

CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE

**Clemency in Capital Cases**

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**Table of Contents**

<b>I.</b>	<b><u>Introduction</u></b>	<b>1</b>
<b>II.</b>	<b><u>Overview of Clemency in Death Penalty Cases</u></b>	<b>2</b>
<b>III.</b>	<b><u>History of Capital Clemency in California</u></b>	<b>6</b>
	<b>A. California Constitutional Clemency Provisions</b>	<b>6</b>
	<b>B. History of Executions and Commutations in California</b>	<b>7</b>
<b>IV.</b>	<b><u>The Limited Role of the Courts in the Clemency Process</u></b>	<b>10</b>
<b>V.</b>	<b><u>Procedures for Clemency Petitions in California</u></b>	<b>15</b>
	<b>A. Common Procedures in Capital Clemency Petitions</b>	<b>16</b>
	<b>B. Variations in Procedures and Approaches to Capital Clemency Petitions</b>	<b>19</b>
	<b>1. <i>Role of the Legal Affairs Secretary</i></b>	<b>19</b>
	<b>2. <i>Briefing Schedule</i></b>	<b>20</b>
	<b>3. <i>Acceptance of Materials and Commentary Other Than Briefs from Counsel</i></b>	<b>21</b>
	<b>4. <i>Hearings: Standards and Process</i></b>	<b>21</b>
	<b>5. <i>Role of the BPH or BPT</i></b>	<b>23</b>
	<b>6. <i>Format and Publication of Decisions</i></b>	<b>24</b>
<b>VI.</b>	<b><u>Reasons for Denying or Granting Clemency Petitions</u></b>	<b>25</b>
	<b>A. Post-1976 Clemency Petitions</b>	<b>25</b>
	<b>1. <i>Factors Raised by Petitioners</i></b>	<b>27</b>
	<b>2. <i>Information about the Nature of the Crime,</i></b>	

<i>Recommendation of the BPH, Views of Family Members, and Views of Other Interested Persons</i>	31
<b>B. Pre-1976 Clemency Petitions</b>	33
<b>VII. <u>Approaches in Other States</u></b>	36
<b>A. Decision by Governor Alone: North Carolina</b>	36
<b>B. Decision by Governor to Grant Clemency Conditioned Upon     Recommendation by Board: Texas</b>	37
<b>C. Decision by Governor Alone but Required Advisory     Recommendation by Board: Ohio</b>	39
<b>D. Decision by Board Alone: Georgia</b>	40
<b>E. Decision by Board Alone but Governor Is Member     of the Board: Nevada</b>	41
<b>F. Comparisons</b>	42
<b>VIII. <u>Modifications of the Clemency Process</u></b>	43
<b>A. ABA Projects on Clemency</b>	43
<b>B. Procedural and Substantive Standards</b>	45
<b>C. Insulation from Political Pressures</b>	48
<b>IX. <u>Recommendations</u></b>	49

## List of Appendices

<b><u>Appendix A</u></b>	<b>List of Persons Interviewed</b>	<b>i</b>
<b><u>Appendix B</u></b>	<b>Statistical Comparison of Death Sentences, Number On Death Row, Commutations, and Executions by Type of Clemency Authority</b>	<b>ii</b>
<b><u>Appendix C</u></b>	<b>Clemency Decisions 1992 – Present</b>	<b>iii</b>
	Robert Alton Harris	1
	William Bonin	4
	Keith Daniel Williams	6
	Thomas Martin Thompson	12
	Jaturun Siripongs (Gov. Wilson)	23
	Jaturun Siripongs (Gov. Davis)	35
	Manuel Pina Babbitt	44
	Darrell Keith Rich	59
	Stephen Wayne Anderson	71
	Kevin Cooper	106
	Donald Beardslee	108
	Stanley Williams	112
	Clarence Ray Allen	117
	Michael Morales	120
<b><u>Appendix D</u></b>	<b>ABA Death Penalty Moratorium Project’s Clemency Recommendations</b>	<b>iv-vi</b>

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### **I. Introduction**

At the request of the Commission, we undertook a study of clemency in capital cases throughout the years of California's use of the death penalty. Our goal is to provide the Commission with as much information as possible about the procedures and reasons for granting or denying clemency in capital cases. In the course of researching information for the report, we interviewed many individuals who have been involved in one capacity or another in capital clemency proceedings. We have greatly appreciated the time and insights of those with whom we spoke and they are listed in Appendix A. We would like to make it clear, however, that all aspects of this report are the views of the authors and not of any person who was interviewed.

We begin the report in Section II with a brief overview of the meaning of clemency, its function, and its historical background. Section III describes the present constitutional provision on clemency and its history as well as the history of executions and commutations in California. In Section IV, we outline the highly limited legal constraints and almost nonexistent intervention by courts in the clemency process.

In Section V, we begin describing the clemency process as it exists now in California, examining the roles of the Governor, the Legal Affairs Secretary, the Board of Parole Hearings, the attorneys for the petitioner, and the District Attorney's office involved in the case. This section also includes the role of other sources of information, such as from victims' families or the petitioners' families, the role of a hearing before the Board or the Governor, and the method of delivering a decision. Section VI follows with a description of the reasons given for denying clemency in the cases since 1992 and, to the extent it was possible to find information, the reasons for granting or denying clemency prior to 1976.

We then turn to an examination of alternatives to the process in California and various modifications suggested in the academic literature. Section VII provides information about the clemency process in five selected states. Four of those states have a process that is significantly

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\* We would like to thank our research assistants who worked on this project for many months and provided invaluable research and insights. They are Leslie Ramos, Lauren Tipton, Andrew McClelland, Chris Chaffee, and Ben Eilenberg.

different from California's in one or more respects. Section VIII is an overview of critiques of and suggested changes in clemency by the American Bar Association and other commentators.

The final section, Section IX, is a list of recommendations to assist the Commission in its work in evaluating clemency in the context of the criminal justice process in California. We look forward to a discussion of these recommendations and to any questions that you might have about our study of the clemency process.

As a last note before we begin the substance of the report, there are a number of terms used that may cause some confusion. The terms "clemency" and "commutation" are defined upfront in the first section. Other references that occur throughout the report that warrant explanation at the outset are to the "modern era" of the death penalty and to "pre-1976" and "post-1976" data. All death penalty statutes in the United States were effectively rendered invalid in 1972 when the United States Supreme Court found the statutes of Texas and Georgia unconstitutional as applied. The "modern era" of the death penalty nationally in the United States is viewed as beginning in 1976 when the United States Supreme Court upheld the death penalty itself as constitutional and upheld the facial validity of the revised statutes of Georgia, Florida, and Texas in a series of three decisions. After those decisions, states, including California, began to reenact death penalty statutes patterned after those of the states involved in the litigation before the Supreme Court. These statutes differed significantly from those that existed in the pre-1976 era. California passed a new statute in 1977. Our state statistics could be viewed as "post-1977," but we will refer to all statistics using the 1976 date as that is consistent with nationally-gathered statistics.

## **II. Overview of Clemency in Death Penalty Cases**

At the outset of this report, and in order to evaluate the benefits of different models or variations on models of clemency, it is important to keep in mind the functions of clemency. As discussed below, two dominant themes emerge from case law and academic scholarship for the role of clemency.<sup>1</sup> The first is clemency as the final fail-safe for correcting miscarriages of justice that occurred in the judicial process. The second is clemency as a source of mercy based on facts or circumstances that are outside the parameters of the judicial process. An example of the first is granting clemency to an innocent person. In this instance, the judicial process, as fair as it may have been, erred and an injustice will result if the person continues to be punished for an act he or she did not commit. An example of the second is granting clemency to a person who is dying of cancer or performed an act of heroism in saving a guard from a prison riot while serving his time.

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<sup>1</sup> There is an ongoing debate in the academic literature about the role of "mercy" in clemency decisions. Some writers are of the view that mercy is inconsistent with retributive justice. Others posit that "justice" includes a concept of mercy. Still others take the position that there can be two processes, one that focuses on justice (retributive justice) and the other on broader concerns, such as mercy. Because it appears to be well-entrenched in California gubernatorial administrations that clemency encompasses a mercy component as well as an injustice component (i.e., unfairness in the legal proceedings), we proceed from the assumption that miscarriages of justice in the sense of unfair proceedings or results and mercy on other grounds are both valid purposes for clemency. See, e.g., Symposium, *Clemency and Mercy*, 4 OHIO ST. J. CRIM. L. 321 (2007); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. Rev. 1415 (2004).

Clemency as practiced in the United States is almost exclusively an *executive* function and not a judicial function. The term *clemency* is a broad one and generally encompasses at least three executive actions: a pardon, a reprieve, and a commutation. Another term that is used to describe comprehensively all types of clemency is the “pardoning power.” A *pardon* itself, however, is a term specifically for an action that absolves the person of his or her conviction and sentence.<sup>2</sup> A *reprieve* stays the sentence for a short period of time.<sup>3</sup> A *commutation* is a reduction of sentence.<sup>4</sup> In the context of capital cases, most often a grant of clemency comes in the form of a commutation. Rarely, a death row inmate will be pardoned if evidence of innocence is discovered after all court processes are complete.<sup>5</sup> However in most cases, clemency in capital cases is extended where innocence is not proved, but an executive officer or board decides to commute a sentence of death to one of life imprisonment, usually without the possibility of parole.<sup>6</sup> Unless otherwise noted, the use of the term “clemency” in this report will mean “commutation.”

While clemency is part of the criminal justice process insofar as it is a final step for a defendant in a criminal action, at the same time clemency is not part of the criminal justice process insofar as it is a purely executive function. This existence at the intersection of judicial and executive power makes clemency unique. It is this unique placement that has caused some to view clemency as a fail-safe to correct errors brought about through the criminal justice process, while others find clemency to be an inadequate mechanism to reliably correct miscarriages of justice.<sup>7</sup>

The unique nature of clemency as a tool of the executive branch has also resulted in very limited judicial review of clemency procedures and decisions. To date, the judicial branch has only rarely involved itself in issues that affect the grant or denial of clemency. The minimal due process limitations on clemency will be discussed in Section IV below.

Exercising their broad discretion, the states have created a variety of clemency procedures. While all states with death penalty statutes do have a clemency procedure, the authority to whom such requests are made and the process for submitting requests is significantly different from state to state. In fourteen states, the Governor has sole authority to grant clemency.<sup>8</sup> In three states, a board decides clemency petitions.<sup>9</sup> Eight states require a Governor

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<sup>2</sup> See Linda E. Carter & Ellen Kreitzberg, UNDERSTANDING CAPITAL PUNISHMENT LAW, ch. 18, p. 253 (LexisNexis 2004).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (accessed March 4, 2008).

<sup>6</sup> Carter & Kreitzberg, *supra*, n.2, pp. 253-54.

<sup>7</sup> See Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1826 (2002), citing *Herrera v. Collins*, 506 U.S. 390 (1993), as an example of the Supreme Court erroneously considering clemency a safeguard against injustice. See also Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and Rightful Claim to Clemency*, 24 N.Y.U. Rev. L. & Soc. Change 43, 47 (1998).

<sup>8</sup> Death Penalty Information Center, *supra*, n. 5; Dinsmore, *supra*, n.7 at 1838 n. 66. California is listed as one of these fourteen, although it is unique in that a decision to grant clemency to a twice-convicted felon

to have a recommendation from a board or advisory group, and ten states require a recommendation from a board, but make the recommendation non-binding on the Governor.<sup>10</sup> The states in each category of clemency procedure are listed in Appendix B. For federal crimes, the authority is granted to the President by the United States Constitution.<sup>11</sup>

The clemency power in the United States is rooted in the English pardoning power which allowed Kings and Queens to forgive crimes against the Crown.<sup>12</sup> The English tradition may have been influenced by even earlier societies, as reports of grants of clemency for the condemned date back to ancient Rome.<sup>13</sup> In England, factors that formed the basis for a pardon included “benefit of the clergy,”<sup>14</sup> youth, or insanity.<sup>15</sup> The tradition of the royal pardon was carried over to the American colonies and royal Governors served as surrogates for the King in issuing pardons in early America.<sup>16</sup> While the framers of the United States Constitution were fairly wary of executive power, they acknowledged the need for executive pardoning power to counterbalance injustices that may result from the application of the law.<sup>17</sup> Article II, section 2, of the U.S. Constitution provides that the President “. . . shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.” Individual states in the early republic created their own systems of clemency and some gave the power to pardon to the legislature, rather than to the Governor.<sup>18</sup> All, however, rested clemency with one of these two elected branches and not with the judicial branch.<sup>19</sup> One tenet that has held since the English royal pardons is the ability for the pardoner to use his or her discretion in awarding clemency. In our modern day system of clemency, the executive branch has virtually complete discretion to decide whether or not to grant clemency, on what grounds, and by what procedure.<sup>20</sup>

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must be approved by four members of the California Supreme Court. New York and New Jersey are also listed among the fourteen states, although they have both recently abolished the death penalty.

<sup>9</sup> Death Penalty Information Center, *supra*, n.5. These states are Connecticut, Georgia and Idaho.

<sup>10</sup> Death Penalty Information Center, *supra*, n. 5.

<sup>11</sup> See U.S. CONST. art. II, § 2, cl. 1: “(The President) shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”

<sup>12</sup> See Ridolfi, *supra*, n. 7 at 49-50 and Michael A. G. Korengold, et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 353 (1996).

<sup>13</sup> See Daniel Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 569 (2000) (describing the history of clemency; giving example of clemency granted in ancient Rome if the condemned man happened to cross the path of vestal virgins).

<sup>14</sup> See Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 586 n.97 (1991) (describing the “benefit of the clergy” as originally exempting “clerics and their associates”).

<sup>15</sup> See Ridolfi, *supra*, n.7 48 n.23 (describing the use of clemency in England for situations that would be covered today by defenses: “self-defense, lack of intent, insanity, and age”).

<sup>16</sup> See Ridolfi, *supra*, n.7 at 50.

<sup>17</sup> See Ridolfi, *supra*, n.7 at 50-51.

<sup>18</sup> Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 248-249 (2002).

<sup>19</sup> *Id.* at 249.

<sup>20</sup> See Linda E. Carter, *Lessons From Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT’L. L. 259, 267 (2005)(noting that, in most states, “the only oversight of clemency rest[s] with voters who elect the Governors”).

Scholars have debated the purposes and role of clemency with most concluding that some aspect of “mercy” should inform the clemency inquiry.<sup>21</sup> Professor Ridolfi has articulated two general purposes for clemency: “(1) to dispense mercy when the system is too harsh in an individual case and, (2) to ensure justice when the system proves itself incapable of reaching a just result.”<sup>22</sup> Professor Linda Ross Meyer looks at the historic bases for clemency and divides pardons into five categories based on: (1) equity, (2) peace, (3) allegiance, (4) compassion, and (5) extrinsic-good.<sup>23</sup> She argues that without taking the risk of pardoning people along all five of these bases, we will be subject to a merciless state.<sup>24</sup> Other scholars see no place for mercy in a system of retributive justice and urge that mercy, as distinct from equitable discretion, is improperly applied in a justice system.<sup>25</sup>

The United States Supreme Court has recognized the significance of clemency. In the context of a case that was raising a claim of actual innocence, Justice Rehnquist commented on the role of clemency as a safeguard against errors in the judicial process. In *Herrera v. Collins*,<sup>26</sup> he wrote that “[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”<sup>27</sup> Calling the power to pardon “an act of grace,” he further wrote: “Executive clemency has provided the ‘fail-safe’ in our criminal justice system. ... It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”<sup>28</sup> And, more recently, the United States Supreme Court has again reaffirmed clemency proceedings as “a matter of grace” outside of the judicial process and open to executive discretion.<sup>29</sup>

The broader purpose of clemency, as an act of mercy, is rooted in history and contemplates factors beyond what is considered in a judicial process. As Judge Janice Rogers Brown of the U.S. Court of Appeals for the District of Columbia Circuit, and formerly a justice of the California Supreme Court, wrote in 1992 after the execution of Robert Alton Harris: “Mercy cannot be quantified or institutionalized. It is properly left to the conscience of the executive entitled to consider pleas and should not be bound by court decisions meant to do justice.”<sup>30</sup> At the time that she wrote the article from which the quoted passage is taken, Judge Brown was the Legal Affairs Secretary to Governor Pete Wilson and, thus, had a significant role in the clemency process for Harris whose case had just come before the Governor.

It is with this backdrop in mind that we examine the historic use of the clemency process in California capital cases and try to find its place in our current criminal justice system.

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<sup>21</sup> Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton University Press 2006).

<sup>22</sup> Ridolfi, *supra*, n. 7 at 77-78.

<sup>23</sup> Linda Ross Meyer, *The Merciful State*, p. 66, in *Forgiveness, Mercy and Clemency*, edited by Austin Sarat and Nasser Hussain (Stanford University Press 2007). In this essay, Professor Meyer draws on the pardons made by Abraham Lincoln in a series of letters to demonstrate that the first four types of pardons are deeply rooted in American history.

<sup>24</sup> *Id.*

<sup>25</sup> Dan Markel, *Against Mercy*, 88 Minn. L. Rev. 1421 (2004).

<sup>26</sup> 506 U.S. 390 (1993).

<sup>27</sup> *Id.* at 411-412.

<sup>28</sup> *Id.* at 415.

<sup>29</sup> *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 285 (1998).

<sup>30</sup> Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327 (1992).



### **III. History of Capital Clemency in California**

#### **A. California Constitutional Clemency Provisions**

The original California Constitution of 1849 gave the Governor the “power to grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.”<sup>31</sup> That provision, at the time Article V, section 13, also required the Governor to communicate each pardon or reprieve (but not commutation) to the Legislature at the beginning of every session.<sup>32</sup> In 1879, the clemency provision of the California Constitution moved to its own Article, namely, Article VII, section 1, which stated:

The governor shall have the power to grant reprieves, pardons, and commutations of sentence, after conviction, for all offenses except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying pardons. Upon conviction for treason, the Governor shall have power to suspend the execution of the sentence until the case shall be reported to the Legislature at its next meeting, when the Legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. The Governor shall communicate to the Legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same. Neither the Governor nor the Legislature shall have power to grant pardons, or commutations of sentence, in any case where the convict has been twice convicted of felony, unless upon the written recommendation of a majority of the Judges of the Supreme Court.<sup>33</sup>

Two important changes were made in the 1879 Amendments. First, the provision broadened the Governor’s reporting requirements to mandate that he or she include the reasons for granting clemency.<sup>34</sup> Second, a new limitation on the power to grant a pardon or commutation was imposed in the form of securing the assent of a majority of the justices of the

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<sup>31</sup> Cal. Const. art. V, §13 (1849).

<sup>32</sup> *Id.*

<sup>33</sup> Cal. Const. art. VII, § 1 (1879). Interestingly, the 1879 Constitution moved the pardoning power to its own section outside of the Article delineating executive power, and while it added commutations to the list of powers the Governor could exercise, it failed to include commutations in the list of acts that the Governor was required to report to the Legislature. That omission was remedied in a 1941 statutory enactment, Cal. Penal Code sec. 4807, and commutations were also added to the list of acts that should be communicated at the beginning of each legislative session in the 1966 Revision of the California Constitution. Unfortunately, the duplication of this requirement in the present Constitution and section 4807 has never been cleaned up, and so the Constitution and the statute both mandate the same reporting with slightly different language.

<sup>34</sup> Cal. Const. art. VII, §1 (1879).

California Supreme Court.<sup>35</sup> This latter requirement is unique to the process of clemency in California.

In 1966, the California Revision Commission moved the clemency provision from Article VII back into the article that addresses the executive power, Article V.<sup>36</sup> The current Article V, section 8(a), is not substantially different from the 1879 version. The newer version omits the specific procedures to be followed by the Governor in the event that he wants to grant a reprieve or pardon to a person convicted of treason. More significantly for the purposes of this report, the newer version corrected what was probably an oversight in the 1879 version by mandating that the Governor report commutations as well as reprieves and pardons to the Legislature. The current provision states:

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.

The constitutional section appears to make the discretion of the Governor subject only to legislation relating to the “application procedures.” We assume for the purposes of this report and for our later recommendations that the term “application procedures” would be narrowly defined by the courts and would permit regulation only of the procedures relating to the submission of a petition and not to more substantive clemency procedures, such as the requirement of a hearing or the consideration of certain criteria.

## **B. History of Executions and Commutations in California**

The Criminal Practices Act of 1851 legalized executions statewide.<sup>37</sup> In 1872, the Penal Code required that all executions be committed “within the walls or yard of a jail, or some convenient private place in the county.”<sup>38</sup> Because executions were performed by county authorities and the information was not recorded, it is impossible to know with complete accuracy how many were executed in total during the first forty years of California statehood.<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Cal. Const. art. V, § 8 (1966).

<sup>37</sup> Stats 1851 ch 29 § 480 (1851).

<sup>38</sup> *Id.*

<sup>39</sup> Gerald F. Uelmen, *California Death Penalty Laws and the California Supreme Court: A Ten Year Perspective*, Prepared for the Senate Committee on Judiciary of the California Legislature, Senator Bill Lockyer, Chairman, Under the Auspices of the Institute of Politics and Government, U.S.C., April 22, 1986, pg 6.

In 1891, the California legislature passed a provision requiring that all executions be performed by the state prisons.<sup>40</sup> After 1893, all executions were performed at either Folsom Prison or San Quentin; the first state-conducted execution was held March 3, 1893, at San Quentin, and the first execution held at Folsom occurred on December 13, 1895.<sup>41</sup> From 1893 until 1938, a total of 310 prisoners were executed. Out of the 310 people executed, one was convicted of assault while serving a life sentence, three were convicted of kidnapping, and the rest were convicted of murder.<sup>42</sup> During the same time period from 1893 to 1938, 55 death sentences were commuted. The following chart lists the executions and commutations by gubernatorial administration from 1893 to the present:

Year	Governor <sup>43</sup>	Executions	Commutations
1893-1894	Henry Markham	3	0
1895	Markham/Budd	9	0
1896-1898	James Budd	20	0
1899-1902	Henry Gage	13	1
1903-1906	George Pardee	27	3
1907-1910	James Gillett	13	1
1911-1916	Hiram Johnson	30	9
1917	Johnson/Stephens	2	1
1918-1922	William Stephens	27	13
1923-1926	Friend Richardson	39	1
1927-1930	Clement Young	39	5
1931-1933	James Rolph Jr.	26	6
1934	Rolph/Merriam	9	7
1935-1938	Frank Merriam	53	9
1939-1942	Culbert Olson	29	16
1943-1952	Earl Warren	80	7
1953	Warren/Knight	8	1
1954-1958	Goodwin Knight	38	5
1959-1966	Edmund "Pat" Brown <sup>44</sup>	35	20
1967	Ronald Reagan	1	1
1992-1998	Pete Wilson	5	0
1999-2003	Gray Davis	5	0
2003-	Arnold		
Present	Schwarzenegger	3	0

<sup>40</sup> Cal. Stats. 1891, ch. 191, § 9, p. 274.

<sup>41</sup> California Department of Corrections and Rehabilitation: History of Capital Punishment in California, [http://www.cdcr.ca.gov/Reports\\_Research/historyCapital.html](http://www.cdcr.ca.gov/Reports_Research/historyCapital.html) (accessed 3/4/08).

<sup>42</sup> Executions in the U.S. 1608-2002: the ESPY File, Inter-University Consortium for Political and Social Research, available at <http://www.deathpenaltyinfo.org/ESPYstate.pdf>.

<sup>43</sup> The years 1895, 1917, 1934, and 1953 are listed separately because two Governors overlapped in those years and we do not have data that indicates in which administration the executions for that year occurred. We are also missing some data from 1910 due to missing legislative reports.

<sup>44</sup> It is commonly reported that 36 executions and 23 commutations occurred during the administration of Governor Pat Brown. The statistics in our chart are based on the ESPY file, the California Department of Corrections website, and the reports to the California Senate. There are probably discrepancies in the counting because it was somewhat common for there to be a two-step process in commuting a death penalty case. We found a number of instances where one Governor commuted from death to life without parole and a subsequent Governor commuted that sentence from life without parole to life with parole. We cannot explain the discrepancy in number of executions.

