

BACK-END ADVOCACY: SECOND CHANCES AND SECOND LOOKS

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NACDL's 2020 Presidential Summit & Symposium

"Prison Brake: Rethinking the Sentencing Status Quo"

October 19-22, 2020



Names, dates, and some identifying details (regarding the underlying crime, victim, and victim's family) have been altered.



DISTRICT ATTORNEY'S OFFICE
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August 28, 2020

Lt. Gov. John Fetterman, Chairman
Lieutenant Governor's Office
Pennsylvania Board of Pardons
333 Market Street, 15th Floor
Harrisburg, Pennsylvania 17126-0333

VIA E-MAIL C/O SEC. BRANDON FLOOD ([redacted])
CC [redacted]
CC [redacted]

**Re: Request for Prosecutor Input - Commonwealth v. John Doe - Update
Common Pleas Docket: [redacted]
Inmate No.: [redacted]
Commutation Application No. [redacted]
BOP No. [redacted]**

Dear Chairman Fetterman:

We have previously written to the Board to express our support for Mr. Doe's application for a commutation of his life sentence. We continue to support his application. We write separately to briefly touch on issues that were raised last December as the Board considered Mr. Doe's application.

We attended the public hearing held regarding John Doe's commutation application on December 20, 2019. As you may remember, at that hearing, Attorney General Shapiro raised questions regarding the risk assessment tools utilized by the Department of Corrections in Mr. Doe's case (as well as in the other cases considered by the Board). After the hearing, we attempted to learn more about these risk assessment tools, to better understand the underlying methodologies and limitations of these particular evaluative instruments. Today, we write to communicate our thoughts on those issues.

As the Board is aware, the Risk Screen Tool (RST) and Offender Violence Risk Typology (OVRT) are two of the assessment tools used by the Department of Corrections when assessing inmates who apply for clemency. The DOC also uses the Texas Christian University Drug Screen

(TCU) to evaluate inmates for substance and alcohol abuse concerns, as well as the Criminal Sentiments Scale-Modified (CSS-M). We write today specifically with regard to the RST and the OVRT and the language associated with various results that is subsequently included in the Integrated Case Summary.

As a primary matter, we at the DAO are immensely grateful to the DOC for the hard work it does in gathering *extensive* information about clemency applicants, and for their clarity and transparency in working and sharing information with us as we assess the applicants.

Under DOC regulations, certain scores on the RST and OVRT dictate certain language to be included in its reports to the Board about a clemency applicant. Generally, this language takes the following form:

Mr./Ms. X's RST score of ___ indicates a low/medium/high risk of re-offending generally. Mr./Ms. X's most recent Category of ___ on the OVRT indicates a low/medium/high level risk of re-offending violently.

See Department of Corrections Policy Statement, Policy Number 11.4.1, February 12, 2013, Section 6 – 13A, Parole Summary, Subsection (F)(3)(c)(3)(b)(ii), page 6-9 (available at <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/11.04.01%20Case%20Summary.pdf>). Indeed, we have seen this language in effectively every commutation case that we have reviewed.

Our research as to the OVRT tool appears to indicate that the tool was developed and adopted after the Pennsylvania parole moratorium of 2008-2009. The tool was designed to capture not only information about whether the current crime of conviction was “violent” but also whether the inmate had a history of violence. That classification was then used to guide programming decisions for inmates, as well as later supervision decisions. See John S. Goldkamp et al., Department of Criminal Justice, Temple University, “Parole and Public Safety in Pennsylvania: A Report to Governor Edward G. Rendell,” March 29, 2009, pp. 6-10 (available at <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Goldkamp-Parole-Report.pdf>).

The OVRT incorporates as part of its evaluation the RST score; its primary other variables are 1) whether the crime of conviction qualifies as violent; and 2) whether the inmate has a previous (defined) history of violence. We understand that if both of those are true, the inmate will receive a score of 3 on the OVRT and his or her Integrated Case Summary will state that the inmate has a “high risk of re-offending violently.”

Our concern is three-fold. The first is that the OVRT is static, rather than dynamic. The OVRT result will be the same on the first day of an inmate's incarceration as it is on the last day—even if fifty years of good conduct while incarcerated separate the two, although the intent of those questions is to ascertain an inmate's *recent* history of violence. This means that the OVRT inherently does not reflect the potential changes that an inmate may undergo during their term of incarceration, and, at least for those who score a 3 because of a current crime of violence and a previous qualifying conviction for the same, nothing they can do will ever change that score, nor prevent that language from appearing in their ICS.

Second, we understand that the OVRT nevertheless is subject to the vagaries of time, but in ways that may obscure rather than clarify the situation. A hypothetical inmate with a prior violent offense from five years previous to the instant violent offense will score a 3 on the OVRT and be rated as a high risk for re-offending violently. Should that person ultimately be paroled after 20

years, imagine that they commit a new non-violent offense the day they are released. Upon that new commitment, the very same offender would be rated as a 1 (or low risk) on the OVRT because neither violent offense would have occurred within 10 years of the instant DOC commitment. (We are grateful to [redacted] of the DOC and [redacted], Chief of the Bureau of Treatment Services, Assessments and Classifications for their illuminating guidance and clarity as to this question.)

Third, we understand that the OVRT was not designed with older offenders in mind and has not been validated against that population. In light of that, we have concerns that the language used to describe the OVRT score of 3 (“high risk of re-offending violently”) may be both unfairly prejudicial and factually unwarranted.

As to the RST, we understand that that tool is also largely a static one. This presents one of the same salient problems of the OVRT with regard to commutation applicants: it does not, was not meant to, and cannot account for the profound changes that many meritorious commutation applicants undergo to their character and mentality after decades of incarceration. Per an e-mail from the Chief of the Bureau of Treatment Services, Assessments and Classifications dated August 19, 2020: “Someone could conceivably go to a lower risk category as he/she ages, but the other factors either stay the same or can only increase the score over time. . . . The RST does take age into consideration, but it is only one of seven items that influences roughly 20% of the total score.”

