

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2022-0198

IN RE: THE MATTER OF PAMELA SMART

PETITION FOR WRIT OF MANDAMUS

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

SISTI LAW OFFICES

Mark L. Sisti, Esq.
NH Bar ID No. 2357
Sisti Law Offices
387 Dover Road
Chichester, NH 03258
(603) 224-4220

(15 minutes for oral argument)

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ISSUE PRESENTED

The question before the Court is whether the Governor and Executive Council can refuse to consider whether or not to grant a hearing on a petition for commutation submitted pursuant to N.H. RSA 4:21.

STATUTES AND AUTHORITIES

The New Hampshire Constitution states that “All penalties ought to be proportioned to the nature of the offense. No wise Legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. 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.” Part I, Art. 18, *N.H. Const.*

The state constitution further provides that “[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.

This Court has determined that life-without-parole sentences do not necessarily violate the Constitutional prohibition on cruel and unusual punishments as “defendants will have the opportunity to obtain educational and vocational training within prison and could ultimately receive an executive pardon.” State v. Farrow, 118 N.H. 296, 304 (1978). The Court reasoned 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.

The Court held that “[i]f the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed.” Barnard v. Taggart, 66 N.H. 362, (1890). The Court explained that “[i]f he is to act according to his discretion, and he will not act, **or even consider the matter**, we may compel him to put himself in motion to do the thing, but we cannot control his discretion.” Id. (emphasis added).

The term “consider” is defined as follows: “To fix the mind on, with a view to careful examination; to examine, to inspect. To deliberate about and ponder over. To entertain or give heed to.” Black’s Law Dictionary, 306 (6th Ed., 1990).

The New Hampshire Legislature has enacted laws related to the pardon and commutation process. N.H. RSA 4:21 (Petitions for Pardon or Commutation of Sentence) 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.”

N.H. RSA 4:22 (Commissioner of Corrections to Report On) states that “[i]n all cases where the petition is for the pardon of a person serving a sentence in the state prison, the commissioner of corrections shall make a report upon the petition before it is referred to the council.”

N.H. RSA 4:23 (Commutation) states that “[t]he governor, with advice of the council, upon application of any convict under sentence of death may grant him a pardon on condition that he shall be imprisoned for life or any term of years expressed in the pardon, and upon such further conditions as may be thought just.”

STATEMENT OF THE CASE

Ms. Pamela Smart is currently serving a legislatively mandated 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. By refusing to even consider the question of whether or not to grant such a hearing, the Governor and Council denied her the opportunity to demonstrate her "fitness to return to society without being a threat to it". State v. Farrow, 118 N.H. at 305. However, this decision was made arbitrarily as there was no consideration of the petition or its contents at the meeting where Ms. Smart's request was on the agenda.

STATEMENT OF FACTS

Ms. Smart is currently serving a legislatively mandated life-without-parole sentence for her conviction on a charge of Accomplice to First Degree Murder on March 22, 1991.

Two of the other co-defendants in her case, William "Billy" Flynn and Patrick "Pete" Randall, received life sentences. Mr. Flynn "shot [Gregory Smart] in the head" while Mr. Randall "with one hand, held Gregory's head down and with the other hand, held a knife in front of his face." State v. Smart, 136 N.H. 639, 645 (1993). In 1992, both Flynn and Randall each received sentences of 40 years to life with 12 years of the minimum deferred. In 2008, Flynn's minimum sentence was reduced by three years, as was Randall's in 2009. Both men were released on June 4, 2015, after serving less than twenty-five years of their original sentences.

Vance “JR” Lattime, Jr., was also sentenced to 30 years to life in prison and was later paroled in 2005. Raymond Fowler received a sentence of 15-30 years and was paroled in 2003, and later in 2005 after violating the terms of his release.

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. Exh. A. The filing included a 23-page petition addressed to the Governor, Executive Council, and the Office of the Attorney General. Id, Appendix, Part 1. It also included a Memorandum in Further Support of Pamela Smart’s Petition for Commutation. Id, Appendix, Part III.

Ms. Smart’s petition was submitted with Letters in Support of Pamela Smart’s Petition for Commutation. Id., Appendix, Part I-II. It contains numerous letters, some written to previous governors, from various corrections officials, clergy, inmates, academics, counselors, friends, family, and others supporting the commutation of Ms. Smart’s sentence. Id. Over 30 of these letters were submitted since 2020. Id.