During the early twentieth century, as the above chart reflects, there were certainly differences in the use of the capital clemency power from administration to administration. Governor Friend Richardson commuted only one death sentence in his one term as Governor from 1923-1927.<sup>45</sup> In the two administrations before Governor Richardson, Governors Stephens and Johnson commuted sentences at a rate of about one commutation to three executions, or maybe even a slightly higher ratio. In the years following Governor Richardson, Governors continued to routinely commute death sentences, although the ratios varied greatly depending on the administration. For example, during his administration from 1939-1942, Governor Culbert Olson commuted 16 death sentences while overseeing only 29 executions.<sup>46</sup> In contrast, Governor Earl Warren held office for almost ten years from 1943 to 1953 and commuted only about 7 sentences, while overseeing approximately 80 executions.<sup>47</sup> Despite these differences in volume of commutations, it was the practice of most Governors to commute some of the death sentences that were presented to them during their tenure.

The last execution before years of death penalty hiatus took place in 1967. Despite the lack of official recordation of executions within California during the first forty years of statehood, a database referred to as the ESPY Database estimates that a total of 709 executions took place within the state between 1778 and 1967.<sup>48</sup>

Multiple events led to the cessation of executions in California from 1967 until April of 1992. In 1964, the California Supreme Court issued an opinion necessitating new penalty trials for all death row inmates because of an erroneous jury instruction.<sup>49</sup> This order halted executions in the mid-1960s. In the California Supreme Court's 1972 decision, *People v. Anderson*,<sup>50</sup> the court overturned California's death penalty law, holding that it violated the California constitutional ban of cruel and unusual punishment.

Soon after *Anderson*, the United States Supreme Court handed down its decision in *Furman v. Georgia*.<sup>51</sup> In *Furman*, the Court held that the death penalty in Georgia and Texas was unconstitutional as applied. The dominant reasoning in the nine separate opinions in *Furman* was that the death penalty as administered was arbitrarily imposed in violation of the Eighth Amendment's cruel and unusual punishment clause. The decision in *Furman* effectively invalidated the death penalty systems in all states. As a result of *Anderson* and *Furman*, all

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<sup>45</sup> Message of the Governor Regarding Acts of Executive Clemency 1923-24 (transmitted to the Legislature January 1925); Message of Governor Friend Wm. Richardson Regarding Acts of Executive Clemency 1925-26 (transmitted to the Legislature January 1927).

<sup>46</sup> See chart in text.

<sup>47</sup> Governor Warren's Lieutenant Governor Frederick Houser granted two commutations during Governor Warren's absence from the state. Message of the Governor Concerning Pardons, Commutations and Reprieves, 1945-1946 (transmitted January 1947).

<sup>48</sup> Executions in the U.S. 1608-2002: the ESPY File, Inter-University Consortium for Political and Social Research, available at <http://www.deathpenaltyinfo.org/ESPYstate.pdf>.

<sup>49</sup> *People v. Morse*, 60 Cal. 2d 631 (1964) (holding that it was an error to instruct a jury responsible for deciding whether to impose death penalty on a defendant that if the jury did not impose a death sentence, the defendant could be paroled after seven years).

<sup>50</sup> 6 Cal. 3d 628 (1972).

<sup>51</sup> 408 U.S. 238 (1972).

death sentences were commuted.<sup>52</sup> These decisions led to 107 people on California's death row having their sentences changed, including Sirhan Sirhan, who assassinated Robert F. Kennedy, and Charles Manson. Subsequently, however, in 1976, the U. S. Supreme Court held that, while the death penalty cannot be imposed arbitrarily, the death penalty itself is not unconstitutional.

In the aftermath of the 1976 decisions by the U.S. Supreme Court, states, including California, passed new death penalty statutes. The California legislature passed such a statute in 1977. Although there have been various amendments over the years, most notably in 1978 with the Briggs Initiative, California has had a death penalty on its books continuously since 1977.

In April 1992, the first execution since 1967 took place in California with the execution of Robert Alton Harris. In total, since the death penalty was reinstated in California, thirteen men have been executed. Eleven of those 13 individuals petitioned for clemency and their petitions are discussed in Section VI below. Two other death row inmates have also petitioned for clemency and their petitions were denied, but they have not been executed. These cases, too, are discussed *infra*. There are presently no executions imminent in California and there are no pending clemency petitions.<sup>53</sup>

#### **IV. The Limited Role of the Courts in the Clemency Process**

The courts take a "hands-off" approach to clemency. In large part, this is due to the status of clemency as an executive function, not a judicial one. Courts have repeatedly found little or no legal authority for courts to intervene in the clemency process. There is, however, a sliver of due process protection within capital clemency that does not exist in the clemency process for non-capital crimes due to the case of *Ohio Adult Parole Authority v. Woodard*,<sup>54</sup> decided by the United States Supreme Court in 1998.

Woodard had challenged the Ohio procedures as providing inadequate notice of a pre-hearing interview and a clemency hearing before the Ohio Parole Authority,<sup>55</sup> excluding his counsel from the interview and permitting participation of counsel at the hearing only in the discretion of the chair of the Authority, and precluding the submission of oral or written evidence at the hearing.<sup>56</sup> There are three opinions in the decision: 1) a four-justice plurality that found no due process rights in a clemency proceeding for a condemned inmate; 2) a four-

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<sup>52</sup> See California Department of Corrections and Rehabilitation: History of Capital Punishment in California, *supra*, n. 41. As a result of the 1972 decisions, 107 inmates had their sentences commuted.

<sup>53</sup> Two previously-scheduled executions have been halted by federal courts in recent years. The execution of Kevin Cooper, originally scheduled for Feb. 10, 2004, was halted by the Ninth Circuit Court of Appeals in order to allow for additional DNA testing of blood and hair evidence. See *Cooper v. Woodford*, 35 F.3d 1117 (9th Cir. 2004). The execution of Michael Morales, originally scheduled for Feb. 21, 2006, was suspended indefinitely after a District Court order that the execution be carried out by a medical professional. See *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006). The issue of the constitutionality of the lethal injection method is presently pending before the United States Supreme Court in the case of *Baze v. Rees*, 128 S.Ct. 34 (2007) (cert. granted), *as amended* 128 S.Ct. 372 (2007).

<sup>54</sup> 523 U.S. 272 (1998).

<sup>55</sup> *Id.* at 289-290 (O'Connor, J., concurring) (Woodard had three days notice that he could have an interview with a member of the Authority and 10 days notice of the actual clemency hearing).

<sup>56</sup> *Id.*

justice concurring opinion that found that a condemned inmate retained an interest in life that was accorded “some minimal procedural safeguards” in clemency; and 3) a one-justice concurring and dissenting opinion that agreed with a minimal level of due process. Eight justices held that Ohio’s procedures were constitutional (the four-justice plurality and the four-justice concurring opinion). The plurality, of course, considered the procedures constitutional because, in their view, Woodard had no due process right in the clemency proceedings.<sup>57</sup> The four-justice concurring opinion that recognized a minimal due process right also found that Ohio’s process was constitutional, noting that Woodard had “notice of the hearing and an opportunity to participate in an interview” in accord with Ohio’s procedures and the due process clause. The one-justice concurring and dissenting opinion did not express a view on the constitutionality of Ohio’s process and would have remanded the case to the District Court for that determination.

The justices who found a due process life interest in the clemency proceedings provided a few examples of what might violate due process. Their examples suggest that only the most extreme arbitrariness or denial of access would constitute a due process violation. Writing for the four-justice concurring opinion, Justice O’Connor suggested:

Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.<sup>58</sup>

Concurring and dissenting, Justice Stevens agreed that “only the most basic elements of fair procedure are required.” He added:

Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. I think, for example, that no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency.<sup>59</sup>

Justice Stevens also suggested that “procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence” would violate due process.<sup>60</sup>

Although a splintered opinion, the agreement of five justices that a minimal level of due process existed in capital clemency means that *Woodard* opened the door, however slightly, for due process challenges to the clemency process. There are numerous cases raising due process claims, both before and after *Woodard*. However, due to the limited nature of the due process right, state and federal courts have routinely rejected due process challenges to clemency procedures. The case that we found in which it was most likely that the court would have found

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<sup>57</sup> The plurality did state that Woodard had a “residual life interest, e.g., in not being summarily executed by prison guards,” but they did not find a life interest in the clemency process itself. *Id.* at 281.

<sup>58</sup> *Id.* at 289.

<sup>59</sup> *Id.* at 292.

<sup>60</sup> *Id.* at 290-91 (stated in context of disagreeing with the logical result of the plurality’s position).

a due process violation was one where the State was viewed as interfering with the inmate's ability to present information to the Governor in clemency. The inmate wanted to submit an affidavit from a prosecutor. The prosecuting office, the Circuit Attorney, threatened to fire the prosecutor if she submitted the affidavit. The Eighth Circuit Court of Appeals did not mince words, noting that the actions might well be a crime of tampering with a witness, and held, *inter alia*, that the inmate stated a valid §1983 claim and remanded the case.<sup>61</sup>

Since *Woodard*, there have been four notable due process challenges to clemency in California. They arose in the cases of Siripongs, Anderson, Allen, and Morales. None of the cases resulted in a determination that there had been a due process violation.

In a §1983 action in 1998, a federal court issued a temporary restraining order that stayed the execution of Jaturun Siripongs.<sup>62</sup> Siripongs claimed that he had been misled by letters from the Governor's office and the Board of Prison Terms (BPT) about what the Governor would or would not consider in clemency. Specifically, Siripongs claimed that he understood the letters to preclude consideration of his guilt of the crime, but that Governor Wilson's denial of clemency was based, in part, on the lack of evidence of innocence.<sup>63</sup> The Attorney General's office contested the interpretation that there were any limits placed on issues in clemency, contending that the letters only stated the obvious that clemency was not a judicial proceeding or a relitigation of guilt or innocence.<sup>64</sup> Although indicating there were "serious questions" raised in Siripongs' claim, the court denied the preliminary injunction because the execution date was rescheduled and Siripongs would have another chance to file a clemency petition.<sup>65</sup> Thus, there was no resolution of the due process claim on the merits. There was a change in administrations shortly thereafter and Siripongs submitted a new petition for clemency to Governor Davis.

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<sup>61</sup> *Young v. Hayes*, 218 F.3d 850 (8<sup>th</sup> Cir. 2000), *appeal dismissed as moot*, 266 F.3d 791 (8<sup>th</sup> Cir. 2001) (appeal was dismissed as moot after the prosecutor left the Circuit Attorney's office and obtained new employment). Ultimately, there was no final determination of a due process violation.

<sup>62</sup> A panel of the Ninth Circuit Court of Appeals denied the state's petition for a writ of mandamus to review the TRO. *Wilson v. United States District Court for the Northern District of California*, 161 F.3d 1185 (9<sup>th</sup> Cir. 1998).

<sup>63</sup> The letter from the Legal Affairs Secretary stated in pertinent part:

"As you know, the clemency process is not a trial or judicial proceeding of any kind. If the Governor believes that an oral presentation would be helpful, we will advise you after he reviews your written submissions. Otherwise, the Governor will make his decision on the basis of the written submissions."

Letter from Daniel M. Kolkey to Linda Schilling, Michael Laurence and James Tanizaki, October 19, 1998.

The letter from the BPT to Siripongs' attorneys stated in pertinent part:

"In considering relevant material that you may wish to provide, please understand that this review is administrative and does not include re-litigation of the issues decided in the various courts. Rather it is an opportunity for the Governor to consider the totality of the person and circumstances in making a decision based upon his commutation authority."

Letter from Dave McAule, Senior Investigator, BPT, to Michael Laurence, October 21, 1998.

<sup>64</sup> See Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction and Request for a Dismissal of Plaintiff's Request for Declaratory and Injunctive Relief, filed December 3, 1998.

<sup>65</sup> See *Siripongs v. Davis*, 282 F.3d 755 (9<sup>th</sup> Cir. 2002) (Court denied attorney's fees to Siripongs because the TRO was not viewed as "proving an actual violation of the plaintiff's rights" as required in order to recover the fees).

In Stephen Wayne Anderson's case, the claim was that Governor Davis had a blanket policy not to grant clemency to any convicted murderer and that this violated due process and Eighth Amendment rights. The Ninth Circuit rejected the claim on the basis that there was insufficient evidence that Anderson's case would not receive individual consideration by the Governor.<sup>66</sup> In the course of its decision, the Ninth Circuit panel noted that other courts had not found a general policy to refuse clemency in capital cases to be violative of due process. They also distinguished this case from Siripongs in that there was no claim of inadequate notice of what would be considered in clemency.

In the third case, Clarence Ray Allen sought a stay of execution on Sixth, Eighth, and Fourteenth Amendment grounds. Suffering from many medical problems, Allen claimed that he was unable adequately to prepare his clemency petition because he had not received necessary medical care and was unable to meet sufficiently with his attorneys due to transfers to various medical facilities. The federal district court denied a stay, citing to the minimal due process standard in clemency that "the State does not arbitrarily deny the prisoner all access to the clemency process, and the clemency decision is not wholly arbitrary or capricious."<sup>67</sup>

The fourth California case similarly resulted in a rejection of a due process challenge. In 2006, Michael Morales sought an injunction prohibiting the participation of the San Joaquin County District Attorney's office in clemency proceedings on the basis that an Assistant District Attorney in that office was formerly a criminal defense attorney who had represented Morales. The court noted that there was no allegation that the attorney was providing any confidential or privileged information to the attorneys in the office handling the clemency petition. The court further found that the fact that the attorney presently worked in the District Attorney's office did not infringe on the minimal procedural safeguards identified in *Woodard*.<sup>68</sup>

Other challenges around the country have raised a variety of due process claims, none of which were successful. In several cases, petitioners argued that actual or appearance of bias or a conflict of interest on the part of a Governor or clemency board rendered the proceedings unfair. In two cases, the Governor had served as that state's Attorney General during earlier proceedings in the case.<sup>69</sup> In another situation, petitioner argued that where two of five members of the clemency board in Georgia were under investigation by the state Attorney General's office, they would at least have the appearance of bias because they would want to agree with the state's position in clemency to further their own causes.<sup>70</sup> Also in one of the Georgia cases, there was a

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<sup>66</sup> Anderson v. Davis, 279 F.3d 674 (9<sup>th</sup> Cir. 2002), *cert. denied*, 534 U.S. 1119 (2002).

<sup>67</sup> Allen v. Hickman, 407 F.Supp.2d 1098, 1103-04 (N.D.Cal. 2005).

<sup>68</sup> Morales v. Willett, 417 F.Supp.2d 1141 (C.D.Cal. 2006)

<sup>69</sup> Buchanan v. Gilmore, 139 F.3d 982 (4<sup>th</sup> Cir. 1998) (Virginia) (reversing stay where, *inter alia*, claim was challenging Governor for bias where Governor had been the attorney general in prior proceedings involving petitioner's case; reliance on "rule of necessity" where only Governor can grant or deny clemency); Bacon v. Lee, 353 N.C. 696 (2001) (North Carolina) (no violation where Governor had been Attorney General during death row inmates' post-conviction proceedings).

<sup>70</sup> Gilreath v. State Bd. Of Pardons and Paroles, 273 F.3d 932 (11<sup>th</sup> Cir. 2001) (Georgia) (no violation where two of five members of parole board were under investigation by the state attorney general's office; no indication that attorney general took any position on clemency and had no role in it); Parker v. State Bd. Of Pardons and Paroles, 275 F.3d 1032 (11<sup>th</sup> Cir.), *cert. denied*, 534 U.S. 1072 (2001). (Georgia) (no violation on same claim as Gilreath and additional claim that third Board member would be represented by Attorney General's office in sexual harassment suit).



challenge based on alleged bias by the chair of the Board, who had stated three years before petitioner's case that no one on death row would get clemency while he was chair.<sup>71</sup> In a third situation, the Governor was running for the U.S. Senate and petitioner claimed that the political pressure in an election in which the granting of clemency in death penalty cases was a campaign issue would preclude the Governor from giving him a fair consideration in clemency.<sup>72</sup> None of these courts found that the possible conflicts of interest jeopardized the "minimal" due process right identified in *Woodard*.

Arguments that the absences of certain procedures were due process violations have also failed. For example, the lack of a public proceeding, the lack of a hearing, the absence of reasons for the decision, the absence of records of the actions taken,<sup>73</sup> and the failure to provide counsel in a second clemency proceeding<sup>74</sup> have not constituted due process violations. Similarly, courts have rejected arguments that the refusal to allow petitioners to run DNA tests on evidence or to have other medical tests run on the petitioner violates due process.<sup>75</sup>

The legal challenges to clemency have even included treaty rights. In one case, for example, the petitioner argued that a provision of the International Covenant on Civil and Political Rights that guarantees the right to seek pardon or commutation if one is sentenced to death was violated by an inadequate clemency process. The Fifth Circuit rejected this argument on the basis that the treaty was unenforceable in a U.S. court.<sup>76</sup> While not a challenge to a clemency process, it is also worth noting that the concept of clemency in U.S. cases was considered in a decision rendered by the International Court of Justice (ICJ). In a case brought by Mexico against the United States on behalf of all Mexican nationals on death row in the United States, Mexico argued that the provisions of the Vienna Convention on Consular Relations (VCCR) required a judicial hearing to determine the effect on the conviction and sentence of a failure to advise detained foreign nationals of their right to contact their home

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<sup>71</sup> Parker, 275 F.3d at 1034 (noting that district court had credited the chair's testimony that he had an open mind to consider each clemency petition).

<sup>72</sup> Roll v. Carnahan, 225 F.3d 1016 (8th Cir. 2000) (Missouri).

<sup>73</sup> Faulder v. Texas Bd. of Pardons & Paroles, 178 F.3d 343 (5th Cir.), *cert. denied*, 527 U.S. 1017 (1999).. See also LaGrone v. Cockrell, No. 02-10976, 2003 U.S. App. LEXIS 18150 (5th Cir. 2003), *cert. denied*, 540 U.S. 1172 (2004) (no hearing or meeting by Board; votes cast by fax); Sepulvado v. Louisiana Bd. of Pardons & Parole, No. 05-70034, 2006 U.S. App. LEXIS 7002 (5th Cir. 2006) (no violation where petitioner denied a hearing under procedure by which Board decides whether hearing is warranted under provisions of Louisiana code; petitioner here denied a hearing on basis of the seriousness of the crime and the amount of time served).

<sup>74</sup> Provenzano v. State, 739 So. 2d 1150 (Fla.), *cert. denied*, 120 S.Ct. 13 (1999) (no violation where no counsel provided on second clemency petition in context where Governor had already indicated clemency not appropriate); Glock v. Moore, 776 So. 2d 243 (Fla.), *cert. denied*, 531 U.S. 1107 (2001) (no violation where no counsel provided in second clemency petition under similar circumstances to Provenzano). See also Rutherford v. State, 940 So. 2d 1112 (Fla.), *cert. denied*, 127 S. Ct. 465 (2006) (rejecting argument that Florida clemency process was arbitrary; petitioner had relied in part on the ABA death penalty project's evaluation of the Florida system).

<sup>75</sup> Noel v. Norris, 336 F.3d 648 (8th Cir. 2003) (refusal to allow a brain-scan procedure); Alley v. Key, 431 F. Supp. 2d 790 (W.D. Tenn.), *cert. denied*, 126 S. Ct. 2975 (2006) (no access to trial evidence for DNA testing); Arthur v. King, No. 2:07CV319(WKW), 2007 U.S. Dist. LEXIS 61058 (M.D. Ala. 2007) (no access to evidence for DNA testing), *aff'd* 500 F.3d 1335 (11th Cir. Ala. 2007).

<sup>76</sup> LaGrone v. Cockrell, *supra*, n. 73 at \*35-36. Article 6, section 4, of the ICCPR provides:

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

consulate. The United States argued that clemency afforded the opportunity to have a sufficient review and reconsideration of the effect of the violation. Recognizing the nature of executive clemency as a process without standards or procedures, the ICJ found that the treaty required a judicial hearing in order to give effect to the rights under the treaty.<sup>77</sup>

## **V. Procedures for Clemency Petitions in California**

While the application procedures for initiating the clemency process are codified, and some specific procedures are required for cases involving two-time felons, overall the procedures for executive clemency are not heavily regulated or widely understood. The specific procedures used by the decision maker in California in reaching his or her conclusion to grant or deny clemency are not prescribed by the California Constitution, statute or regulation. Therefore, to determine the procedures used in reviewing and deciding clemency petitions in capital cases, we undertook an oral history project. We spoke to at least one Legal Affairs Secretary from every gubernatorial administration from Governor Edmund “Pat” Brown in 1959 to the present administration of Governor Arnold Schwarzenegger. The observations that we discuss in this section result from the interviews we conducted with Legal Affairs Secretaries and two Governors themselves. We also interviewed a senior investigator from the Board of Parole Hearings, two attorneys who have represented petitioners, two attorneys who were the District Attorney at the time of a particular petition, and an attorney with the California Department of Justice who has been involved in capital cases for decades. Everyone with whom we spoke gave us detailed information about clemency procedures. We were fortunate to have been able to tap the recollections of many who held the office of Legal Affairs Secretary or otherwise participated in clemency procedures, and to benefit from their enormous insight into a process that they experienced first hand.

Across political party affiliation and decades, a common theme emerged in our interviews. The decisions about clemency in capital cases were universally discussed as time-consuming and difficult decisions that required labor-intensive investigations by the Legal Affairs Secretaries and their staffs. Almost to a person, those with whom we spoke commented on the immense responsibility they felt to uncover every stone and ensure that justice was done in the clemency process. Many described the process as the most difficult and emotionally weighty aspect of the job. Another universal theme was the vital role played by the Board of Parole Hearings (formerly Board of Prison Terms), particularly its investigations unit. The collection of interviews, background, hearing transcripts, prison information, psychological reports, and other relevant information by that unit forms the basis of the “black book” upon which the Legal Affairs Secretary, and then the Governor, relies in reaching a conclusion about the propriety of granting or denying executive clemency.

Based on our interviews and research, a clear division became apparent between the capital clemency volume and process during the mid-1900s and the role of capital clemency in

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<sup>77</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128, ¶¶ 140-41 (Mar. 31). *See also* discussion in Linda E. Carter, *supra*, n. 20.

the years following the reinstatement of the death penalty in California in 1977. The procedural distinctions are highlighted below, but the substantive distinctions for granting or denying clemency then and now are discussed throughout other sections of this report.

### **A. Common Procedures in Capital Clemency Petitions**

The clemency process in capital cases begins with the setting of an execution date. Once all appeals and writs have been exhausted, the trial court judge is called upon to set a date for execution.<sup>78</sup> That event triggers the transmittal of a report by the Board of Parole Hearings (BPH).<sup>79</sup> One Legal Affairs Secretary told us that the report usually arrived about 30 days prior to the execution date. The role this report plays varies from administration to administration, and seems to have had a changing emphasis over time. At a bare minimum, the black book has historically included case files from the trial and all appeals, a record of the inmate's health and mental health during incarceration, and any other prison documentation that may have been accumulated in the years following sentencing and incarceration.

In the current formation of the BPH, the black book contains substantially more and is compiled by BPH without express direction by the Governor's Office. Regardless of whether a clemency application is filed, the BPH investigation unit constructs an investigative report in two phases. The initial investigation is undertaken after the appeal of the death sentence is affirmed. Investigators use a checklist to ensure that all background information relating to physical and mental health, childhood trauma, events surrounding the crime, evidence submitted and not submitted at trial, juror statements, victim impact statements and other relevant information, is collected close in time to the imposition of the death sentence.<sup>80</sup> The report that comes from this phase is the "black book." The second phase is commenced as the judicial process is coming to a close. The BPH investigators are in contact with the Governor's Office and the California Office of the Attorney General regularly. Since the Attorney General's office usually represents the state in direct appeals of inmate convictions and in the state and federal habeas processes,<sup>81</sup> it is able to alert the BPH investigators and the Governor's Office when a case is coming to the end of its judicial review. Upon this informal notice, the second phase of construction of the investigative report begins. In this phase, conduct and circumstances since incarceration are added. Witnesses are again contacted, and the investigators collect information from victims' families, the inmate's family, correctional staff and others who can provide any information concerning the inmate or contentions he or she may raise in the clemency proceeding.<sup>82</sup> Sometimes this supplemental material is contained in the black book that is initially transmitted

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<sup>78</sup> CAL.PENAL CODE § 1227. For a good overview of the steps in the clemency process, see Ward A. Campbell, *The District Attorney's Role in California's Capital Clemency Process*, Prosecutor's Brief, Vol. XXVIII, Nos. 2&3 (CDA Publication). For an earlier description of the pre-1976 procedures, see Edwin Meese and John S. McInerney, *Executive Clemency*, Section 26 (CLE materials).

