

Last Hope

A guide to seeking executive clemency or pardon in Washington State.

BY MAUREEN DEVLIN



Not all remedies are judicial. In some situations where judicial remedies have been exhausted, you might consider

advising your client to file a petition for clemency or pardon under RCW 9.94A.728 and RCW 9.94A.885. Despair can run deep among the criminally convicted and their loved ones, especially when appeals and post-conviction proceedings have proven unsuccessful. The clemency process can provide a bit of hope that there may be a possibility—however slim—of another form of relief, and may be what keeps that person going.

The Policy Behind Clemency

There has been some controversy regarding the very notion of executive clemency. After all, the power essentially allows the executive branch to override both the judicial and legislative branches. Nonetheless, executive clemency is a time-honored tradition in the federal government as well as in every state. In Washington, the power is rooted in Article III, section 9 of the Washington State Constitution. In an article on the history of clemency (*Chicago Tribune*, December 4, 2002) Daniel Kobil, professor at Capital University Law School, argues that the purpose of clemency is to provide “a meaningful check on courts and legis-

latures.” As the United States Supreme Court eloquently stated 90 years ago in *Ex Parte Grossman*, 267 U.S. 87, 120-21 (1925):

The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To offer a remedy, it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.

nary to warrant a lesser sentence or a pardon. Extraordinary circumstances in a commutation request might be that the petitioner has engaged in acts of remarkable good works, that the petitioner has shown pronounced personal change, that the petitioner has the support of the victim or the victim’s family, that the petitioner has a serious medical condition requiring special care, or that other circumstances exist demonstrating that the petitioner has been punished enough and is no longer a danger to the community.

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The Nuts and Bolts of Clemency

1: What is clemency? In Washington State, requesting “clemency” can mean that you are asking for one of two things:

- a commutation of the petitioner’s sentences by some period of time; or
- a full or conditional pardon of the petitioner’s crime(s).¹

2: What are the grounds for seeking clemency? There are virtually no guidelines or law in clemency. The key phrase in RCW 9.94A.885 is “extraordinary cases.” A petitioner must demonstrate circumstances that are sufficiently extraordi-

For a pardon, extraordinary circumstances might be a long period of demonstrated stellar citizenship after release coupled with the desire for an executive pardon when seeking certain kinds of employment, enrolling in particular training or military programs, or dealing with immigration issues.

3: How does the process get started? Petitions and supporting documents are first filed with the Clemency and Pardons Board. The basic forms can be found at <http://www.governor.wa.gov/clemency/default.asp>. All filing now can and should be done electronically. Paper filing is accepted but the materials will then need

to be scanned by board staff anyway for circulation to the board members, in which case you risk having your artfully arranged presentation messed up or documents taken out of order. The board has a full-time paralegal, who acts as a sort of clerk for filing. The current paralegal is unfailingly gracious and helpful. She knows more about the clemency process than the rest of us combined, and anyone new to the world of clemency would be well-advised to maintain a respectful and courteous relationship.

4: What forms and other documents need to be filed?

The basic petition form seems simple enough, but there are a few pitfalls to avoid.

The major pitfall concerns prior offenses. Previous versions of the petition required the petitioner to list only all *convictions*. The current version, however, asks petitioners if they have “ever been arrested, charged, or convicted of any other offense at any other time.” The board is not forgiving of petitioners who neglect to note each and every arrest and charge, whether a conviction resulted or not. Once such a mistake is discovered — and you should work on the assumption that it will be discovered — the rest of the petition will be viewed under a cloud of suspicion.

Similarly, the petition asks if the petitioner is currently or “at any time in the past” has been subject to a restraining order. Sometimes petitioners mistakenly believe that this question only refers to restraining orders for the current case. Additionally, the rules require that a copy of the judgment and sentence for which relief is sought be attached to the petition. These are usually simple enough to obtain, but if you wait until the last minute and do not have that copy attached, the petition may not even be

read and you may end up causing unnecessary delay in the review of your petition.

