

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE  
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**Clemency in Capital Cases**

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**Executive Summary of Comments**

**1. The nature of clemency**

- a. *Executive*, not judicial function
- b. Virtually no judicial oversight
- c. Two ramifications from executive nature of clemency with little judicial involvement: 1) no set standards, procedures, or review and 2) no guarantee of review or consideration of any particular issue
- d. Purposes of clemency, nevertheless, are valuable: 1) final safeguard for process and 2) consideration of mercy
- e. Decline in grants of clemency in the last 40 years compared with earlier in the 20<sup>th</sup> Century

**2. Clemency in California**

- a. Model of decision by Governor with qualification of concurrence of majority of California Supreme Court for granting clemency to a twice-convicted felon  
(Eleven other states have this model)
- b. Board of Parole Hearings (BPH) role is advisory at discretion of Governor
- c. Other models include:
  - i. Governor with mandatory recommendation from Board to grant clemency (8 states)
  - ii. Governor with required advisory recommendation from Board (10 states)
  - iii. Board has authority (3 states)
  - iv. Board has authority, but Governor is a member of the Board (3 states)

**3. Revisions to the California Constitution**

- a. **Recommendation to report denials as well as grants of clemency to the legislature**
  - i. Current law requires reporting grants of clemency only
  - ii. Purposes served include accountability for clemency decisions and creating a record of actions taken

- iii. The purposes apply equally to denials of clemency and the purposes would be better served if denials were also reported to the legislature
- iv. Relatively easy to implement because all 14 petitions have resulted in written decisions

**b. Recommendation that Governor meet with attorneys for both sides**

- i. Decision maker should hear from counsel for both sides orally, as well as in written or other form, to ensure maximum understanding of the issues involved
- ii. While the Commission could recommend that Governors undertake a hearing with counsel as a best practice, it would likely be necessary to amend the California Constitution to ensure the hearing requirement

**c. Reconsideration of the requirement of concurrence of majority of California Supreme Court in order to grant clemency to a twice-convicted felon**

- i. Not a recommendation in our report, but one that we believe should be considered by the Commission
- ii. Originally, the provision requiring four justices to concur with a grant of clemency was a check on the power of the Governor
- iii. While today the provision may serve as evidence of consensus on a particularly strong claim of clemency and thus distribute the decision making power more broadly than a Governor acting alone, the availability of a referral to the BPH for a non-binding recommendation serves the same function without creating a bar to the exercise of clemency in some cases

**4. Revision to California statutory provision on clemency  
Recommendation to amend statute requiring referral to and  
recommendation from BPH for a twice-convicted felon**

- i. California Penal Code section 4813 requires BPH recommendation to be transmitted to the Governor in all cases involving twice convicted felons
- ii. The recommendation of the BPH is non-binding so there appears to be no reason to make this mandatory review for one category of felons
- iii. The four justice concurrence, if not amended, serves as a check on the granting of clemency for twice convicted felons
- iv. Review and recommendation requests to the BPH should be discretionary for all clemency requests since each Governor has

the power to decide whether to accept or reject BPH recommendations

**5. Data collection, public access, and public education**

- i. Release briefs of both sides through the Governor's office to increase transparency of the process and inform the public of the types of claims that are presented in capital clemency
- ii. Store data in an accessible location – requiring published denials to the legislature would aid in the information availability as well
- iii. Public awareness campaign including increasing public information about clemency as an extra-judicial process, the role of the BPH investigations, the practice of hearing all arguments presented and the role of mercy as a consideration in the process

West's Ann.Cal.Const. Art. 5, § 8

**C**Effective: [See Text Amendments]

West's Annotated California Codes Currentness  
Constitution of the State of California 1879 (Refs & Annos)  
Article V. Executive (Refs & Annos)

**→ § 8. Governor; reprieves, pardons and commutations; review of parole decisions; report to legislature**

Sec. 8. (a) Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.

(b) No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.

CREDIT(S)

(Adopted Nov. 8, 1966. Amended Nov. 7, 1972; Nov. 5, 1974; Nov. 8, 1988.)

HISTORICAL NOTES

1996 Main Volume

The 1972 amendment deleted, preceding the second sentence, the words "at each session".

The 1974 amendment made changes in gender references.

The 1988 amendment of this section by Prop. 89 was approved at the general election held Nov. 8, 1988, and added subd. (b), relating to review of parole decisions.