<sup>79</sup> CAL.PENAL CODE §5075(a) (West 2000 & Supp. 2008) (creating the BPH and abolishing the BPT as of July 1, 2005).

<sup>80</sup> *Siripongs v. Wilson*, Supplemental Exhibits in Support of Motion for Preliminary Injunction, C 98-4417-MMC, Nov. 30, 1998 (Exhibit 68).

<sup>81</sup> The Attorney General's office generally represents the State of California in appeals in capital cases. Cal. Const. art. V, § 13; Cal. Govt. Code § 11042 (2007).

<sup>82</sup> Interview with Toni Pacheco, Investigator, BPH, February 15, 2008.

to the Governor's office. In other cases, the supplemental investigation is completed after the black book has been sent.

Immediately upon a sentence of death, a trial judge must transmit the sentence and a transcript of the trial to the Governor.<sup>83</sup> The Governor may call upon the Attorney General or the Justices of the Supreme Court to give an opinion as to the sentence,<sup>84</sup> but given that a series of appeals inevitably follow, this power is not used as a practical matter. For the purposes of notification to the Governor, a period of years then passes while appellate counsel is secured, appeals are taken and judicial process is exhausted. Most Legal Affairs Secretaries reported that they, like the BPH investigators, were alerted to the imminence of an execution order by the Attorney General's office, and specifically by attorneys in the Criminal Writs and Appeals section. As discussed below, this advance notice allowed some Legal Affairs Secretaries to take a proactive role in coordinating the clemency process.

While a California statute requires the Governor to transmit any request for clemency from a twice-convicted felon to BPH for review and recommendation,<sup>85</sup> in all cases the BPH conducts an investigation for the Governor's Office. However, the Governor only receives a recommendation from BPH if a hearing is conducted. It appears that, in practice, the Governor exercises complete discretion as to which petitions, if any, are set for hearing with and recommendation from the BPH.<sup>86</sup> If the Governor does determine that the clemency petition should be referred to the BPH for a public hearing and confidential recommendation, the BPH has a protocol that it follows to give notice to all interested parties and to conduct a hearing in a timely manner so that the recommendation of the Board can be transmitted to the Governor with ample time for his consideration.

Twelve Commissioners comprise the BPH and are trained to hear adult matters.<sup>87</sup> They are appointed by the Governor, with the advice and consent of the Senate, for terms of three years,<sup>88</sup> and a Commissioner may be reappointed beyond a single term. By statute the membership of the Commission should reflect the diversity of the state of California.<sup>89</sup> Commissioners are full-time salaried employees and may only be removed for cause.<sup>90</sup>

When a case is referred to the BPH by the Governor for a hearing and recommendation, the entire Board considers the application and decides what recommendation will be made.<sup>91</sup>

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<sup>83</sup> CAL. PENAL CODE § 1218 (West 2004 & Supp. 2008).

<sup>84</sup> CAL. PENAL CODE § 1219 (West 2004).

<sup>85</sup> CAL. PENAL CODE § 4813 (West 2000).

<sup>86</sup> Given the breadth of authority given to the Governor in California Constitution, article V, section 8, it seems that the California code requirement that the Governor transmit a certain category of clemency petitions to the BPH for a recommendation may be in conflict with the California Constitution. While the Constitution does require the approval of four Supreme Court justices to grant clemency in the case of a twice-convicted felon, it does not appear to place any further unique procedures on the exercise of discretion for inmates in this category.

<sup>87</sup> CAL. PENAL CODE § 5075(b)(West 2000 & Supp. 2008).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> CAL. PENAL CODE §§ 5076, 5081 (West 2000 & Supp. 2008).

<sup>91</sup> CAL. CODE REGS. tit. 15, § 2818 (2006). Since capital cases are always referred to the Commissioners by the Governor, it appears that the full membership of the Board must convene to hold the public hearing and

The BPH has the authority to “do any and all things necessary to make a full and complete investigation of and concerning all applications referred to it.”<sup>92</sup> This investigative function of the Board is performed by the BPH investigation unit, and not the Commissioners themselves. The investigative unit also remains in close contact with the Governor’s Office during the clemency process, and the investigators may be asked to conduct further research in response to arguments and issues raised by the inmate in his petition or by the District Attorney in response to the same.

The California Supreme Court, which becomes involved if the petitioner is a two-time felon, does not accept applications for clemency unless the Board of Parole Hearings has recommended a grant of clemency, or the Governor acting without a BPH recommendation has indicated a desire to commute a sentence. Under either circumstance, the petition and file must be transmitted to the California Supreme Court along with “the papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms.”<sup>93</sup>

The first step for most inmates in the clemency process is the filing of the petition with the Governor’s Office. Thirteen condemned men have applied for executive clemency in the last 15 years and none has been granted a commutation. All have been represented by counsel, as is guaranteed in California.<sup>94</sup> In each case, after the petition was submitted to the Governor’s Office, responses were filed by the District Attorney of the county in which the case was tried. In the event that the Attorney General’s office tried the case, due to a conflict of interest with the County District Attorney’s Office, the Attorney General’s office was also responsible for preparing and presenting a response to the clemency petition.

In each administration we contacted, the report of the BPH investigative unit along with information provided by the counsel on each side was reviewed first by the Legal Affairs Secretary and then presented to the Governor. Across administrations, Legal Affairs Secretaries viewed their role as one that required a thorough examination of the petition and any supporting or opposing written or oral submissions, and a recommendation to the Governor about the grant or denial of clemency. Ultimately, in all cases since 1992, the Governor made an adverse decision on the petition and the decision was made known to the inmate and the public through a written statement or decision. Since the Constitution only requires that the Governor report

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to vote on a recommendation. Ordinarily, however, when the BPH is acting on its own initiative in non-capital cases, the Commissioners meet in panels of three, and any action must be approved by a majority vote of those present. CAL. PENAL CODE § 5076.1 (West 2000 & Supp. 2008). The Board may also delegate deputy commissioners to hear cases and make decisions. CAL. PENAL CODE § 5076.1 (West 2000 & Supp. 2008).

<sup>92</sup> CAL. PENAL CODE § 4812 (West 2000).

<sup>93</sup> CAL. PENAL CODE §§ 4850, 4851 (West 2000).

<sup>94</sup> Cal. Rules of Court, Sup. Ct. IOPP XV (B) (2008)(“ At or after the time the court appoints appellate counsel to represent an indigent appellant on direct appeal, the court also shall offer to appoint habeas corpus/executive clemency counsel for each indigent capital appellant. Following that offer, the court shall appoint habeas corpus/executive clemency counsel unless the court finds, after a hearing if necessary (held before a referee appointed by the court), that the appellant rejected the offer with full understanding of the legal consequences of the decision.”).

grants of clemency to the Legislature,<sup>95</sup> these decisions of denial are not easy to research or acquire after they are initially released.

## **B. Variations in Procedures and Approaches to Capital Clemency Petitions**

Since there are no procedures mandated for the decision-making process in executive clemency, each California Governor and his or her administration has the flexibility to adopt its own process for review of clemency petitions. Some administrations have chosen to adopt internal procedures formally and others have chosen to vary the process from petition to petition. We found that many Legal Affairs Secretaries had been in contact with their predecessors, even across administrations, to obtain a primer in the executive clemency process and to solicit ideas for how to best manage the petitions. All those we interviewed spoke of the importance of flexibility in the process and the unique nature of each petition that they had considered. Repeatedly we heard that no two cases are the same and that the same procedure was not necessarily appropriate for all cases.

### **1. Role of the Legal Affairs Secretary**

Before September 1967, the job title of the person who reviewed and advised on capital clemency cases was the Executive Clemency and Extradition Secretary. During the Reagan administration, while Edwin Meese held the position, the title changed to Legal Affairs Secretary. The designation before 1967 was appropriate to the time because with the volume of executive clemency petitions filed, and the number of executions each year in the state, the secretary spent about half his time considering clemency petitions. In the modern era, the clemency petitions are one part of a large portfolio of tasks that the Legal Affairs Secretary must manage. The volume of capital clemency petitions has dramatically decreased from the number considered by Pat Brown's administration (55) to the number considered by Arnold Schwarzenegger (5) thus far. Even though the number of petitions considered in the modern era is far less, the resources devoted to these petitions are significant. The Legal Affairs Secretaries with whom we spoke indicated that when a petition had been filed, they turned their complete attention to the review of the petition and in some cases turned over all other responsibilities to a deputy Legal Affairs Secretary so that they could exclusively focus on the review of the petition, response and supporting materials.

During Pat Brown's administration, Legal Affairs Secretaries were selected because they brought a perspective on the death penalty that was different from that of the Governor. In his book *Public Justice, Private Mercy*,<sup>96</sup> and in conversations that we had with two of Governor Pat Brown's clemency secretaries, we learned that Governor Brown sought to have advisers who would challenge his own ideas about the death penalty and its application. Ultimately, he and his advisers came to establish, albeit informally, certain criteria that they would look for in

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<sup>95</sup> CAL. CONST. art. V, § 8.

<sup>96</sup> Edmund (Pat) Brown with Dick Adler, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (Weidenfeld & Nicolson 1989).

determining whether to grant or deny clemency, but Governor Brown did look to his advisers for sound advice and disagreement at times.

Some Governors since have not necessarily sought out Legal Affairs Secretaries with an eye specifically to their perspectives on the death penalty. And, of course, Governors bring with them different views of the role of clemency in the death penalty context. Almost all Legal Affairs Secretaries with whom we spoke viewed their role as advisor. They were expected to fully immerse themselves in the briefs filed by counsel, review the trial, appellate and habeas records in detail, sort through any other submissions or documentation, and make a recommendation to the Governor about whether clemency should be granted or denied. Many also spoke of the role they played in relation to obtaining and reviewing information from the investigative unit at BPH.

Where there was divergence in the role of the Legal Affairs Secretary, it appeared that the differences related to how involved each Governor wanted to be in the collection and review of information. Some Secretaries were expected to hold any in-person hearings with counsel. Others were expected to attend any such hearings, but not to preside at them. In some administrations, hearings through the BPH were conducted but no meetings with counsel were scheduled. The role of the Legal Affairs Secretary under the latter scenario was limited to a review of the paper record. Each Legal Affairs Secretary came to know the types of arguments that would be especially important to the Governor that they served, but those areas were different for each administration. For example, in one administration, it was the perception of the Legal Affairs Secretary that rehabilitation would not be a basis for granting clemency. In other administrations, issues that had been litigated by the judicial system were generally not considered to be a strong basis for a claim.

## ***2. Briefing Schedule***

We noted minor differences in the scheduling procedures employed by various administrations. While all Legal Affairs Secretaries did accept documents from both the inmate's counsel and the District Attorney's office from the county in which the inmate was tried, the involvement in setting a schedule and the formality of the schedule was different from administration to administration. Some administrations set the schedule to mirror a law and motion schedule in a court, requiring first a brief from the inmate's counsel, then an opposition from the District Attorney's office, followed by a reply from counsel for the inmate. Other administrations required simultaneous briefing due to timing concerns and a desire to separate the process from that of a typical court proceeding.

In the current administration, the Legal Affairs Secretary sends out a briefing schedule for the clemency petition as soon as an execution date is set. This letter with a briefing schedule contemplates the possibility that a hearing might be held at BPH and factors in time for such a hearing, if one is deemed necessary. The parties are expected to follow the schedule in the same manner as counsel would follow a schedule set by a court. In other administrations, the Legal Affairs Secretary did not set out a schedule until a petition was filed. It was left up to the petitioner and his counsel to start the process. The challenge with this latter system, of course, is

that there is no guarantee that the petition will be presented in a manner that will allow time for full consideration of the issues or the possibility of a hearing. However, because the Governor also has the power to grant a reprieve if more time for consideration is needed, the time pressure presented by an impending execution date is not as severe as it might otherwise be.

### ***3. Acceptance of Materials and Commentary Other Than Briefs From Counsel***

While most administrations have been willing to accept any documentation, including written submissions, photos and videotapes, that either the inmate or the District Attorney wishes to provide, there are differences in the acceptance of outside materials from interested parties.

In some of the early administrations, while no formal mechanism was provided for outside groups and individuals to submit written briefs, Governors did consult with people outside of the process. Calls and letters from outside groups and individuals were not uncommon. More recently, the Legal Affairs Secretaries attempt to limit the influence of these types of outside sources. Calls relating to the clemency process, even from close friends or contacts, are routed away from the Governor to the Legal Affairs Secretary. Letters from outside groups or interested individuals are collected, and examined, but do not seem to have a formal place in the consideration process.

Increasingly, the materials submitted include more than written submissions. Videotape testimony from the inmate and other interested parties is not uncommon in recent years. Legal Affairs Secretaries indicated that they would accept support or opposition in any medium the parties preferred.

The role of statements from victims' families has also changed over time. In the pre-1976 administrations, the positions of the victims' families were primarily expressed through the written and oral presentations of the District Attorney's office. In the Reagan administration, statements of victims' families were considered in the course of the process, but the families were not encouraged to come to the hearings. In the Wilson, Davis, and Schwarzenegger administrations, documents submitted by the victims' families would be considered, as would any documents submitted by any interested parties. There seems to have been a movement toward accepting more, rather than less, material in the modern era, and several Legal Affairs Secretaries believed that the emergence of the victims' rights movement starting in the 1970s has had an impact in fostering participation in the clemency process.

### ***4. Hearings: Standards and Process***

Perhaps the most interesting and varied aspect of the clemency procedure in the last several decades has been the role of a hearing in the process. Some administrations required hearings for every clemency case, some held hearings in some cases but not others, and some held no hearings at all. Even in cases where hearings were held, the variations in the attendees, the forum, and the presiding official are significant. In our state, Governors have used public and private hearings. The hearings have been conducted by the Governor himself, the Legal



Affairs Secretary and the BPH. The hearings have been structured to allow for counsel for the inmate and the District Attorney to present essentially oral arguments to the Governor in a court-like setting. They have also been structured so that the inmate's counsel and the District Attorney have a private audience with the Governor separate from one another. Hearings have taken place weeks before the execution date and sometimes only days before the execution. Victims' families have been allowed to attend the hearings at times, and other administrations have kept the hearings to counsel only. In sum, there has been no consensus about the necessity or appropriate form of hearings in the California clemency process.

During the Pat Brown administration, a hearing was conducted concerning each petition for clemency. Governor Brown presided over a meeting with the counsel for the inmate and the District Attorney, and the media was invited to attend. Victims' families were not invited to the hearings and counsel was not allowed to put on testimony. Occasionally, Governor Brown would announce his decision about clemency at the hearing, but more often he would conclude the hearing without a decision and provide a written statement of the decision later.

At the outset of Governor Reagan's administration, a decision was made that the public hearings of the Brown administration created too much of a "circus" atmosphere. The Governor also felt that his status as a non-lawyer left him ill-equipped to conduct clemency hearings.<sup>97</sup> Consequently, he directed his Legal Affairs Secretary to conduct hearings with the lawyers on both sides. Governor Reagan would later hear a briefing and recommendation concerning the hearing in each case.

There were no capital clemency petitions during the administration of Governor Jerry Brown<sup>98</sup> and only one petition during the administration of Governor George Deukmejian. The petition was filed on behalf of Robert Alton Harris. Since the Harris execution was scheduled to be the first one since the reinstatement of capital punishment in California, there was considerable thought given to the value of a hearing and the need for the public to see the death penalty process at work in the state.<sup>99</sup> No conclusion about the appropriate hearing process was ever reached in the Deukmejian administration because Harris withdrew his clemency petition to Governor Deukmejian, and filed a subsequent petition with Governor Wilson after he took office.

The Wilson administration held a private hearing in the case of Robert Alton Harris, but did not institute a practice of holding private hearings with counsel in every case. Governor

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<sup>97</sup> Hugo Adam Bedau, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT*, ch. 5, p. 150 (Northeastern University Press 1987).

<sup>98</sup> It is unclear if Governor Brown's staff prepared any draft procedures in the event of capital clemency petitions. A Legal Affairs Secretary from Governor Deukmejian's term recalled reviewing draft procedures from Gov. Brown's staff, but Judge J. Anthony Kline, the Legal Affairs Secretary from the second Brown administration with whom we did speak, did not specifically remember these draft procedures. Because there was no need to finalize or activate such procedures during the Brown administration, it is likely that they were only in a very preliminary stage.

<sup>99</sup> One Deputy Legal Affairs Secretary and a representative from the Attorney General's office recalled a discussion about possibly holding a public hearing at San Quentin with the inmate present. Governor Deukmejian's Legal Affairs Secretary and the former Governor himself did not recall planning a hearing at the prison.

Wilson made clear that not all petitions for clemency would demand a private hearing. Some of the hearings conducted during the Wilson administration were conducted by Governor Wilson himself, others were conducted by his Legal Affairs Secretaries, and some did not have a hearing at all. Those cases that they found to have more serious claims and bases for clemency were set for private hearing, while those that appeared to them to be without merit did not warrant the resources that a private hearing required.

The Davis administration did not hold private hearings, and instead sent all clemency petitions for a public hearing through the BPT. Governor Davis's Legal Affairs Secretary and the Governor reviewed the transcript of the hearing, but did not have an opportunity to observe the witnesses and arguments presented. The approach of the Davis administration was considered to be more like an appellate court reviewing the record for error and ensuring that all issues had been fully resolved and given proper weight. Credibility determinations and the compilation of all relevant testimony were left to the Commissioners of the BPT.

The current administration has implemented a case-by-case approach to the holding of hearings. There is no set standard for the form or venue of a hearing, and no requirement for any hearing at all, if the result is clear to the Governor from the written submissions and the BPH investigative report. In one recent case, Cooper, no hearing was held at all. In another, the Beardslee case, a public hearing before BPH was held. In the hearing, the BPH took testimony from the victim's family, outside groups with an interest in the case, as well as expert witnesses on both sides of the issue. In that case, the Legal Affairs Secretary and Governor ended up watching the entire video of the hearing. The claim in that case dealt with mental illness and Mr. Beardslee's ability to formulate the *mens rea* for the crime. The administration initially determined that more factual findings needed to be made, and that a BPH hearing with the taking of testimony would aid in that process. In another case, that of Stanley "Tookie" Williams, the Governor held a hearing with counsel for Mr. Williams and the District Attorney present and allowed both sides to present oral arguments in a meeting that was not open to the public. Governor Schwarzenegger's first Legal Affairs Secretary indicated that, in his view, a true plea for mercy should be made in private, outside of the public spotlight.

##### **5. *Role of the BPH or BPT***

The role of the BPH (BPT prior to 2005) has changed over time based both on regulations of the Board itself and the role that each gubernatorial administration has envisioned for the Board. While in some administrations, the BPH role is focused on its investigative and information gathering functions, other administrations have called on BPH Commissioners to hold hearings and offer recommendations on the petition itself.

During the administration of Governor Pat Brown, the BPT provided a parole report, but did not compile the trial and appellate records and did not make a recommendation. It was up to the clemency secretaries and counsel for each side to secure all court records and any other relevant documents.

Immediately following, in Governor Reagan's administration, there was a very close working relationship with the Director of the investigative unit of the Department of Corrections. The Reagan administration viewed the investigative unit as the institutionalized clemency secretary and relied on the unit to collect and compile as much objective information as it could find.

The Deukmejian administration had many clemency petitions in non-capital cases, but never went all the way through a capital clemency since Harris withdrew his petition. In the course of preparing for the possibility of these petitions, the administration did discuss the role that BPT would play. The thought, although it was never formalized, was that the BPT would provide information, serve as the investigative staff, and complete a packet of information. Its express role was never finalized.

The Davis administration directed the BPT to hold public hearings and offer recommendations in each of the four cases presented. Those recommendations were relied on in each statement denying clemency.

In the Wilson administration, the BPT conducted investigations and provided background, medical records in prison, and prison reports, victims' statements, views of the community and recommendations. Governor Wilson did not, however, have BPT conduct any public hearings and its use of the BPT was limited to the information gathered by the investigators.

The current administration relies on BPH to do an investigation of the inmate, and to provide a report within about 30 days of the execution date. Depending on the case, a hearing before BPH may be ordered and recommendations requested. In this administration, as in Wilson's administration, it appears that the role of BPH shifts depending on the perceived need for a complete hearing.

## ***6. Format and Publication of Decisions***

The only requirement for written clemency decisions is that any grant of clemency must be filed with the California legislature.<sup>100</sup> Every year in the pre-1976 death penalty era, Governors submitted their lists of commutations, pardons, and reprieves to the state legislative body. Since no administration in the modern era has granted clemency in a capital case, none has been required to submit a written report to anyone.

Even though not required, written decisions for denials of clemency are drafted and sent to the inmate's counsel and the District Attorney, as well as released to the press. The content of these written denials and the decision about whether to make a personal statement about the opinions has varied. Some Legal Affairs Secretaries took primary responsibility for drafting denials and the press releases to go with them. Some Governors wrote decisions that read like legal opinions while others took a more plain language approach. From our discussions, we learned that even though reasoned decisions are not required by the process, all Governors have

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<sup>100</sup> Cal. Const. art. V. § 8.

tended to want to produce a sound basis for denying clemency and have relied on their staffs to help them craft responsive and well-reasoned decisions.

In the Wilson administration, the decisions issued by the Governor announced a standard and criteria for granting clemency and explained why each case did not meet that standard. Governor Wilson’s decisions cited to the *People v. Superior Court*<sup>101</sup> standard and the *Herrera v. Collins*<sup>102</sup> opinion to explain the purpose of clemency to prevent a miscarriage of justice where ordinary procedures resulted in injustice. In contrast, Governor Schwarzenegger, a non-lawyer, has attempted to keep his decisions free of legal standards and language, but instead has tried to explain in a straightforward way the reasons that he did not find clemency to be an appropriate remedy. Another non-lawyer Governor, Ronald Reagan, did not issue a written opinion in the one denial of clemency in a capital case during his term. Since there is no recordation requirement for denials of clemency, even though there are written reasons for the denials in almost all administrations, finding those written decisions is not an easy task and thus their circulation is severely limited.

## **VI. Reasons for Denying or Granting Clemency Petitions**

### **A. Post-1976 Clemency Petitions**

There have been 14 petitions for clemency since 1976 on behalf of 13 individuals. Because Siripongs petitioned before both Governors Wilson and Davis, there is one more petition than individuals in the list. The petitions per governor were:

<u>Date</u>	<u>Governor</u>	<u>Petitioner</u>
1992	Wilson	Harris
1996	Wilson	Bonin
1996	Wilson	K. Williams
1997	Wilson	Thompson
1998	Wilson	Siripongs
1999	Davis	Siripongs
1999	Davis	Babbitt
2000	Davis	Rich
2002	Davis	Anderson
2005	Schwarzenegger	Cooper
2005	Schwarzenegger	Beardslee
2005	Schwarzenegger	S. Williams
2006	Schwarzenegger	Allen
2006	Schwarzenegger	Morales

<sup>101</sup> *People v. Superior Court*, 190 Cal. 624, 625 (1923). See Decision Denying Clemency to Keith Daniel Williams, Governor Wilson, Apr. 24, 1996 [hereinafter Decision K. Williams].

<sup>102</sup> *Herrera v. Collins*, 506 U.S. 390 (1993). See Decision Denying Clemency to Thomas Thompson, Governor Wilson, July 31, 1997 [hereinafter Decision Thompson]; Decision Denying Clemency to Jaturun Siripongs, Governor Wilson, Nov. 13, 1998 [hereinafter Decision Siripongs—Wilson].

All petitions for commutation were denied and 11 of the 13 individuals listed above were executed. Michael Morales remains on death row despite the denial of clemency because his case involves a challenge to lethal injection that is pending in the courts. Kevin Cooper also remains on death row due to court challenges and a stay of execution. The total number of persons executed in California since 1976, however, is 13. Two people, David Mason (1993) and Robert Lee Massie (2001) were executed, but did not petition for clemency and, thus, are not listed above.