The form calls for a “petitioner’s statement” and asks specific questions of the petitioner. These include asking the petitioner to “fully explain the facts of the crime for which relief is being sought,” to describe what “extraordinary circumstances” might justify relief, to describe the petitioner’s rehabilitation efforts since conviction, and

must also be mailed to the board. The release of information is extraordinarily broad and allows for release of “any and all information ... concerning me, my work record, my reputation, my medical information, my psychological records, my military service records, my criminal history, and my financial status.” Putting aside for the moment the question of whether such a sweeping release is even legal, the release raises other concerns. For one thing,

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to detail the petitioner’s prison record (including disciplinary records). It is important that this statement be in the petitioner’s own words, but this can be a challenging assignment for many petitioners. Counsel should be prepared to carefully review the statement prior to submission.

In addition to the required forms, petitioners are free to submit whatever documentation they feel might be helpful. These might include, if available, evidence of rehabilitation efforts, documentation of educational achievement, psychological evaluations, statements from judges, prosecutors, or legislators, recommendations by employers, teachers, clergy members, and offers of practical support such as housing and employment.

Another important requirement is that petitioners attach a signed release of information to the petition. A scanned copy of the original signature is acceptable to meet the filing deadline as part of an electronically-filed petition but the original signed release

as discussed below, all petitions are considered public information once filed. While there is no formal procedure for keeping such sensitive information as medical, psychological, or financial records from becoming part of the public petition, it does appear that the board and the governor make some attempt to keep this information confidential. However, a petitioner may want to specifically request that such information be kept from public view.

5: Who sits on the Clemency and Pardons Board? The board consists of five members appointed by the governor to staggered four-year terms. It is important to know your audience: you should be aware that the board tends to be weighted towards members with prosecutorial or law enforcement experience, but also usually includes a community member and someone with criminal defense experience. The current board consists of:

- John Turner: Chief of Police for the

City of Snohomish; retired Chief of Police for the City of Mountlake Terrace;

- Raul Almeida: Captain of the Hanford Patrol; retired Chief of Police for the City of Mabton;
- James McDevitt: former US Attorney for the Eastern District Washington; attorney in Spokane;
- Jennifer Rancourt: Snohomish County Public Defender and Judge Pro Tem for Everett and Marysville Municipal Court; and
- Cheryl Terry: community member.

6: What happens after a petition is filed? Initial reviews of petitions are performed by two-member subcommittees of the board. If one or both determine that a hearing is warranted, then the matter will be scheduled for a hearing. If neither finds that a hearing is warranted, the petitioner will be notified but no reasons will be given as to why a hearing was not granted.

7: When are hearings held and what are the filing deadlines for those hearings? The full board meets four times a year in Olympia to conduct hearings. Multiple hearings are conducted on each hearing date. Clemency petitions cannot be granted without a public hearing, per RCW 9.94A885 (3). Hearings are typically scheduled in March, June, September, and December. If you wish to be considered for a particular hearing date, you should keep in mind that the filing deadlines are usually six full months in advance. For example, to be considered for the board's December 2012 meeting date, you must have your petition filed by June 8, 2012. The filing deadlines can be found at <http://www.governor.wa.gov/clemency/deadlines.asp>.

8: Who else is notified of a pending hearing? If a hearing is granted, the board is required to notify the prosecuting attorney who in turn is required to notify victims (or victims' families) and law enforcement. The prosecuting attorney may submit a response to the petition, as may law enforcement and victims.

9: What happens at a hearing? The hearings are relatively informal. Board members are generally very respectful and maintain a courteous atmosphere. Witnesses are not sworn, and there is no trial-like examination of witnesses. Witnesses and supporters can sometimes get tongue-tied and forgetful of what they wanted to say, so advance preparation is important. The hearings are open to the public and are recorded. Most will also be broadcast in their entirety on TVW. Many incarcerated individuals are quite familiar with what goes on at these hearings and regularly watch the TVW hearings. The rules of evidence do not apply. Petitioners are expected but not required to make a statement, and should give that statement careful thought.

