

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

DAVID J. EUCHNER, PCC#65694, SB#021768

Attorney for Arizona Attorneys for Criminal Justice

33 N. Stone Ave., 21st Floor, Tucson, Arizona 85701

TEL: (520) 724-6800

FAX: (520) 770-4168

David.Euchner@pima.gov

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,

Plaintiff,

v.

RONNIE ROY VERA,

Defendant.

) Case No. CR-51483

) **AMICUS CURIAE BRIEF OF ARIZONA**
) **ATTORNEYS FOR CRIMINAL JUSTICE**

) Honorable Kyle Bryson
) Division 5

INTRODUCTION

In Arizona, there are more than a dozen different forms of “release,” including parole, work furlough, medical furlough, home arrest, administrative release, temporary release, discretionary release, provisional release, mandatory release, earned release credits (which themselves come in nearly 10 different variations), community supervision, and executive clemency. This panoply of release types – all of which are governed by an interconnected combination of formal statutes, case law, and administrative rules and policies – often leads to confusion about what exactly an inmate is eligible for, when that eligibility begins, and the likelihood of actually being released.

As those seeking relief under *Miller v. Alabama*, 132 S.Ct. 2455 (2012), must have received a life sentence to fall within *Miller*’s ambit, the discussion here is limited to those forms of release available to Arizona inmates serving life sentences – *i.e.* parole and executive clemency.

1 **INTEREST OF *AMICUS CURIAE***

2 Arizona Attorneys for Criminal Justice (AACJ) is a statewide not-for-profit membership
3 organization representing criminal defense lawyers licensed to practice in the State of Arizona,
4 law students, and other associated professionals, which is dedicated to protecting the rights of the
5 criminally accused in the courts and the legislature, promoting excellence in the practice of
6 criminal law through education, training, and mutual assistance, and fostering public awareness
7 of citizens’ rights, the criminal justice system, and the role of the defense lawyer. AACJ offers
8 this brief in support of Mr. Vera’s petition for post-conviction relief because the issue presented
9 here is important to the right of criminal defendants to be free from cruel and unusual
10 punishment.

11
12 **BASIC FRAMEWORK**

13 Parole is “a conditional release from incarceration allowing the individual to serve the
14 remainder of their sentence outside the institution if the individual abides by specific conditions.”
15 *Exhibit A: Board of Executive Clemency, Board Policy No. 100.01.B, effective date May 1, 2008.*
16 The power to grant parole is vested exclusively in the Board of Executive Clemency (formerly
17 known as the Board of Pardons and Paroles). A.R.S. § 31-402. As discussed in more detail
18 below, parole is not available to any inmate whose offense occurred after January 1, 1994, but
19 remains available to those inmates whose offense occurred before that date. A.R.S. § 41-
20 1604.09(I).

21 Executive clemency consists of three distinct forms of relief: pardons, reprieves, and
22 commutations. As pardons and reprieves are almost exclusively limited to death penalty cases,
23 they generally do not apply to juvenile offenders seeking relief under *Miller*. As such, only
24 commutations will be discussed here.¹

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¹ The terms “executive clemency” and “commutation” will be used interchangeably in this memo
for ease of reference.

1 A commutation is “[a] change or modification of a sentence.”
2 <http://www.azboec.gov/hearings/commutation.asp> (last visited Nov. 7, 2013) (definition of
3 “Commutation of Sentence”). The power to grant commutation is vested exclusively in the
4 Governor, “subject to any limitations provided by law.” Ariz. Const. art. V, § 5; A.R.S. § 31-443.
5 Currently, the only “limitation provided by law” is that the Governor may not grant a
6 commutation “unless it has first been recommended by the [Board of Executive Clemency].”
7 A.R.S. § 31-402. As discussed in more detail below, commutation remains available to all
8 eligible inmates, regardless of the inmate’s offense date. However, commutation is the only form
9 of release available to juveniles sentenced to life imprisonment for offenses committed on or
10 after January 1, 1994.

11 In short, the Board of Executive Clemency considers applications for both parole and
12 executive clemency. The Board has the exclusive authority to grant paroles, but has no authority
13 to grant commutations; the Board may only make recommendations for clemency to the
14 Governor. The Governor has the final, exclusive authority to grant or deny all applications for
15 executive clemency, including commutations.

