
CHAPTER 11

Executive Clemency

The Georgia Board of Pardons and Paroles set out its current standard for clemency in 2007, while granting a stay of execution for Troy Davis: “[The Board] will not allow an execution to proceed in this State unless and until its members are convinced that there is no doubt as to the guilt of the accused.” Nonetheless, Troy Davis was executed on September 21, 2011 amid serious doubts about whether Davis was actually responsible for the murder of police officer Mark MacPhail.

Officer MacPhail was shot and killed while off duty in the early morning hours of August 19, 1989, after coming to the aid of a homeless man at a Greyhound bus station in Savannah, Georgia. Several people, including Davis and Sylvester “Redd” Coles, were hanging out near a Burger King parking lot adjoined to the bus station. Coles started arguing with Larry Young, a homeless man. Young was assaulted by someone in the group and called for help. Officer MacPhail, serving off-duty as a security guard at the bus station, responded. As he came running to Young’s aid, he was shot and killed. Testimony at trial was in consensus that MacPhail was shot and killed by the same man who had attacked Young. The day after the shooting, Coles went to the police station with his lawyer and said that Davis was the shooter.

Since Davis’ conviction, most of the state’s witnesses have either contradicted their trial testimony against Davis or admitted their testimony was false. Two new witnesses have implicated Coles in the shooting. In addition, a new analysis of physical evidence that had been presented to the Board of Pardons and Paroles in 2008, which the state alleged showed the presence of blood on a pair of shorts recovered from Davis’ home, adds more doubt to the state’s case against Davis. The Board denied clemency to Davis in 2008 after the Georgia Bureau of Investigation submitted this piece of evidence to the Board. Thereafter, a DNA and serology expert reviewed the full report and in 2010, after reviewing the new expert analysis, a federal court concluded that the shorts, in fact, did not link Davis to the murder of Officer MacPhail, finding that it was not clear that the substance was blood and even if it was blood, it was unknown to whom it belonged.

Recommendation 35. The executive branch should:

- a) ensure that the clemency process is accessible to all death sentenced prisoners for independent review of their claims,**
- b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state,**
- c) adopt substantive standards against which clemency applications will be evaluated, and**
- d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.**

Executive clemency can be granted in distinct forms, with different consequences for the defendant. A death row prisoner typically seeks a commutation or reduction of his or her capital sentence to life imprisonment, either with or without parole eligibility. A reprieve temporarily postpones or delays a scheduled punishment and typically is requested to allow time for additional judicial or executive review of a conviction or sentence. A pardon sets aside the conviction.

Since 1976 through 2012, 273 clemencies have been granted in capital cases for humanitarian reasons, including doubts about the defendant's guilt or conclusions regarding the death penalty process.¹ Many of those resulted from broad grants of clemency, including: Governor Pat Quinn of Illinois, in 2011 (all inmates); Governor Jon Corzine of New Jersey in 2007 (all inmates); Governor George Ryan of Illinois in 2003 (all inmates); Governor Richard Celeste of Ohio in 1991 (8 inmates); and Governor Toney Anaya of New Mexico in 1986 (all inmates).²

Executive clemency serves a vital role in the administration of justice. As Justice Holmes observed:

A pardon in our day is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.³

¹ Death Penalty Information Center, Clemency, <http://deathpenaltyinfo.org/clemency>.

² *Id.*

³ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

The U.S. Supreme Court’s lead opinion in *Gregg v. Georgia* recognized that a state capital punishment system that did not comprehend executive clemency “would be totally alien to our notions of criminal justice.”⁴ Later, in *Herrera v. Collins*, the Court observed that “all ... States that authorize capital punishment have constitutional or statutory provision for clemency,”⁵ and emphasized that “[e]xecutive clemency has provided the ‘fail safe’ in our criminal justice system.”⁶ A more recent decision described clemency as “traditionally available to capital defendants as a final and alternative avenue of relief. . . .”⁷

In *Herrera v. Collins*, the Court declined to hold that a freestanding claim of actual innocence, absent some other independent constitutional violation, can serve as the basis for federal habeas corpus relief, relying in part on the “fail safe” of executive clemency. Thus, the responsibility to investigate post-conviction claims of actual innocence rests heavily upon the executive clemency process. “When a sentence of death is at stake, it becomes all the more vital that these processes serve the interests of justice; that mercy is meted out as appropriate; and that claims of actual innocence, which under established judicial policy may be ineligible for federal habeas corpus relief, do not fall on deaf ears.”⁸

Executive clemency decisions typically are made in the last few days and even in the frantic hours and minutes before a scheduled execution. Clemency procedures vary widely among jurisdictions. In some jurisdictions, hearings are not required, and even in jurisdictions where hearings are held, the condemned prisoner may not be permitted to appear in-person before the decision-maker. Further, there is no constitutional right to counsel for petitioners seeking clemency.