Board members are free to ask whatever they like of the petitioner, the witnesses, and the lawyers. Sometimes these questions can seem odd to lawyers accustomed to certain courtroom rules. For instance, I was once asked at a hearing whether my client was paying for my services. The board member who asked apparently felt that a petitioner who could afford a lawyer should have been able to pay off more of his restitution. Board members may also ask detailed questions about the underlying facts of the offense.

10: What happens after a hearing? There is no suspense about what the board will recommend to the governor. Follow-

ing the hearing, the board deliberates on the record and makes its decision. The real suspense starts once the board forwards its recommendation to the governor. The current governor, Chris Gregoire, has held off on making final decisions for months and, in some cases, years. There are no rules about when the governor must make a decision.

There are no appeals of negative decisions. On the bright side, though, petitioners can file new petitions every three years with no limit on the number filed.

11: What is the effect of a pardon? When a pardon is granted, the governor's office will, pursuant to RCW 9.94A.030(11), send a letter to the Washington State Patrol asking that conviction be removed from the criminal history reporting that is available to the public. A pardon does not, however, automatically vacate a criminal conviction. Only the courts can vacate convictions. The rules for vacating convictions are set forth in RCW 9.96.060 and RCW 9.94A.640. These statutes do not explicitly address pardons or whether the limitations placed on the types of offense eligible for vacation apply to pardons. Without a vacation of the conviction, a pardoned person may not assert that he or she has never been convicted of a crime. Even with a pardon and a vacation of conviction, certain authorities may be entitled to obtain some non-conviction records.

12: Can previously filed petitions be viewed? Transparency should be paramount in clemency proceedings in order to avoid appearance of backroom deals or improperly motivated decisions. Hearings are open to the public and televised on TVW. Otherwise, though, information is somewhat difficult to

come by in Washington. It is a cumbersome, hit-or-miss process to get a handle on the kinds of petitions filed and on what happens to those petitions. There is no efficient way to access information about the kinds of petitions filed, especially those that do not receive a hearing. Disposition logs are maintained by the board's paralegal, who will forward these logs upon request, but these logs do not discuss the particulars of any petitions. The governor's office maintains all files and petitions once the board makes its decision but these files are not readily accessible to the public. Upon request, general counsel for the governor will forward thorough summaries prepared by the board for the governor's review but does not generally provide the actual petitions.

Lessons Learned from a Review of Petitions Granted — General Trends of a Successful Petition

Here are some observations that might increase the odds of success on a clemency petition:

- The board has in the past tended to be somewhat sympathetic to three-strikers whose offenses are not particularly heinous, especially those who were sentenced soon after the persistent offender statute was passed (when prosecutors tended to exercise even less discretion over charging decisions). King County Prosecutor Dan Satterberg supported a spate of such petitions a few years back.
- The board sometimes shows genuine compassion and understanding for petitioners whose crimes were committed in the throes of addiction and who have demonstrated a track record of sobriety, especially when those petitioners were very young at the time of the offense.

- The board finds victims (other than domestic violence victims) persuasive when those victims come forward to say they believe the petitioner has been sufficiently punished.
- Women tend to be viewed more sympathetically than men, especially if they are asking for a pardon when a prior conviction may be hindering them from pursuing a particular career.
- The board looks favorably upon

cal support (a job, housing, health insurance, financial assistance) and emotional support.

General Trends of Unsuccessful Petitions

There are some things that will generally sink your petition:

- If the offender has not made a real effort to pay restitution or otherwise make amends, the board will not look kindly on the petition.
- If an offender even vaguely hints

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snitches. If a petitioner has some juicy information that can help frame someone else, the board is more inclined to find that petitioner worthy of relief. I attended one hearing where the petitioner's truthfulness was so questionable that the audience starting exchanging raised eyebrow glances at each other and shaking their heads. Nonetheless, two members of the board found that this petitioner had demonstrated such strong moral character that a commutation was warranted. The governor has not yet ruled on this petition.