Stats.1993, Res. ch. 52 (A.C.R.10), provided in part:

"WHEREAS, Domestic violence is a serious and widespread problem, recognition of which has grown in recent years; and

"WHEREAS, Statistics regarding family violence are sobering. For example, in the United States, a woman is physically assaulted in her home every 15 seconds; and

West's Ann.Cal.Const. Art. 5, § 8

"WHEREAS, Our criminal justice system has been slow to respond to the victims of domestic violence. According to police department data, arrests are made in only 5 percent of domestic disturbance calls in Los Angeles County. Other research indicates that many battered women who kill their abusers previously have attempted, without success, to protect themselves or their children in other ways from battery, and later they are held to an unreasonable standard of justification when they try to assert their right to self-defense in court; and

"WHEREAS, Evidence of the battered women's syndrome was only recognized by the California Legislature on January 1, 1992. Even now such evidence is still very limited by the courts in trials of battered women who kill; and evidence of battered women's experiences often is not admitted by the court in trials; and

"WHEREAS, Because of these unreasonable standards of justification and limited admissibility of relevant evidence, victims of domestic violence who kill or assault their abusers in self-defense may nonetheless be convicted of felonies carrying long sentences; and many courts continue to mete out disproportionately harsh penalties for women who kill their abusers, even if the killing occurred after years of severe and well-documented abuse; and

"WHEREAS, At this moment, there are hundreds of women in California prisons who are serving time for defending themselves against their abusers. These women have been doubly victimized--first by their abusers and later by a criminal justice system that failed to recognize the legitimacy of their self-defense claims; and

"WHEREAS, In view of the extraordinary circumstances surrounding their crimes, these victims deserve an impartial review of the sentences they are now serving. It may be that some of them are rightfully imprisoned; however, only when their histories as victims of domestic violence are taken into account can the justice of their incarceration and the length of the sentences they are required to serve be fairly determined; and

"WHEREAS, A number of battered women in California prisons have already filed petitions with the Governor for pardon or commutation, or both, documenting their histories of abuse and the victimization by their partners whom they killed; many other women, who have not yet been identified, are in prison for defending themselves or their children, or both, against their abusers; now, therefore, be it

*"Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature of the State of California hereby requests the Governor of the State of California to use the authority granted him under Section 8 of Article V of the California Constitution to direct the Board of Prison Terms to immediately identify and investigate the cases of those battered women serving sentences in state prison who file petitions for clemency and of all other persons convicted of murder, attempted murder, manslaughter, attempted voluntary manslaughter, assault with a firearm, or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury in violation of Section 245 of the Penal Code, when those convictions were for acts alleged by the defendant to be related to victimization by domestic violence, as defined in Section 13700 of the Penal Code; and be it further*

*"Resolved, That the Legislature of the State of California hereby requests the Governor to direct the Board of Prison Terms to report to him regarding the findings of the investigation and any recommendations for pardons or commutations related to these cases; and be it further*

*"Resolved, That the Legislature of the State of California hereby requests the Governor to use the authority granted him under Section 8 of Article V of the California Constitution to make decisions regarding pardons or commutations within six months after receiving those findings and recommendations; and be it further*

*"Resolved, That The Chief Clerk of the Assembly transmit copies of this resolution to the Governor of the State of*

West's Ann.Cal.Const. Art. 5, § 8

California and to the Board of Prison Terms as an expression of serious concern for this issue from the California Legislature."

Former § 8, adopted May 7, 1879, empowering the governor to fill vacancies, was repealed Nov. 8, 1966. See Const. Art. 5, § 5.

#### CROSS REFERENCES

Death penalty, governor's power to suspend, see Penal Code § 3700 et seq.

Executive power, see Const. Art. 5, § 1.

Legislative power, see Const. Art. 4, § 1.

Register of application for pardon or commutation of sentence, see Government Code § 12030.

Statutory provisions, see Penal Code § 4800 et seq.

Supreme court, jurisdiction, see Const. Art. 6, §§ 10, 11.

C

Effective:[See Text Amendments]

West's Annotated California Codes CurrentnessPenal Code (Refs & Annos)Part 3. Of Imprisonment and the Death Penalty (Refs & Annos)    ¶ Title 6. Reprieves, Pardons and Commutations (Refs & Annos)        ¶ Chapter 1. Powers and Duties of Governor (Refs & Annos)            → **§ 4813. Applications of second offenders; recommendation; transmittal of papers**

In the case of applications of persons twice convicted of a felony, the Board of Prison Terms, after investigation, shall transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application.

CREDIT(S)

(Added by Stats.1941, c. 106, p. 1129, § 15. Amended by Stats.1957, c. 2256, p. 3938, § 83; Stats.1977, c. 165, p. 672, § 70, eff. June 29, 1977, operative July 1, 1977; Stats.1979, c. 255, p. 563, § 37.)

Current through Ch. 2 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

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