The DAO appreciates risk assessment tools and are always interested in learning more about them. We try to look at data regarding crime, recidivism, and public safety to make informed decisions in our policy approaches, in active cases, and as we look back at older cases, like lifers seeking commutation.

When we undertook the process of assessing clemency applicants, we found that much of the data with regard to life-sentenced inmates who are later released is, perhaps, counterintuitive—and reason to be hopeful. We also see this among some groups of older inmates released more or less *en masse*: per a November 15, 2018 article in the Baltimore Sun, 188 inmates in Maryland with an average age of 64 who were released after a court case in 2012 invalidated their convictions have exhibited a recidivism rate of 3%, when the overall Maryland recidivism rate is 40%.¹ Closer to home, we have the Philadelphians released pursuant to *Miller v. Alabama*: all originally sentenced to life without parole, and currently exhibiting a 1.14% recidivism rate.²

It has been our opinion and experience that assessment of commutation applicants—especially those serving life sentences—has been a very qualitative and holistic process. The experience of the “Ungers” in Maryland and the “Millers” in Philadelphia suggests that we should not discount the drive of people who believed they would die in prison to prove themselves, and to serve as role models for lawmakers and policy creators, as well as their fellow inmates.

¹ Tim Prudente, “Nonprofit points to Maryland Unger cases as proof oldest prisoners should be set free,” November 15, 2018, Baltimore Sun (<https://www.baltimoresun.com/news/investigations/bs-md-sun-investigates-unger-20181114-story.html>); Justice Policy Institute, Abell Foundation, “The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars,” November 2018 (https://www.abell.org/sites/default/files/files/JPI_The%20Ungers%205%20Years%20and%20Counting_Nov_2018.pdf).

² Philadelphia DAO, “New Study Finds 1% Recidivism Rate Among Released Philly Juvenile Lifers,” April 30, 2020 (<https://medium.com/philadelphia-justice/new-study-finds-1-recidivism-rate-among-released-philly-juvenile-lifers-607f19d6d822>).

Although far fewer Philadelphians have had their life sentences commuted in the past several years than these groups, we would not be at all surprised to see that they similarly take seriously their responsibility as pioneers in showing what people, convicted of terrible crimes, can make of themselves if they are given a second chance.

Ultimately, in light of all the foregoing, we believe that our reliance on the OVRT and the RST to help assess the potential risk of recidivism among commutation applicants, particularly those who have served decades in prison for crimes they committed at young ages, should be quite circumscribed. This conclusion only strengthens our support for Mr. Doe's clemency application.

Should you require any additional information or have further questions or concerns, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Cummings". The signature is written in a dark ink and is positioned above the typed name.

Patricia Cummings

Supervisor, Conviction Integrity & Special Investigations Unit

Names, dates, and some identifying details (regarding the underlying crime, victim, and victim's family) have been altered.



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August 28, 2020

Lieutenant Governor John Fetterman, Chairman
Lieutenant Governor's Office
Pennsylvania Board of Pardons
333 Market St, 15th Floor
Harrisburg, Pennsylvania 17126-0333

SENT VIA E-MAIL C/O SEC. BRANDON FLOOD ([redacted])
CC [redacted]
CC [redacted]

Re: Request for Prosecutor Input
Commonwealth v. John Doe
Common Pleas Docket: [redacted]
Inmate No.: [redacted]
Commutation Application No. [redacted]
BOP No. [redacted]

Dear Chairman Fetterman:

We understand that the Board is set to assess the above clemency request at a public hearing scheduled for Friday, September 4, 2020. We are writing to express our support for Mr. Doe's request for a commutation of his life sentence and to withdraw any and all prior letters of opposition submitted by our office.

As we have described in previous letters sent to the Board regarding commutation applications, and in our enclosed letter outlining in detail our present review process (see Appendix A), the Philadelphia District Attorney's Office ("DAO") now seeks to conduct a holistic, in-depth review of each of these applications so as to provide a helpful substantive response to the Board.

Mr. Doe and Co-Defendant were arrested in late February of 1977, tried in separate jury trials, and both were convicted of first-degree murder in the summer of 1977. As the Board is

likely aware, the underlying facts of the conduct that led to the murder of Victim involved a robbery of a service station in Delaware County on February 8, 1977, during which Victim was kidnapped and then ultimately murdered in Philadelphia County. Accordingly, Mr. Doe faced robbery and kidnapping charges in Delaware County in addition to his murder charge in Philadelphia.¹

At the conclusion of the two trials, Co-Defendant was sentenced to death while Mr. Doe's jury deadlocked at sentencing and a life sentence was imposed. Just a short time later, Co-Defendant's death sentence was vacated as a result of Pennsylvania's death penalty statute being held unconstitutional in late 1977, and he was resentenced to life. For his part, Mr. Doe's murder conviction was vacated and his second trial was scheduled to commence in late 1978.

As for the victim, Victim, who was approximately 18 years old in 1977, we have spoken to Victim's sister, Next of Kin 1. We understand that she has been in contact with Office of Victim Advocate (OVA) and is working with them to communicate her position to the Board. We understand that she presently **opposes** Mr. Doe's request for clemency. We have also spoken to Victim's other sister, Next of Kin 2. Next of Kin 2 has also been put in touch with OVA to gather her thoughts further about whether and how to participate in the proceedings before the Board. Both of Victim's foster parents at the time have passed away, and we have not yet spoken to any other family members.

Although our review in this case has been somewhat limited, it has not been hampered by our inability to locate the DA trial file in Mr. Doe's case. In fact, the records we do have provide us with sufficient information about the underlying facts of the crime as well as compelling equities that have led us to write this letter in support of Mr. Doe's application for commutation. In short, it is undisputed by any party ever involved with this case, that Co-Defendant fired the shots that killed Victim and, although a subsequent single shot fired by Mr. Doe injured Victim, it was not the injury that caused his death (nor could it have, even had Co-Defendant not fatally shot Victim). However, to the extent any board member may request additional information, we are presently seeking the DA trial file of the co-defendant, Co-Defendant (Docket No. [redacted]).