It is difficult to generalize about reasons for denying clemency as the context is necessarily different for each individual. For instance, claims of mental illness or organic brain damage were considered insufficient to commute a sentence in five cases.<sup>103</sup> In most of those cases, the Governor felt that consideration of the mental illness by the jury or court was sufficient. In several cases, the Governor found that, even if there was new evidence of mental problems, the level of mental disorder was insufficient to grant clemency because the crime had been committed with full awareness or intention on the part of the defendant. For example, in the case of Donald Beardslee, Governor Schwarzenegger posed the issue as whether, if Beardslee was in a dissociative state due to mental illness as claimed, “that fact sufficiently impeded his comprehension of the heinous nature of his crimes such that it inspires in me mercy compelling enough to set aside the jury’s sentence and commute death to life in prison without parole.” The Governor concluded that nothing indicated that Beardslee did not understand that he was committing murder and that it was wrong to do so.

It is also difficult to generalize because the facts of each case were different and there were also other factors raised, but considered insufficient for clemency. Beardslee, for example, also argued that his death sentence was disproportionate to the sentences received by his accomplices. The Governor rejected this reason on the basis that Beardslee, but not his accomplices, had a prior murder conviction and that the evidence showed that Beardslee had inflicted the fatal wound to both of the women killed. Beardslee additionally raised his exemplary behavior while in prison. This, too, was rejected by the Governor as what is expected of an inmate and insufficient for conferring mercy.

One consistent theme was to reject factors that had been raised in the courts. For example, Governor Wilson wrote in the Thomas Martin Thompson case that a “clemency proceeding is not another judicial proceeding in which to relitigate claims already raised in, and fairly addressed by, the courts.” He further noted that “clemency is a historic remedy for preventing a miscarriage of justice where the judicial process has been exhausted.” In Thompson’s case the governor found that evidence regarding whether or not the victim had been raped prior to being murdered had already been litigated.<sup>104</sup>

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<sup>103</sup> See Decision Denying Clemency To Robert Alton Harris, Governor Wilson, Apr. 17, 1992 [hereinafter Decision Harris]; Decision K. Williams; Decision Denying Clemency to Manuel Babbitt, Governor Davis, Apr. 30, 1999 [hereinafter Decision Babbitt]; Decision Denying Clemency to Kevin Cooper, Governor Schwarzenegger, Jan. 30, 2004 [hereinafter Decision Cooper]; Decision Denying Clemency to Donald Beardslee, Governor Schwarzenegger, Jan. 18, 2005 [hereinafter Decision Beardslee].

<sup>104</sup> Thompson argued that the sexual intercourse with the victim was consensual. He further argued that if there was no rape, the special circumstance of murder in the course of rape was invalid and he should not

While in each case, the Governor summarized the evidence on the point raised by the petitioner, in the Stephen Wayne Anderson case, Governor Davis's decision referred to his own review of the facts. Other Governors may well have engaged in a similar, independent review of the facts, but no other decisions spell out that review as clearly as the Anderson case. For instance, Governor Davis wrote that he considered the arguments and trial record on Anderson's ineffective assistance of counsel claim and that he agreed with the decisions of the courts. The way this decision is written, there appears to have been an independent review of the claim and not merely deference to the courts.

Although it is not possible to make sweeping generalizations about reasons for denying clemency, it is worth noting the types of factors that have been raised in the 14 petitions to date to show what is considered in clemency. The major factors are described below in two sections: 1) factors raised by the petitioners and 2) information about the nature of the crime, the recommendation of the Board of Parole Hearings, views of family members, and views of other interested persons.

### ***1. Factors Raised by Petitioners***

One subgroup of factors raised by petitioners relates largely, but not exclusively, to the circumstances of the crime and the conduct of the prosecution, defense, and judicial proceedings. Those factors are mental disorders and related impairments; abusive or highly disadvantaged childhood; unfair judicial proceedings; disparity with sentences of co-perpetrators; and race or ethnicity. A second subgroup of factors relates to issues that arise post-conviction and sometimes after all judicial proceedings are ended. These factors are new evidence and innocence; remorse or redemption; and good adjustment to prison. In addition, there were three factors raised that were somewhat unusual: debilitated health and old age; intercession by a foreign government; and a possible death penalty moratorium.

***a. Mental disorders and related mental impairments.*** A number of cases involved arguments that a mental disorder or organic brain damage, including post-traumatic stress disorder and substance abuse impairment, affected the capacity of the individual at the time of the crime.<sup>105</sup> In their decisions denying clemency, the Governors almost uniformly rejected this factor as sufficient for a commutation on the basis that, while the petitioner might have had a

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have been in the category of death-eligible defendants. Without the special circumstance, the maximum penalty would be life imprisonment.

<sup>105</sup> See Decision Harris (fetal alcohol syndrome); Decision Cooper (brain damage as a result of childhood auto accident); Decision Beardslee (organic brain damage compounded by childhood accidents, causing Beardslee to act in a dissociative state while committing the murders); Decision K. Williams (diagnosis of mood disorder resulting in "episodic manic behavior"); Decision Denying Clemency to Clarence Allen, Governor Schwarzenegger, Jan. 13, 2006 [hereinafter Decision Allen] (possible mood disorder resulting from undiagnosed brain damage); Decision Babbitt (post traumatic stress disorder resulting from Babbitt's service in the Vietnam War); Decision Denying Clemency to Stephen Wayne Anderson, Governor Davis, Jan. 26, 2002 [hereinafter Decision Anderson] (post traumatic stress disorder resulting from childhood abuse); Decision Denying Clemency to Michael Morales, Governor Schwarzenegger, Feb. 17, 2006 [hereinafter Decision Morales] (diminished mental capacity due to PCP use at the time of the murder).

mental impairment, he maintained the capacity to act intentionally and to understand what he was doing. For example, in Robert Alton Harris' case, fetal alcohol syndrome and its effects on the brain were raised in clemency. In dismissing this claim, Governor Wilson wrote that Harris acted "with a clear criminal purpose," and that he "was capable of planning to do wrong." He concluded that Harris was not deprived of "his capacity to understand his act" or "the capacity to resist doing it."

A secondary strand of reasoning to reject mental disorders as a sufficient basis for clemency was to indicate that the courts had already adjudicated the issue. In the Manuel Babbitt case, for instance, the petition raised an argument that defense counsel had failed to adequately present evidence in the trial and sentencing of post-traumatic stress disorder (PTSD) stemming from Babbitt's service in Vietnam. In his decision denying clemency, Governor Davis emphasized that the federal courts had evaluated the claim and rejected it.

**b. Abusive or highly disadvantaged childhood.** Another factor that is common in the petitions is evidence of severe abuse or neglect in childhood.<sup>106</sup> Similar to the analysis of mental illness, the Governors' response has been to acknowledge, but place little weight on the abusive circumstances on the grounds that the petitioner was still able to act intentionally and to understand what he was doing. The general view is that the troubled background is a valid ground to raise, but cannot justify an exercise of mercy. Robert Alton Harris' childhood, for example, is described in Governor Wilson's decision as "a living nightmare." He further wrote that Harris "suffered monstrous child abuse that would have a brutalizing effect on him" and that this information was "deserving of the earnest and careful consideration that I have given to it." In the end, though, Governor Wilson reasoned that "Harris was not deprived of the capacity to premeditate, to plan or to understand the consequences of his actions." Similarly, Governor Davis viewed Manuel Babbitt's difficult childhood as inadequate to deserve clemency for killing an elderly woman. Governor Davis wrote that "such experiences cannot justify or mitigate the savage beating and killing of defenseless, law-abiding citizens in order to steal their personal property."

**c. Unfair judicial proceedings.** In some of the petitions, a claim is raised that the judicial proceedings were unfair, either because of ineffective assistance of counsel or misconduct by the prosecutor.<sup>107</sup> This is the category where the Governors are most likely to indicate that the issues have been adjudicated by the courts and the Governors either feel that the issues were adequately reviewed in the judicial system or that the Governor's role should not override the courts' determinations. In the case of Stanley Williams, for example, Governor Schwarzenegger emphasized that the issues raised about the fairness of the trial were litigated in "at least eight substantive judicial opinions." The decision denying clemency further states that "[t]he possible irregularities in Williams' trial have been thoroughly and carefully reviewed by

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<sup>106</sup> Decision Harris; Decision Siripong; Decision Babbitt; Decision Anderson.

<sup>107</sup> Decision Denying Clemency to William Bonin, Governor Wilson, Feb. 21, 1996 (claim of unfair trial); Decision Babbitt (claim that trial counsel did not competently present the PTSD defense); Decision Anderson (claim of numerous alleged improprieties committed by trial counsel at guilt and penalty phases,); Decision Denying Clemency to Stanley Williams, Governor Schwarzenegger, Dec. 12, 2005 (claim that prosecutor removed people from the jury on basis of race); Decision Morales (claim that key witness gave false testimony and the prosecutor's charging decision was discriminatory).

the courts, and there is no reason to disturb the judicial decisions that uphold the jury's findings that he is guilty of these four murders and should pay with his life.”

**d. Disparity with sentences of co-perpetrators.** In two cases, petitioners argued that a commutation was appropriate on the grounds that co-perpetrators had received lesser sentences.<sup>108</sup> In Thomas Martin Thompson's case, Governor Wilson noted that a co-defendant was convicted of a lesser crime that carried a lesser sentence and that, if there was any disparity, it was that the co-defendant should have been punished more severely. In the Donald Beardslee case, as noted earlier, Governor Schwarzenegger considered Beardslee more culpable than his co-perpetrators.

**e. Race or ethnicity.** In two cases, the petitioners raised claims of disparities on the basis of race or ethnicity.<sup>109</sup> Neither was considered of any significance by the Governor. In a third case, Jaturun Siripongs, one of the reasons that Governor Wilson gave for declining Thailand's request for clemency and simultaneous offer to take Siripongs into its custody was that it would be discriminatory to grant clemency on the basis of nationality.

**f. New evidence and innocence.** In the cases in which the petitioner was raising either new evidence that affected the level of culpability<sup>110</sup> or arguments of innocence,<sup>111</sup> the Governors did not view the claims as factually strong. For example, in the case of Stanley Williams, Governor Schwarzenegger described the evidence of guilt, found the evidence “strong and compelling,” and concluded that “there is no reason to second guess the jury's finding of guilt or raise significant doubts or serious reservations about Williams' convictions and death sentence.” Similarly, in the Jaturun Siripongs case, Governor Davis found the evidence supported the finding of guilt and also commented on the number of courts that had considered the claims.

**g. Remorse or redemption.** A claim of remorse or redemption was raised in six cases.<sup>112</sup> This factor, even if viewed as sincere, did not significantly affect the Governors. In some cases, the Governors commended the good works of the petitioners while on death row. Even in those situations where the actions were commended, however, it did not appear that remorse or redemptive behavior would carry much weight in a clemency determination. For example, Kevin Cooper presented information to Governor Schwarzenegger that, since being on death row, he had become associated with an Oakland church. The pastor and members of the church wrote letters on his behalf and described, *inter alia*, his involvement in counseling young people away from crime.<sup>113</sup> While the Governor acknowledged Cooper's religious change in his decision, the circumstances of the case and Cooper's record of violence led to a denial of clemency. Governor Davis similarly viewed Jaturun Siripongs claim of remorse as “perhaps

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<sup>108</sup> Decision Thompson; Decision Beardslee.

<sup>109</sup> Decision Denying Clemency to Darrell Rich, Governor Davis, Mar. 10, 2000 (Rich's Native American ethnicity); Decision Morales (claim that “charging decision was biased by race, gender, and ethnicity).

<sup>110</sup> Decision Thompson (new evidence that there was no rape and, therefore, no special circumstance).

<sup>111</sup> Decision Siripongs; Decision S. Williams. *See also* Decision Cooper (claim that an incriminating DNA test had been tampered with).

<sup>112</sup> Decision Siripongs; Decision Babbitt; Decision Anderson ; Decision Cooper; Decision S. Williams; Decision Morales.

<sup>113</sup> Petition of Kevin Cooper at 49-53.



even admirable,” but stated that remorse “is not sufficient to override the...verdict and sentence of the trial court and jury.” In several cases, the Governors did not find the remorse sincere.<sup>114</sup> In the case of Stanley Williams, for example, Governor Schwarzenegger’s decision denying clemency expressed doubt about the sincerity of Williams’ redemption. Although Williams had written books against gang activity, the Governor raised questions about whether the writings in fact advocated violence.<sup>115</sup>

*h. Good adjustment to prison.* Another claim that surfaced in six cases was the petitioner’s good behavior in and adjustment to prison life.<sup>116</sup> The petitioners argued that their exemplary conduct while incarcerated was evidence that they would not pose a danger to society if their death sentences were commuted to life without parole. Similar to the analysis of remorse or redemption, the Governors viewed the good behavior in prison as a commendable, but not particularly relevant to a determination of clemency. Governor Davis’ comment in the case of Darrell Keith Rich is echoed in most of the other cases. He stated that Rich’s model behavior was the “legitimate expectation from every prisoner” and “is not sufficient to override the verdict in a capital case.”

*i. Other factors.* One petitioner, Clarence Ray Allen, raised his poor health and advanced age of 76 as reasons to grant a commutation. Similar to the position on other changes while the petitioner is on death row, Governor Schwarzenegger declined to find that these changes outweighed the decision by the jury that Allen deserved the death penalty for his crimes.

A factor raised in the Darrell Keith Rich case was the anticipation of a moratorium on the death penalty. This argument was dismissed as irrelevant in Governor Davis’ decision denying clemency.

Another unusual factor arose in the Jaturun Siripongs case. Siripongs was a citizen of Thailand. The Thai Ambassador to the United States made a plea for clemency on behalf of the Thai government and apparently offered to take custody and imprison Siripongs in Thailand. Siripongs argued that clemency would further a strong relationship with the government of Thailand. It appears that the Thai Ambassador made a reciprocity-type argument by pointing out that the sentences of 49 American citizens in Thailand had been reduced by the King. Governor Wilson acknowledged that the Ambassador made “an eloquent and dignified plea for clemency on humanitarian grounds,” but was not swayed to treat Siripongs differently on the basis of this factor. In a related argument, Siripongs claimed that his rights under treaty or customary international law were violated when he was not told that he could contact the Thai consulate when he was arrested. Both Governors Wilson and Davis rejected this ground, noting that there was no prejudice shown from any violation.

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<sup>114</sup> Decision Rich; Decision Anderson; Decision S. Williams .

<sup>115</sup> For example, the Governor’s decision referred to the dedication of a book by Williams called “Life in Prison.” The Governor commented that the inclusion of George Jackson, described as “a militant activist and prison inmate who founded the violent Black Guerilla Family prison gang,” in the dedication list was “a significant indicator that Williams is not reformed and that he still sees violence and lawlessness as a legitimate means to address societal problems.”

<sup>116</sup> Decision Thompson; Decision Siripongs; Decision Rich; Decision Anderson; Decision Beardslee; Decision Morales.

## ***2. Information about the Nature of the Crime, Recommendation of the BPH, Views of Family Members, and Views of Other Interested Persons***

In addition to rejecting the reasons for clemency raised by the petitioners, several factors in particular played a role in at least some of the decisions denying clemency. These factors were the facts and circumstances of the crime, the recommendation of the BPH, the views of the victims' families, and the views of other parties. One can see the strong theme of retribution, the just deserts for the crime, in the use of these factors.

***a. Facts and circumstances of the crime.*** Although some decisions are more detailed than others, they all describe the facts of the crimes that the petitioner committed. The facts are an important element in deciding whether to grant mercy or whether the death penalty is the appropriate punishment for the crime. In most cases, the facts as presented portray a calculated and intentional crime, often with extreme viciousness and brutality. The nature of the facts is used both to provide a picture of the petitioner's actions and as support for a conclusion that death is the appropriate sentence. For example, in the Darrell Keith Rich case, Governor Davis' decision begins by describing in detail the kidnap, rape, and murder of three women and a child, as well as other attacks on female victims. The conclusion returns to these facts as the Governor states:

Mr. Rich was a ruthless predator who terrorized the entire Shasta County community during the summer of 1978. Before his arrest, the community coined the name 'Hilltop Rapist' to describe the serial killer who stalked, brutalized, and murdered local young women and a little girl.

The Honorable Warren K. Taylor, who presided at Mr. Rich's trial, observed, 'The manner in which each of these victims was killed showed a complete lack of regard for human life and involved brutal, barbarous methods of killing.' . . .

For these heinous crimes, the jury has meted out a severe and just punishment. That punishment has been affirmed by the state and federal appellate courts. Nothing in Mr. Rich's Petition or Reply, or in the submitted materials, has made a convincing case for clemency, and I find no reason to grant clemency.

***b. Recommendation of BPH.*** As described in an earlier section, it is within the Governor's discretion to seek input from the Board of Parole Hearings. Governor Davis in the Babbitt, Rich, and Anderson cases and Governor Schwarzenegger in the Beardslee case directly stated that the Board had unanimously recommended a denial of clemency. In other cases, the Governors indicated that they had considered the recommendation of the Board, but did not state the content of the recommendation.<sup>117</sup>

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<sup>117</sup> Decision Thompson (refers to recommendation from BPT, but does not state what the recommendation was); Decision Siripongs--Wilson (refers to BPT, but does not say what the recommendation was); Decision Siripongs (refers to courts and BPT and generally states that "[e]ach and everyone one of these bodies has rejected the nearly identical arguments included in this plea for clemency").

*c. Views of the victims' families.* The victims' family members often give statements to the Board of Parole Hearings or directly to the Governors. In addition, the District Attorney's office that is responding to the petition is likely to present victim impact statements as part of their response opposing clemency. While the emphasis on the views of family members varies in the decisions, it appears that this is important information to the Governors in reaching their decisions. Governor Davis, for example, referred to the views of family members as a "key concern" and often quoted from statements from the family members. In the Darrell Keith Rich case, the clemency decision quoted from a statement by the son of one of the victims, describing how difficult his life had been without his mother, and from a statement by one of the surviving victims, describing her continuing fear and panic attacks as a result of the crime. In the Jaturun Siripongs case, Governor Davis wrote that "[t]he views of the decedents' families are a key concern, since they are the ones who continue to suffer most as a result of these murders." He concluded the clemency decision with a quote from the daughter of one of the victims. She stated:

...My intention is not to seek revenge, but to see that justice is done and that this serves as an example for anybody who thinks that they can get away with committing such a serious crime...Thank you very much for taking time to consider this matter and let me once again tell you how strongly I feel that clemency should not be granted. Governor Davis, I am pleading with you on behalf of my family members as well as myself to please do what is right so that my mother can finally rest in peace.

Governors Wilson and Schwarzenegger were less likely to refer directly to the victims' family members in their decisions, but at times acknowledged their views and clearly had information about their views in the District Attorneys' responses to the petitions. For instance, in the Kevin Cooper case, Governor Schwarzenegger commented that he had considered "the views of those who will be most impacted by my decision," the family and friends of both the victims and the petitioner.

It should be noted that, even in the relatively few clemency petitions that have come up in California, the victims' families are not necessarily opposed to commutation. This information, too, is considered by the Governors. Governors Wilson and Davis, for example, noted in their decisions in the Siripongs case that the former husband of one of the victims supported clemency.

*d. Views of other interested persons.* Governors receive letters and calls from various interested persons when a clemency petition is pending. These may include anti-death penalty groups, corrections officers or the warden, jurors from the trial,<sup>118</sup> international figures such as Sister Helen Prejean, actors or recording artists, and others. While the Governors have not often referred to this information in their decisions, their legal affairs advisors have indicated that all such communications are included in their records of the case.

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<sup>118</sup> See Decision Thompson (referring to statements of seven former prosecutors and two jurors); Decision Siripongs (Governors Wilson and Davis refer to juror statements); Decision Anderson (referring to three jurors supporting clemency).

The source of information that appears to be used most in the decisions and, at times, is solicited by the Governors, is the view of the trial judges.<sup>119</sup> For example, in the Thomas Martin Thompson case, Governor Wilson wrote that he asked for the views of the trial judge who sentenced Thompson. He quoted from the response in which the judge stated: “There is absolutely no basis for the granting of clemency...I can assure you that this case and this defendant belong to that special category for which the death penalty was intended. ...” In other instances, the Governors have quoted from either the trial transcript or a written decision. As an example, in the Clarence Ray Allen case, Governor Schwarzenegger quoted the Ninth Circuit Court of Appeals as stating : “if the death penalty is to serve any purpose at all, it is to prevent the very sort of murderous conduct for which Allen was convicted.” The significance of the view of the trial judge is also highlighted in that, in one case, the Governor appeared to feel it necessary to address the view of the trial judge that was contrary to that of the Governor. In the Michael Morales case, Governor Schwarzenegger acknowledged the trial judge’s support of clemency and then indicated why he was disagreeing with it.

## B. Pre-1976 Clemency Petitions

From 1893 through 1967, there were 501 executions and 106 commutations of death sentences. The chart in Section III (B), *supra*, indicates the distribution by Governor. There is little reported information of the number of or reasons for denials of clemency, but there is some basic information on reasons for commutations because grants of clemency had to be reported to the legislature.

Among the few reported denials, there are five<sup>120</sup> from 1925-1926 (Governor Richardson) and four<sup>121</sup> from 1927-1928 (Governor Young). All of the cases involved murder charges. Similar to the denials of clemency in recent times, the Governors emphasized the nature of the crimes, deference to the findings of the juries and courts, and a lack of evidence of insanity or other incapacity. Interestingly, there must have been significant press coverage of a couple of the cases because the Governors commented negatively on the pressure from the newspapers. Both Governors also had cases that raised an issue over the level of culpability because there were petitioners who had not done the actual killing. In each case, the Governor turned to the fact that California law penalized those who participated in felonies that resulted in death (felony-murder rule) the same as the actual perpetrator. One other point worth mentioning is that Governor Young described his process in one of his decisions and that process involved the Governor personally reviewing records and meeting with not only the attorney for one of the petitioners, but also the relatives of both petitioners.<sup>122</sup>

Since grants of clemency must be reported to the legislature, there are many more records of commutations, reprieves, and pardons than of denials of such petitions. The detail of why

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<sup>119</sup> See Decision Thompson (view of trial judge requested by Governor), Decision Rich (quoting from trial transcript); Decision Anderson (quoting from trial transcript).

<sup>120</sup> Although the denials involved five individuals, three of those individuals were co-defendants in the same crime. The cases were 1) Reid, 2) Ferdinand, Sears, and Geregac, and 3) Kels.

<sup>121</sup> Two of the four were co-defendants. The cases were 1) Arnold and Sayer, 2) Vukich, and 3) Kelly.

<sup>122</sup> Arnold and Sayer case appearing in *Message of Governor C.C. Young Regarding Acts of Executive Clemency*, Jan 10, 1929, reprinted in 48th session, JOURNAL OF THE SENATE, at 118, 123-124 (1929).

clemency was granted varies tremendously in the records. Some barely state that a death sentence was commuted to life without parole while others describe the case and reasons. Most of the commutations, however, at least indicate who recommended clemency so that part is fairly well-documented and indicates the influence that trial judges, jurors, politicians and other notable figures had on the decision maker. We have the most information about the commutations granted by Governor Pat Brown because of his book, *Public Justice, Private Mercy*.<sup>123</sup>

Why did the Governors grant clemency in capital cases over the years?<sup>124</sup> The dominant reasons include doubt about guilt, mental illness or infirmity at the time of the crime or subsequently while on death row, and the young age of the petitioner.<sup>125</sup> It is also very common to see the Governors state that the trial judge, the district attorney, the jurors, the State Advisory Board of Pardons, or a combination of them recommended clemency. For example, in one of the earliest reported commutations by Governor Stanford in 1862, he indicated doubt about defendant's motive and intent, as expressed by the trial judge, a majority of the jurors, and other citizens, as well as defendant's young age of 19.<sup>126</sup> In another case in 1941, Governor Olson commuted a death sentence where the petitioner was old and ill, there were doubts about guilt, and the Advisory Pardon Board recommended a commutation.<sup>127</sup> The Governors also often mention the California Supreme Court, either for the mandatory four justices that must concur if petitioner was a two-time felon or more generally that some of the justices raised issues in a dissent in the court case.

The most recent case in which there was a commutation of a death sentence occurred in 1967. Governor Reagan commuted the death sentence of Calvin Thomas. The report to the legislature is not detailed, but it does indicate that justices (the number is not stated, but it had to be at least four) of the California Supreme Court recommended a commutation. From other sources, the reason for the commutation was Thomas' low level of mental capacity.<sup>128</sup> He had set fire to his girlfriend's house and her three-year old child died as a result. Testing occurred after Thomas was on death row that indicated epilepsy and brain damage such that there were questions about his mental functioning.