Also attached to the petition are Documents in Support of Pamela Smart’s Petition for Commutation. Contained therein are copies of two Master’s Degrees (M.A.in English/M.S. in Law) and a Certificate of Ordination, noting that Ms. Smart is an ordained minister. Id., Appendix, Part II, B-8-11. In addition, there are dozens of other documents related to her individual achievements as well as numerous other programs she completed or in which she was involved. Id., B-12-76.

The documents supporting her request include Inmate Progress Reports for Ms. Smart ranging from May of 1999 to August of 2020. Id., B-78-87. In each of the reports, Ms. Smart received the highest rating of “Excellent” in all of the categories assessed. Id. She similarly

received the highest ratings possible in regard to her Educational Evaluations. Id., B-88-91.

While volunteering with the prison's ministerial services, she received mostly scores of 5 (Excellent), though there were a few instances where she received a score of 4 (Good). Id., B-92-97.

Also included are multiple "Honor Floor Reference Forms". Id., B-98-101. Each form states that "[a]ll applicants must exhibit a definitive desire to improve, take the necessary steps toward rehabilitation, and portray an outstanding degree of program participation." Id. It further states that "[i]n addition, all applicants are to behave and act in at a level well above the norm." Id.

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." Exh. B, Governor and Executive Council Minutes, March, 23, 2022, p. 17, Item No. 124. (emphasis added). A recording of the meeting can be found on the Secretary of State website at <https://sos.nh.gov/administration/miscellaneous/governor-executive-council/2022-meetings/> . (hereinafter Executive Council Audio, ECA).

The discussion related to Ms. Smart's request lasted less than two and one-half minutes. ECA, 1:52:20-1:54:31.

The Governor began by asking "Do I have a motion to accept or deny the pardon ---, uh the commut---, the commutation hearing request for Pamela Smart. Item 124." Id., 1:52:25.

Council Members Theodore Gatsas and Janet Stevens both moved to deny the hearing request. Id., 1:52:31.

The Governor then stated, “So we have a motion and a second to deny that request. Is there any discussion on Item 124?” Id., 1:52:36.

The Governor then stated, “Hearing none, all in favor of denying---”. Id., 1:52:39. He then stopped and recognized Council Member Cinde Warmington by stating “Oh, I’m sorry. I apologize, Councilor.” Id., 1:52:43.

Council Member Warmington spoke for forty-eight seconds, stating:

“I would just say, I want to um, I want to say thank you to um, all of the defense attorneys who prepared the extensive materials and to um, the Attorney General’s Office, Mr. Strelzin for your work in preparing these materials. They were very informative uh, I know some of the other councilors have dealt with this um, pardon request in the past. This was my first time and I read all of these materials um, and um, I believe uh, that a commutation request is um, is an extraordinary remedy um, and due under extraordinary circumstances uh, which I do not find here.” Id., 1:52:44-1:53:32.

The Governor then recognized Council Member Janet Stevens who, stated:

“I’m absolutely convinced there is no evidence or argument that rises to the level of granting commutation request for Pam Smart. And I just want to quote um, Associate Attorney General Jeffrey Strelzin who said, ‘Gregg Smart’s loss of life and the impact on his family and friends far outweigh whatever adversity the petitioner has faced in prison. We must never forget about Gregg.’ He would have been my constituent. He also stated, ‘a commutation of Pamela Smart’s sentence demeans the value of Gregg Smart’s life and diminishes the suffering the entire Smart family have endured because of the petitioner.’” Id., 1:53:33-1:54:16.

After that, the Governor said “Thank you. Further discussion.” Id., 1:54:18.

Two seconds later, he stated, “OK. All in favor of denying the petition request for Pamela Smart on item 124, please signify by saying aye.” Id., 1:54:25.

The Executive Council responded in unison, with all members voting “Aye”. Id., 1:54:26.

The Governor asked if “[a]ny oppose?” to no response. Id, 1:54:28.

He then stated, “With that, item 124 has been denied.” Id., 1:54:31.