Candidly, in addition to the facts of this case and the equities referenced above and discussed fully below, in supporting Mr. Doe's application, the Commonwealth has relied heavily on the legal and historical purposes for clemency and the oft quoted statement of the Lieutenant Governor during recent public hearings where he asks "how much time is enough,"

¹ Mr. Doe ultimately was convicted of all Delaware County charges (save murder and kidnapping, which were charged by the Philadelphia DAO) with regard to Victim's death under Docket No. CP [redacted], as well as additional charges in a separate case (again with Co-Defendant as co-defendant and involving similar facts) involving a second victim, Victim 2 (who was injured but did not die) under Docket No. CP [redacted]. As to each of these matters, Mr. Doe was sentenced to 10-20 years, concurrent to each other and to the Philadelphia life sentence. DOC records confirm that Mr. Doe maxed out these sentences in 1997, and he presently has no detainees.

We note that the Philadelphia DAO would have been aware of these cases at the time, as they were resolved as part of the global disposition that resulted in Mr. Doe's plea before Philadelphia Common Pleas Court Judge [redacted] on November 22, 1978.

particularly in cases where plea bargain offers made by the prosecutor were for decades less time than sentences actually served by applicants.

In this case, absent some new crime or serious misconduct while imprisoned, the Philadelphia DAO, the Delaware County District Attorney's Office and the sentencing judge all committed to the notion that the underlying facts of the crime and Mr. Houston's cooperation in the prosecution of Co-Defendant justified their "non-opposition" to commutation and parole after Mr. Doe served ten years of his sentence. However, despite that commitment, and Mr. Doe's reliance on that commitment, this office behaved dishonorably when it actively and vehemently opposed Mr. Doe's past commutation applications.

Before discussing the particulars of what happened in this case regarding the commitment of "non-opposition" to commutation and parole, we note that Mr. Doe himself does not discuss the subject in his commutation application, and we commend his focus on the facts of his crime, his remorse, and his request for mercy. But, as Justice Brandeis was known to say, sunlight is the best disinfectant. We believe it is essential context for the Board as you consider Mr. Doe's case.

During jury selection for the Philadelphia re-trial, the prosecution and the defense ultimately worked out a global disposition: Mr. Doe would withdraw his extant post-verdict motions on his robbery conviction in the Delaware County case and receive a sentence of 10 to 20 years, and would plead guilty to second-degree murder in the Philadelphia case and receive life. (Mr. Doe also pled guilty to kidnapping in the Philadelphia case; the sentence was suspended.) The evidence surrounding this plea is reasonably clear that there was an additional condition: both district attorney offices would agree not to oppose Mr. Doe's release after ten years. In the Delaware County case, this meant parole, and in the Philadelphia case, this meant commutation.²

When that plea was entered on November 22, 1978, Judge [redacted] of the Philadelphia Court of Common Pleas (now deceased) conducted an extensive colloquy regarding this global plea. Defense Counsel, Mr. Doe's defense attorney, stated explicitly that, beyond the general terms of the plea (the charges and the sentences for them; that they would run concurrently): "There are two other caveats to the entry of this plea, Your Honor, one is that neither Philadelphia nor Delaware County will oppose parole when Mr. Doe becomes first available and qualified as a parolee."

Subsequent to that comment, Judge [redacted] conducted a colloquy between the Delaware County ADA (Delco ADA) handling the robbery and kidnapping charges and Defense

² As you are undoubtedly aware, many defendants facing life sentences in Pennsylvania in the late 1970s and (to a lesser degree) into the 1980s and early 1990s reasonably believed that they stood a good chance of earning commutations after a decade or two of prison time. We have uncovered in more than one case we have reviewed (e.g., in PCRA materials) contemporaneous letters from defense attorneys advising their clients that they could expect the possibility of such a release—and within that ten-to-fifteen-year-minimum time frame.

Again, that belief was reasonable in the environment of November 1978, when Governor Milton Shapp was regularly commuting the life sentences of Pennsylvania inmates: a practice which continued until Governor Richard Thornburgh took office in 1979 (at which time commutations decreased sharply in number), regained some vitality under the Casey Administration beginning in 1987, and then cratered abruptly in 1994 after Reginald McFadden's sentence was commuted and he immediately committed several more horrendous felonies in New York state.

Counsel, centering on when, exactly, the Delaware County District Attorney would not oppose parole (after the minimum term vs. after ten years, with Delco ADA insisting on the latter).

At no time did Philadelphia ADA of the Philadelphia DA's Office express confusion or objection at this colloquy; nor did he, for instance, remind the parties that parole was academic when Mr. Doe would be serving a life sentence on his Philadelphia case and the only avenue for release was clemency. Instead, Philadelphia ADA was silent.³ The plea was entered. No appeals were filed. And for years, Mr. Doe accepted the terms of the plea he had taken.

In 1984, Mr. Doe filed his first clemency application with this Board. Instead of submitting a letter to the Board advising that our office did not oppose Mr. Doe's clemency application once he had served ten years of his life sentence, we ultimately submitted a letter in 1985 *opposing* his application in vehement and pointed terms. The analysis in that letter—wherein the ADA who signed the letter averred his belief that we were not obligated to refrain from opposing Mr. Doe's request for clemency ever, because, essentially, Defense Counsel did not *get Philadelphia ADA* to affirmatively say so in open court, and because the words used during the plea colloquy regarding the Philadelphia District Attorney's commitment not to oppose release did not say "clemency" or "commutation" but rather referred only to "parole"—is, at best, profoundly flawed.⁴

Many years later, in an effort to seek some sort of relief, post-conviction counsel for Mr. Doe's obtained records reflecting that: 1) Judge [redacted] believed that the plea bargain encompassed the Philadelphia District Attorney's Office's non-opposition to Mr. Doe's release after ten years; 2) Delco ADA believed that the plea bargain included the Philadelphia District Attorney's Office's agreement not to oppose release after ten years; and 3) Defense Counsel would not have pled Mr. Doe to life on this case without the commitment of non-opposition to commutation and parole because he believed that commitment was not only part of the agreement to plead guilty but it was an essential term of the plea bargain. These records are enclosed herein (see Appendix B) for the Board's review.