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<sup>123</sup> Edmund (Pat) Brown with Dick Adler, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (Weidenfeld & Nicolson 1989).

<sup>124</sup> It is interesting to note that reprieves were far more common in the early years in California than they are now. Many of them were granted in order to allow time for investigation for the consideration of clemency.

<sup>125</sup> Although less frequent, other reasons include the non-homicide nature of the crime, use of alcohol, ineffective assistance of counsel, and inequity due to a co-defendant receiving a lesser sentence.

<sup>126</sup> Case of José M. Franco appearing in *Appendix to Governor's Message*, Jan. 7, 1863, reprinted in 14th session, *JOURNAL OF THE ASSEMBLY* at 71 (1863).

<sup>127</sup> Case of Scott C. Stone appearing in *Message of Governor Concerning Pardons, Commutations and Reprieves Granted by Governor Culbert L. Olson for Period 1941-1943*, 55<sup>th</sup> Session, *JOURNAL OF THE ASSEMBLY* at 8.

<sup>128</sup> See, e.g., John H. Culver & Chantal Boyens, *Political Cycles of Life and Death: Capital Punishment as Public Policy in California*, 65 *ALBANY L. REV.* 991, 997-998 (2002); Interview with Edwin Meese, February 21, 2008.

During his administration, Governor Pat Brown commuted the sentences of 20 death row petitioners and 35 death row inmates were executed.<sup>129</sup> Because of the volume of commutations and executions, and because Governor Brown wrote a book that describes the deliberations and reasoning, we have more insight into the process in his administration than any other that predates 1976.

Immediately upon taking office in 1959, Governor Brown was faced with a clemency decision in the case of John Crooker. Governor Brown commuted the death sentence to life without parole and later, in 1966, commuted the sentence to life imprisonment, which made Crooker eligible for parole. Crooker was a UCLA law student who murdered a wealthy woman in what Governor Brown viewed as a heat of passion, rather than calculated, crime. Crooker had no record, had given a confession that was possibly involuntary, and had a deteriorating mental illness with delusions and hallucinations while on death row.

It is also interesting to note that Governor Brown conducted his own hearing in his office. Present at the same time were Crooker's attorney, Crooker's sister, a psychiatrist, and members of the press. The District Attorney's office could have also had a representative there, but chose to send a written statement instead of a personal appearance. Thus, unlike the proceedings in recent times, the hearing involved presentations by the attorneys, and the presence of both parties and the press before the Governor himself. Governor Brown indicated in his book that this was the procedure used in all cases.

In reviewing the description of the cases in Governor Brown's book and based on interviews we conducted, some of the compelling reasons to grant clemency were mental illness or brain damage, mental retardation, geographic disparity, non-homicide crimes, unplanned murders, and disparity in sentence compared with the sentence of a co-defendant. Recommendations from the clemency secretary, the trial judge, the district attorney, and the warden also played an important role.<sup>130</sup> In at least some of the cases involving two-time felons, Governor Brown also contacted the Chief Justice of the California Supreme Court in advance to see if he would have the four votes necessary to commute. In general, Governor Brown weathered political pressures and unfavorable press in making his decisions. One notable exception that he writes about in an honest and critical manner is a case in which he denied clemency in part because he thought granting it might jeopardize the passage of a farm workers minimum wage bill.

Governor Brown's book looks not only at reasons to grant clemency, but also his reasons to deny clemency. The famous Caryl Chessman case was one of those. Governor Brown granted a reprieve at one point in the process in order to give the legislature time to consider a moratorium on the death penalty. Once the legislature rejected a moratorium, Chessman's execution went forward. Among the reasons that Governor Brown gave for denying a commutation were the lack of remorse by Chessman and the lack of four votes from the justices

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<sup>129</sup> As noted earlier in Section III (B), *supra*, there are some discrepancies in the numbers of commutations and executions during Governor Brown's administration. The number of commutations sometimes is documented as 23 and the number of executions is sometimes documented as 36.

<sup>130</sup> While Governor Brown relied on these recommendations, he also made decisions in disagreement with those recommendations at times.

of the California Supreme Court. Other reasons to deny clemency included the cold-blooded, planned nature of the crime, the lack of significant mental illness or disturbance, and the recommendations against clemency from the clemency secretary, the trial judge, and the district attorney.

## **VII. Approaches in Other States**

Up to this point, we have focused on the clemency process in California. In order to consider alternatives or modifications to the California procedure, it is useful to know how other states handle clemency petitions. The Death Penalty Information Center has identified five categories of clemency procedures.<sup>131</sup> The categories are: (1) decision by Governor acting alone; (2) decision by Governor conditioned upon a recommendation by a Board in order to grant clemency; (3) decision by Governor alone with required advisory decision from a Board; (4) decision by a Board alone; and (5) decision by a Board with the Governor sitting as a member of the Board. California is listed in the first category, because its state Constitution places the power to grant clemency exclusively in the Governor's hands. However, among the states listed in this category, California is unique. No other state requires, as California does, the concurrence of a majority of state supreme court justices to grant clemency in a situation where the inmate is a twice-convicted felon.<sup>132</sup>

Since each state has its own procedures and nuances with respect to the review and reporting of clemency decisions, an examination of the details of clemency procedures in every state would be impractical and not particularly illuminating. However, it does seem relevant to examine at least one state in each category and to consider the scope and source of authority for the clemency power across different state systems. To give a manageable picture, we have selected one state from each category as a sample and have compared the systems, the percentages of capital clemencies granted under each system, and the role of the various branches of government in the process. The States sampled are: North Carolina, Ohio, Georgia, Texas, and Nevada.

### **A. Decision by Governor Alone: North Carolina**

***Executions: 43***

***Commutations: 5***

In the modern era, North Carolina has executed 43 people since 1984 and five commutations have been granted.<sup>133</sup> North Carolina has a system like California in which the Governor is authorized by the state constitution to “grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.”<sup>134</sup> Similar to the advisory BPH in California, the North Carolina Governor may gain

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<sup>131</sup> See, Death Penalty Information Center, *Clemency Process By State*, *supra*, n. 5.

<sup>132</sup> CAL. CONST. art. V, § 8.

<sup>133</sup> Death Penalty Information Center, *State by State Information*, *supra*, n. 5.

<sup>134</sup> N.C. CONST. art. III, § 5 (2007).

assistance in making clemency determinations from the Post-Release Supervision and Parole Commission (PRSP Commission).<sup>135</sup> The Commission was created by legislative enactment, but is made up of three members appointed by the Governor who serve at the pleasure of the Governor.<sup>136</sup> The role of the PRSP Commission appears to be determined by each Governor, although it seems that matters decided by the Commission must be by majority vote of the full Commission.<sup>137</sup>

Governors in North Carolina also may use the services of the Office of Executive Clemency in the process of making a decision on commutation or parole. The OEC is part of the Governor's office and is charged with performing investigations of clemency applications, notifying victims or crimes and their families when a defendant has filed an application for clemency, and presenting the Governor with all information he or she requires to make an informed decision.<sup>138</sup> This is similar to the work of the investigative unit of BPH in California, but in North Carolina, the investigative unit is part of the Governor's office. The process in North Carolina is also similar to California's in that it does not appear to require that clemency and pardon decisions be written.

#### **B. Decision by Governor to Grant Clemency Conditioned Upon Recommendation by Board: Texas**

***Executions: 405***

***Commutations: 2***

Texas has more executions per year and has more total executions in the modern era than any other state. Since 1976, Texas has executed 405 people and two clemencies have been granted.<sup>139</sup> In the Texas clemency system, there is a Board of Pardons and Paroles similar to the BPH in California. In Texas, however, the Board plays a much stronger role in the clemency process than does BPH. Texas requires that, in order to grant clemency, the Governor must have the recommendation of a majority of the Board.<sup>140</sup> Without the recommendation of the Board, a Governor on his or her own may grant one reprieve of up to 30 days, but may not grant further reprieve, commutation or pardon without the approval of the Board.<sup>141</sup> The Board of Pardons and Paroles is constitutionally mandated, but the criteria for membership of the Board are

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<sup>135</sup> N.C. GEN. STAT. § 143B-267 (2007).

<sup>136</sup> *Id.*

<sup>137</sup> David R. Dow, et al., *Is it Constitutional to Execute Someone Who is Innocent (And if it Isn't, How Can it be Stopped Following House v. Bell)?*, 42 TULSA L. REV. 277, 368-369 (2006) [hereinafter Dow]

<sup>138</sup> *Id.* at 369; Office of Executive Clemency, [www.doc.state.nc.us/clemency](http://www.doc.state.nc.us/clemency) (last visited Feb. 23, 2007).

The OEC must notify victims' families and collect and present written statements from these individuals, as N.C. permits victims and their families to submit written statements to the Governor when a defendant has applied for a pardon or a commutation. As of February 23, 2008 there were 18 people with pending applications for commutations, although none were capital cases, and about 240 applications for pardons.

<sup>139</sup> Death Penalty Information Center, *State by State Information*, *supra*, n. 5. The Death Penalty Information Center records only those clemencies granted for humanitarian reasons. Clemencies granted as the result of judicial efficiency are not included. People freed as a result of innocence are reported separately on the website and do not appear on the clemency chart.

<sup>140</sup> TEX. CONST. art. IV, §11 (2008).

<sup>141</sup> *Id.*



established through statute.<sup>142</sup> The seven members of the board are appointed by the Governor, with the advice and consent of the State Senate, for six-year terms. These terms are staggered, with one-third of the members' terms expiring every two years.<sup>143</sup>

Another difference between California and Texas is the statutory specification of the basic procedures and deadlines that a petitioner must meet. These procedures and timelines in California are set by each Governor or by BPH if they are holding a hearing. The Texas administrative code specifies that, after a death warrant has issued, an inmate may file an application for a reprieve and/or a commutation with the Governor.<sup>144</sup> The application for a reprieve must be delivered to the Board of Pardons and Paroles no later than 21 days before the schedule execution, and all submissions on behalf of the inmate must be filed 15 days before the execution.<sup>145</sup> Another procedure in Texas that does not exist in California is the petitioner's ability to request an interview with a Board member. If granted, the interview takes place at the prison with only the inmate, Board member, and staff of the Texas Department of Criminal Justice present.<sup>146</sup> Subsequent to the interview, the Board may consider the inmate's statements in arriving at a recommendation. Although the Board is an essential part of the clemency process, the Texas Board is not required to meet to deliberate, although it has the discretion to schedule a public hearing at which trial officials, the victim's family, advocates for and against the death penalty and members of the public may present information.<sup>147</sup> Unlike the confidential recommendation of the advisory BPH in California, the Texas Board's decision must be made and announced in an open meeting.<sup>148</sup> Litigation challenging the Texas Board in recent years suggests that, although there exists a possibility for the Board to conduct interviews, hold hearings and meet together to deliberate, these processes practically never occur.<sup>149</sup>

The Texas Governor is not obligated to grant clemency based on the Board's affirmative recommendation, but may do so if clemency is recommended by the majority vote.<sup>150</sup> One example of the Governor rejecting the Board recommendation involved an inmate who was mentally ill. The Board of Pardons and Paroles voted 5 to 1<sup>151</sup> to commute the death sentence of a mentally ill inmate, Governor Rick Perry turned down the recommendation, and Kelsey Patterson was executed in May 2004.<sup>152</sup>

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<sup>142</sup> TEX. GOVT. CODE §§ 508.031 – 508.033 (2008).

<sup>143</sup> *Id.*; see also, Dow, *supra*, n. 139 at 387.

<sup>144</sup> TEX. ADMIN. CODE tit. 37. §143.43 et seq. (2006)(outlining procedures for applying for a reprieve); and TEX. ADMIN. CODE tit. 37. §143.57 et seq. (2006)(outlining the procedures for applying for a commutation)

<sup>145</sup> Dow, *supra*, n. 139 at 388.

<sup>146</sup> *Id.*; see also TEX. ADMIN. CODE tit. 37. §143.43 (2006).

<sup>147</sup> Dow, *supra*, n. 139 at 389-390.

<sup>148</sup> *Id.*

<sup>149</sup> *LaGrone v. Cockrell*, 2003 USApp LEXIS 18150 (5th Cir. 2003)(determining that since 1972 there was only one live capital clemency hearing in Texas, board members voted by facsimile and there had been no mercy commutations, but that the system nonetheless did not violate the due process rights of a condemned inmate); *Texas Board of Pardons and Paroles v. Williams*, 976 S.W.2d 207 (1998)(finding that the Texas Board kept no records of Board actions and gave no reasons for its actions but nonetheless satisfied due process requirements).

<sup>150</sup> *Id.*

<sup>151</sup> One position on the Board was vacant.

<sup>152</sup> Ralph Blumenthal, *Governor Commutes Sentence in Texas*, N.Y. TIMES, Aug. 31, 2007 (accessed through [http://www.nytimes.com/2007/08/31/us/31execute.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/08/31/us/31execute.html?_r=1&hp&oref=slogin)).

In Texas, although the decision of the Board of Pardons and Paroles must be announced at an open meeting, it does not appear that the Governor must issue written reasons for denying or granting a request for clemency, similar to both California and North Carolina.

**C. Decision by Governor Alone but Required Advisory Recommendation by Board:  
Ohio**

*Executions: 26*

*Commutations: 10*

Since Ohio re-enacted its death penalty statute in 1981, there have been 26 executions and 10 commutations. While the Ohio Governor has authority to grant a reprieve, commutation, or pardon, except in cases of treason or impeachment, state law requires that the Ohio Parole Board, which is part of the Adult Parole Authority (APA), provide a recommendation to the Governor on all applications for clemency.<sup>153</sup> At first blush, the constitutional and statutory provisions of Ohio appear to be very similar to those of California. However, unlike the discretionary use of BPH in California, the Adult Parole Authority is statutorily obligated to investigate all applications for clemency at the direction of the Governor.<sup>154</sup> The Ohio statute also requires the Adult Parole Authority to gather information and submit in writing a summary of the facts of the case, recommendation on the granting or denying of clemency and the reasons for the recommendation.<sup>155</sup>

In Ohio, the clemency process in a capital case is technically commenced with an application to the APA. However, as a practical matter, the APA will commence its investigation as soon as the Ohio Supreme Court has set a date for execution.<sup>156</sup> The Governor is empowered to grant a reprieve for a definite period of time without awaiting an application. Further, the extensive notice requirements to victims' families and other interested parties that are contained in the Ohio Code may be sidestepped if the Governor seeks to grant a short reprieve.<sup>157</sup>

The requirements for appointment to the Ohio Parole Board, operating under the direction and control of the APA, are complex and much more specific than the requirements for the Commissioners in California's BPH. According to statute, the Board may consist of up to 12 members.<sup>158</sup> All members of the Board must be qualified through education or experience in correctional law, and at least one member must represent a victims' rights organization or be a family member of a victim.<sup>159</sup> The Board may transmit a recommendation to the Governor on majority vote.<sup>160</sup>

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<sup>153</sup> OH. CONST. art. III, § 11 (2008); OHIO REV. CODE ANN. §2967.03 et seq. (2008).

<sup>154</sup> OHIO REV. CODE ANN. § 2967.07 (2008).

<sup>155</sup> *Id.*

<sup>156</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, A.B.A. DEATH PENALTY MORATORIUM & IMPLEMENTATION PROJECT, at 49 (2007) available at <http://www.abanet.org/moratorium/assessmentproject/ohio/finalreport.pdf> .

<sup>157</sup> *Id.*

<sup>158</sup> OHIO REV. CODE §5149.10 (2008).

<sup>159</sup> OHIO REV. CODE §5149.10 (2008).

<sup>160</sup> *Id.*

A December 2007 Associated Press article, published in numerous Ohio newspapers, noted that Governor Ted Strickland had not used his power of executive clemency to issue a pardon or commute a sentence in his first year of office, although he had issued reprieves in three death penalty cases.<sup>161</sup> Quoting the Governor's chief legal counsel, the article stated that the Governor had instituted a new review process in which he first would review petitions without the input of his advisors and then would consider the recommendations of his staff, the Ohio Parole Board, judges, victims and other interested parties.<sup>162</sup> Governor Strickland's system of review illustrates the flexibility of the Ohio clemency process, despite its many statutory and regulatory requirements.

In addition to the requirement that the APA submit a written recommendation to the Governor concerning clemency applications, Ohio law, like California's, also requires the Governor to report all grants of reprieves, commutations and pardons to the Legislature at every regular session.<sup>163</sup> These reports are generally provided biennially and in writing.<sup>164</sup>

#### **D. Decision by Board Alone: Georgia**

***Executions: 40***

***Commutations: 6***

Georgia's clemency process is quite different from California's because it has a process in which executive clemency is granted or denied solely through an appointed Board. The Governor has no authority to grant reprieves, commutations or pardons.<sup>165</sup> The Georgia Constitution creates the State Board of Pardons and Paroles and the Governor, with confirmation by the State Senate, must appoint five members to sit on this Board for renewable seven year terms.<sup>166</sup> Georgia's Board has granted clemency six times in the modern era. Since its first modern era execution in 1983, 40 inmates have been executed.<sup>167</sup>

Death sentenced inmates who wish to apply for commutation must submit an application to the State Board of Pardons and Paroles in writing.<sup>168</sup> The Board then decides whether to consider the application after it appears that all court proceedings have concluded or seventy-two hours before the execution date even if court proceedings continue. The Board may suspend a

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<sup>161</sup> He later denied clemency in all three of those cases and the inmates were executed. Governor Ted Strickland, Newslink, [www.Governor2.ohio.gov/News/May2007/News52107](http://www.Governor2.ohio.gov/News/May2007/News52107); [www.Governor2.ohio.gov/News/April2007/News41907](http://www.Governor2.ohio.gov/News/April2007/News41907); [www.Governor2.ohio.gov/News/March2007/News31607](http://www.Governor2.ohio.gov/News/March2007/News31607) (last accessed Feb. 25, 2008). Note that since the article was written, Governor Strickland has commuted a death sentence.

<sup>162</sup> The Associated Press, *Strickland Has Not Used Clemency Power During First Year of Office*, OHIO.COM, Dec. 16, 2007, <http://www.ohio.com/news/ap?articleID=288821&c=y> (last visited Feb. 24, 2008).

<sup>163</sup> OH. CONST. art. III, § 11 (2008).

<sup>164</sup> Ohio Department of Rehabilitation and Correction, *Clemency Report*, <http://www.drc.state.oh.us/web/Reports/reports17.asp> (last visited Feb. 24, 2008).

<sup>165</sup> GA. CONST. art. IV, § II (2007).

<sup>166</sup> GA. CONST. ART. IV, § II(a); GA. CODE ANN. §42-9 (1997).

<sup>167</sup> Death Penalty Information Center, *State by State Information*, *supra*, n. 5.

<sup>168</sup> GA. COMP. RULE & REGS. 475-3-.10 (2007).

sentence for up to 90 days to review an application.<sup>169</sup> The Board may or may not conduct a hearing in the process of review.<sup>170</sup>

The Georgia statute directs the Board to obtain as much information as possible about the inmate who has applied for clemency. This information must include: 1) a statement of the crime for which the inmate is sentenced, the circumstances of the crime, and the inmate's sentence; 2) the name of the court in which the inmate was sentenced; 3) the term of his/her sentence; 4) the name of the presiding judge, the prosecutors, the investigating officers, and defense counsel; 5) a copy of the presentence investigation and any previous court record; 6) a fingerprint record; 7) a copy of all probation reports that may have been made; and 8) any social, physical, mental or criminal record of the person.<sup>171</sup> Although California does not specify that the same information must be collected, the investigation by BPH includes this type of information. The Georgia statute also requires that the Board keep records of all people who contact the Board on behalf of an inmate and submit a written report of all its activities to the Governor, the Attorney General and all members of the General Assembly each year.<sup>172</sup>

#### **E. Decision by Board Alone, but Governor Is Member of the Board: Nevada**

***Executions: 12***

***Commutations: 1***

In Nevada, the decision-maker for clemency is the Governor, Attorney General and the Justices of the Supreme Court, sitting together as the State Board of Pardons Commissioners. Thus, the Governor has a role, as in California, but is only one member with one vote on a clemency board. The State Board of Pardons has the power to remit fines and forfeitures, commute punishments and grant pardons, except in cases of treason or impeachment. The Board cannot, however, commute a sentence of death or life imprisonment without parole to a sentence allowing parole.<sup>173</sup> Since 1976, Nevada has executed 12 people and the Board has granted one commutation.

Applications for commutation or pardon are made to the Board and, at least 30 days before the Board meets to consider any application, it must notify the district attorney and the district judge in the county of conviction and invite them to submit written recommendations and testify at the hearing.<sup>174</sup> Nevada also has a number of requirements relating to the notification of victims and victims' families, if they elect to be notified.<sup>175</sup> It appears that these notifications may be waived for applications for commutation of the death penalty.<sup>176</sup>

Although in Nevada the Board conducts semi-annual meetings to consider commutations and may schedule hearings at other times, it also appears to be within the discretion of the Board

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> GA. CODE ANN. §42-9-43(a)(1997).

<sup>172</sup> *Id.*

<sup>173</sup> NEV. CONST. art. 5, §14(2007); NEV. REV. STAT. ANN. §213.080 (2007).

<sup>174</sup> Dow, *supra*, n. 139 at 363.

<sup>175</sup> *Id.* at 363-364; *see also* NEV. REV. STAT. ANN. §213.010(2007).

<sup>176</sup> NEV. STAT. ANN. §213.030 (2007).

to decide a matter without a hearing.<sup>177</sup> In the event that a death sentence is commuted by the Board, a written statement must be issued which includes the name of the person whose punishment is commuted, the time and place of conviction, the amount, kind and character of punishment substituted, and the place where the remaining punishment will be served.<sup>178</sup>

## F. Comparisons

Because there are so many variables in each individual petitioner’s case, it is hard to draw any conclusions from this sample. For comparison purposes, however, the statistics on executions and commutations since 1976 in our sample states, viewed comparatively, are:

<u>Type of process</u>	<u>Executions</u>	<u>Commutations</u>
Governor Alone (NC)	43	5
Governor with Required Recommendation of Board To Grant (TX)	405	2
Governor with Required Use Of Board but not Required Recommendation of Board (OH)	26	10
Board Alone (GA)	40	6
Board Alone but Board Includes Governor (NV)	12	1

For a chart showing the ratio of commutations to executions for all states in each of the five categories, see Appendix B.

From the sample of only five states, it would appear that the third category, decision by Governor with required use of a Board but not required recommendation of the Board to grant clemency, yielded the highest number of commutations compared to executions. We would be hesitant, however, to conclude on the basis of such a sample that the variations of the systems employed by these states have a significant effect on the likelihood or frequency with which clemency is granted in capital cases. While Ohio has a higher percentage of commutations to executions than the other sampled states, eight of those commutations were part of an end-of-term series of commutations that took place in Ohio in 1991 when Governor Celeste was leaving office. A Governor could not take such an action in Texas, which requires the Governor to have the approval of the Board, or Nevada or Georgia where the Board is the decision maker. Apart

<sup>177</sup> NEV. STAT. ANN. §213.010 (2007).

<sup>178</sup> NEV. STAT. ANN. § 213.080 (2007).

from that one instance of multiple clemencies, Ohio has a rate of granting clemency similar to the other states sampled.<sup>179</sup>

In an article published in 2006, Professors Carol and Jordan Steiker categorized all death penalty states as falling into two camps: executing states and symbolic states. They use Texas as the prime example of an executing death penalty state and California as the prime example of a symbolic death penalty state.<sup>180</sup> In the short portion of the article devoted to capital clemency, they discuss factors that have led to the reduced use of clemency in the death penalty process and note that while executing states are perhaps using clemency more than symbolic states, neither category of state is using it much.<sup>181</sup> In the thirty years since most states re-enacted their death penalties, very few Governors or Boards have used the clemency power with the ease that pre-*Furman* executives did. Perhaps because of a reality, or perception, that narrowed death penalty statutes and additional layers of judicial review relegate executive clemency to a last resort when a truly unique situation arises, executives across the country, whether sitting with Boards or without them, use the power exceedingly sparingly.

## **VIII. Modifications of the Clemency Process**

In addition to the models of executive clemency used in other states as set forth in Section VII, this section is a description of recommendations, suggestions, and arguments for modifying typical clemency procedures. In this section, we are not attempting to evaluate the strengths or weaknesses of these ideas, but rather to give you an overview of what has been proposed by the American Bar Association and academic commentators and to compare those proposals with the practice in California. In our final section on Recommendations, we will make a few suggestions based on our evaluation of the California process.