SUMMARY OF THE ARGUMENT

The New Hampshire Constitution Supreme Court found that life without parole sentences are not sentences of extermination, and thus violate the state constitution, 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.” State v. Farrow, 118 N.H.at 305. The constitution dictates that the Governor, with advice from council, has the authority to grant such relief. Art II, Part 52, *N.H. Const.*

Ms. Smart submitted a petition for commutation of her life sentence. By voting to deny consideration of Ms. Smart’s request for a hearing, the Governor and Executive Council denied her the opportunity to demonstrate her fitness to return to society. The Council engaged in no discussion of the materials contained in Ms. Smart’s petition. It did not address the numerous documents submitted related to her rehabilitation. There was no discussion of the fact that the other co-defendants, who were physically present at the scene and committed the murder had been out for almost seven years at the time of the March 23, 2022, meeting. Thus, the Governor and Executive Council did not consider Ms. Smart’s fitness to return to society and not pose a threat to the community. Instead, the Council refused to even consider Ms. Smart’s petition based on her status as perhaps the most notable criminal defendant in New Hampshire history.

Ms. Smart is entitled to mandamus relief in this case as she has the right to be heard on her petition and there is no other adequate remedy available to address this denial. The Supreme Court held that sentences such as hers are constitutional as she may be able to receive a pardon if she can demonstrate her fitness to return to society. Farrow 118 N.H.at 305. Thus, she has a right to demonstrate that fitness to those who may grant her a pardon or other relief from her life-without-parole sentence (i.e., commutation). Meanwhile, there are no avenues for Ms. Smart to

appeal the Council's decision. Neither the legislature nor the Governor have provided processes by which someone in Ms. Smart's position may seek to have such decisions reviewed, reversed or otherwise re-visited. As such, this Court provides the only potential path for Ms. Smart to seek any remedy for the arbitrary decision made by the Governor and Executive Council.

ARGUMENT

This Court should issue a Writ of Mandamus ordering the Governor and Executive Council to consider whether to grant Ms. Smart a hearing on the substance of her Petition for Commutation submitted on August 17, 2021. This Court held that life-without-parole sentences are constitutional as prisoners under such sentences may still be able to receive a pardon if they are able to demonstrate their fitness to return to society. Farrow 118 N.H.at 305. Thus, she has an apparent right to have her petition heard in order to demonstrate such fitness. Meanwhile, there are no other alternative remedies available to her to appeal the Council's decision. As such mandamus relief is appropriate in this case.

“Mandamus is an extraordinary writ that may be addressed to a public official, ordering him to take action, and it may be issued only when no other remedy is available and adequate. Rockhouse Mountain Property Owners Ass'n, Inc. v. Town of Conway, 127 N.H. 593, 607 (1986). “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.” Id.

In New Hampshire, “[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). The Supreme 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.

In Brouillard v. Governor and Council, 114 N.H. 541 (1974), this Court addressed “the question whether a writ of mandamus can issue against a governor” noting, “the issue has been raised in a number of other jurisdictions with mixed results.” Id. at 544.

The Court held that it was “not prepared to assert that mandamus will not lie against a Governor” as “it is unlikely that the necessity of the writ should ever arise in this State.” Id. (internal citations omitted). The Court reasoned that “[i]t should not be necessary to order a Governor of this State to obey the law he has taken an oath to execute.” Id.

Ms. Smart has a right to have her petition considered.

Ms. Smart is serving a sentence of legislatively mandated sentence of life without parole. This Court held that such sentences do not violate Part I, Art. 18 of the New Hampshire Constitution because she will have “many opportunities to improve [her] life, culminating with a pardon if [s]he can demonstrate to the Governor and Council [her] fitness to return to society without being a threat to it.” State v. Farrow, 118 N.H. at 305. Given such language, it stands to reason that Ms. Smart, at the very least, is entitled to an opportunity to demonstrate such fitness.

In New Hampshire, for someone incarcerated under a sentence of life without parole, the only path to return to the community runs through the Governor and Executive Council as prescribed in Part II., Art. 52 of the state constitution. As such, she has the right to not only submit the petition, but also have in considered in relation to her fitness to return to society. Id.