There are those that might argue that a convicted murder such as Mr. Doe is not entitled to anything: he was sentenced to life and he should serve life. But that, by all appearances, is not the decision our office made in 1978, and we are morally and ethically obligated to stand by that decision (having benefited from it then and thereafter); we ought not discard it at our election or convenience. We represent the *people* of the County of Philadelphia and the Commonwealth of Pennsylvania, and what we do in their name we must do with honor. To take the benefits of our

³ If, as this office later urged to the Board of Pardons, Mr. Doe was never promised or advised that any limitation on the life sentence would be agreed to by the District Attorney of either county, concerns are raised that Philadelphia ADA would potentially have been violating his ethical duties of candor to the tribunal by not saying that to the court and instead remaining silent. See generally Pa. R. Prof. Conduct R. 3.3, cmt. (2) ("the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false").

⁴ Implicitly at the time of the guilty plea, all parties (then-Delco ADA, Judge [redacted], Defense Counsel, Mr. Doe) except, apparently, the Philadelphia ADA, understood Defense Counsel's use of the word "parole" during the colloquy to encompass both relevant forms of *release*, respective to each office's case. We believe, candidly, that any other reading of the plea colloquy is distorted and unreasonable. So, to the extent that our office's opposition was ever relied upon by the Board of Pardons, at any time after 1987, we humbly submit our apology.

side of the deal (avoidance of an expensive, potentially capital, re-trial; avoidance of decades of post-verdict litigation in appellate, PCHA, and perhaps even federal court) and renege on our commitment (non-opposition to release after ten years) is not honorable.

We note—almost parenthetically in this case—that Mr. Doe, now 68 years old⁵ and having served 43 years in prison for a crime he committed at the age of 24, when (neuroscientific consensus suggests) his brain function and decision-making capabilities were likely not fully formed, has been recommended by Secretary Wetzel of the Department of Corrections for commutation of his life sentence. His record of educational achievement, positive work history, involvement in rehabilitative programming, and good record of conduct (with the last eleven years, it appears, being entirely free of misconducts, and his entire 43-year term of service entirely free of any violent activity) are apparent from the record before the Board.

We urge the Board to consider his rehabilitation over the last 43 years he has served for acting as an accomplice in the murder of Victim, and to conclude that his continued incarceration, at the expense of the Commonwealth, serves little continued utility to the citizens thereof.

As always, please feel free to contact me with any further questions or concerns.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Cummings". The signature is written in dark ink and is positioned above the typed name.

Patricia Cummings
Supervisor, Conviction Integrity & Special Investigations Unit

Enclosures: (2)

⁵ Here, we ask the Board to take note of the extensive sociological literature regarding “aging out” of criminal activity, and the marked decrease in recidivism rates that is observable after the age of 50; Mr. Doe is almost twenty years past that.

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August 31, 2020

Lt. Gov. John Fetterman, Chairman
Lieutenant Governor's Office
Pennsylvania Board of Pardons
333 Market Street, 15th Floor
Harrisburg, Pennsylvania 17126-0333

VIA E-MAIL C/O SEC. BRANDON FLOOD ([redacted])
CC [redacted]
CC [redacted]

Re: Request for Prosecutor Input - Commonwealth v. John Doe
Common Pleas Docket: [redacted]
Inmate No.: [redacted]
Commutation Application No. [redacted]
BOP No. [redacted]

Dear Chairman Fetterman:

We understand that the Board will be considering John Doe's clemency application at the public hearing scheduled for September 4, 2020, and write to express our support for a commutation of Mr. Doe's life sentence.

As described in a letter we previously sent to the Board in December of 2019 (attached here as Appendix A), this Office now seeks to conduct a holistic, in-depth review of each application so as to provide a meaningful response to the Board. Our review of Mr. Doe's application has led us to conclude that commutation is appropriate.

In 1987, Mr. Doe was convicted of second-degree murder (i.e., felony murder), robbery, and conspiracy in connection with the death of Victim. He was sentenced to a mandatory term of life imprisonment for second-degree murder and to a concurrent term of 1 to 2 years for criminal conspiracy. As

Mr. Doe testified to at his trial, he, along with three others (Co-Defendant 1, Co-Defendant 2, and Co-Defendant 3), conspired to rob Victim; that crime ultimately led to Victim's death.¹

Our review of the record indicates that in the early morning hours of July 17, 1986, Co-Defendant 1 helped Mr. Doe and Co-Defendant 3 enter Victim's apartment while Victim was showering. Mr. Doe (by his own admission) ransacked Victim's apartment, took \$13,000 and a gun, and helped physically subdue and bind Victim. Co-Defendant 3 beat and then later shot Victim once in the head and once in the back, causing his death.

It is undisputed that Co-Defendant 3 was the principal planner and ring leader of this tragic and senseless event as well as the person who shot and killed Victim. Although the Commonwealth argued at Mr. Doe's trial that Mr. Doe was in the apartment when Co-Defendant 3 shot Victim, Mr. Doe has always maintained, including during his sworn trial testimony, that he was not present when Victim was killed, and that he left Victim's apartment after finding the money. Ultimately, no physical or other direct evidence is able to resolve that question with finality.

Our Office spoke with Victim's sister, Next of Kin 1, and his brother, Next of Kin 2. They have informed us that they oppose clemency in this case. Next of Kin 1 told us that she has been working with the Office of the Victim Advocate (OVA), and we informed Next of Kin 2 of his ability to do the same if he wished, and have put representatives from OVA in touch with him. We also have attempted to contact Victim's daughter, Next of Kin 3, but have yet to hear back from her.

