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**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2022-SC-0198**

LANCE CONN, ET AL.

APPELLANTS

V.

**ON REVIEW FROM COURT OF APPEALS
NO. 2020-CA-1495
FRANKLIN CIRCUIT COURT NO. 13-CI-1118**

KENTUCKY PAROLE BOARD

APPELLEE

BRIEF OF APPELLEE

Respectfully submitted,

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CERTIFICATION REQUIRED BY RAP 5(A) and 30(B)

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first class mail, postage prepaid, on April 10, 2023: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601; Hon. Timothy G. Arnold, Hon. Andrea Reed, Department of Public Advocacy, Post-Trial Division, 5 Mill Creek Park, Frankfort, KY, 40601; 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, KY 40601. The undersigned does also certify that the record on appeal was not withdrawn by the party filing this brief.

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STATEMENT CONCERNING ORAL ARGUMENT

The Court's Order granting discretionary review did not designate that oral argument would take place. The Kentucky Parole Board does not desire oral argument in this matter as the appeal centers on well-settled, uncomplicated issues of law. Accordingly, oral argument is not necessary to the parties and would not likely assist the Court.

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(3)(a) because, excluding the part of the documents exempted by RAP 15(D) and 31(G)(5), this document contains 2,759 words.

/s/ Seth E. Fawns _____
Seth E. Fawns

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COUNTERSTATEMENT OF CASE

This matter was brought in the Franklin Circuit Court by prisoners in the custody of the Kentucky Department of Corrections (“KDOC”) as a Petition for Declaration of rights challenging certain administrative regulations of the Kentucky Parole Board. (Transcript of Record, “T.R.” at 841-852, 10/1/2020 Summary Judgment Order.) Among their claims, Appellants asserted that the Parole Board (“Board”) cannot lawfully order a parole-eligible inmate to serve-out a life sentence. (T.R. at 841-852, 10/1/2020 Summary Judgment Order.) In an October 1, 2020 Order, the Franklin Circuit Court granted summary judgment to the Board on this issue, rejecting Appellants’ claim that the practice of issuing serve-outs on life sentences violates the separation of powers. (T.R. at 841-852, 10/1/2020 Summary Judgment Order.) The Franklin Circuit Court cited *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), finding that in *Simmons* this Court confronted the same scenario at issue here: a serve-out issued on a parole-eligible life sentence. Looking to *Simmons*, the Franklin Circuit noted that “the power to grant parole is purely an executive function,” and issuing the serve-out on a parole-eligible life sentence does not encroach upon “the functions reserved for the judicial or legislative branches of government.” (T.R. at 841-852, 10/1/2020 Summary Judgment Order.)

The Franklin Circuit Court’s order was not final and appealable as the court granted summary judgment on some issues (such as the serve-out issue) but denied summary judgment on other issues. (T.R. at 841-852, 10/1/2020 Summary Judgment Order.) Appellants then moved the Franklin Circuit Court to issue a final and appealable judgment on the claim of whether the Board can order an inmate to serve-out a life sentence. (T.R. at 855-57, 10/4/2020 Motion.) The Court granted Appellants’ motion, certifying the issue

of whether the Board can order an inmate to serve-out a life sentence, making it final and appealable under CR 54.02. (T.R. at 859-862, 10/7/2020 Order to Sever.)

Appellants then appealed this single issue to the Kentucky Court of Appeals. The Court of Appeals affirmed the Franklin Circuit Court’s decision. *Conn v. Kentucky Parole Board*, --S.W.3d--, 2022 WL 1194186 (Ky. App. Apr. 22, 2022). In analyzing the statutory authority of the Parole Board to issue a serve-out on a life sentence, the Court of Appeals found that “the Legislature has not prohibited the Board from authorizing a serve-out for life sentences.” *Id.*, at *3. Moreover, the Court of Appeals found that serve-outs of life sentences by the Parole Board did not violate the separation of powers doctrine since a serve-out on a life sentence does not violate the clear guidelines established by statute. *Id.* The Court of Appeals found that *Simmons* supported its conclusion.¹

Following the Court of Appeals opinion, Appellants sought discretionary review by this Court, which this Court granted on December 7, 2022.