16 The Board of Executive Clemency consists of five members, appointed by the Governor,
17 to five-year terms. A.R.S. § 31-401. One member of the Board is selected by the Governor as the
18 Board’s Chairman *Id.* A minimum of three Board members must be present to form a voting
19 quorum, though the Chairman can designate that two members constitutes a quorum, with the
20 Chairman voting after-the-fact on any tie votes (*i.e.* if a two-member quorum splits its vote 1-1,
21 the Chairman will cast the deciding vote). A.R.S. § 31-401(I)-(J).

22 23 24 **PAROLE PROCESS**

25 Parole applications are initiated automatically in Arizona. When an inmate first begins
26 serving his/her sentence and enters the Department of Corrections (“DOC”), the Time
27 Computation Unit (“Time Comp”) will conduct an “Initial Classification” review and determine
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1 an inmate's parole eligibility date, if any. *Exhibit B: Arizona Department of Corrections,*
2 *Chapter 1000, Department Order 1002.1.2, effective date January 8, 2003.* Parole eligibility
3 depends on the sentence imposed, and the date of the offense. Parole is only available for those
4 inmates whose offense dates are prior to January 1, 1994. A.R.S. § 41-1604.09(I); *see also*
5 *Exhibit B* at 1002.1.3. Inmates whose date of offense is on or after January 1, 1994 are not
6 eligible for parole, work furlough, home arrest, discretionary release, provisional release, or
7 mandatory release, and Time Comp will not initiate parole proceedings for such inmates. A.R.S.
8 § 41-1604.09(I), *see also Exhibit B* at 1002.1.3. The only avenue for release for such inmates is
9 via commutation, discussed *infra*.

10 For those inmates who are eligible for parole, Time Comp will automatically initiate
11 parole proceedings between seven and nineteen months in advance of the inmate's parole
12 eligibility date, depending on the date of offense. *Exhibit B* at 1002.05. When the proceedings
13 are initiated, Time Comp will certify the inmate's eligibility, and forward the inmate's name to
14 the Board of Executive Clemency (the "Board").

15 Once Time Comp initiates parole proceedings for eligible inmates, the Board will set a
16 parole hearing date, to occur before either the Board itself or by a hearing officer designated by
17 the Board. A.R.S. § 31-411. If the Board hears the application, an in-person hearing with the
18 inmate will be conducted. *Id.* At least fifteen days prior to the scheduled hearing date, the Board
19 will provide notice to, and solicit input from, the Attorney General's Office, the presiding judge
20 of the Superior Court in which the inmate was convicted, the County Attorney's Office in the
21 county the inmate was convicted, and the victim. *Id.*² At the hearing, the inmate "shall be given
22 an opportunity to be heard," and may present family, friends, the inmate's lawyer, and any other
23 witnesses in support of the inmate. *Id.*

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28 ² The notice and solicitation requirement is waived if the inmate is in imminent danger of death,
or is within 210 days from the expiration of the inmate's sentence. A.R.S. § 31-411(I).

1 If the Board designates a hearing officer, the hearing officer will conduct a hearing in the
2 same manner described above. *Id.* Within thirty days of the hearing, the hearing officer will
3 submit a written report to the Board recommending whether or not parole should be granted. *Id.*
4 Within thirty days of that recommendation, the Board shall review the written report and vote to
5 either approve or reject the recommendation. *Id.*

6 At the conclusion of a parole hearing, or upon review of a hearing officer's
7 recommendation, the Board *shall* vote to grant parole if "it appears to the board, in its sole
8 discretion, that there is a substantial probability that the applicant will remain at liberty without
9 violating the law and the release is in the best interests of the state." A.R.S. § 31-412. By statute,
10 parole must be granted if the Board finds the above-factors in favor of the inmate. *Id.* The vote
11 must be at least a majority vote for parole to be granted; tie votes (*i.e.* a 2-2 split) act to deny
12 parole. For certain crimes, the vote must be unanimous if less than a full quorum of the Board is
13 present. A.R.S. § 31-412(C).

14 If the Board grants parole, it may impose any conditions (such as electronic monitoring,
15 attendance at Alcoholics Anonymous or similar programs, monthly supervision fees, etc.) that it
16 sees fit. A.R.S. § 31-411. The inmate will then be released from DOC custody subject to
17 whatever parole conditions the Board has imposed. A.R.S. § 31-412(A).