As always, we take very seriously that Secretary John Wetzel of the Department of Corrections "strongly support[s]" Mr. Doe for commutation of his life sentence and that the DOC recommends his application be granted. We note that this is so despite a history of approximately eleven misconducts over the course of Mr. Doe's more than thirty years of confinement, including two minor misconducts over the past ten years. While the Board is certainly conversant with commutation applicants who have accrued no misconducts, or a number that can be counted on one hand, we would not discount Sec. Wetzel's or the DOC's evaluation of Mr. Doe as a good candidate for clemency despite this conduct history. We also note that Mr. Doe's incarceration spans, essentially, his entire adulthood, yet he has never exhibited any violence, nor even the threat of violence, while in custody.

We understand that Mr. Doe has earned his GED, completed numerous types of vocational training, and presently works as a legal reference aide, and we laud his efforts to learn, grow, and contribute to the community. From speaking with personnel at SCI [redacted], we understand that Mr. Doe's accomplishments in prison reflect not only his personal drive to better himself, but also the increased capacity for learning that he has developed during his incarceration.

It is evident from his clemency application that Mr. Doe is profoundly remorseful for his actions and accepts responsibility for his role in this crime. When he learned the police were looking for him in connection with this crime, he turned himself in voluntarily and admitted to his participation. He writes now that he lives with deep regret over his "decision to go along with Co-Defendant 3's plans to break into

¹ Co-Defendant 2, who served as the driver and was 17 at the time, pled guilty to 3rd degree murder, robbery and criminal conspiracy. He was sentenced to a concurrent term of 3 to 6 years for each conviction. Co-Defendant 1 helped plan the robbery with her then-boyfriend, Co-Defendant 3. She also assisted Co-Defendant 3 and Mr. Doe in gaining entry to Victim's apartment and stole drugs from the home. Like Co-Defendant 2, Co-Defendant 1 also pled guilty to 3rd degree murder, robbery and criminal conspiracy, and was sentenced to concurrent terms of 8 to 16 years for murder, 5 to 10 years for robbery and 2 to 4 years for criminal conspiracy. Co-Defendant 2 was paroled in January of 1992, and Co-Defendant 1 was paroled in July of 1997.

Co-Defendant 3, who was the shooter and played the lead role in the conspiracy, pled guilty to first-degree murder and was sentenced to a mandatory sentence of life imprisonment.

Victim[’s] home,” and recognizes that his decision “aided in Victim[’s] death and ushered in so much heartache and pain for his family and all who knew and loved him.”

While we briefly touched on Mr. Doe’s educational and vocational efforts above, we also note that Mr. Doe has undertaken activities to help give him emotional perspective. Specifically, Mr. Doe has volunteered as a hospice worker, which he states had a profound effect on him.² Mr. Doe also credits his participation in a Rutgers University study on trauma in helping him better cope with his own traumas, including the death of his mother at the age of nine.

At the time of this offense, John Doe was only 20 years old. Many of the social science findings that the Supreme Court has said lessen the “moral culpability” of juveniles (e.g, greater “transient rashness, proclivity for risk, and inability to assess consequences”) also apply to young adults. Those factors also “enhance[] the prospect that, as the years go by and neurological development occurs,” such a person’s “deficiencies will be reformed.” *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

Today, at the age of 54, Mr. Doe himself recognizes how his youth and his need for acceptance affected him and his decision-making over 30 years ago. Should his sentence be commuted, he plans to parlay his experience into an opportunity to help vulnerable youth in his community. Mr. Doe has the support of his family, including his elderly father and siblings, as well as members of the clergy here in Philadelphia, specifically Pastor [redacted] and Pastor [redacted].

In light of our review of Mr. Doe’s application and the surrounding circumstances, we concur with the recommendation made by Sec. Wetzel, and believe that Mr. Doe is a good candidate for commutation. We support his application.

Should you have any questions or concerns, please feel free to contact me.

Sincerely,



Patricia Cummings
Supervisor, Conviction Integrity & Special Investigations Unit

² See, generally, Susan J. Loeb, Christopher S. Hollenbeak, Janice Penrod, Carol A. Smith, Erin Kitt-Lewis, and Sarah B. Crouse. “Care and companionship in an isolating environment: inmates attending to dying peers.” *Journal of Forensic Nursing* Volume 9, Issue 1 (Jan./ Mar. 2013), 35-44. “The purpose of this study was to examine the values, beliefs, and perceptions of end-of-life (EOL) care held by inmates caring for peers approaching end of life. . . . Key themes were: getting involved; living the role; and transforming self through caring for others. . . . This study provides clear evidence that providing compassionate care for dying peers may result in transformative experiences for inmate caregivers.” *Id.* at 35.

See also Suleika Jaouad, “The prisoners who care for the dying and get another chance at life: In a California prison hospice, inmates become caregivers to fellow convicts who will never make it out alive,” *The New York Times*, May 16, 2018 (<https://www.nytimes.com/interactive/2018/05/16/magazine/health-issue-convicted-prisoners-becoming-caregivers.html>) (accessed Aug. 27, 2020).