The critiques and suggestions from the ABA and the academic literature that are described here are based on trying to achieve the goals of mercy and correcting miscarriages of justice from the judicial process. There are suggestions in the academic literature for modifying clemency that roughly fall into two categories: 1) procedural and substantive standards and 2) insulation from political pressures. The ABA's comprehensive efforts are first described below and then both standards and political pressures are discussed.

### **A. ABA Projects on Clemency**

The ABA has provided suggestions on clemency in two contexts. One is the Kennedy Commission and the other is the Death Penalty Moratorium Project. The Kennedy Commission

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<sup>179</sup> It should also be noted that while Governor Celeste commuted 8 sentences at the end of his final term, he did not engage in a mass commutation. He left large numbers of people on death row, and Ohio presently has 186 people under death sentence in the state.

<sup>180</sup> Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869 (2006) ("executing" states are those states that actively executed those penalized to death; "symbolic" states are those states which retain the death penalty, but largely refrain from using it).

<sup>181</sup> *Id.* at 1906-1908.

was set up in response to Justice Kennedy's strong remarks at the 2003 annual meeting of the ABA. In that address, Justice Kennedy called for renewed attention to post-conviction matters, including sentencing, corrections, prisons, and clemency. Regarding the "pardon power," Justice Kennedy stated: "The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy."<sup>182</sup>

Professor Stephen Salzberg chaired the Commission that ultimately generated proposed resolutions in four areas, one of which was "commutation, elimination of collateral disabilities and restoration of rights." While the focus of the Commission's research was largely noncapital cases, it is still noteworthy that they considered the clemency function to have atrophied. They found that, in general, the pardoning power decreased in use after 1990 and that the clemency power was more likely to be used in states where the decision maker was the most protected from political fallout.<sup>183</sup> The resolutions included one that urged the establishment of "standards governing applications for executive clemency" and the specification of "procedures that an individual must follow in order to apply for clemency." The report does not, however, give details about either proposed standards or procedures, so it is unclear exactly what the Commission contemplated. One theme of the Commission was accessibility of the process, so specifying procedures would assist that effort. Another theme was to increase the use of clemency for "exceptional circumstances," including "old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering."<sup>184</sup>

The second ABA effort, by the Death Penalty Moratorium Project, specifically targeted clemency in capital cases. On October 29, 2007, the American Bar Association's Death Penalty Moratorium Implementation Project [hereinafter ABA Project] issued an "Assessment Guide" for collecting information and evaluating a state's death penalty process. The ABA Project itself conducted assessments of eight states (Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee) and also published "Key Findings" from these assessments. In the Key Findings, there was an emphasis on the importance of clemency and identification of three observations that emerged from the Project's evaluation of the eight states. Those observations or themes were:

- Most states fail to require any specific type or breadth of review in considering clemency petitions;
- Most states do not require the clemency decision-maker to explain the reasons why clemency was or was not granted; and
- Very few states require that the clemency decision-maker meet with the petitioning inmate and/or the inmate's counsel.<sup>185</sup>

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<sup>182</sup> A.B.A. Justice Kennedy Commission, *Report with Recommendations to the A.B.A. House of Delegates*, August 2004 at 3, available at

<http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>

<sup>183</sup> *Id.* at Recommendation on Clemency, Sentence Reduction, and Restoration of Rights at 7, adopted by the ABA House of Delegates, August 9, 2004, available at

<http://www.abanet.org/media/kencomm/rep121c.pdf>. The report discusses a greater number of pardons in states where the authority is rested in an independent board rather than with the Governor.

<sup>184</sup> *Id.* at 1 (Recommendation).

<sup>185</sup> <http://www.abanet.org/moratorium/assessmentproject/keyfindings.doc>

Building on these three themes, the ABA Project made eleven recommendations. The first five relate to what should be considered in a clemency process. The next two recommend representation of the inmate by counsel and adequate time and resources to investigate. The eighth and ninth recommendations are that proceedings should be conducted in public, presided over by the decision maker, and if there are multiple persons responsible for the decision, each should have an in-person meeting with the petitioner. The tenth recommendation suggests education of both the decision makers and the general public about the nature of clemency. The final recommendation is perhaps the most difficult one to implement and that is to insulate the decisions as much as possible from political pressures. The full text of the ABA recommendations is set forth in Appendix D.

## **B. Procedural and Substantive Standards**

The procedures that were emphasized in the ABA Project's recommendations were representation by counsel, with adequate time and investigative resources, and a hearing conducted by the decision maker(s) in public. Some of the academic writers echo these suggestions and some go further in proposing greater procedural guarantees. In the period of time after the Supreme Court emphasized the role of clemency in resolving miscarriages of justice in *Herrera v. Collins* (1993) and before the Supreme Court found only a minimal guarantee of due process in capital clemency in *Woodard* (1998), some writers suggested that there should be procedural guarantees similar to judicial hearings. For instance, there were arguments for a right to procedures such as a hearing, the opportunity to introduce evidence, cross-examining witnesses, right to counsel, a statement of reasons for a denial, and a right to judicial review of the procedures followed.<sup>186</sup> Post-*Woodard*, suggested procedures have included providing notice of factors that would be considered in clemency, providing counsel, providing adequate investigative resources for counsel, allowing the inmate to rebut evidence presented by the state, and requiring a statement of reasons for a denial.<sup>187</sup>

It is unlikely that most, or any, of these procedures are mandated by the due process clause of the 14<sup>th</sup> Amendment, given the limited nature of *Woodard*. The Kennedy Commission report, which recommended establishing known procedures for the clemency process, is aimed at legislatures. Establishing and publishing set procedures are not without controversy. One commentator has argued against having a requirement to state reasons for granting clemency on the ground that such a requirement might inhibit granting clemency out of fear of setting a precedent for other cases.<sup>188</sup> Others have suggested that any regularized process would be

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<sup>186</sup> Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Rich. L. Rev. 201, 224-226 (1993); Daniel Lim, *State Due Process Guarantees for meaningful Death Penalty Clemency Proceedings*, 28 Colum. J.L. & Soc. Probs. 47,72-78, 81 (1994); Stephen E. Silverman, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 Ariz. L. Rev. 375, 395-397 (1995).

<sup>187</sup> Dinsmore, *supra*, n. 7 at 1853-54 (proposing that state legislatures should pass procedural guidelines); A.B.A. Justice Kennedy Commission, *Report with Recommendations to the A.B.A. House of Delegates*, August 2004, *supra*, n. 182.

<sup>188</sup> Daniel T. Kobil, *Should Clemency Decisions be Subject to a Reasons Requirement?* 13 FED. SENT. R. 150, n.19(2002) (providing an example of how a commutation of a death sentence might be denied where



likely to create additional litigation over whether those procedures had been followed correctly in a process that has been historically insulated from judicial oversight.<sup>189</sup>

In California, some of the concerns about procedures are already covered. For instance, there are statutory provisions related to appointment of counsel and provision of resources. It has been the practice, even though not mandated, that the Governor issue a statement of reasons for a denial of clemency. Although similarly not legislatively required, the practice is to consider all information that is presented and specifically to consider the extensive compilation of information from the investigative unit of BPH or from the hearing, if there is one. Judge Janice Rogers Brown, former Legal Affairs Secretary to Governor Wilson, has described a process that was followed in his administration and, from the descriptions we received, was generally followed in other administrations as well. She wrote that “[a] minimally adequate review entails:

1. A review of the existing written record which will in every case include the complete trial transcript, the investigative reports of the Board of Prison Terms, the prisoner’s complete prison file, the pleadings, transcripts, and decisions in all direct and collateral appeals;
2. A review of all written and taped submissions from proponents or opponents of the clemency request;
3. An independent review of pertinent literature;
4. An independent review of any expert opinions offered;
5. Independent discussions with custodial and mental health staff who have observed the prisoner during incarceration; and
6. Independent review of any other relevant source materials or discussions with other appropriate individuals.<sup>190</sup>

Of the factors that Judge Brown lists, most of the Legal Affairs Secretary indicated that they and/or the Governor reviewed the entire written record from the courts and BPH; all submissions from those in favor of or against clemency; and any materials submitted by the parties, such as new expert reports. We did not get information about reviewing pertinent literature or independent discussions with custodial and mental health staff, although information from the latter staffs would have been considered in all administrations.

Some of the procedures, however, are not followed on a regular basis in California. For example, some Governors have met with the inmate’s counsel while others have not. In some circumstances, there has been a public hearing before the BPH while in other cases, there was no such hearing. It should also be noted that, even if there is a public hearing before the BPH, that is not a hearing before the actual decision maker as suggested by the ABA Project. While the BPH and Governor’s office have generally been receptive to any evidence that the petitioner, district attorney, and others wish to present, there is no practice of establishing a list or guidelines on reasons for granting clemency. In fact, the one time that BPH arguably tried to

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the inmate has a compelling case of mental illness out of fear that every mentally ill inmate would then seek clemency on that ground.

<sup>189</sup> Brian Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 638 (2001).

<sup>190</sup> Janice Rogers Brown, *supra*, n. 30 at 332 n.19 .

limit what petitioner presented at a hearing, a lawsuit ensued when the petitioner believed that he had been misled about what the Board would consider.

The substantive bases that the ABA Project recommends should be considered by the decision maker are the facts and circumstances of the crime, factors that affect whether death is the appropriate punishment, patterns of racial or geographic disparity, including racially-based exclusion of potential jurors, serious mental illness, lingering doubt about guilt, rehabilitation or significant positive acts while on death row. The Project does not take a position on whether these factors should be published or otherwise established by law. Nor does the Project indicate the weight that should be given to any of the factors. The Kennedy Commission recommends the “establishment of standards,” but similarly does not explain precisely what mechanism is envisioned, such as legislative or executive action. Academic writers have differed in their views on substantive standards for clemency. Some argue for guidelines that would assist petitioners and the executive.<sup>191</sup> Others argue that the function of clemency is better served by not attempting to list substantive factors because there are other possible bases that could arise in future cases that would be excluded from consideration.<sup>192</sup> In their view, this would defeat the purpose of clemency as the final fail-safe to consider anything that might warrant mercy.

In California, we found that all of the Legal Affairs Secretaries interviewed indicated that they would consider anything presented to them by the petitioner, the District Attorney’s office, or other interested parties. It is clear from reading the decisions denying clemency since 1992 that the Governors considered mental illness or disorders, doubts about guilt, rehabilitation and good behavior on death row, although in no case were these factors sufficient to warrant a commutation. Governors also routinely considered the facts and circumstances of the crime, although perhaps not as an “independent consideration of facts and circumstances” as the ABA recommendations provide. If the ABA recommendation means that there should be a *de novo* consideration of guilt or innocence, then that is not typically done in a clemency review in California. In most of the decisions, as indicated earlier in Section VI, the Governor has written that they will not reassess the findings of the jury and courts involved in the case. Similarly with the ABA recommendation to consider factors that affect whether death is the appropriate punishment, California Governors tend to consider new or omitted evidence of mental illness or other mitigation, but tend not to revisit the facts that led to the original determination of death as the sentence.

Of the ABA recommended factors, there are two that stand out as either not considered or not of much significance to California Governors. The first is one that is not apparent in the details of any of the decisions since 1992. That is the factor of geographic disparity. In contrast, geographic disparity was clearly a factor in some of the decisions during Governor Brown’s administration. The second one is the good behavior of the inmate while on death row. Although the Governors acknowledge the good behavior, the decisions typically indicate that such behavior is expected and not a reason to grant clemency.

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<sup>191</sup> Dinsmore, *supra*, n.7 at 1853-54.

<sup>192</sup> See e.g., Brian M. Hoffstadt, *supra*, n. 189 at 640.

### C. Insulation from Political Pressures

A number of commentators write of concerns that Governors or clemency boards will feel pressured not to commute a death sentence because of political fallout, especially that they will not be perceived as strong on “law and order.”<sup>193</sup> It is hard to document whether Governors have declined to commute a sentence due to this pressure. The ABA Kennedy Commission was concerned with an overall decline in the use of executive clemency in all cases, capital and noncapital. Professors Radelet and Zsembik conducted a study that analyzed commutations in death penalty cases granted nationally between 1973 and 1992.<sup>194</sup> They found only 29 commutations for humanitarian reasons while there were an increasing number of death sentences imposed such that, by 1992, approximately 2,700 individuals were on death row. They particularly noted that, at that time, there had been no humanitarian commutations in either California or Texas, which had the largest death row populations. Other scholars, too, have documented a decline in clemency since 1976.<sup>195</sup> Current statistics nationally and in California also show a sparing use of clemency in capital cases compared with the first half of the 20<sup>th</sup> century.<sup>196</sup> For example, between 1976 and 2002, there were only 49 commutations compared with 820 executions.<sup>197</sup> As of September 2007, there have been 241 commutations compared with 1099 executions. It should be noted, though, that 167 of the 241 commutations occurred in Illinois as a result of a blanket commutation of all those on death row by Governor Ryan in 2003.<sup>198</sup> Is this decline due to political pressures? Some academic scholars have found little or no evidence of actual political fallout, although they recognize that the belief in political consequences might affect a decision.<sup>199</sup> Even if the numbers are not indicative of an increase in

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<sup>193</sup> See, e.g., Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. ON C.L. & C.R. 191, 194 (2003) (describing instances where political campaigns capitalized on an opponent’s commutations while governor—such as Carnahan in Missouri and Dukakis in Massachusetts); Victoria J. Palacios, *Faith in the Fantasy: the Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 349 (1996).

<sup>194</sup> Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, at 293,297 (1993). They found 70 commutations of which 41 were for judicial expediency and 29 were for humanitarian reasons. Judicial expediency means that a commutation occurred because it was likely that a court would vacate the sentence or there was a desire to avoid a second sentencing proceeding. Humanitarian commutations were for reasons such as mercy, doubt about guilt, mental problems, and co-defendant equity.

<sup>195</sup> Kobil, *Chance and the Constitution in Capital Clemency Cases*, *supra*, n. 13 at 572 (2000) (noting that before *Furman*, 25% or more of death sentences were commuted compared with 7.5% after 1976); 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, 215 (2000) (calculating the ratio of executions to commutations as 13.8 to one post-*Furman*, which is significantly higher [3-9 times higher depending on the state] than before *Furman*).

<sup>196</sup> Victoria J. Palacios, *supra*, n. 193 at 347-349.

<sup>197</sup> Death Penalty Information Center, *supra*, n. 5.

<sup>198</sup> There were also broad-based commutations in New Mexico (by Governor Anaya on leaving office) and New Jersey (upon repeal of the death penalty), but the absolute numbers were small (New Mexico—5; New Jersey—8). Governor Celeste in Ohio is sometimes included in a list of mass commutations because commuted the death sentences of 8 individuals at one time in 1991, but that is different from Illinois, New Mexico, and New Jersey because 101 individuals remained on death row.

<sup>199</sup> Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 295 (2003) (finding no statistical significance between grants of clemency and pending elections); Michael A.G. Korengold et al, *supra*, n. 12 at 363-364 (belief that commutations are “political suicide” is not supported).

political pressures, is it advisable to attempt to insulate a Governor from some of the political pressures and, if so, how can that be done?

Some of the academic writers suggest that an independent board is less subject to political pressures. Even boards, however, can be subject to political pressures if members are political appointments.<sup>200</sup> One academic scholar, who herself had been a member of a parole board, suggested that the Governor appoint a selection board that would then choose the members of the clemency board.<sup>201</sup> In this way, the resulting clemency board would be several steps away from direct political pressure. Other writers have suggested an appointments group comprising the state attorney general, a state supreme court justice, and a present or former member of the state parole board. This appointments group would then select the members of the clemency authority. An additional proposal to insulate the decision makers from political influence was to appoint the members of the clemency authority for life terms.<sup>202</sup>

Other scholars recognize the political pressures in clemency decisions, but argue that executive clemency should be left alone. In one article, the authors argue that the political and unfettered nature of clemency at times restricts granting clemency, but also works at times to the advantage of death row inmates.<sup>203</sup> In other words, the absence of procedures, standards, and judicial review allows for more leeway in granting clemency as well as in denying it.

In California, there is little insulation from political pressures in the structure of our clemency process. There is a check on a Governor whose inclination or whose political pressures would lead him or her to *grant* clemency in that the votes of four justices on the California Supreme Court are required to grant clemency to a two-time felon. The legislative history of the provision on Supreme Court concurrence supports the inference that the legislature was concerned with the discretion of the Governor to grant clemency, not the discretion to deny it. There is no comparable requirement for concurrence of justices in order to *deny* clemency. The use of the advisory Board of Parole Hearings commissioners, however, is another way in which a Governor can find some political insulation for either granting or denying clemency. In fact, one can see in several of the decisions denying clemency that the Governor included a statement of the recommendation of the Board to deny a commutation. Presumably, a Governor would have similar support or insulation for a decision granting clemency if the Board had also recommended a commutation. There is certainly nothing, however, in place in California that attempts to remove some of the political pressure on an elected official such as by putting a determinative decision into the hands of an independent board.

## **IX. Recommendations**

It is important to remember what clemency is and what it is not. Clemency is not a judicial proceeding and, as such, it is not a substitute for a guarantee of a review of any particular

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<sup>200</sup> Palacios, *supra*, n. 193 at 352-353.

<sup>201</sup> Palacios, *supra*, n. 193 at 371. Victoria Palacios was a member of the Utah Board of Pardons from 1980 to 1990.

<sup>202</sup> Michael A.G. Korengold, et al., *supra*, n. 12 at 368-369.

<sup>203</sup> Beau Breslin & John J.P. Howley, *supra*, n. 18 at 233.

issue. For any errors in the procedure or result for which there should be a guaranteed process of review, it is necessary to have a judicial process, not clemency. Why is clemency inadequate to guarantee review of particular issues? Although any issue can be raised in clemency, there is no guarantee that the issue will be considered nor any guarantee that clemency will be granted even if the claim is meritorious. In other words, a Governor could refuse to consider an issue such as mental illness; similarly, a Governor could find that a petitioner is innocent and yet refuse to commute a sentence. While perhaps at least the latter is unlikely, there is nothing in the clemency process that compels a Governor to act. While clemency at times in some states has functioned to correct miscarriages of justice, there is no requirement that a Governor or Board do so.

Should clemency be modified to incorporate standards, procedures, and review? We do not think so because we believe that clemency serves a purpose as it is presently constructed in California and elsewhere. Although there are tremendous variations from Governor to Governor and state to state, the concept of clemency as a nonjudicial process that allows for the consideration of any type of issue is a safety valve in the overall criminal justice system. If standards and procedures are adopted, there are likely to be issues that would be precluded from the process. Moreover, the more specific the requirements, the more likely there are to be judicial challenges to the process. One enduring attribute of clemency is to provide a forum outside of the judicial process. This nonjudicial characteristic has allowed Governors to consider issues that could not be raised in court, such as the battered women's syndrome before the evidence was admissible in court.

This means, though, that clemency should not be the primary avenue for handling claims of innocence, mental deterioration on death row, or any other issue on which there is a need for a guaranteed form of review. Instead, clemency should be viewed as an extra safeguard in addition to a functioning criminal justice judicial system.

Although we conclude that clemency as an unregulated, extra-judicial process is valuable, there are a few recommendations that we would make with regard to the procedures in California.

1. The requirement that the Governor report grants of clemency to the legislature should be amended to also require reporting denials of clemency, at least in capital cases. This recommendation will require an amendment to Article V, sec. 8 (a) of the California Constitution.

This amendment would not greatly affect the practice of Governors since 1992 as they have all issued written decisions denying clemency. The amendment, however, would create a more complete data base for future Governors, legislators, researchers, and the general public. The legislative reports were the best source that we found for tracking commutations. In contrast, it took much more searching to locate the decisions denying clemency. By including denials in the reporting requirement, it would make the data and decisions as available as the actual commutations.

2. The constitutional requirement that four justices of the California Supreme Court concur with the Governor's decision to grant clemency to a twice convicted felon should be deleted from the text of Article V, sec. 8 (a) of the California Constitution.

Originally, when this provision was drafted in 1879, it was created to serve as a check on the power of the Governor to grant clemency. This requirement has not been a factor in clemency decisions in the capital cases since 1992 as all the capital clemency petitions were denied. More importantly, checks on the Governor's exercise of clemency are already built into the process with the reporting requirement to the legislature and from the reaction of the voting public.

Further, the involvement of the California Supreme Court in the clemency process intertwines the state judicial branch with a power that is exclusively vested in the executive branch by the California Constitution and not a usual judicial function. Interestingly, when the requirement of judicial concurrence was added to the clemency provision of the constitution in 1879, the Article was moved away from the other executive branch constitutional provisions. When the clemency article was moved back to the executive branch section of the constitution in 1966, the involvement of the State Supreme Court was not altered. In the interest of maintaining the power of clemency as a nonjudicial, and purely executive, function as contemplated by the 1966 revisions to the California Constitution, the requirement of judicial branch involvement should be removed. No other state has a process that gives the judicial branch this type of veto power over the executive's decision. Additionally, the concept of granting mercy is an extra-judicial function that is not one that within the usual function or process of a court.

3. The statutory requirement that the Governor refer requests for clemency by a twice-convicted felon to BPH for its review and recommendation should be amended to make it discretionary rather than mandatory, which would eliminate the distinction between twice-convicted felons and other petitioners. This recommendation will require an amendment to California Penal Code § 4813.

The amendment will bring the statute into conformity with the actual practice of Governors in recent years and alleviate a possible conflict with the California Constitution and separation of powers doctrine. While Governor Davis referred all of his cases to BPH for a hearing, the practice of Governors Wilson and Schwarzenegger was and is to refer the cases to BPH for a hearing and recommendation in select cases. It should be noted that all of the recent Governors have used the investigative unit of BPH to gather information for them, but if there is no referral for a hearing, BPH does not give the Governor a recommendation. While reasonable minds can differ about the desirability of a hearing before BPH (see discussion below in recommendation #5), the design of clemency in California is to provide BPH as an advisory tool for the Governor. As such, there may be cases where the Governor decides it is better to hear the parties him or herself (such as occurred with Robert Alton Harris before Governor Wilson and all cases before Governor Pat Brown). Moreover, because the California Constitution does not set forth the requirement of a referral, it is possible to interpret the statutory provision as conflicting with the discretion afforded to the Governor under the Constitution. An amendment to make the referral discretionary in all cases would eliminate any possible conflict.

If the mandatory referral provision is retained, then our recommendation is to amend it to require a referral for review and recommendation in all capital cases, not just those of twice-convicted felons. There does not seem to be a logical reason to distinguish the two types of cases when the recommendation of BPH is nonbinding. Since the recommendation from BPH is advisory only, the purpose is to assist the Governor, and that assistance is just as pertinent in capital cases that do not involve two-time felons.

4. Certain features of the California clemency process that are commendable should be safeguarded and funded sufficiently. These include provision of counsel and investigative resources for the inmate, the investigation unit of BPH, the practice of accepting all information submitted by the inmate, and the practice of accepting all information from the victim's family or other interested parties. This recommendation does not require an amendment of a statute or the Constitution, but there should be a process to review and monitor how well these functions are operating.

Each of the four identified attributes of the clemency process in California are worth preserving and encouraging. It is important that the inmate have counsel who can adequately present the case for clemency in order to have an orderly and fair process. The investigation unit at BPH performs an invaluable service for the Governors in the collection of documents and in interviewing family members of the victim, family members of the inmate, the trial judge, and others. This investigation results in the "black book" that is used by Governors and their staffs to review all pertinent information and has been described as the most, or one of the most, important aspects of the process. The other two features that are mentioned involve accepting information from all of those concerned. There should not be any exclusion of information in the process. While this is not something that we would suggest should be legislated, it is worth noting in any comprehensive messages about clemency that are delivered to the public or to the legislature.

5. Public access to materials submitted in clemency should be increased to the extent possible. This recommendation does not necessarily require an amendment of a statute or the Constitution, but we urge the Commission to make a recommendation to the Governor's Office that the briefs of the parties in a clemency proceeding be released to the public either during or after the clemency process.

