermination" in violation of Part I, Article 18 unless the prisoner is provided an opportunity to demonstrate to Governor and Council her fitness to return to society. Petitioner reads to much into *Farrow*. The Court in *Farrow* made clear that a life sentence without the possibility of parole is not the equivalent to extermination for several reasons. The first and most obvious reason is because such a sentence is not equivalent to execution. 118 N.H. 305. The Court also stated that such a sentence provides the prisoner with opportunities to improve his or her life inside the prison walls. *Id.* The Court further observed that such life improvement could result in a pardon if the prisoner could demonstrate to the Governor and Council his or her fitness to return to society. *Id.* The *Farrow* Court did not say that a paroleless life sentence violates Part I, Article 18 unless the prisoner is provided an opportunity before Governor and Council to demonstrate her fitness to return to society. *Id.* at 304-05.

In any event, even if *Farrow* grants a prisoner the right to demonstrate to Governor and Council her fitness to return to society, as Petitioner contends, the case does not identify any particular procedures that must be followed in order to satisfy that right. Prisoners, like all persons, have a right to petition the Governor and Council, as well as other government representatives. That petitioning may come in the form of

written or oral advocacy, but no person is entitled to a particular quantum of process or a hearing on petitioning activity. Petitioner in this case *did* petition the Governor and Council, and they denied her request. The *Farrow* case does not entitle a prisoner to a particular process before Governor and Council to demonstrate fitness to return to society.

Nor does the constitution provide a prisoner with such a right. As discussed in Section I above, the clemency power is an executive branch function, and Part II, Article 52 does not require the Governor and Council to follow any particular process in considering a pardon or commutation application. Even if this Court could constitutionally impose clemency procedures on Governor and Council without violating separation of powers, nothing in the *Farrow* case suggests that this Court has done so.

Petitioner has failed to identify any other authority for her alleged right "to have the Governor and Executive Council [] review her petition and engage in good faith discussion about why the materials do or do not warrant the granting of a hearing on her petition." PB10. Petitioner acknowledges that under Part II, Article 52, "the power to pardon or commute sentences lies solely with the Governor and the Executive Council[,]" and concedes that "[n]either the state constitution nor legislative statutes provide any means or process for persons serving life without parole sentences to seek relief from such sentences." PB13.

Here, the Governor placed Petitioner's petition for commutation on the March 23, 2022 Governor and Executive Council agenda, and, during that meeting, the Council acted on the item by voting to deny Petitioner's request for a commutation hearing. Because Petitioner fails to demonstrate

that she has an apparent right to any additional process relating to her commutation petition, her petition for a writ of mandamus must be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court dismiss the petition for lack of jurisdiction, or, in the alternative, affirm the action of Governor and Council.

The State does not request oral argument. If the Court schedules oral argument, Laura Lombardi will present argument on behalf of the State.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Laura E. B. Lombardi, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,380 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 17, 2022 *<u>/s/ Laura E. B. Lombardi</u>*
Laura E. B. Lombardi

CERTIFICATE OF SERVICE

I, Laura E. B. Lombardi, hereby certify that I am filing this brief electronically and that a copy is being served on all other parties or their counsel, in accordance with the rules of the Supreme Court, as follows: I am serving registered e-filers through the court's electronic filing system; I am serving or have served all other parties by mailing or hand-delivering a copy to them.

August 17, 2022 *<u>/s/ Laura E. B. Lombardi</u>*
Laura E. B. Lombardi