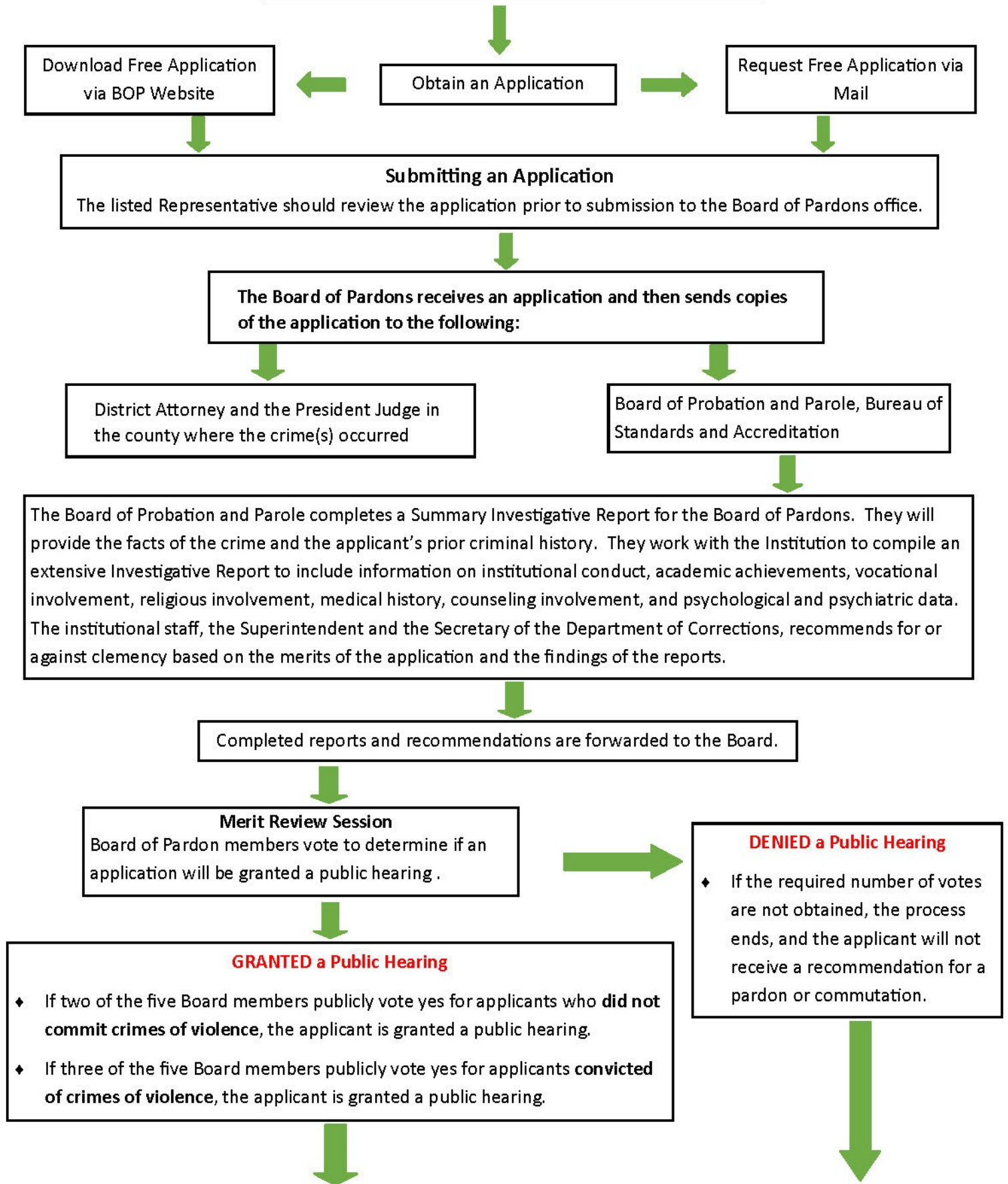
Commutations of life sentences in Pennsylvania

Clemency for people serving life without parole was once considered a release valve for the prisons. These days, it's rare, but Gov. Tom Wolf has commuted more life sentences than any governor in 25 years.

	Applications heard by Board of Pardons	Recommended to Governor	Granted by Governor
MILTON SHAPP (1971-1978)	733	267	251
DICK THORNBURGH (1979-1986)	375	75	5
ROBERT CASEY (1987-1994)	249	118	27
TOM RIDGE (1995-2001)	15	4	0
MARK SCHWEIKER (2001-2002)	2	1	1
ED RENDELL (2003-2010)	11	5	5
TOM CORBETT (2011-2014)	2	0	0
TOM WOLF (2015-PRESENT)	56	23	19

Chart: Samantha Melamed \ The Philadelphia Inquirer • Source: [Pennsylvania Board of Pardons](#)

Application Process for Incarcerated Cases



The Applicant, Representative, Board of Probation and Parole, District Attorney, President Judge and Victim/Victims Next of Kin, will receive notification of the hearing date and time.

Applicants serving a sentence of death, life, or a sentence for murder, voluntary manslaughter or attempted murder/voluntary manslaughter will be interviewed by Board Members prior to the public hearing. The applicant and their representative will answer questions from Board.

Public Hearing Session
Supreme Court, Capitol Rotunda Room 437,
Main Capitol Building, Harrisburg PA.

- ◆ The representative, and applicant's supporters have a total of 30 minutes to present their case.
- ◆ Victims/Victims Next of Kin or those in opposition also have a total of 30 minutes to present their opposition.

Recommendation goes to the Governor for final decision.

Recommendation

After all the applicants are heard, the Board adjourns, then returns to vote publicly. An applicant must receive a majority vote to be recommended; however, those seeking to commute a death or life imprisonment sentence must be approved by a unanimous vote.

If granted, the applicant will **serve life on parole** and be interviewed weekly for the **first six months**.

Act 16 of 1995 - Applicant must serve 1 year at a Community Corrections Center.

Reapplication:

- ◆ The applicant may reapply 12 months from the date of the final adverse decision.
- ◆ An applicant who receives two consecutive adverse decisions cannot file another application for 24 months after the date of final adverse decision.

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Reconsideration

The applicant must show a change in circumstances since the application was filed, or other compelling reasons sufficient to justify reconsideration. Dissatisfaction with the Board's decision is not grounds to request reconsideration.

Denied Recommendation

For more information contact:

PA Board of Pardons
717-787-2596
www.bop.pa.gov

Office of Lt. Governor John Fetterman
717-787-3300



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December 18, 2019

Lieutenant Governor John Fetterman, Chairman
Lieutenant Governor's Office
Pennsylvania Board of Pardons
333 Market St, 15th Floor
Harrisburg, Pennsylvania 17126-0333

SENT VIA REGULAR MAIL AND E-MAIL C/O SEC. BRANDON FLOOD (bflood@pa.gov)
CC CARLA HAGY (chagy@pa.gov)
CC HAYLEY BARRETT (habarrett@pa.gov)

Re: Philadelphia District Attorney's Office – Approach and Guidelines for Review of Clemency and Commutation Applications

Dear Chairman Fetterman:

As you know, the Philadelphia District Attorney's Office ("DAO") has endeavored over the past several months to provide input to the Board of Pardons as to the merits of each clemency applicant requesting commutation of their life sentence prior to any public hearing on that application. As we have informed the Board, the DAO now provides that input pursuant to an approach of open-minded and individualized assessment of each request, rather than a reflexive, categorical inclination toward opposition.