Because clemency is a nonjudicial process, there is no bank of the records filed. The BPH "black book" and the recommendation of the BPH, if given, are confidential. Right now, the parties' briefs and other materials are similarly not released unless they are released by the parties themselves. There are two reasons to release at least the briefs of the parties. One is a general principle, even though not legally required, of transparency about what is occurring in executive clemency proceedings. A second reason is to establish an institutional history of the clemency process. Although we found counsel for the inmates and the district attorney's offices helpful in sending us their briefs, some were not available to us, largely because they could not be located in archives. The briefs filed by the parties, at least the ones we have seen, are similar to court documents. If there is anything too sensitive or confidential in them, redacted versions could be released. Our suggestion would be that the documents are released through the Governor's Office.

6. The Governor should meet with at least the attorneys for each side, regardless of whether or not there is a hearing before BPH. This recommendation does not necessarily require amendment to the state Constitution or code. If the Commission wanted to mandate a hearing with counsel in all cases, an amendment to the state Constitution would likely be necessary, unless the term “application procedure” in California Constitution, Article V, section 8(a) could be construed to encompass a hearing with counsel. In that case, the legislature could pass the hearing requirement as an application procedure. At a minimum, we recommend that the Commission encourage the Governor’s Office to adopt a practice of meeting with counsel for each side.

In California, the Governor is the decision maker. Even if there is a hearing before BPH, the Board’s recommendation is advisory only. As the only decision maker, the Governor should hear evidence and arguments as much in person as possible. We considered recommending that a hearing before the Governor be public as is the hearing before BPH. However, several of the Legal Affairs Secretaries pointed out that a Governor is less likely to be as candid in the exchange if the proceeding is public. There were a number of references to a concern about the process becoming a “circus.” In our view, the clemency process is one that, despite the political pressures, Governors should take seriously on a case-by-case basis. The best middle ground we found would be to make some of the records public, such as the briefs indicated in #4 above, but leave a meeting with the Governor private if the Governor so prefers. What is more important is the ability to make a personal appeal to the decision maker. Thus, we urge that the Governor conduct a hearing him or herself with at least the attorneys present.

7. As a general matter, data should be kept in an accessible location. Either the state law library or another site should be the repository for all documents and the decisions themselves.

8. There should be efforts undertaken to educate the public about the function and process of clemency. This could be done in a number of different ways, such as information on the websites of the Governor’s Office, the BPH, the Attorney General’s Office, the District Attorney’s Association, the California Attorneys for Criminal Justice, and other such government offices or organizations.

The goal of this effort would be to explain the nonjudicial, highly discretionary process of clemency, the type of factors that are taken into account, and how clemency fits within the overall criminal justice system. One way to minimize or neutralize public pressure on sitting Governors is to educate the voting public about the purposes and historical use of clemency in the State of California. Given the limited transparency in the process and the very limited use of the process in recent generations, very few members of the public have any idea of the purpose of the power and its intended uses. If voters understand the role that the process has played, Governors might feel less public pressure and, as Justice Kennedy suggested in his ABA address, clemency might become a more significant instrument in the criminal justice system as it was in the pre-1976 period of time.

We hope that our report will serve a purpose of promoting discussion of these issues and assist you in improving the criminal justice system in California.



## Appendix A

### Interviews Conducted<sup>1</sup>

Arthur Alarcon, former Legal Affairs Secretary to Governor Pat Brown

Janice Rogers Brown, former Legal Affairs Secretary to Governor Pete Wilson

Ward Campbell, Supervising Deputy Attorney General, California Department of Justice

Gray Davis, former Governor

George Deukmejian, former Governor

James Fox, District Attorney for the County of San Mateo

Barry Goode, former Legal Affairs Secretary to Governor Gray Davis

Andrea Hoch, Legal Affairs Secretary to Governor Arnold Schwarzenegger

J. Anthony Kline, former Legal Affairs Secretary to Governor Jerry Brown

Daniel Kolkey, former Legal Affairs Secretary to Governor Pete Wilson

Michael Laurence, defense attorney for Robert Alton Harris, William Beardslee and Jaturun Siripongs

John McInerney, former Legal Affairs Secretary to Governor Pat Brown

Edwin Meese, former Legal Affairs Secretary to Governor Ronald Reagan

Toni Pacheco, senior investigator for the Board of Parole Hearings

Charles Patterson, defense attorney for Manuel Babbitt and Clarence Ray Allen

Randy Pollack, former Deputy Legal Affairs Secretary to Governor George Deukmejian

Vance Raye, former Legal Affairs Secretary to Governor George Deukmejian

McGregor Scott, former District Attorney for Shasta County

Peter Siggins, former Legal Affairs Secretary to Governor Arnold Schwarzenegger

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<sup>1</sup> Some interviews were conducted in person and some by telephone. This list of interviewees is alphabetical and indicates the person's position or former position relative to the capital clemency process.

## Appendix B

### Statistical Comparison of Death Sentences, Number on Death Row, Commutations, and Executions by Type of Clemency Authority

State	Death Sentences through 2006	Current Death Row Inmates	Number of Commutations	Number of Executions
<b>Governor has sole authority</b> [*With limitation in CA--Must have agreement of majority of state supreme court justices to commute if two-time felon]				
Alabama	368	201	1	38
California*	851	669	0	13
Colorado	20	1	0	1
Kansas	10	10	0	0
Kentucky	77	39	2	2
New Mexico	28	1	5	1
North Carolina	517	166	5	43
Oregon	56	35	0	2
South Carolina	190	58	0	37
Virginia	145	20	7	98
Washington	38	8	0	4
Wyoming	12	2	0	1
<b>Governor has authority, but must have a recommendation from a Board to grant clemency</b>				
Arizona	261	114	0	23
Delaware	52	19	0	14
Florida	907	388	6	64
Louisiana	228	85	2	27
Montana	15	2	1	3
Oklahoma	332	82	2	86
Pennsylvania	371	228	0	3
Texas	994	370	2	405
<b>Governor has authority, but receives a recommendation from a Board</b>				
Arkansas	105	38	1	27
Illinois	298	13	172	12
Indiana	99	20	3	19
Maryland	53	5	2	5
Mississippi	182	65	0	8
Missouri	174	45	2	66
New Hampshire	0	0	0	0
Ohio	388	186	10	26
South Dakota	5	3	0	1
Tennessee	216	96	1	4
<b>Governor has no authority; clemency determined by a Board</b>				
Connecticut	10	9	0	1
Idaho	42	19	1	1
Georgia	308	107	6	40
<b>Clemency determined by a Board, but Governor sits on the Board</b>				
Nebraska	30	10	0	3
Nevada	141	83	1	12
Utah	26	10	0	6

Statistics from Death Penalty Information Center, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)

**Appendix C**  
**Clemency Decisions 1992- Present**

## Robert Alton Harris

*Here is the text of Gov. Wilson's statement denying clemency:*

Petitioner Robert Alton Harris argues that the death penalty should not be imposed on him because it would be inappropriate to hold him accountable for the murders of which he was convicted 14 years ago.

It is argued on his behalf that Robert Harris must be judged to be in effect a child who cannot be held accountable under California law.

Specifically, it is argued that Robert Harris lacks the requisite mental capacity to entertain a criminal intent. Experts contend that Harris has suffered organic brain damage both as result of his mother's abuse of alcohol during pregnancy and as a result of trauma inflicted by his parents, mostly by an especially vicious father. His experts also believe that Harris' substance abuse has aggravated this brain damage.

Fetal alcohol syndrome is the name given to symptoms of physical and mental dysfunction suffered in the womb by the fetus of a woman abusing alcohol during pregnancy. Excessive consumption of alcohol during pregnancy can bring severe and lasting, perhaps irrevocable, damage to the child.

I have described this very real menace to children afflicted by their mother's prenatal alcohol or drug use as "nothing less than child abuse through the umbilical cord." Both as a member of the United States Senate and as governor, I have proposed vigorous efforts to combat and prevent substance and alcohol abuse by pregnant women.

The record now before me in the application for clemency adequately demonstrates that Mr. Harris' childhood was a living nightmare. He suffered monstrous child abuse that would have a brutalizing effect on him. This material is deserving of the earnest and careful consideration that I have given to it.

Mr. Harris was traumatized, as far too many children have been, by the very parents and stepparent who were supposed to nurture and care for him. Indeed, society must employ far more vigorous measures to intervene and prevent domestic violence and child abuse, as well as to prevent fetal alcohol syndrome and substance abuse during pregnancy.

"But victimized though he may have been, Harris was not deprived of the capacity to premeditate, to plan or to understand the consequences of his actions. His conduct must be the test of petitioner's capacity to exercise personal responsibility. And for the protection of its most vulnerable members, society must hold accountable and hold to a minimum level of personal responsibility Robert Harris and all members of society – excepting only those who have been clearly shown to lack the capacity to meet that minimum level of responsibility.

Offsetting the materials offered by Harris' counsel which deal with fetal alcohol syndrome and child abuse is Harris' own conduct – clear and chilling evidence of his capacity to think, to conceive a plan, to understand the consequences of his actions, to dissemble and deceive and destroy evidence to avoid apprehension and punishment. I attach to this statement the facts of the case as found by the jury and explicitly incorporate the recital of those facts as a part of this statement. The facts and Harris' own words and actions make clear his capacity to premeditate and plan.

Those who urge clemency for Harris argue that his plans were not conceived with great intelligence and did not achieve great success. Perhaps not, but they were without question conceived with a clear criminal purpose. Contrary to the assertion that Harris could not and did not comprehend the nature of his acts or the consequences, it is clear repeatedly through a recurrent pattern of conduct that he was capable of planning to do wrong, and of taking precautions to conceal his wrongdoing and to otherwise avoid being caught and punished.

For example, before pleading guilty to manslaughter in a prior case, petitioner tried to minimize his culpability. After he'd kicked and beaten James Wheeler to death over a six-hour period, he threatened witnesses and ordered them to tell a fabricated story to police to set up a scenario of justifiable homicide. The witnesses were ordered by him to say that Harris fought with his victim after Wheeler attacked a woman in the house and that Wheeler was armed with a weapon. Harris also claimed that his brother committed the murder.

In the instant case, Harris planned a bank robbery for two months, practiced live-fire exercises, stole a car to avoid identification as a bank robber, and – most tragically – murdered two 16-year old boys, Michael Baker and John Mayeski, to eliminate the witnesses who could connect him to the car theft and bank robbery; and then he burned the robbery equipment and other evidence of the bank robbery.

Hearing Michael Baker's pathetic plea, "God help me," Harris said, "God can't help you now, boy. You're going to die." He then pulled the trigger, taking Baker's life.

Counsel for Mr. Harris argues that the death penalty, though appropriate in many cases, ought not to be applied "indiscriminately." By that, I assume, he means simply that the perpetrator of even the most tragic and shocking wrongdoing should not receive the ultimate penalty, if in fact he performed his acts without the ability to comprehend the nature of his act or to appreciate his deed as wrongdoing.

I agree, and there is precedent for making that distinction in prior clemency proceedings. But I cannot agree that the facts of this record warrant making that distinction in the case of Mr. Harris' crimes. I do not agree that Harris was deprived of his capacity to understand his act or that he was deprived of the capacity to resist doing it.

As a society, we must do everything possible to avoid the victimization of children by preventing fetal alcohol syndrome and by preventing child abuse and domestic violence.

We must also do what is necessary to protect innocent members of society from becoming the victims of heinous crimes.

It is not an indiscriminate application of the death penalty to apply it to those who, whatever their own victimization, take a life, having the capacity to understand and to resist the performance of their homicide.

We must insist on the exercise of personal responsibility and restraint by those capable of exercising it. If we excuse those whose traumatic life experiences have injured them – but not deprived them of the capacity to exercise responsibility and restraint – we leave society dangerously at risk.

Robert Harris, the child, had no choice. He was a victim of serious and inexcusable abuse.

Robert Harris, the man, did have a choice. He chose to take a life, two lives – to make victims of Michael Baker and John Mayeski.

The decision of the jury was correct. The evidence of Robert Harris' own victimization does not alter his responsibility for his acts.

As great as is my compassion for Robert Harris the child, I cannot excuse or forgive the choice made by Robert Harris the man.

Clemency is denied.

## William Bonin

Text from Gov. Pete Wilson's order Tuesday denying clemency to condemned killer William Bonin.

Despite the overwhelming weight of the compelling and utterly chilling evidence of petitioner's multiple brutal crimes, his counsel argue that he was denied a fair trial and that imposition of the death penalty would be a miscarriage of justice.

These arguments cannot serve as a basis for clemency.

Bonin's guilt is beyond dispute.

His case has been argued and examined from every angle up and down the state and federal courts.

The whole process has consumed more years than Bonin allowed some of his young victims to live.

It is a compelling argument for reform of the law of habeas corpus.

Justice delayed is indeed justice denied - denied to the victims and their grieving loved ones, and to a society which is entitled to be protected by the law, rather than put at risk by its excess of leniency to the perpetrator.

The history of William Bonin is an all but unbelievable nightmare - both because of the savagery and sadistic character of the serial murders he committed and because of the inexcusable, repeated failure of the criminal justice system to protect young boys against this vicious sexual predator and killer.

There has indeed been a miscarriage of justice, a shameful miscarriage of justice perpetrated against the victims of William Bonin - not against Bonin.

It is a stain upon our claim to be a civilized society that despite all too abundant evidence of the danger posed by his release, California's criminal justice system repeatedly released Bonin through the decade of the '70s to kidnap, molest and murder new victims.

It is a tragedy that almost two full decades more were required before a legislature acted to cure the fatal flaw in our sentencing laws that permitted Bonin's release and cost the lives of his victims.

The reforms I asked for and obtained from the legislature will assure that never again will any administration be compelled to let loose upon the unsuspecting public a proven menace like Bonin.

For certain crimes, justice demands the ultimate punishment. Bonin's premeditated shockingly brutal murders of these fourteen boys are such crimes.

In 1981, as he awaited trial in prison, Bonin was interviewed by David Lopez, a television reporter. Mr. Lopez asked Bonin what he would be doing if he were still on the

street. Bonin replied, "I'd still be killing. I couldn't stop killing. It got easier with each victim I did."

William Bonin will never kill again.

Clemency is denied.



IN THE OFFICE OF THE GOVERNOR  
STATE OF CALIFORNIA

In the Matter of the Clemency )  
Request of )  
 )  
 )  
 KEITH DANIEL WILLIAMS )  
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### I. Introduction

In 1979, Keith Daniel Williams was convicted of the first-degree murders of Miguel Vargas, Salvador Vargas, and Lourdes Meza and sentenced to death. He is scheduled for execution on May 3, 1996.

By petition dated April 17, 1996, Mr. Williams now seeks a commutation of his death sentence to life imprisonment without parole. By request dated April 23, 1996, he also seeks a temporary reprieve from execution. For the reasons stated in this decision, these requests are denied. Not only have most of Mr. Williams's arguments been raised previously and rejected by the courts, but the new materials submitted by him woefully fail to support his contention that his mental state relieves him of responsibility for his crimes.

### II. The Basis For The Clemency Application

In his clemency petition, Mr. Williams accepts "full responsibility" for the three murders that he committed in 1978, and he acknowledges that his crimes were "senseless"; however, he seeks clemency because he is "mentally ill," which "illness unquestionably contributed to his crime." (Clemency Petition, p. 19; see also pp. 2-3). Mr. Williams contends that he "has long suffered from ... major mental illnesses and brain damage" (*id.* at 2), "suffered a number of serious head injuries" while a boy (*id.*), was physically abused by his step-father, who hit him with his hand and his belt (*id.* at 8), and "witnessed and experienced constant violence" when committed to the California Youth Authority for a number of crimes he earlier committed (*id.* at pp. 10-11).

On April 23, 1996, Mr. Williams made a supplemental submission contending that the federal government "has released nearly 600 pages of previously undisclosed records" which give "additional weight to Mr. Williams' [sic] claims concerning his mental and psychiatric illnesses." (Response to District Attorney, p. 1.)

In considering Mr. Williams's clemency application, I have carefully scrutinized the materials submitted on Mr. Williams's behalf, the response of the Merced County District Attorney's Office, the recommendation of the Board of Prison Terms, and the judicial opinions analyzing Mr. Williams's post-conviction appeals.<sup>1</sup>

### III. Factual Background

The facts surrounding Mr. Williams's crimes are undisputed.

In late September, 1978, Williams and his crime partner, Robert Tyson, were in need of cash. They began their crime spree by stealing a .22 caliber Beretta pistol, power tools, and several other items from a gentleman who had employed them to do some remodeling and plumbing work.

On September 30, 1978, Williams and Tyson next robbed the owners of a camper in Modesto, taking the camper and its contents. Williams fired several shots toward the owners as they fled in fear for their lives. After removing its contents, on Monday, October 2, 1978, Williams drove the camper to the area of Lake Camanche and torched it.

During a four-day period from October 4 through October 7, the valuables taken from the camper were offered for sale at a yard sale. Two of Williams's victims, Miguel Vargas and Lourdes Meza, attended the yard sale on Friday, October 6, at which time Williams expressed an interest in purchasing Mr. Vargas's car for \$1,500. Williams later told Tyson and his wife that it would have been easy "just to get rid of" Mr. Vargas and Ms. Meza by putting them into the trunk of their car and taking them to a field.

On Saturday, Mr. Vargas and Ms. Meza returned to the Tyson home to complete the sale. Williams paid for the car with a \$1,500 check written from a checkbook stolen from the camper. Mr. Vargas retained possession of the registration slip with the understanding that it would be turned over once the check cleared. Williams took possession of the car.

On Sunday, October 8, Williams and Tyson drove to the home which Mr. Vargas and Ms. Meza shared with Vargas's cousin, Salvador Vargas. Williams planned to rob Mr. Vargas, obtain the car's registration slip, and retrieve the check that Williams had paid for the car. Along the way, they discussed killing Mr. Vargas and Ms. Meza.

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<sup>1</sup> Mr. Williams's state appeal and state *habeas corpus* proceeding is reported in *People v. Williams*, 44 Cal.3d 883 (1988). The federal courts' decisions with respect to Williams's federal *habeas corpus* petition are found at *Williams v. Vasquez*, 817 F.Supp. 1443 (E.D. Cal. 1993) and *Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995). The United States Supreme Court has twice denied Williams's petitions for writs of certiorari. See *Williams v. Calderon*, 116 S.Ct. 937 (1996); and *Williams v. California*, 488 U.S. 900 (1988).

Williams, armed with a fully loaded 10-shot Beretta, and Tyson, also armed, arrived at the Vargas home in the early evening only to find that guests were visiting the Vargases. Leaving their weapons in the car, they joined Mr. Vargas, Ms. Meza, and their visitors in the house. After the visitors departed and Salvador Vargas had retired to an upstairs bedroom, Williams and Tyson returned to their car and retrieved their guns. When they reentered, Williams held the Beretta to Mr. Vargas's neck, but Tyson intervened and pulled Williams's arm away. The incident was treated as a joke, and Tyson proposed that he and Williams get some beer. They left the Vargas home. Tyson testified at trial that he had hoped that Williams would abandon his plan once they left the house, but Williams refused. Instead, he told Tyson that he "wanted to take him [Mr. Vargas] out right then." Williams threatened Tyson that he would kill Tyson's wife and children if he did not return to the residence and do as ordered.

Williams and Tyson then returned to the house. Williams ordered Mr. Vargas to lie down, ordering Tyson to guard while he went upstairs. Williams then directed Tyson to bring Mr. Vargas upstairs and ordered Mr. Vargas into a bedroom and told him to lie down. He directed Tyson to take Ms. Meza downstairs and shoot her. Tyson refused. Meanwhile, Williams shot both Salvador and Miguel Vargas twice each. Thereafter, he took the check and receipt for the auto, two guns, and Ms. Meza's wallet.

Williams and Tyson next left the house with Ms. Meza. Williams testified that they drove to an unpopulated area near Sonora for the purpose of killing Ms. Meza. On the way, Williams had intercourse with her. Tyson remained in the car while Williams took her into a field, saying that he only wanted to have intercourse with her again. There, in the early morning hours of Monday, October 9, 1978, Williams shot Ms. Meza four times, abandoning her body in the field. When he returned to the car, he told Tyson: "I f...d her ... and I killed [her]. I love to kill." He then ordered Tyson to retrieve some beer cans that Tyson had thrown out of the car so that there would be no fingerprints. Williams testified that on their way back, Tyson became ill and was crying, but Williams felt Tyson was "sniveling." He also testified that he "don't particularly like Mexicans, period."

The bodies of Miguel and Salvador Vargas were discovered on Monday morning. Tyson surrendered on October 13, 1978, and led authorities to the location near Sonora where the unclothed body of Ms. Meza was found.<sup>2</sup> Williams was arrested in Arizona in late November. While in custody in Arizona, he confessed to the murders.

Williams was returned to Merced County for trial. At trial, he was found guilty of the first-degree murders of Mr. Miguel Vargas, Mr. Salvador Vargas, and Ms. Lourdes Meza, and of nine of ten special circumstances, including robbery and kidnapping. The jury then found that Williams was sane and returned a sentence of death on all three counts of murder.

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<sup>2</sup> Tyson was charged with three counts of murder and was found guilty on all counts by the jury. He was sentenced by the trial court to life in prison with the possibility of parole.

#### IV. Analysis

In his clemency petition, Mr. Williams argues that he suffers "from a serious mental illness that was a critical factor in the commission of this crime" and that a "wealth of information" about his "mental impairments" was unavailable to the jury. Neither the record nor the submission of Mr. Williams's counsel bear this out.

First, Williams's clemency application is based primarily on a diagnosis by Clairemont Hospital that he suffered from a mood disorder, a diagnosis by doctors for the State that he suffers "episodic manic behavior," and a declaration from a psychologist, opining that Williams has a disorder. These are simply insufficient to support Williams's contention that he suffered from a mental illness that relieves him of responsibility for his crimes. None of these materials demonstrates that he was incapable of knowing or understanding the nature and quality of his acts or of distinguishing between right from wrong - the current definition for legal insanity. Nor do they demonstrate that he qualifies as "insane" under the more liberal definition of insanity which existed at the time of his trial.

In contrast, at trial, Dr. Brannan, a neutral psychiatrist appointed by the trial court to determine Williams's sanity at the time of the offenses, concluded that Williams did not suffer from any mental illness that would preclude him from having the intent to rob or kidnap for the purpose of robbery.<sup>3</sup> Dr. Brannan opined that Williams was legally sane and did not have a mental disease which would have prevented him from appreciating the criminality of his conduct.<sup>4</sup> Moreover, Williams showed no remorse during the psychiatric examination and instead told Dr. Brannan that he "rejects authority and always will" and "does not go for this rehabilitation bull...t."<sup>5</sup> The report of another doctor appointed by the court, Dr. Lloyd, was also admitted at the sanity phase of the trial. He found Williams's use of alcohol and controlled substances insufficient to prevent him from forming the requisite intent to murder. He opined that Williams was legally sane, although he had a personality disorder.<sup>6</sup> Additionally, Dr. Litwiller, the chief psychiatrist at San Quentin State Prison, has reported that Williams is sane and does not exhibit psychotic behavior. Dr. Litwiller also noted that while Williams has taken psychiatric medicines in the past for such diagnoses as insomnia, irritability, and impulsive annoyance, these are not diagnoses of mental disorders.

<sup>3</sup> *People v. Williams, supra*, 44 Cal.3d at 902-903.

<sup>4</sup> Dr. Brannan stated that: "There is no evidence that [Williams] has any ... mental illness or that he is insane or that he was insane at the time of the alleged incident ... [I]n my opinion he was legally sane at the time of the alleged incident and he is legally sane at the present time ... he did not have a mental disease or defect that would cause him to lack substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law. ... There is no evidence that he has ever been insane."

<sup>5</sup> *People v. Williams, supra*, 44 Cal.3d at 903.