¹ Although unpublished and not binding, it is worth noting the Court of Appeals has, on many other occasions, denied relief to inmates serving life sentences who received a serve-out from the Parole Board. *See Cosby v. Kentucky Parole Bd.*, No. 2004-CA-002240, 2006 WL 574403 (Ky. App. Mar. 10, 2006) (unpublished), *discretionary reviewed denied*; *Reyes v. Coy*, No. 2003-CA-002682, 2004 WL 2914912 (Ky. App. Dec. 17, 2004) (unpublished), *discretionary reviewed denied*; *Preston v. Coy*, No. 2003-CA-000459, 2004 WL 1586844 (Ky. App. Jul. 16, 2004) (unpublished); *Cavender v. Mudd*, No. 2008-CA-001988, 2009 WL 2835173 (Ky. App. Sep. 4, 2009) (unpublished), *discretionary reviewed denied*; *Henderson v. Kentucky State Parole Bd.*, No. 2007-CA-001024, 2008 WL 4182041 (Ky. App. Sep. 12, 2008) (unpublished), *rehearing denied, discretionary review denied*; *Gerton v. Justice and Public Safety Cabinet*, No. 2009-CA-1712, 2010 WL 2218774 (Ky. App. June 4, 2010) (unpublished); *Hermansen v. Bevin*, No. 2015-CA-1005, 2016 WL 6892580; (Ky. App. Nov. 23, 2016) (unpublished), *discretionary reviewed denied*; *Dunn v. Commonwealth*, No. 2020-CA-1430, 2022 WL 2898323 (Ky. App. July 22, 2022) (unpublished).

ARGUMENT

I. DECISIONS REGARDING PAROLE ARE WITHIN THE DISCRETION OF THE PAROLE BOARD.

Parole is not a right, but a privilege afforded as a matter of grace to those persons deemed eligible by the Parole Board. *See Land v. Commonwealth*, 986 S.W.2d 440, 442 (Ky. 1999); *Commonwealth v. Polsgrove*, 22 S.W.2d 126, 128 (Ky. 1929). Parole is not a liberty interest in which inmates have a legitimate claim of entitlement. *Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky. App. 1996) “[T]here is simply no liberty interest in parole.” *Phillips v. Commonwealth*, 382 S.W.3d 52, 55 (Ky. App. 2012).

Whatever criteria Appellants might meet, the Board would not be required to grant parole because there is no statutory mandate that any offender be released prior to the expiration of his or her sentence. *Garland v. Commonwealth*, 997 S.W.2d 487, 489 (Ky. App. 1999) (citing *Belcher, supra*). As the Court in *Garland* explained, “[N]othing in the parole statutes or regulations mandates the granting of parole or diminishes the discretionary nature of the Parole Board's authority.” *Id.* Even if an inmate satisfies all minimum parole eligibility requirements, the Parole Board may still deny parole and defer an inmate’s parole eligibility. *See id.* 997 S.W.2d at 489; *Belcher*, 917 S.W.2d at 586.

In short, whether to grant parole rests within the discretion of the Board. *See KRS 439.340(1)* (“The board *may* release on parole persons ... eligible for parole[.]”) (emphasis added). Indeed, decisions regarding parole are clearly, as a matter of law, within the Board’s discretion. *See Willard v. Ferguson*, 358 S.W.2d 516 (Ky. 1962).

II. KRS 439.340 ALLOWS THE PAROLE BOARD TO ISSUE SERVE-OUTS ON LIFE SENTENCES.

At issue here is what the Franklin Circuit Court referred to as a “parole-eligible life sentence.” For all parole-eligible sentences (not just parole-eligible life sentences), an initial parole eligibility date is set. *See* 501 KAR 1:030 Section 3(1). The difference between a parole-eligible life sentence and a life sentence that is not parole-eligible is this initial parole eligibility date – only the parole-eligible life sentence will get an initial parole eligibility date.

Except as provided in KRS 439.340(14), a subsequent parole review after this initial parole eligibility date is at the discretion of the Board. 501 KAR 1:030 Section 3(2)(a). In other words, with the exception of limitations placed on the Board’s authority in KRS 439.340(14), if parole is not granted at the initial review, the Board has the discretion to set a date for an additional review (a deferment) or decide that the offender will not be reviewed for parole again (a serve-out). As spelled out in 501 KAR 1:030 Section 3(2)(b), at the initial review for parole, or at any subsequent review, the Board is authorized to serve-out a sentence. A “[s]erve-out” means a decision of the board that an inmate shall serve until the completion of his or her sentence.” 501 KAR 1:030 Section 1(10).