In previous administrations, the effective policy and practice of the DAO was to apply a presumption whereby the DAO opposed most, if not all, commutation applications. The new position of the DAO instead takes seriously its responsibility to provide in-depth, holistic, evidence-based, and individualized assessment to each and every request for clemency, with a grounding in the facts, and an open mind toward moving away from that previous status quo. As part of an approach that prioritizes public safety and wise use of scarce resources, the DAO has supported, and will continue to support, many clemency applications involving aging inmates who no longer, by dint of their age, condition, and record of rehabilitation, pose a continuing threat to society—where the costs of continued incarceration are so great, but do not come with concomitant benefits to the public. Prevention of future crime requires wise use of resources that

could support education, treatment, policing, and other efforts more effective in preventing crime than corrections.

We write now to advise the Board about the contours of our assessment process, so that the Board may understand our input in individual cases, without an exhaustive recounting of the particulars in each and every communication we send to the Board. We are providing a copy of this letter to each member of the Board in the hopes that it will illuminate our process and our thinking as you consider our recommendations and input with regard to individual applications.¹

Victim Contact

At the outset, we note that our approach involves making every reasonable effort to identify, locate, and contact the surviving next of kin to the victim, based on the often-limited information and resources available, in order to provide information about a commutation application and serve as a resource for questions and concerns. In every case where we are successful in reaching the victim's next of kin, we proactively discuss the Office of Victim Advocate ("OVA") as a resource, as well as the option of formally registering with OVA if they have not done so already. We also work collaboratively with OVA on these efforts as much as is practicable and appropriate.

General Approach

As you may have noticed, our present approach to commutation requests has led us to support requests where the applicant has served a substantial, reasonable, and appropriate amount of time in prison, and we are satisfied that there would be little public safety risk should the applicant's request be granted. While other issues and concerns are present in individual requests and given due weight, these two issues—time served, and public safety—are of paramount importance as we consider whether to support an individual request for a commutation.

While we endeavor to provide clear feedback to the Board, sometimes we are compelled to offer more nuanced and substantive feedback about specific concerns or reservations, rather than a simple answer of "support," "oppose," or "no opinion." In those cases, as in all other cases, we strive to provide feedback that is useful; we are always happy to speak with any member of the Board, or his or her staff, about any underlying issues in a clemency application at any time during the clemency process.

As a general rule, certain cases involving particularly severe or egregious issues are considered under more stringent standards by the DAO, and applicants whose cases fall into those categories are generally held to a higher burden of persuasion in order to garner the support of the DAO. Nevertheless, they are assessed according to the same protocol and rubric as the

¹ A copy of this letter will also be attached as an exhibit to individual letters in all future requests for input on commutation applications.

larger class of cases generally, and every applicant is given a holistic, in-depth, and individualized assessment.

When assessing either these “higher-burden” cases or the greater class of cases, the DAO looks both to information regarding developments in the years since the underlying offense as well as information regarding the offense itself. We are mindful that the facts of the underlying cases are all painful and remain salient and pointed memories to the loved ones of the victims who were harmed in those cases. However, we are also mindful of the maxim popularized by Bryan Stevenson, that each of us is more than the worst thing we have done, and endeavor to balance the crime itself with the history of how each applicant has spent their time in the years since.

Factors Considered in Individualized Review

The primary factors that we consider are the amount of time already served, and the potential risk to public safety should an applicant’s request for commutation be granted. (While we do make all reasonable efforts to locate, contact, and discuss clemency applications with the families of victims, we are mindful that we, as representatives of the Philadelphia District Attorney’s Office, do not serve as the “voice” of the victims, and that victims have their own avenue for reaching out to the Board of Pardons in clemency cases.) We also consider, as appropriate and on a case-by-case basis, factors relating to the underlying prosecution of the case, any special vulnerabilities of the applicant while incarcerated, and any other relevant factor under a holistic, “totality of the circumstances,” approach.

Amount of Time Served

When it comes to amount of time served, our general approach is that we will, in most cases, only seriously consider supporting a commutation application if the applicant has served a substantial, reasonable, and appropriate proportion of their sentence. We look to sentences for similar crimes in this and other jurisdictions for guidance where available and appropriate, and to plea offers extended by this and other offices under similar circumstances to the applicant’s case.

Public Safety

Public safety is the most expansive, and in some ways, the most important factor in our analysis and review of commutation applications. We consider the applicant’s record of rehabilitation during incarceration, including but not limited to the following sub-factors:

- the applicant’s disciplinary record (including consideration not just of the number of disciplinary citations, but also the classes or types of such citations, the underlying facts of those incidents (where appropriate), the context of those citations, and the trajectory of the disciplinary record;

- whether the applicant has taken advantage of any available educational, vocational, character-building, therapeutic, or otherwise-rehabilitative programming while incarcerated;
- the applicant’s own words in their clemency application or in any interviews or other sources, as those records reflect on their current character, disposition, and insight; and
- any expression of remorse, responsibility, and/or perspective on their conviction and the underlying offense, as well as the applicant’s candor about the same, to the extent it bears upon the risk to public safety.

We consider as very important to our assessment of risk to public safety the applicant’s present age, and whether the applicant has, by virtue of their age and the period of incarceration, “aged out of” any expected further serious criminal activity. As the Board is undoubtedly aware, rates of recidivism for those inmates who are released at older ages are markedly low; one Pennsylvania study found that, of inmates who were released at the age of 50 or older in 2003, only 1.4% were convicted of new crimes in the two years following their release.²

We similarly consider the applicant’s present physical condition and health; the applicant’s pre-offense criminal record and background; any history of post-offense criminal prosecutions; any history of escape or escape attempts (which has been shown to be positively correlated with recidivism risk³); an applicant’s re-entry plan and support system, including any history of substance abuse and a plan to address the same; whether or not the applicant is supported in their clemency application by the Secretary of the Department of Corrections⁴; any relevant references from family, SCI staff, educators, program staff, or peers who know and can speak to their sense of the applicant’s character and potential recidivism risk; any immigration issues that pertain to public safety risk; and our overall assessment of the applicant’s disposition, character, and psychological/psychiatric/neuropsychological health (including, where appropriate, any history of mental illness, diagnoses, treatment, and/or compliance).