Ms. Smart does not contend that she has a right to a pardon or commutation of her sentence. To the extent her sentence is commuted, she is not claiming that she has a right to parole. However, she does have a right to demonstrate her fitness to return to society. As such,

she is entitled to have the Governor and Executive Council to review her petition and engage in good faith discussion about why the materials she presented do or do not warrant the granting of a hearing on her petition.

The Executive Council's decision was arbitrary.

The Council's decision to deny consideration of whether to grant a hearing on Ms. Smart's petition was made arbitrarily as it was based on personal and political feelings instead of her fitness to return to society. for Council Member Warmington, there was no indication that any of the other members even read or reviewed the petition. Even then, there was no discussion from Council Member Warmington as to the petition's contents and why it did not warrant further consideration. While the Council is not required to reach a certain outcome in situations such as this, Ms. Smart has a right to have her petition considered in good faith.

In the present case, the Governor and Executive Council failed to properly address Ms. Smart's petition for commutation. The Governor and Council devoted less than three minutes to the question of whether or not to grant her a hearing on that petition. See ECA. Aside from Councilor Warmington's assertion that she read all the materials, there was no discussion of the petition or any of its contents. *Id.* Instead, the Council voted to deny even considering the petition. By refusing to consider the petition, the Council prevented Ms. Smart from demonstrating her "fitness to return to society without being a threat to it." State v. Farrow, 118 N.H.at 305.

Council Member Warmington stated that "a commutation request is... an extraordinary remedy...and due under extraordinary circumstances...which I do not find here." ECA, 1:53:25-1:53:32. While is hard to dispute that commutation is an extraordinary form of relief, the request itself as well as the request to be heard on it, are not relief but merely steps that must be taken so

that relief may be granted. More importantly, her assertion that such relief is only warranted “under extraordinary circumstances...which [she] did not find [in Ms. Smart’s petition]” is in conflict with any objective reading of the petition.

Council Member Stevens’s comments indicate that her decision was based, not on Ms. Smart’s current fitness to return to society, but on the crime for which she was convicted over thirty years ago. Most telling is Council Member Steven’s assertion that there is “no argument or evidence that rises to the level of granting a commutation request for Pam Smart.” ECA, 1:53:33-1:53:38. Her statement had nothing to do with Ms. Smart’s fitness to return to society. It was a blanket statement that Ms. Smart should never be granted a commutation request, let alone a pardon. It shows that the Council Member based her decision, at least in part, on why Ms. Smart was separated from society then instead of her fitness to return to society now.

Council Member Stevens’s statement, quoting Asst. Atty. General Strelzin, that “Gregg Smart’s loss of life and the impact on his family and friends far outweigh whatever adversity the petitioner has faced in prison” (Id., 1:53:42-1:53:49) does not accurately reflect the considerations noted in Farrow. In that case, the Court did not suggest that life without parole sentences are constitutional because a prisoner may obtain a pardon if they can show they have faced adversity that outweighs the impact of their crime on members of the community. She further referred to remarks by the Attorney General that “a commutation of Pamela Smart’s sentence demeans the value of Gregg Smart’s life and diminishes the suffering the entire Smart family have endured because of the petitioner” in support of her opposition. Id., 1:54:02-1:54:16. Again, the Farrow Court’s holding does not suggest that prisoners may be pardoned if the prisoner can demonstrate that such relief will not demean the life of the victim and diminish the suffering of the victim’s family.

Ms. Smart submitted numerous letters in support of her commutation from individuals in all walks of life, all expressing positive sentiments about Ms. Smart's fitness to return to society. She submitted multiple degrees, including a Ph.D. that she earned while incarcerated. She provided years of progress reports where she consistently received the highest ratings possible by those evaluating her. She provided years of reports from the Honor Floor, a special housing unit at the Bedford Hills facility whose occupants are expected to "behave and act at a level well above the norm." Exh. A, B-98-101. These submissions, taken together, are evidence of Ms. Smart's constant and continued commitment to her rehabilitation and desire to return to the community.

There was absolutely no discussion of any of these materials at the March 23, 2022, meeting. There was no discussion about the myriad of individuals who support Ms. Smart's commutation request. There was no discussion among the Council as to why the contents of her petition were so lacking as to not even warrant consideration of a hearing on the matter, where further discussions could be held. In fact, only two of the five members spoke other than to vote "no" to considering a hearing. Even then, the members who spoke said nothing about the contents of Ms. Smart's submission or the letter submitted by her attorneys on March 21, 2022, responding to the Attorney General's opposition of her request. There was no discussion of the fact that those who went to the Smart residence, held Greg Smart at knifepoint and shot him have been out on parole since 2015.