Upon its extensive evaluation of 12 states’ death penalty systems, which included states that have executed the majority of prisoners in the modern death penalty era, the American Bar Association (“ABA”) Death Penalty Due Process Review Project found that:

Most states fail to require any specific type or breadth of review in considering clemency petitions; [c]lemency decision-makers have denied clemency stating

⁴ *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Stewart, J).

⁵ *Herrera v. Collins*, 506 U.S. 390, 414 (1993).

⁶ *Id.* at 415.

⁷ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 398 (1998) (plurality opinion). *See also* *Fay v. Noia*, 372 U.S. 391, 476 (1963) (Harlan, J., dissenting) (arguing that the death-sentenced defendant in that case should seek relief “with the New York Governor’s powers of executive clemency, not with the federal courts”); *Thompson v. Oklahoma*, 487 U.S. 815, 869 (1988) (Scalia, J., dissenting) (arguing that the execution rate for juveniles has been low, in part, because of “the exercise of executive clemency”).

⁸ TEXAS APPLESEED AND TEXAS INNOCENCE NETWORK, *THE ROLE OF MERCY: SAFEGUARDING JUSTICE IN TEXAS THROUGH CLEMENCY REFORM* 4 (2005), at www.texasappleseed.net and www.texasinnocencenetwork.org (“ROLE OF MERCY”).

that all relevant issues have been vetted by the courts[,] in fact, however, claims that may often warrant a grant of clemency have not or cannot be reviewed on the merits in the court system; [s]tates do not provide a right to counsel in clemency proceedings, and [f]ew states require the clemency decision-maker to meet with the inmate or the inmate’s counsel.⁹

Thus, clemency has been described as “standardless in procedure, discretionary in exercise, and unreviewable in result,”¹⁰ as well as a “Wizard of Oz process” that is “fraught with ‘haphazardness’ that immediately would be condemned as arbitrary if it surfaced elsewhere in the capital-punishment process.”¹¹

In *Ohio Adult Parole Authority v. Woodard*, the U.S. Supreme Court acknowledged that minimal due process protection exists for clemency petitioners convicted of capital crimes.¹² Since this opinion, however, clemency petitioners’ due process rights have been interpreted very narrowly. For example, in *Bacon v. Lee*, the Supreme Court of North Carolina found no due process violation when the governor deciding clemency was the Attorney General at the time the inmate was sentenced to death. As one report states, “[t]he system created by *Herrera* and *Woodard* is one in which the federal judiciary relies very heavily on systems of executive clemency to ensure that innocent people are not wrongly convicted or even put to death, while at the same time it requires very little in the way of procedural or substantive safeguards to ensure that clemency processes function effectively.”¹³ The current system of “wide discretion, unchecked by procedural standards, may not be able to properly serve its role as a failsafe for miscarriages of justice.”¹⁴

⁹ See ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, THE STATE OF THE MODERN DEATH PENALTY IN AMERICA 11 (NOV. 2014), at http://www.americanbar.org/content/dam/aba/migrated/keyfindings_2_authcheckdam.pdf.

¹⁰ Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1827 (2002).

¹¹ James R. Acker & Charles S. Lanier, *May God – or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems*, 36 CRIM. L. BULL. 200, 225-26 (2000) (citations omitted).

¹² 523 U.S. 272, 276 (1998). In *Woodard*, a death row inmate claimed Ohio’s clemency procedures violated his Fourteenth Amendment due process rights. *Id.* at 277. In a plurality opinion, four justices concluded that inmates are not afforded due process rights in clemency proceedings, citing clemency as an extrajudicial act of grace. *See id.* at 275, 285. However, a four-justice concurring opinion found that “some *minimal* procedural safeguards apply in clemency proceedings” because a death row inmate maintains an interest in his life. *Id.* at 288–89 (O’Connor, J., concurring). In a concurring and dissenting opinion, Justice Stevens supported a due process finding, stating that “these proceedings are not entirely exempt from judicial review,” *id.* at 290, and that “it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.” *Id.* at 292 (Stevens, J., concurring in part and dissenting in part). Justice Stevens maintained that “only the most basic elements of fair procedure are required,” *id.*, and concluded that “procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence” violate due process. *Id.* at 290–91.