Some considerations relating to public safety resemble those often propounded at trial or a penalty phase as “mitigation”-type evidence (*e.g.*, young age at the time of the offense; mental health history; history of abuse). We believe it is appropriate to consider these factors primarily in the light of how they relate to the applicant’s record of rehabilitation and their present

² Advisory Committee on Geriatric and Seriously Ill Inmates, Joint State Government Committee of the General Assembly of the Commonwealth of Pennsylvania, *A Report of the Advisory Committee on Geriatric and Seriously Ill Inmates* (2005). Needless to say, this 1.4% rate of recidivism includes many minor and non-violent offenses; the rate of violent recidivism is even lower.

³ See, *e.g.*, Joan Nuffield, *Parole Decision-Making in Canada: Research Towards Decision Guidelines*, Solicitor General of Canada (1982); Eva Mulder, Eddy Brand, Ruud Bullens, and Hjalmar van Marle, “Risk Factors for Overall Recidivism and Severity of Recidivism in Serious Juvenile Offenders,” *Int’l J. of Offender Therapy and Comparative Criminology*, 55(1) (2011) at 126.

⁴ We understand that the support of the Secretary is unusual and telling, and we view the Secretary’s recommendation for clemency as very persuasive in many, if not most, cases.

relevance to the risk to public safety. In the case of those who were over 18 but still young at the time of their crimes, many of the social science findings in juveniles that, the Supreme Court has said, lessen their “moral culpability” (*e.g.*, greater “transient rashness, proclivity for risk, and inability to assess consequences”) also apply to young adults. Those factors also “enhance[] the prospect that, as the years go by and neurological development occurs,” such a person’s “deficiencies will be reformed” and the threat that person posed will have dissipated. *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

For similar reasons, we do not draw hard and fast lines relating to the degree of homicide for which an applicant was convicted, nor to relative culpability among co-defendants during the commission of the offense. All of these factors are part of a holistic review that prioritizes attempting to assess the public safety risk of a commutation in an individual case, and are relevant primarily to that extent.

While no one can predict the future with any certainty, we strive as we consider the potential risk to public safety of a commutation to rely, where possible, on real, empirical evidence rather than lay intuitions, truisms, or anecdotes. We are always seeking to improve our knowledge in these areas, which will help us make decisions with confidence as we go forward.

Integrity and Fairness Considerations

We may also, in an appropriate case, consider issues that concern whether the DAO believes there to have been some underlying concern regarding fairness that warrants support of a clemency application. This can include whether the DAO considers there to have been law enforcement, prosecutorial, or judicial misconduct (even or especially where that misconduct was deemed not legally actionable); whether the DAO considers the applicant to have received deficient or ineffective assistance of counsel; whether there has been any relevant change in the law or in legal practice (*e.g.*, that would mean a defendant in like circumstances would not receive the same sentence); whether supporting commutation would give effect to a jury’s verdict (*e.g.*, in assessing the comparative roles of co-defendants, or rendering partial acquittals); whether supporting commutation could address a disparity in the individual case or across a wider class of cases; and/or whether the applicant points to any special vulnerabilities that render continued incarceration unduly and particularly harsh (*e.g.*, the applicant has been assaulted; the applicant identifies as LGBTQ and has safety concerns; the applicant has health and/or disability issues; etc.).

Common and Systemic Considerations

We also consider structural factors that are common to many of the cases of the most meritorious commutation applicants: the need to reduce mass incarceration where over 2,000 inmates out of Philadelphia have no avenue for parole and meritorious commutation applicants present some of the lowest recidivism risks, empirically, of any inmates in the prison system; honoring the advice given to and expectations held by some of the longest-serving inmates

regarding the availability of commutations as a practical matter in Pennsylvania when they, *e.g.*, accepted plea bargains with life sentences; aligning Pennsylvania practice with that of most other states, which contemplate the possibility of parole for at least some inmates serving “life” sentences; prioritizing efficiency and reasonable, realistic cost-benefit analyses that balance the cost of continued incarceration of aging inmates specifically against the value of ensured incapacitation-by-incarceration for those aging inmates, as compared to the cost of a hopefully-minimal risk of recidivism against the value of non-incarceration to the applicant and to the community⁵; and the wisdom of putting an end to ongoing appellate or collateral litigation, freeing up additional time and resources among many stakeholders.

Totality of the Circumstances

In every case, the DAO gives appropriate weight to any factor that is relevant in that case. We understand that clemency is fundamentally discretionary, and we feel that to attempt to predict, pre-categorize, and essentially pre-judge every one of the thousands of cases that might appear, would be unwise. The factors described above are guidelines for thoughtful consideration, not hard-and-fast criteria, and are always weighed appropriately in the appropriate case. We believe that no one issue should be dispositive in all cases, across the board, as a matter of policy.

Please do not hesitate to contact me if you or any other member of the Board has questions about our protocol in general or with regard to any individual commutation application. We aim to be a resource to the Board as you consider these important requests. Thank you for taking our input into consideration in these cases.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Cummings". The signature is written in dark ink and is positioned below the word "Sincerely,".

Patricia Cummings

Supervisor, Conviction Integrity & Special Investigations Unit

⁵ Well over 5,000 Pennsylvanian inmates are serving sentences of life without parole; nearly 2,700 of them were convicted in Philadelphia. Each of those inmates costs, conservatively, \$42,000 per year to incarcerate, and that expense only grows as an inmate ages, even as the inmate’s risk of recidivism declines. The average yearly cost for an inmate over 50 years old is currently \$68,000. See American Civil Liberties Union, *At America’s Expense: The Mass Incarceration of the Elderly* (2012).