Council Member Warmington's assertion that Ms. Smart's petition contained no extraordinary circumstances is not supported by the materials. Meanwhile, Council Member Stevens's sentiments indicate that she has no interest in ever addressing any submissions by Ms. Smart. The lack of discussion regarding the contents of the petition, coupled with Council

Member Steven's comments, are evidence that the Council's decision was not based on careful consideration of Ms. Smart's fitness to return to society; it was based on her notoriety in New Hampshire. Thus, the decision was arbitrary and the Court should issue a writ of mandamus ordering the Governor and Council to re-visit the matter.

Ms. Smart has no alternative means to challenge the Council's decision.

Ms. Smart is entitled to mandamus relief in this instance as she has no other way to challenge the Executive Council's decision. There are no other legislatively or administratively created processes by which she can challenge the decision.

In New Hampshire, the power to pardon or commute sentences lies solely with the Governor and the Executive Council. *N.H. Const.*, Part II., Art. 52. Neither the state constitution nor legislative statutes provide any means or process for persons serving life without parole sentences to seek relief from such sentences. The Court, in Farrow, acknowledged this in stating that a prisoner can avoid extermination "with a pardon if he can demonstrate to the **Governor and Council** his fitness to return to society without being a threat to it." State v. Farrow, 118 at 305 (emphasis added). There is no other executive body, tribunal, or other entity that can provide Ms. Smart with the relief she seeks other than the Governor and Executive Council. Even this Court, the Supreme Court of the State of New Hampshire, does not have the authority to grant Ms. Smart a pardon or commutation. The Court can neither order the Governor and Executive Council to grant Ms. Smart a pardon or commutation, nor can it order them to grant Ms. Smart a hearing on her petition. See Rockhouse Mountain Property Owners Ass'n, Inc. v. Town of Conway, 127 N.H. at 607. In the present matter, Court can only order the Governor and Executive Council to perform their duties in good faith. See In re Cigna Healthcare, Inc., 146

N.H. at 687. Thus, given the lack of any alternative means to challenge the decisions of the Governor and Executive Council, the issuing of a writ of mandamus is appropriate in this case.

CONCLUSION

Ms. Smart is serving a legislatively mandated sentence of life without parole. The only way for her to re-enter the community is via a pardon or commutation of her sentence to allow for parole. As such, under Farrow, she is entitled to demonstrate her fitness to return to society without posing a threat to others in the community. In New Hampshire, only the Governor, with advice from the Executive Council, have the authority to grant pardons or commutations. In this case, the Governor and Executive Council engaged in no discussions about Ms. Smart's petition or its failure to demonstrate her fitness to return to society. What little discussion did occur provides evidence that the Council's decision was made arbitrarily and in bad faith. To remedy this, the Court should issue a writ of mandamus ordering the Governor and Executive Council to re-consider Ms. Smart's request in a manner consistent with the dictates set forth in Farrow.

REQUEST FOR ORAL ARGUMENT

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

Respectfully Submitted,

PAMELA SMART
By her attorney

July 25, 2022

/S/ Mark L. Sisti
Mark L. Sisti, Esq.
NH Bar #2357
Sisti Law Offices
387 Dover Road
Chichester, NH 03258
(603) 224-4220

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,388 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/S/ Mark L. Sisti
Mark L. Sisti, Esq.

CERTIFICATION OF DECISION APPEALED

I hereby certify that a copy of the Decision being appealed is included with this filing and found on page 17 of the Governor and Executive Council Minutes at Item #124.

/S/ Mark L. Sisti
Mark L. Sisti, Esq.

CERTIFICATE OF SERVICE

I, Mark L. Sisti, hereby certify that a copy of the foregoing Petitioner's Brief in Support of Petition for Writ of Mandamus was forwarded on this 25th day of July, 2022 to the Attorney General's Office, via the Court's electronic filing system.

/S/ Mark L. Sisti
Mark L. Sisti, Esq.