

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2022-____

IN RE: THE MATTER OF PAMELA SMART

PETITION FOR WRIT OF MANDAMUS

SISTI LAW OFFICES

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(15 minutes for oral argument)

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ISSUE PRESENTED

Whether the Governor and Executive Council can refuse to consider granting a hearing on a petition for commutation submitted pursuant to N.H. RSA 4:21.

STATEMENT OF THE CASE

Ms. Pamela Smart is currently serving a life-without-parole sentence for her conviction as an accomplice to first degree murder in 1991. On August 17, 2021, she submitted a Petition for Commutation to the Office of the Attorney General in accordance with N.H. RSA 4:21. On March 23, 2022. The Governor and Executive Council had a meeting where Ms. Smart's petition was on the agenda. At that meeting, the Executive Council voted to deny consideration of whether or not to grant Ms. Smart a hearing on her petition, therefore denying Ms. Smart's request for commutation of her sentence.

STATEMENT OF FACTS

Ms. Smart is currently serving a life-without-parole sentence for her conviction on a charge of Accomplice to First Degree Murder on March 22, 1991. On August 16, 2021, Counsel for Ms. Smart submitted a Petition for Commutation to New Hampshire Attorney General John Formella, along with letters, documents, and a memorandum in support of that petition. Exhibit A. On March 23, 2022, “[t]he Governor and [Executive] Council on motion of Councilor Gatsas, seconded by Councilor Stevens voted to **deny consideration** of whether the petition of Pamela Smart (age 54) requesting a commutation hearing for the offense of Accomplice to First Degree Murder should be granted.” Governor and Executive Council Minutes, March, 23, 2022, p. 17, Item No. 124. (Exhibit B)(emphasis added).

SUMMARY OF ARGUMENT

Ms. Smart contends that her rights under Part 1, Article 18 of the New Hampshire Constitution were violated when the Council refused to even **consider** her request for a hearing on her petition. In doing so, the Council deprived her an opportunity to show that she would not pose a threat to society if she were paroled. The New Hampshire Supreme Court has indicated that life-without-parole sentences do not violate the state constitution because inmates always have a chance for a pardon. See State v. Farrow, 118 N.H. 296 (1978). However, the Council's refusal to even consider her petition for commutation indicate that Ms. Smart's chances for a pardon are essentially non-existent. To the extent that she has no chance for a pardon, her life-without-parole sentence violates Article 18 of the state constitution. As such, she now requests that this Court issue a writ of mandamus ordering the Governor and the Council to accept resubmission of her petition and schedule a hearing on that petition.

LEGAL ARGUMENT

The Court should order the Council to consider Ms. Smart's request and grant a hearing on her petition so she may demonstrate her fitness to return to society.

In New Hampshire the courts "will allow the writ to issue to overturn the result of the discretionary performance of an official function when an official exercises his discretion arbitrarily or in bad faith." Gloria Guarracino, Administratrix v. Roland Beaudry, 118 N.H. 435, 437 (1978).

This Court has jurisdiction in this matter pursuant to N.H. RSA 490:4, which states that "[t]he supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses...shall have exclusive authority to issue writs of error, and may issue writs of certiorari, prohibition, habeas corpus and all other writs and processes to other courts, to corporations and individuals."

The New Hampshire Constitution states that “[a]ll penalties ought to be proportioned to the nature of the offense.” *N.H. Const.*, Part 1, Art. 18. It goes on to state that:

“Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.” *Id.*

The New Hampshire Supreme Court determined that life-without-parole sentences do not necessarily violate the Constitutional prohibition on cruel and unusual punishments. See State v. Farrow, 118 N.H. 296 (1978). The Court found that such “defendants will have the opportunity to obtain educational and vocational training within prison and could ultimately receive an executive pardon.” *Id.*, 304. The Court held that:

“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.” *Id.*, 305.

Under the state constitution, “[t]he 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.” *N.H. Const.*, Part II., Art. 52. Meanwhile, N.H. RSA 4:21 states that:

“On all petitions to the governor and council for pardon or commutation of sentence written notice thereof shall be given to the state’s counsel, and such notice to others as the governor may direct; and the prosecuting officer may be required to furnish a concise statement of the case as proved at the trial and any other facts bearing on the propriety of granting the petition.”

While both pardons and request for commutation are reviewed by the Governor and his Council “[t]here is a distinction between a pardon and a commutation of sentence. A pardon is an act of grace proceeding from the power entrusted with the execution of the laws.” Whittington v.