While KRS 439.340(14) places some limitations on the Board’s discretion, it does not limit the Board’s authority to issue a serve-out. The statute merely requires that any deferment greater than five years be approved by a majority vote of the full Board. KRS 439.340(14)(a). The General Assembly does not limit the Board’s authority by mandating that it cannot issue a serve-out on a parole-eligible life sentence. Rather, the legislature

clearly envisioned that such serve-outs could be ordered, as long as they are approved by a majority vote of the full Board.

The express language of KRS 439.340 states that the General Assembly has placed maximum periods of deferment on classes of prisoners, “except for life sentences.” KRS 439.340(14)(b) (“No deferment shall exceed ten (10) years, except for life sentences.”). The General Assembly has thus authorized the Parole Board to defer consideration for those with life sentences to the maximum of their sentence: life. This is reiterated in the regulations, which state, “Except as provided in KRS 439.340(14):...(b) The board, at the initial or a subsequent review, may order a serve-out on a sentence.” 501 KAR 1:030 Section 3(2). The Board’s regulations clearly acknowledge that some limitations for deferments have been place by the General Assembly in KRS 439.340(14), but KRS 439.340(14) expressly does not place such limitations on parole decisions for those serving life sentences; as such, the Parole Board may exercise its discretion and order such individuals to serve-out their sentences.

III. A SERVE-OUT OF A LIFE SENTENCE DOES NOT VIOLATE THE SEPERATION OF POWERS DOCTRINE.

Apparently acknowledging that the General Assembly has declined to limit the Board’s discretion in relation to issuing a serve-out on a parole-eligible sentence, Appellants focus on the separation of powers and argue that a serve-out encroaches upon the authority of the judiciary by changing a parole-eligible sentence to one no longer eligible for parole.

This argument was addressed in *Simmons*, where the Court of Appeals found that the Board has the authority to issue a serve-out on a parole-eligible life sentence. 232 S.W.3d 531 (Ky. App. 2007). The Court there held that parole is “purely an executive

function,” and declined to find that the Board’s exercise of the power to issue a serve-out invaded functions reserved for the judicial or legislative branches. *Id.* at 535.

Appellants’ initial challenge to *Simmons* is essentially the same separation of powers argument addressed in *Simmons* – that by issuing the serve-out, the Board is changing an offender’s sentence. This is an inaccurate description of the serve-out. As explained above, the difference between a sentence with the possibility of parole and a sentence without that possibility of parole is the initial parole eligibility date. Per 501 KAR 1:030, parole consideration after the initial parole review is solely at the discretion of the Parole Board. In other words, a parole-eligible sentence of any type only guarantees an offender one appearance before the Board. For any parole-eligible sentence, including a parole-eligible life sentence, subsequent parole review, with limited exceptions set out in statute, is at the discretion of the Board.

Further, an offender on parole serving a life sentence is still serving a life sentence, he is simply serving it under supervision in the community rather than within the four walls of a jail or prison. Once the offender is convicted and has been sentenced and remanded to the custody of the Department of Corrections, it moves to the executive branch to determine where an offender will serve his sentence, and parole consideration is part of that determination. Parole is simply a possibility of where the offender may serve the sentence the judiciary has imposed. Prisoners not only have no right to be housed at a particular prison, they also have no right to be granted parole. *Land*, 986 S.W.2d at 442; *Belcher*, 917 S.W.2d 584. As Kentucky courts have consistently stressed, granting or denying parole is an “executive function, not a judicial one.” *Commonwealth v. Cornelius*, 606 S.W.2d 172, 174 (Ky. App. 1980). It is a rational extension that the decisions that go hand in hand with

that process, such as deferments or serve-outs, are also executive functions, not judicial ones. The parole process, including issuing a serve-out, does not encroach upon legislative or judicial authority.

As former Chief Justice Palmore bluntly wrote:

[T]he fundamental fact [is] that when a person has been convicted of a crime and has begun to serve his sentence the function and authority of the trial court is finished. What then happens to the prisoner is entirely in the bailiwick of the executive branch of government, and is no business of the courts, including the trial court.

Peck v. Conder, 540 S.W.2d 10, 12 (Ky. 1976).

