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MEMORANDUM

FROM: Michael Kebede

TO: Senator Beebe-Center, Representative Salisbury, and Members of the Committee on Criminal Justice and Public Safety

DATE: March 21, 2023

Re: LD 178, An Act to Support Reentry and Reintegration into the Community

Issue: Whether the Maine constitution prohibits retroactive parole

ISSUE PRESENTED

Whether the Maine constitution prohibits the establishment of a parole system that would be retroactively applicable to people who were sentenced to terms of imprisonment or who are alleged to have committed the crime underlying their conviction before the effective date of the new parole system.

SHORT ANSWER

Retroactive parole was and remains constitutional in Maine. The constitution has been found to prohibit the legislature from granting the power to reduce sentences, but granting parole does not reduce sentences and no court has found that the Maine constitution prohibits retroactive parole. Commutation of sentences is radically different from changing the manner in which sentences are served. If LD 178 allowed a parole board to commute sentences, then it would "present[] legal and constitutional issues." But it does not. LD 178 presents no legal and constitutional issues. The Attorney General's assertion to the contrary is meritless.

BACKGROUND

The Attorney General of Maine has argued that "LD 178 … presents legal and constitutional issues to the extent the bill seeks to expand parole eligibility retroactively."[1] The

[1] Testimony of Aaron Frey, Attorney General of Maine, in opposition to LD 178, at 2, *available at* mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=168258.

Attorney General's argument is a carbon-copy of his argument against a prior attempt to establish parole, citing the same two 1980s court cases in support.[2] Citing no specific part of LD 178 that would be "present[] legal and constitutional issues," the Attorney General instead resorts to the phrases "to the extent the bill seeks" and "[t]o the extent the bill authorizes …." The Attorney General does not say that LD 178, as written today, "would be unconstitutional" or "would violate the Maine constitution's separation of powers doctrine" or would, in any other way, be unlawful. However, by asserting "LD 178 … presents legal and constitutional issues" in the context of his opposition to LD 178, and by citing two cases that struck down different types of the parole statutes, the Attorney General implies that LD 178 might violate the Maine constitution. Accordingly, this memo will analyze whether LD 178, including any provisions that would be retroactively applicable to people currently serving prison sentences, would violate the Maine constitution.

A. The Maine Constitution Does Not Prohibit Retroactive Parole, But Does Give The Governor The Exclusive Power To Commute Sentences.

Stated simply, retroactive parole is constitutional in Maine. Retroactive parole is constitutional regardless of the dates the prospective parolee was convicted, sentenced, or committed the conduct underlying their conviction. No case from the Law Court, the state's highest tribunal, has held otherwise. The two leading court cases on parole in Maine, *Gilbert v. State* and *Bossie v. State*, decided in 1985 and 1986 respectively, both support the proposition that there is nothing unconstitutional about the practice or concept of retroactively applicable parole.

The Attorney General improperly cites *Bossie* and *Gilbert* to assert that LD 178 "presents legal and constitutional issues to the extent the bill seeks to expand parole eligibility retroactively." The Attorney General's misreading of both cases seems to stem from a conflation of *commuting* prison sentences with *changing the manner of serving* prison sentences. The former – a parole board commuting sentences – is unconstitutional. The latter – a parole board *changing the manner of serving* prison sentences – is not only constitutional, but also current practice under the Supervised Community Confinement Program ("SCCP"). The SCCP program

[2] Testimony of Aaron M. Frey, Attorney General of Maine, in Opposition to LD 842, An Act to Reestablish Parole, at 2, Apr. 22, 2021, available at www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=155131.

allows people to serve part of their prison sentence outside the prison walls, even if the prisoner's conviction or the conduct underlying their conviction predates the SCCP statute's passage.

The facts of *Bossie* and *Gilbert* are both instructive. In *Bossie*, three incarcerated men sued the state alleging that the Maine Department of Corrections miscalculated the amount of time that should be reduced from their sentences for serving "good time" under a law then in effect.[3] The Court not only disagreed with the men, but also struck down the law allowing for "good time" deductions from prison sentences because the law encroached on the Governor's exclusive power to commute sentences.[4] Article five, part one, section eleven of the Maine Constitution states:

> The Governor shall have power to remit after conviction all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons.