Stevens, 221 Miss. 598, 73 So.2d 137, 139 (Miss. 1954). “A pardon relieves the person named from the legal consequences of a specific crime.” Id. Alternatively, “[a] commutation of sentence is the change of the punishment to which a person is sentenced to less severe punishment--a substitution of the lesser for a greater punishment.” Id. When a defendant is pardoned by the Governor, that person is no longer subject to the consequences of conviction. In other words, a defendant serving a life-without-parole sentence who is pardoned, without any conditions, is no longer subject to the requirements of that sentence. Commutation of that same defendant’s sentence to life-with-parole would still subject to the consequences of the sentence but would be allowed to seek parole and thereby potentially be eligible for release.

In Ms. Smart’s case, the Governor and the Council denied her opportunity to demonstrate her fitness to return to society. The refusal of the Council to even **consider** whether or not to grant Ms. Smart a hearing on her petition is tantamount to a sentence of extermination as it prevents her from being deemed fit to return to society and thus forecloses any chance at having her sentence altered.

In support for her petition for commutation, Ms. Smart submitted hundreds of pages of materials to the Attorney General and Executive Council of New Hampshire. Included in these materials are letters from friends and family of Ms. Smart, as well as others from inmates, corrections officials and others who have come to know her during her incarceration. See Exhibit A. Although each of these individuals’ interactions with Ms. Smart is unique, the common sentiment from each is that, at the very least, she deserves an opportunity to be released into the community. While these submissions do not bind the Council to a particular outcome regarding the petition, they clearly warrant **consideration** by the Council when deciding whether to grant

Ms. Smart a hearing on her petition. However, the Council, as reported in the minutes from March 23, 2022, refused to even **consider** her request for a hearing.

Given the Council's refusal to **consider** Ms. Smart's request for commutation of her sentence, there is essentially no chance that she would ever be **considered** for, much less receive, a pardon. As shown by her petition for commutation, Ms. Smart has engaged in a myriad of programs and college courses over the years. She has earned multiple Master's degrees and been ordained as a minister. Exhibit A, p. 9. Ms. Elaine Lord, the prison superintendent at Bedford Hills Correctional Facility (where Ms. Smart has been incarcerated) from 1984-2004 oversaw Ms. Smart's first decade of incarceration and submitted a letter in March 2021 supporting commutation of her sentence. *Id.*, p. 7. Hers is one of over one hundred letters of support from other inmates, academics, corrections officials, friends and family all advocating for modification of Ms. Smart's life-without-parole sentence. *Id.*, p. A-1-142. This evidence, when viewed objectively, clearly demonstrates the positive changes necessary for one to be deemed fit to return to society without posing a threat to the community. Due to the Council's unwillingness to **consider** her petition for commutation despite such evidence, it stands to reason that a request for a pardon would fare no better and thus she is serving a sentence of extermination. State v. Farrow, 118 N.H. at 305.

As noted, Ms. Smart has completed multiple academic degree programs while incarcerated. She has engaged in both individual and group programming during that time. In addition, she has served as a peer counselor, mentor, and teacher to other inmates. Those charged with supervising her have indicated that her conduct and actions in prison warrant an opportunity to rejoin society. Given all of the work Ms. Smart has done while in prison, it is difficult to imagine that additional programming will affect future decisions by the Council on any future

requests for relief. Thus, to the extent the Council deems these accomplishments unworthy of **consideration** for commutation, then it stands to reason Ms. Smart will never be able to demonstrate her fitness to return to society.

CONCLUSION

By refusing to even **consider** Ms. Smart's request for a hearing, the Council prevented her from demonstrating her fitness to return to society without posing a threat to the community. State v. Farrow, 118 N.H. 305. As such, her life-without-parole sentence is one of extermination as she has been effectively denied from seeking a pardon or commutation of her sentence by the Council. This refusal to even **consider** her request is contrary to "the true design of all punishment [which is] to reform" and results in Ms. Smart's "extermination" under Article 18 of the state constitution.


REQUEST FOR ORAL ARGUMENT

Ms. Smart requests fifteen (15) minutes of oral argument before the full court.

Respectfully Submitted,

PAMELA SMART
By her attorney

April 14, 2022

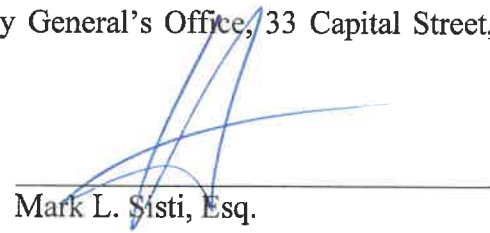


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CERTIFICATE OF SERVICE

State of New Hampshire
Merrimack County, SS.

I, Mark L. Sisti, hereby certify that two (2) copies of the foregoing Petition were forwarded on this 14th day of April, 2022 to the Attorney General's Office, 33 Capital Street, Concord, NH 03301.



Mark L. Sisti, Esq.