In discussing the issue of whether, in issuing a serve-out order, the Board exercises power held by the legislative or judicial branch – which is the crux of the argument here, as Appellants argue that the serve-out changes the sentence from one with the possibility of parole to one without the possibility of parole –, this Court explained that the power to grant parole is purely an executive function. *Simmons*, 232 S.W.3d at 535 (citing *Cornelius*, 606 S.W.2d 172). 501 KAR 1:030 establishes that any parole review beyond the initial parole eligibility date is purely at the discretion of the Board. “A constitutional violation of separation of powers occurs when, and only when, one branch of government exercises power properly belonging to another branch.” *Prater v. Commonwealth*, 82 S.W.3d 898, 907 (Ky. 2002). Here, the Parole Board is exercising the discretion provided to it and is not usurping the role of the judiciary, as parole decisions are purely an executive function. As such, no violation of the separation of powers has occurred.

Appellants further attempt to challenge *Simmons*, arguing that it allows the Parole Board to impose a sentence greater than the maximum allowed by the General Assembly. In so arguing, Appellants cite essentially the same cases cited in the lower courts. The

Franklin Circuit Court addressed each case cited by Appellants, ultimately finding that *Simmons* “has not been distinguished in any way, and thus the Board still retains the power to serve-out a parole-eligible sentence.” (T.R. at 841-852, 10/1/2020 Summary Judgment Order.) The Court of Appeals similarly found that the cases cited by Appellants “do not overturn *Simmons* nor create a deferment mandate for life sentences.” *Conn v. Kentucky Parole Board*, 2022 WL 1194186, at *4.

Appellants do not add anything to the analysis of those cases before this Court that would detract from the lower courts’ determination that those cases did not overrule *Simmons* nor create a deferment mandate for life sentences.

IV. A SERVE-OUT OF A LIFE SENTENCE IS NOT THE IMPOSITION OF A NEW SENTENCE.

“The imposition of a serve-out is not punishment. It is merely a ruling by the Parole Board which is within its sound discretion.” *Simmons*, 232 S.W.3d at 535. A defendant serving a sentence of life with the possibility of parole is nonetheless serving a life sentence as handed down by the sentencing court. If the Parole Board ultimately elects not to grant that individual the privilege of parole, the Board has not enhanced the sentence provided by the sentencing court, nor has it violated the separation of powers. A serve-out of a judicially imposed life-sentence does not somehow alter the judicially imposed sentence or otherwise change or enhance the punishment; the defendant still faces the “maximum sentence” provided by the sentencing court, “no more and no less.” *Garland v. Commonwealth*, 997 S.W.2d 487, 489 (Ky. App. 1999). A sentence of life with the possibility of parole merely offers the opportunity for parole and does not mean a defendant will be extended that grace, as “he does not have to be granted parole at all.” *Id.* The Parole Board can never be required to release an offender before the completion of his or her

maximum sentence. *Id.* at 490.

Here, the maximum sentence, as given by the sentencing court, is life in prison. Once that initial parole eligibility hearing has been held, the Parole Board is well within its executive role, and does not violate the role of the judiciary, when it decides to require the individual to complete his sentence by serving out the remainder.²

Appellants are incorrect to claim that the issuance of a serve-out of a life sentence is “effectively overruling the sentence imposed by the judiciary.” Appellants’ Brief at 9. In issuing a serve-out of a life sentence, the Parole Board is not determining a new sentence. Rather, the individual has already been sentenced to life by the judiciary, and the Parole Board is merely exercising its appropriate discretion in determining whether or not that individual will be extended the grace of parole or if he should continue serving his sentence within the confines of the prison walls. This is not the imposition of a new sentence but the exercise of the exact discretion that the Parole Board has been given. *Garland, supra; Stewart v. Commonwealth*, 153 SW.3d 789, 793 (Ky. 2005). The Appellants’ court-issued sentences, which contain the phrase “imprisonment for life,” have never changed.

CONCLUSION

WHEREFORE, based on the foregoing, the Kentucky Parole Board respectfully requests that this Court Affirm the Opinion of the Court of Appeals.

² Of course, an inmate serving a life sentence who is given a serve-out can still be released via executive clemency. Also, an inmate sentenced to life imprisonment and given a serve-out can nonetheless receive medical parole under KRS 439.3405, and the Board's Policies and Procedures may permit the Chair of the Board to request reconsideration of any case. Although the odds of such remaining avenues for parole or release are remote, it is not necessarily a given that an inmate receiving a serve-out on a life sentence will remain serving that sentence behind prison walls for the remainder of his life.

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