- For pardons, what constitutes "extraordinary circumstances" varies according to what the underlying offense was; the more serious the offense the more extraordinary the circumstances need to be.
- The board is impressed when the petitioner can produce a cadre of supporters who vow to offer practi-

that the blame for committing the offense lies somewhere other than solely with the offender, the game is over and the petition will fail. If your client is not going to take full, complete and sole responsibility for what happened, and if your client cannot express sincere remorse for the harm caused, then the petition will likely go nowhere.

- If the main basis for a petition is that the petitioner has stayed out of major trouble in prison and has taken all the classes DOC offers, the petition is probably not going anywhere. These things are a good start, but are not nearly enough. The board expects all petitioners to have been excellent inmates and to have taken advantage of opportunities for self improvement.

Does Anyone Ever Actually Win These?

The short answer is yes, but not very often. Granting clemency is not

politically popular. There is generally not much to be gained politically by a governor granting clemency, and much to be lost. It will be a long time before any governor in this state can think about clemency without also thinking two words: "Maurice Clemmons."

Governor Gregoire has been stingy with granting sentencing commutations and a little more generous in granting pardons. Although, as discussed above, complete information is not readily available, it appears that Governor Gregoire has thus far granted a mere six petitions for

compelling and tragic. Her childhood was fraught with physical abuse, sexual abuse, and serious trauma. At the time of the offenses, Ms. London was severely addicted to drugs. Ms. London had shown herself to be a model, non-aggressive inmate. Most significantly, Ms. London had the support of her sentencing judge who testified before the board that he did not believe at the time of sentencing, and still did not believe that Ms. London deserved to spend her life in prison. King County Prosecutor Dan Satterberg also supported Ms. London's petition. Ms. London also had the good

his felony conviction prevented him from doing so.

The Future of Clemency

Governor Gregoire leaves office in January 2013. She still has many petitions sitting on her desk, awaiting final decision. Perhaps she will have a sudden burst of compassion for these petitioners. Or not. The next governor could be more inclined towards granting petitions. Or less.

For many of our clients, once legal challenges have been exhausted, a chance at clemency may be their only hope of either being released from prison or getting on with a productive life outside of prison. A well-presented petition, prepared witnesses, and a petitioner capable of taking responsibility and showing true remorse can give these clients the best odds with the clemency board and with the governor. 

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commutation and approximately 36 petitions for pardon in her seven-plus years in office. The governor's office does not publish information about the number of petitions that are filed, or the number that are granted hearings. Several petitions are still awaiting the governor's decision. This governor has rejected petitions even when the board has recommended granting relief.

One of the most recent commutations granted by Governor Gregoire is illustrative of what it might take for a clemency petition to be successful. Mary London was sentenced under the persistent offender statute to life without parole for offenses involving robbery, burglary, and assault of acquaintances. The third strike was for a robbery that netted \$6 and two radios. At the time of her petition, Ms. London was 51 years old and had served 15 years. Ms. London's life story was

fortune to be represented by Jeff Ellis, who put together a thoroughly supported, forceful petition.

Typical of pardons granted by Governor Gregoire are the cases of Kizzy McNeal and Nghia Luu. Ms. McNeal was convicted in 1996 of assault in the third degree of her then-husband and the woman Ms. McNeal found sleeping with him. Following her conviction, Ms. McNeal went on to live an exemplary life. She attended college, enrolled in the military, remarried and had children. Ms. McNeal wished to pursue a career as an Army combat medic, and her assault conviction was hindering that ambition and getting in the way of her joining her military unit in combat in Iraq. Mr. Luu was convicted at age 19 of theft in the first degree for trying to steal a computer from Costco. Mr. Luu had led a crime-free life since the offense; he wished to pursue a career as a pharmacist but

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Notes

1. Petitioners may also file requests to have their civil rights restored through the clemency process; these requests are not discussed here.
2. RCW 10.01.120 governs pardons/commutations in death penalty cases. The application of clemency to death penalty cases is not discussed here.

**Writers Needed for
WASHINGTON CRIMINAL DEFENSE**

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