18 If the Board denies parole, Time Comp will automatically recertify the inmate for parole
19 again in four months, and the Board will conduct another parole hearing within six months.
20 *Exhibit B* at 1002.05.1.11. The Board may stipulate, however, that recertification not occur for
21 up to one year from the date of previous denial, or, in "extenuating circumstances," that
22 recertification occur within one month of the previous denial. *Exhibit B* at 1002.06.1.1.6. This
23 process will automatically repeat until the inmate is either granted parole, or the inmate's
24 sentence concludes.
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27 **EXECUTIVE CLEMENCY PROCESS**
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1 By comparison, Executive Clemency proceedings are not automatic. Time Comp will
2 take no action until the inmate fills out and submits a “Commutation of Sentence Application”
3 form. The application form is available on the Board’s website. *See Exhibit C*. Once Time Comp
4 receives the application form, it will determine whether the inmate is eligible for commutation.
5 Eligibility depends on the inmate’s sentence. Generally, an inmate must have served at least two
6 years from the sentence-begin date, and not be within one year of the sentence-end date. *Exhibit*
7 *D, Board of Executive Clemency, Board Policy No. BOEC 400.13.G, effective date Oct. 19,*
8 *2011*. Certain exceptions may allow the inmate to apply at an earlier date, including a judicial
9 order under A.R.S. § 13-603(L) (indicating that the sentencing judge believes a sentence is
10 excessive), and whether the inmate is in imminent danger of death or in a persistent vegetative
11 state. *See Exhibit D; see also* A.R.S. § 13-603(L).

12 The eligibility criteria are different for “life” and “natural life” sentences. Inmates
13 sentenced to “natural life” will never be eligible for parole, commutation, or release of any kind.
14 A.R.S. § 13-751(A). Inmates sentenced to “life” under A.R.S. § 13-751 (for first degree murder)
15 will be eligible to apply for commutation after twenty-five years (or thirty-five years, depending
16 on the age of the victim). A.R.S. § 13-751(A). Inmates sentenced to “life” under A.R.S. § 13-706
17 (for “third strike” serious offenses) will be eligible to apply in as few as two years, or as many as
18 thirty-five years, depending on the nature of the inmate’s prior convictions. A.R.S. § 13-706(A)-
19 (B).

20 For those inmates who are eligible to apply, Time Comp will forward the inmate's
21 application to the Board of Executive Clemency (the “Board”), which will set a “Phase I”
22 hearing date. The Phase I hearing is an in absentia hearing (*i.e.* the inmate is not present);
23 however, family, friends, victims, and other witnesses and legal counsel may submit written
24 information or provide oral testimony. *Exhibit D* at 400.13.G(F). At the hearing, the Board will
25 review the application, the inmate's files, and any letters or other relevant information. *Id.* At the
26 conclusion of the hearing, the Board may vote to deny the application, or to pass the application
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1 to a “Phase II” hearing for further investigation. *Id.* The vote must be by at least a majority of
2 the Board members present; a tie vote (*i.e.* a 2-2 split) will result in a denial of the application.
3 *Id.*

4 If the Board denies the application, the inmate will not be eligible to apply for
5 commutation again for a minimum of two years. *Exhibit D* at 400.13.G(J). For certain offenses,
6 the inmate cannot apply again for a period of five years. A.R.S. § 31-403(A). The Board may
7 also, in its sole discretion, lengthen the period of time to 10 years or more for certain offenses.
8 A.R.S. § 31-403(C).

9 If the Board passes the application to a Phase II hearing, the Board will schedule a Phase
10 II hearing date. *Exhibit D* at 400.13.G(F). Unlike a parole hearing, however, the inmate has no
11 statutory right to be present at the hearing, nor does the inmate have a right to be heard at the
12 hearing. *Cf.* A.R.S. § 13-411(B) with A.R.S. § 31-402(C)(2). As a matter of practice, the Board
13 will often interview the inmate as part of the hearing, but it is not required to do so. The Board is,
14 however, statutorily required to give notice to, and provide an opportunity, for the victim, county
15 attorney, and presiding judge to present and give testimony at the hearing. A.R.S. § 31-
16 402(C)(2).
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18 At the conclusion of the Phase II hearing, the Board *may* recommend commutation to the
19 Governor only if “after finding by clear and convincing evidence that the sentence imposed is
20 clearly excessive given the nature of the offense and the record of the offender and that there is a
21 substantial probability that when released the offender will conform the offender's conduct to the
22 requirements of the law.” A.R.S. § 31-402(C)(2). Notably, unlike parole, even if the Board finds
23 all of the above factors in favor of the inmate, it is not statutorily required to recommend
24 commutation to the Governor. *Cf.* A.R.S. § 31-412 with A.R.S. § 31-402(C)(2). The vote must
25 be at least a majority vote for commutation to be recommended; tie votes (*i.e.* a 2-2 split) act to
26 deny the application. *Exhibit D.*
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1 If the Board votes *not* to recommend commutation to the Governor, the inmate will not
2 be eligible to apply for commutation again for a minimum of two years. *Exhibit D* at
3 400.13.G(J). For certain offenses, the inmate cannot apply again for a period of five years.
4 A.R.S. § 31-403(A). The Board may also, in its sole discretion, lengthen the period of time to ten
5 years or more for certain offenses. A.R.S. § 31-403(C).