¹³ 549 S.E.2d 840, 849-50 (N.C. 2001); *see generally* ROLE OF MERCY, *supra* note 8.

¹⁴ Brittney Cunningham, *Empty Protection and Meaningless Review – The Need to Reform California’s Stagnant Capital Clemency System*, 44 LOY. L.A. L. REV. S265, S268 (2011) (citations omitted).

For example, with respect to claims of actual innocence in clemency proceedings, the Texas Board of Pardons and Paroles (“BPP”) has largely abdicated its role to consider such claims in clemency proceedings. Although not statutorily mandated, the BPP maintains a rule stating that before any clemency application for a pardon based on innocence is considered, it must first have the unanimous written recommendation of the trial officials, which are the district attorney’s office that prosecuted the case, the chief of the law enforcement agency that investigated the case and the judge of the court that presided over the case.¹⁵ According to Texas Appleseed and the Texas Innocence Project:

This rule is not found in any other examined state’s statutory or administrative regulations governing clemency. Only one other state, Alabama, requires the recommendation of a trial official before a presently incarcerated inmate can be pardoned on grounds of innocence. Alabama, however, requires only the recommendation of either the judge or prosecuting attorney, not both. Moreover, Texas is the only state where the Board requires an applicant for a pardon for innocence to provide a certified order or judgment of a court and a certified copy of the findings of facts with respect to the new evidence.¹⁶

The Texas executive branch has essentially abandoned its role as a failsafe for wrongful execution in death penalty cases and instead has delegated its authority to assess claims of actual innocence to other entities – such as the district attorney’s office (which prosecuted the defendant) and the judiciary (which sentenced him). The clemency process should be accessible to all death-sentenced prisoners for independent review of all claims, particularly claims of actual innocence.

The traditional role of clemency has been to dispense mercy, irrespective of guilt or innocence. The most common reasons offered in support of favorable clemency decisions involve doubts about the offender’s guilt, whether the offender has intellectual disability or mental illness and equitable considerations in light of less harsh sanctions imposed against other participants in the same crime. Indeed, clemency can serve as a stop-gap measure against many of the concerns discussed throughout this report. However, in practice, evidence and claims never considered on their merits due to ineffective assistance of counsel, procedural default, anti-successor rules, insurmountable burdens of proof, client waivers and the lack of true proportionality review very rarely are rectified through clemency review.

This state of affairs may be due, in part, to a widespread perception that sparing a death-sentenced offender is politically risky for an official who aspires to future public office. Several observers have warned that a governor’s decision to commute a death sentence may be

¹⁵ 37 TEX. ADMIN. CODE ANN. § 143.2 (West 2012).

¹⁶ ROLE OF MERCY, *supra* note 8, at 35.

tantamount to political suicide.¹⁷ Racial considerations, which have proven so vexing in the context of capital charging and sentencing decisions, also appear to play an invidious role in the clemency process. A *ProPublica* report published in December 2011 found that white criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities.¹⁸ African-Americans have had the poorest chance of receiving the president's ultimate act of mercy, according to an analysis of previously unreleased records and related data.¹⁹ *ProPublica*'s analysis showed that other factors also appeared to influence petitioners' success rate. For example, married applicants were twice as likely to succeed and those with congressional support were three times as likely to receive a pardon.²⁰

The Committee supports the need for basic procedural standards in clemency proceedings to provide a necessary safeguard against miscarriages of justice. The Committee recommends that the executive branch (a) ensure that the clemency process is accessible to all death sentenced prisoners for independent review of their claims; (b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state; (c) adopt substantive standards against which clemency applications will be evaluated; and (d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.

Arbitrariness is a core concern of due process and equal protection as it affects both the fairness of particular proceedings as well as the relative treatment of similarly situated persons and cases.²¹ The existence of transparent procedures, substantive criteria to guide decision-making, and a written explanation of each clemency decision are essential tools to limit arbitrariness and ensure that clemency operates as the intended safeguard within the criminal justice system. Although the written explanation of clemency decisions may never be publicly available or further reviewed, the Committee supports the preparation of a written explanation to the extent that there is a reason for further review in a particular case, and on the basis that the act of preparing a written explanation is itself conducive to the deliberative process and can aid that process.

¹⁷ Acker & Lanier, *supra* note 11, at 210-11.

¹⁸ Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, PROPUBLICA, DEC. 3, 2011, at <http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).