This section grants the governor power to commute and pardon sentences. Article three, section two provides:

> No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

This section prevents one branch from interfering with a power explicitly granted to another branch. This is the section that enshrines the separation of powers principle in state constitutional law, and gives courts the basis to invalidate actions by one branch that encroach on powers explicitly granted to another branch. Citing these two sections of the constitution, the Law Court invalidated the "good time" law, which would have allowed for reductions in sentences for those who faithfully observe the requirements of a prison sentence. Describing its own reasoning, the Court stated that because "good-time credits have the undeniable effect of reducing the length of sentences . . . . [and] the power to reduce an offender's sentence on the basis of his post-

[3] *Bossie v. State*, 488 A.2d 477, 479 (Me. 1985).
[4] *See* Me. Const. art. V, Pt. 1, sec. 11; art. III, sec. 2.

conviction behavior is encompassed within the executive's commutation power," the statute permitting good time credit was unconstitutional.[5]

The seminal parole case in Maine is almost certainly *Gilbert v. State*, decided a year after *Bossie.* In that case, a man who was serving a life sentence sued the state for, among other things, denying him parole.[6] At trial, the judge had ruled that Gilbert, the plaintiff, may "never . . . be granted parole, because application of the post-1951 parole statute amendments to Gilbert. . . infringes upon the Governor's exclusive constitutional power to commute sentences after conviction."[7] On appeal, the Law Court ruled that "[b]ecause of the inherent differences between parole and commutation, a grant of parole to Gilbert on the authority of amendments passed after his conviction would not amount to a commutation of his sentence in violation of the constitutional demands of separation of powers."[8]

Comparing the case before it to *Bossie*, the *Gilbert* Court stated:

> [L]egislative acts that "commute" sentences are those that shorten the length of time a previously convicted and sentenced inmate must serve. [*Bossie*,] 488 A.2d at 479–80. Parole, however, does not shorten the length of a sentence. Instead, parole is a change in the manner in which a sentence is served in that the parolee remains under the custody of the institution from which he is released but executes the unexpired portion of his sentence outside of confinement. . . . Unlike a commutation, the release on parole is conditional, and the parolee is subject both to the continuing supervision of his parole officer and to the threat of return to prison to serve out his sentence there if he violates a condition of parole.

Gilbert, 505 A.2d at 1328. In other words, parole is supervision by another name; parole is supervised release; parole is not total freedom, because it carries a risk of return to prison – a risk that has been tailored to the person on parole. The *Gilbert* court further explained parole:

> Parole ... is a legislative program of rehabilitation and restoration of persons convicted of crime to useful membership in society. The purpose of the law is to offer the institutionalized convict the opportunity to make good on his own outside the prison walls but under the immediate supervision of the probation-parole officer to whom the parolee must report and whose guidance he may seek at all times. ... To the extent that the parolee must strictly observe all the conditions of his parole and remain within the area of

[5] *Bossie*, 488 A.2d at 477.
[6] *Gilbert v. State*, 505 A.2d 1326, 1327 (Me. 1986).
[7] *Id.*
[8] *Id.*

> permitted enlargement of the prison walls consistent with effective supervision, he is not a totally free man.[9]

The court here describes parole as an "enlargement of the prison walls," and not as a reduction of the prisoner's sentence. Crucially, neither the *Gilbert* nor the *Bossie* courts invalidated laws for being retroactive. Nothing in either case supports the notion that retroactive parole is unconstitutional. The only laws that *are* unconstitutional under the analyses in both cases are laws that commute a sentence. LD 178 would not do that.

CONCLUSION

Retroactive parole is constitutional in Maine. The constitution has been found to prohibit the legislature from granting the power to reduce sentences, but no court has found that the Maine constitution prohibits retroactive parole. Commutation of sentences is radically different from changing the manner in which sentences are served. If LD 178 allowed a parole board to commute sentences, then it would "present[] legal and constitutional issues." But it does not. LD 178 presents no legal and constitutional issues. The Attorney General's assertion to the contrary is meritless.

[9] *Id. (quoting Mottram v. State*, 232 A.2d 809, 813–14 (Me.1967)).