6 If the Board votes to recommend commutation to the Governor, the Board will prepare a
7 letter of recommendation that includes the reasons for the recommendation, which will be
8 forwarded to the Governor along with the case materials considered by the Board at the Phase II
9 hearing. *Exhibit D* at 400.13.G(G). Letters of dissent may also be prepared and forwarded with
10 the recommendation. *Exhibit D* at 400.13.G(H). The Governor is not bound by the
11 recommendation, and may grant or deny clemency for any reason. Ariz. Const. art. V, § 5; *see*
12 *also* A.R.S. § 31-443. However, if the recommendation was by a unanimous vote, the Governor
13 must make a decision within ninety days; if the Governor takes no action within ninety days, the
14 Board's recommendation automatically goes into effect. A.R.S. § 31-402(D). However, if the
15 Board's vote was not unanimous, the Governor may act on the Board's recommendation at any
16 time – days, months, years later, or even never.

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18 If the Governor accepts the Board's recommendation and grants a commutation, the
19 inmate's sentence will be modified in accordance with any conditions imposed by the Governor.
20 For example, an inmate may have a "natural life" sentence commuted to a term of years. If the
21 inmate has not yet served that full term of years, however, the inmate will remain in prison until
22 the full term has been served. As another example, the Governor's commutation may make an
23 inmate eligible for parole who would not otherwise be eligible for parole (those serving "natural
24 life" sentences, for instance). If the inmate is made parole eligible, parole proceedings will be
25 initiated (as discussed *infra*) but the inmate will not be released until parole is granted.

26 If the Governor does not accept the Board's recommendation and denies clemency, the
27 inmate will not be eligible to apply for commutation again for a minimum of two years. *Exhibit*
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1 D at 400.13.G(J). For certain offenses, the inmate cannot apply again for a period of five years.
2 A.R.S. § 31-403(A).

4 SUMMARY COMPARISON

5 Despite some surface similarities, parole and executive clemency are very different
6 release mechanisms in Arizona. As the Supreme Court has long recognized, parole is a “regular
7 part of the rehabilitative process,” such that it is generally “possible to predict... when parole
8 might be granted.” *Solem v. Helm*, 463 U.S. 277, 300-01 (1983). “Commutation, on the other
9 hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any
10 time for any reason without reference to any standards.” *Id.*

11 As a result, parole and executive clemency impose very different requirements, and
12 impose very different standards, before relief may be granted. A few of the key differences are
13 summarized, as follows:

14 SUMMARY OF KEY DIFFERENCES		
	16 Parole	17 Clemency
18 Authority to grant relief?	Board of Executive Clemency	Governor (upon recommendation by Board of Executive Clemency)
19 Process automatically initiated?	20 Yes	No
21 Number of hearings before relief may be granted?	22 1	2, plus consideration by Governor
23 Right to be present at hearing?	24 Yes	No
25 Right to be heard at hearing?	26 Yes	No
27 Relief mandatory if Board finds in inmate's favor?	28 Yes	No

SUMMARY OF KEY DIFFERENCES

	Parole	Clemency
If relief denied, time before may apply again?	1 month to 1 year	2 years to 10+ years
Reapplication process automatic?	Yes	No

The differences between these two mechanisms have resulted in drastically different release rates. Since July 2003, 4,607 Arizona inmates have been considered for parole. Of those, 1,060 – or 23.0% – have been granted parole and been released. By comparison, 6,255 inmates have applied for executive clemency in that same time frame. Of those, only 82 – a mere 1.3% – have been granted relief. In the past year, that number has fallen even further – only 6 out of 1,122 applicants (0.5%) received relief. Put another way, over the past ten years, an Arizona inmate had a 1-in-4 chance of being granted parole, but just a 1-in-100 chance of obtaining executive clemency, and only a 1-in-200 chance over the past year.

The following tables demonstrate both the overall and year-to-year differences in relief rates for parole and executive clemency:

PAROLE			
Fiscal Year	Hearings	Granted	%
2004	694	242	34.9%
2005	574	147	25.6%
2006	485	126	26.0%
2007	427	72	16.9%
2008	458	83	18.1%

PAROLE

Fiscal Year	Hearings	Granted	%
2009	472	88	18.6%
2010	439	68	15.5%
2011	313	82	26.2%
2012	329	72	21.9%
2013*	326	80	24.5%
TOTALS	4,607	1,060	23.0%

* Data current through July 2013. BOEC statistics, Fiscal Years 2004 through 2013, to date, attached as Exhibit E

EXECUTIVE CLEMENCY

Fiscal Year	Phase I Hearings	Phase II Hearings	Recommendations	Governor	%
2004	919	87	72	11	1.2%
2005	907	110	85	13	1.4%
2006	581	84	47	9	1.5%
2007	656	102	56	4	0.6%
2008	538	94	54	7	1.3%
2009	606	97	49	9	1.5%
2010	366	53	31	6	1.6%
2011	236	54	34	8	3.4%
2012	324	70	40	9	2.8%
2013*	1,122	60	19	6	0.5%
TOTALS	6,255	811	487	82	1.3%

* Data current through July 2013. BOEC statistics, Fiscal Years 2004 through 2013, to date, attached as Exhibit E.

1
2 **CONCLUSION**

3 *Miller* forbids any sentencing scheme that mandates a life without parole sentence on
4 those who were juveniles at the time of their offense. *Miller* also requires that the sentencing
5 judge have a choice of sentences, and that at least one of those options offer the juvenile a
6 “meaningful opportunity to obtain release.” Arizona’s sentencing scheme neither forbids a
7 mandatory life without parole sentence for juveniles, nor offers sentencing courts any sentencing
8 options that provide juvenile offenders with a “meaningful opportunity to obtain release.”

9 For all inmates, like Ronnie Vera, whose offense occurred after January 1, 1994, parole is
10 not available. As such, for homicide offenses, the two available sentences – “life” or “natural
11 life” – offer an illusory distinction. Neither option provides for parole, and are thus facially in
12 violation of *Miller*. That commutation is available for those sentenced to “life” does not remedy
13 the constitutional defect.

14 The Supreme Court has long held that “as a matter of law, parole and commutation are
15 different concepts,” and that the mere availability of commutation, along with its potential for
16 arbitrary exercise, “does not mitigate the harshness of the sentence of life without parole.”
17 *Graham v. Florida*, 130 S.Ct. 2011, 2027 (2010) (citing *Solem*, 463 U.S. at 300-01).

18 As a matter of *fact*, the recent history of executive clemency bears out why the Supreme
19 Court considers executive clemency a constitutionally insufficient substitute for parole. If parole
20 is the standard for what the Supreme Court considers a “meaningful opportunity for release,”
21 then an executive clemency process that is 25 to 50 times less likely to result in release cannot
22 reasonably be considered “meaningful.”

23 In short, as applied, there is no meaningful difference between “life” and “natural life”
24 sentences in Arizona. Neither provides parole eligibility and neither provides any meaningful
25 opportunity for release. The result is a sentencing scheme that violates *Miller v. Alabama* and the
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1 Eighth Amendment to the U.S. Constitution. Ronnie Vera's sentence stemming from that
2 sentencing scheme is thus also unconstitutional.

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4 DATED: November _____, 2013.

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6
7 By _____
8 DAVID J. EUCHNER
9 Attorney for AACJ

10 Copies of the foregoing
11 mailed/delivered on November _____, 2013 to:

12 Honorable Kyle Bryson, Division 5 DELIVERED
13 Pima County Superior Court
14 110 W. Congress Street
15 Tucson, AZ 85701

16 Lindsay St. John DELIVERED
17 Deputy Pima County Attorney
18 32 N. Stone Ave. #1400
19 Tucson, AZ 85701

20 Natman Schaye DELIVERED
21 131 E. Broadway
22 Tucson, AZ 85701
23
24
25
26
27
28