<sup>6</sup> Dr. Richard A. Lloyd's report stated that: "[T]he defendant was legally sane at the time of the alleged offense ... he did not have a mental disease or defect which caused him to lack substantial capacity either to appreciate the criminality, wrongfulness, of his conduct or to conform his conduct to the requirements of the law ... "

There is a second ground for denying Mr. Williams's clemency request. With one exception, the materials and arguments raised in Mr. Williams's clemency petition concerning his mental condition were previously raised, fairly considered, and rejected by the courts. Absent extraordinary circumstances not present here, the clemency power should not be invoked to relitigate issues which were fairly heard and rejected in the courts. The Governor is not another judicial tribunal to which to relitigate claims raised in the courts. Clemency allows the State to do justice "in those cases where the ordinary procedure results in injustice by reason of extrinsic fraud or any other reason." *People v. Superior Court*, 190 Cal. 624, 625 (1923)

That is not the case here. Instead, both the issue of Williams's sanity and his claim that he had diminished capacity were litigated at trial. The jury found him sane and that his crimes warranted the death penalty. Although Williams now argues that he has stronger evidence of his mental problems which the jury did not consider, this argument was previously presented to the courts, which have rejected it. The Ninth Circuit rejected his argument on the grounds that the additional evidence would not have affected the verdict: "Williams' own testimony, both on the stand and during a taped confession played for the jury, was so clear, lucid, and powerful that no psychiatrist would have made a difference." *Williams v. Calderon*, 52 F.3d at 1470. Likewise, the California Supreme Court concluded: "Considered in light of the entire record it does not appear reasonably probable that these opinions [of other psychiatrists] or records of defendant's earlier hospitalization would have affected the verdicts at the guilt and sanity phases of the trial. ... The jury ... heard direct evidence of preplanning activity by [Williams], and of his detailed recall of events." *People v. Williams*, 44 Cal.3d at 947.

Mr. Williams's other arguments in support of his claim of mental illness were also raised at trial and rejected by the jury and the courts. Williams argues that he was the victim of abuse as a child, but that was argued at trial, in his direct appeal to the California Supreme Court, and in his post-conviction *habeas corpus* proceedings. He argues that he "suffered a number of serious head injuries" while a boy (Clemency Petition, p. 4), but his mother testified at trial to the same head injury which he suffered when he was 15 years old. Williams argues that he was "disabled from birth" and subject to comas (Clemency Petition, p. 3), but the jury heard that he was treated for epileptic seizures and suffered blackouts. Again, the Governor, in the exercise of his clemency powers, is not another judicial tribunal to which to relitigate claims raised in the courts and fairly addressed by them.

The one exception to Mr. Williams's effort to relitigate before me the arguments he lost in court is his claim that the federal government has only recently released nearly "600 pages of previously undisclosed records" which give "additional weight to Mr. Williams' [sic] claims concerning his mental and psychiatric illnesses." (Response to District Attorney, p. 1). However, the material submitted to me woefully fails to rise to the level of proof of a mental illness which would relieve Williams of responsibility for his crimes. Indeed, some of the records are contrary to his contentions. One record dated only five months before his crimes says that a "unit psychologist reports that ... [Williams] has no mental or emotional problems, except for his prior abuse of alcohol and drugs and his antisocial behavioral pattern."

## V. Decision

Within the body of Keith Daniel Williams dwells a malignant heart. He faces the death penalty only after coolly, callously, and with racial animus, planning, over a period of days, to rob and murder innocent strangers. Williams snuffed out three lives -- and in the case of Ms. Meza, he took away the mother of four young children.

He now seeks clemency on the grounds that he suffers from "a serious mental illness" which relieves him of responsibility for his murders. The neutral, court-appointed psychiatrists at his trial found differently. So did the state's chief psychiatrist at San Quentin. Even now, after 18 years to amass such evidence, he presents no compelling evidence to support his position.

Moreover, Mr. Williams is simply making the same arguments to me previously rejected by the courts. His contention that he has additional evidence of his mental state that could change the jury's verdicts was rejected by the California Supreme Court and the federal courts. The Ninth Circuit found, "Williams' own testimony, both on the stand and during a taped confession played for the jury, was so clear, lucid, and powerful that no psychiatrist would have made a difference."

After 18 years, Keith Daniel Williams must suffer the consequences of his actions -- actions for which he is actually and legally responsible. The only injustice in this case would be further delay of the punishment meted out by the jury. These heinous murders and robberies were not impulsive acts by a person who did not understand the criminality of his conduct. To the contrary, Williams planned the murders for several days; he considered various alternatives, such as stuffing his victims into the trunk of the car he sought to steal; he and his partner armed themselves with guns when paying a visit to the victims' home; he rejected the advice of his partner not to commit the murders when given one clear chance to avoid them; he carefully and deliberately took pains to avoid leaving evidence which might leave his fingerprints at the crime scene; and he attempted to escape justice by leaving the State. The time for excuses is over. It is now time for Williams to bear the responsibility for his actions.

Clemency is denied.

Dated: April 24<sup>th</sup>, 1996

  
Governor Pete Wilson

# IN THE OFFICE OF THE GOVERNOR

## STATE OF CALIFORNIA

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In the Matter of the Clemency  
Request of

THOMAS MARTIN THOMPSON

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### I. Introduction

On the night of September 11, 1981, in the studio apartment of David Leitch and the defendant, Thomas Martin Thompson, twenty-year-old Ginger Fleischli was stabbed five times in the head near her right ear. Thompson was admittedly in the apartment at the time of the murder. The knife penetrated two and a half inches through Ms. Fleischli's ear, rupturing her carotid artery and causing massive bleeding and her death. Her body was found two days later, unceremoniously dumped in a grove of trees near an interstate highway, and wrapped in an old sleeping bag and a pink blanket that was traced to Mr. Thompson's apartment.

On November 4, 1983, a jury convicted Thomas Martin Thompson of the rape and first-degree murder of Ginger Fleischli. Finding that the murder occurred in the course of committing the rape, the jury unanimously recommended the death penalty. Another jury convicted David Leitch, Thompson's roommate, of second-degree murder for aiding and abetting Ms. Fleischli's death.

By petition dated July 10, 1997, Mr. Thompson, citing "new evidence," now seeks a commutation of his death sentence, primarily on the grounds that he is innocent of rape. Despite the skillful job done by Thompson's lawyers, his claim of innocence is ultimately premised on an inherently incredible explanation of events--that he had consensual sex with the victim and then managed to sleep through a struggle, the murder, an elaborate wrapping of the victim's head and body, and an extensive carpet scrubbing to remove her blood--all occurring within six to seven feet of him. Strikingly, this version of events is inconsistent with the facts, including that the victim was found with her shirt and bra cut in front and pulled down to her elbows in a restraining position consistent with rape. And the "new" evidence which Thompson proffers to show his innocence of rape was recently characterized by the U.S. District Court as "one version of events, offered sporadically over the years by [Thompson's] co-defendant Leitch, which is *contradicted* both by some of Leitch's other statements, as well as the compelling physical evidence of rape."<sup>1</sup> [Emphasis added.] A plea for clemency, premised on the basis of the defendant's continued adherence to an inherently incredible and contradictory alibi, cannot be

honored without dishonoring the jury, the courts, and the system, which, with painstaking care over a fifteen-year period, found and affirmed Thompson's guilt.

## **II. The Basis For The Clemency Petition**

Mr. Thompson's clemency petition argues (1) that evidence not presented at trial "points [to] Mr. Thompson's innocence" (Petition, pp. 4-5, 21-38); (2) that a commutation is warranted because he has no prior criminal record and has been a model prisoner (*id.* at 2, 16-21); and (3) that it would be unfair to execute him when his co-defendant was convicted of only second-degree murder and received a lesser sentence (*id.* at 38-40).

In considering Mr. Thompson's clemency application, I have carefully reviewed the materials submitted on his behalf, the petition and letters signed by supporters of clemency, the submissions of the Orange County District Attorney, the letters of the trial judge concerning clemency, the judicial decisions of the California Supreme Court, the U.S. District Court, and the Ninth Circuit Court of Appeals, portions of the trial transcripts, and the materials and recommendation provided to me by the Board of Prison Terms. Finally, on July 29, 1997, at the request of Mr. Thompson's attorneys, I personally met with them and prosecutors from the Orange County District Attorney's Office for two hours while each side presented their arguments concerning clemency.

## **III. Factual Background**

On the evening of Friday, September 11, 1981, in Laguna Beach, Thomas Thompson and his roommate David Leitch encountered at a restaurant two acquaintances: Leitch's ex-wife Tracy Leitch and Tracy's new roommate Ginger Fleischli. The previous month, Ginger Fleischli had moved out of David Leitch's apartment, and Thompson had moved in.

The foursome then drove to a bar. At trial and following cross-examination, Tracy Leitch admitted that at that bar, Ginger Fleischli had prophetically asked her, "Do you think David [Leitch] would have Tom [Thompson] kill me?" After Tracy and David Leitch left, Ginger Fleischli and Thompson remained at the bar and were subsequently joined for drinks by Afshin Kashani. The three moved to another bar, where Thompson and Kashani drank and smoked hashish.

Around 1:00 a.m., the three walked back to Thompson's (and Leitch's) apartment on Ocean Front in Laguna Beach. Around 2:00 a.m., Ginger Fleischli left to get a soda from a nearby liquor store.

In her absence, Thompson told Kashani that he wanted to be alone with Ms. Fleischli that weekend. Kashani obligingly left the apartment, but on the way to his truck, he realized that he had left his cigarettes. When he returned to Thompson's apartment, the door was open and Thompson seemed nervous, handing Kashani's cigarettes out to him through the door rather than inviting him back into the apartment.



Thompson admits that Ms. Fleischli returned to the apartment, but claims he had consensual sex with her, and then passed out and fell asleep. At trial, Thompson called witnesses claiming he was a heavy sleeper. Later, however, he also testified that had been awakened at the time of his arrest in Mexico by the sound of police cocking the hammers of their revolvers pointed at his head.<sup>2</sup>

The next morning, on September 12, Thompson claims he woke up to find David and Tracy Leitch in the apartment. Tracy Leitch asked Thompson where Ginger Fleischli was. According to Tracy Leitch, Thompson lied and said that Ms. Fleischli and Kashani had left the bar together. (R.T. 1573.)<sup>3</sup>

That evening, according to Tracy Leitch, she encountered Thompson at a party and expressed concern about Ms. Fleischli's whereabouts. Although her body had not yet been discovered, Thompson referred to Ms. Fleischli in the past tense, saying that he had liked her and that she was a nice girl.

The following day, Tracy Leitch filed a missing person's report with the Newport Beach Police Department.

Ms. Fleischli's body was found on September 14, 1981 in a grove of trees near Interstate 5. The footprints of two people were found near the body. One footprint, made by a rippled or wavy soled shoe, was of the same size and pattern as a pair of shoes worn by David Leitch that month. The other footprint was different--made by a smooth soled shoe. The body was wrapped in an old sleeping bag and a pink blanket, which were traced to Thompson's and Leitch's apartment. Fibers found on the body matched the carpet in the Ocean Front apartment. The evidence suggests that her body had been transported in David Leitch's car: A red smear on the rope wrapped around the body matched paint from the trunk of Leitch's car, and fibers from the pink blanket matched fibers found in the trunk of Leitch's car.

Fleischli's head was wrapped with silver duct tape, two towels, a sheet, and her jacket. Her shirt and bra had been cut in front and pulled down to her elbows. Her jeans were fully zipped, but not buttoned. She wore no underwear, shoes, or socks, and a vaginal swab revealed the presence of semen consistent with Thompson's blood type.

Fleischli had been stabbed five times in the head near her right ear. One of the stab wounds, inflicted with a single-edged knife, penetrated the ear two and one-half inches, severing the carotid artery and causing her death. Fleischli's ankles, hands, wrists, and left elbow showed bruising, at least some of which clearly occurred around the time of the murder. She had sustained an injury to her right wrist, which was consistent with the use of handcuffs, which were found in Thompson's possession upon his arrest.

Investigators discovered the victim's blood in the carpet at the Ocean Front apartment. Indeed, on September 12, the day of the murder, Tracy Leitch had noticed that the carpet in the apartment was wet, since she had gotten a damp stain on her pants from kneeling

on the carpet. Despite an apparent attempt to clean it up, however, blood remained on the back of the carpet, carpet padding, and the cement slab floor beneath.

Around the time that Fleischli's body was discovered, Thompson and David Leitch went to Mexico, purportedly to get a boat in order to engage in a venture smuggling Vietnamese refugees from Thailand in return for gold. Leitch later pawned his car and returned to the U.S. and was arrested.

Thompson stayed in Mexico. He was arrested in Cabo San Lucas, Mexico on September 26, 1981. Handcuffs were found in his possession. And Thompson appeared to know that the victim had died of stab wounds to the head, even though the media had not released this information. When confronted with this, Thompson claimed that David Leitch had told him this before he left Mexico.

At trial, two jailhouse informants testified that Thompson had confessed to the rape and murder while in jail.

#### **IV. Analysis**

##### ***A. Thompson's Challenges To The Jury's Findings Of Guilt***

Mr. Thompson's primary basis for clemency is that "new evidence, added to the evidence presented in the federal proceedings ... establishes that Thompson did not rape Ms. Fleischli" and "that he is innocent of capital murder, which is based solely on the rape." (Clemency petition, p.26). He challenges the evidence considered by the jury (*id.* at 29-32); cites as new evidence David Leitch's testimony at a parole hearing that he observed Thompson and Ms. Fleischli having consensual sex (*id.* at 3-4, 25); raises questions about the veracity of the jailhouse informants (*id.* at 32-36); and contends that the closing arguments in the two trials of Thompson and Leitch were inconsistent, thereby raising further doubts as to the true facts (*id.* at 28-29, 36-37). As further proof that there are serious doubts as to his guilt, he points to the amicus brief filed by seven former prosecutors raising doubts about his convictions (*id.* at 5-6, 23-25) and the statement of two jurors stating they have "some doubt" whether Thompson raped Ms. Fleischli (*id.* at 5).

The amicus brief of the seven former prosecutors and the statement of the two jurors 14 years after they reviewed the evidence must be viewed in proper perspective. Not only did the U.S. Supreme Court deny the relief sought by the seven former prosecutors, but the amicus brief was not drafted by the prosecutors, but primarily by Thompson's counsel--a fact confirmed at the oral presentations before me on July 29. And a news account reports that at least several of these former "prosecutors" are, in fact, criminal defense counsel or opposed to the death penalty. *See* "Defender Quizzed on the Use of Ex-Prosecutors," *Los Angeles Daily Journal*, July 21, 1997, pp. 1, 10.

As for the statement of the two jurors expressing doubt over the rape conviction, this statement was signed 14 years after the jurors had reviewed the evidence, and was based on a one-sided presentation to those jurors by a defense investigator concerning the new

evidence that was presented in federal court. As was confirmed at the oral presentations held on July 29, the jurors were not provided with all the prosecution evidence presented at the federal proceeding. Nor was the prosecution given an opportunity to present its position to those two jurors. A statement signed under such circumstances can hardly be considered a fair or reliable indicator of Thompson's guilt.

Rather than relying on this statement or on an amicus brief, I must determine whether Thompson's evidence establishes that "he is innocent of capital murder." (Petition, p. 26). However, a clemency proceeding is not another judicial proceeding in which to relitigate claims already raised in, and fairly addressed by, the courts. Rather, clemency is a historic remedy for preventing a miscarriage of justice where the judicial process has been exhausted. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 852, 122 L.Ed.2d 203 (1993). Thompson must show that a failure to overturn the verdict of the jury, who, after all, heard his testimony and viewed the available evidence, would be a miscarriage of justice in light of the "new" evidence.

No miscarriage of justice has occurred here. First, the trial judge who presided over both the trials of Thompson and Leitch and personally viewed the evidence, has advised me:

There is in reality absolutely no doubt about the crucial facts: It was Thomas Thompson who handcuffed the victim, cut her clothes down her front and pulled them to her sides, and raped her. When he was through, he plunged a knife five times into the right side of her head, one stab wound penetrating 2 and a half inches into her skull, cutting the carotid artery ... . *These facts were proven beyond any possible doubt at his trial.* [Emphasis added.]

The judge concluded: "It would be an absolute tragedy and a travesty of justice to even seriously consider clemency in this case."

Second, the evidence of Thompson's guilt in the rape and murder of Ms. Fleischli is strong. Thompson admitted at trial that Ms. Fleischli had returned to the apartment and that he and she were alone. He admits that he had intercourse with Ms. Fleischli, albeit claiming it was consensual. The victim, of course, is in no position to refute this. But the physical evidence does: Her shirt and bra were cut in front and pulled down to her elbows "placing her in a position consistent with restraint during a rape," *see Thompson v. Calderon*, 109 F.3d 1358, 1365 (9<sup>th</sup> Cir. 1996); her body was found without underwear, shoes, or socks; her Levis were fully zipped but not buttoned; and her mouth had been gagged with duct tape. (*See* R.T. 1505, 1772.) Nor does Mr. Thompson's explanation--upon which he now seeks to overturn the jury's verdict of rape--comport with the evidence. Despite his testimony that Ms. Fleischli began to dress after they had "consensual" intercourse (R.T. 2322), her body was found without any underwear, shoes, or socks. Does Mr. Thompson expect us to believe that she was not raped, but that the murderer decided to remove her underwear and unbutton her jeans after stabbing her?

These undisputed facts are strong evidence of rape and belie Thompson's explanation of events. But additional facts--which Thompson seeks to relitigate before me--also point to

his culpability: At trial, a deputy sheriff who had seen hundreds of handcuff injuries, testified that the injury to Ms. Fleischli's right wrist was consistent with an injury inflicted by handcuffs--which Thompson had in his possession upon his arrest. And two jailhouse informants testified that Thompson confessed to the rape and murder.<sup>4</sup>

Indeed, the lack of merit of Thompson's plea for clemency is demonstrated by the fact that his claim of innocence is ultimately premised on an alibi that is inherently incredible: His position is that he had consensual sex with Ginger Fleischli and then slept while she was attacked and murdered only some six feet away from him. He slept while she was stabbed numerous times in her head. He slept undisturbed, while silver duct tape was unrolled and wound around her head. He slept on while her head was further wrapped with two towels, a sheet, and her jacket. He slept while her body was wrapped in a blanket and a sleeping bag, tied with a rope, and carried down to his co-defendant's car. He even slept while the murderer returned to the apartment and doused and scrubbed the carpet to remove the victim's blood that had soaked into it. Yes, Mr. Thompson claims he was asleep through all this commotion-- despite the fact that only 14 days later, when he was arrested in Mexico, he was roused from his sleep by the click of the hammers of police revolvers being cocked near his head.

Moreover, although Mr. Thompson claims he had no knowledge that anything was amiss with Ms. Fleischli until several days later, on the evening following the murder, Mr. Thompson spoke of Ms. Fleischli in the past tense, telling Tracy Leitch that he had liked her and that she was a nice girl.

Significantly, Mr. Thompson's claim of his innocence is further undermined by the fact that he has continually lied--and been caught--throughout this matter. At the oral presentation held before me on July 29, the prosecutor aptly observed that Thompson's testimony was the moment of truth at the trial since it gave the jury the opportunity to see whether Thompson was credible in making his incredible alibi that he slept while the victim was murdered and her body disposed of. On the stand at trial, Mr. Thompson was forced to admit that he had lied to police in the tape-recorded statement that he had made shortly after his arrest:

Q. Let me clarify Saturday morning, September 12 [the morning after the murder]. Did you, or did you not, say Ginger left with Shawn [Kashani] to Tracy?

A. I did not, sir.

Q. Then why did you tell that to [police investigators] Owen and Coder?

A. Because at that time, as I said before, he [Shawn] seemed as likely a candidate as anybody.

Q. So you lied about that too?

A. I did, sir.

R.T. 2380.

At trial, Thompson was asked why he told the police that he was "thinking self-preservation" when Tracy Leitch asked him on the morning following the murder what happened to Ginger Fleischli. This was a time, after all, when he allegedly had no knowledge that anything was amiss with Ginger Fleischli. He had no explanation:

Q. So what you're telling us, you didn't do anything wrong; you had no knowledge of any wrongdoing, what happened to Ginger Fleischli, but you lied to the police about what happened; you didn't tell Tracy what Ginger's plans were, and you're worried about self preservation when Tracy asked you where Ginger is.

That doesn't sound very innocent to me, Mr. Thompson.

A. That's your job to point that out, sir.

R.T. 2385.

Mr. Thompson, in the words of a psychiatrist who examined him, is a "manipulator in the first order" and "a liar of the first magnitude"--someone who has "been more interested in how to manipulate and get himself out of jams ... than he has been in long-range thinking and planning." (Crinella Testimony, R.T. 2816, 2818, 2821.)

The jury did not believe Mr. Thompson was telling the truth about sleeping through the murder or having consensual sex. I will not overturn the jury's assessment, based on their first-hand observation of Thompson at trial, when his claim of innocence, far from demonstrating innocence, is based on an inherently incredible story told by someone who has admittedly lied about the events in issue.

However, Mr. Thompson claims that "startling new" evidence now corroborates his claim of innocence. (Petition at 3-5, 25-26). He states that "in January, 1995, Mr. Thompson's co-defendant, David Leitch, testified at his parole hearing ... that he had returned to his apartment only an hour or so before Ms. Fleischli died, had walked through the unlocked door and had seen Mr. Thompson and Fleischli having consensual intercourse." (Petition at 3-4). This "startling" new evidence provides absolutely no help to Thompson. Leitch never said that the intercourse was "consensual" at the parole hearing; he was not even in a position to know whether what he allegedly saw was consensual; he gave contrary versions both before and after the parole hearing; and this supposedly exonerating version is itself inconsistent with Thompson's own version of the facts.

First, Leitch never stated that the intercourse was consensual at the parole hearing. Instead, at the hearing on January 4, 1995, Leitch stated, "when I came in the apartment earlier, it looked like somebody were [sic] having sex in the middle of the apartment, so I left, and I came back later." Only four pages later in the hearing transcript, Leitch speculated that Thompson did rape Ms. Fleischli: "... The only thing I can come up with is that he raped her and then didn't want her--her to tell." (Parole Hearing Transcript,

January 4, 1995, p. 61.) His speculation of rape demonstrates that his testimony cannot and should not be construed to mean that the sex was "consensual."

Second, this evidence is not even probative of Thompson's innocence of rape. Leitch admits he had been drinking all night and that his "judgment was way off." He admits that he only had a brief view from the "end of a corridor." *Id.* at 57. As the U.S. District Court, which also recently reviewed this evidence, concluded: "Leitch's purported observation [is not] dispositive on the issue of consent based on his brief view." *Thompson v. Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).

Third, this inconclusive statement from Leitch--the core of the "new" evidence--was given under questionable circumstances and contradicts his other statements, both before and after this one. Leitch's statement at the parole hearing--from which Thompson's counsel infers consensual sex--was made by Leitch to explain away his ability to identify the victim despite her taped and wrapped condition when he allegedly encountered her body in his apartment. Leitch was asked how he could know that the wrapped body was Fleischli's and he responded that he knew because he had come into the apartment earlier and glimpsed the two having sex. Significantly, Leitch raised this publicly for the first time at his parole hearing--after conviction when disclosure of his presence at the murder scene was too late to jeopardize him but in time to help Thompson avoid the death penalty. The credibility of Leitch's statement must be viewed both in that light and in light of the trial judge's description of Leitch as a "conniving individual."

Further, Leitch has given conflicting versions of his presence at the murder scene throughout this matter. His first version was that he had gone to his apartment on the night of the murder and that neither Thompson nor Ms. Fleischli was there. In another version, Leitch stated that he had returned to the apartment to find Ms. Fleischli dead and wrapped in a blanket. And at his most recent parole hearing, he testified that he had returned to the apartment to find Ms. Fleischli dead. Interestingly, Leitch never mentioned seeing Thompson engaged in consensual sex during his conversations with Tracy Leitch during her visits to him in jail, which were recorded by prison officials without Leitch's knowledge. Instead, he claimed Thompson raped her.

Finally, this supposedly exonerating version conflicts with Thompson's alibi. Leitch stated that Thompson and Ms. Fleischli were having sex "on the floor." (Parole Hearing Transcript at 57-58.) But Thompson testified that he had consensual sex with Ms. Fleischli on his bunk, which was located against the wall. Accordingly, the newly discovered evidence does not help Mr. Thompson: It is inconsistent with Thompson's alibi, and Leitch did not state the sex was consensual and was not in a position to know, and has contradicted this statement. As the U.S. District Court, which recently considered this "new" evidence, ruled, Thompson "certainly has not made the persuasive demonstration of actual innocence that is required to establish that a fundamental miscarriage of justice will result if the State of California is permitted to execute him." *Thompson v. Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).

#### ***B. Thompson's Absence Of A Criminal Record***

Mr. Thompson's petition also argues for clemency on the basis of his lack of a prior criminal record and his "positive adjustment to prison life." The short answer is that this heinous murder cannot be mitigated simply because he had not murdered before.

Moreover, in considering whether to recommend the death penalty, Mr. Thompson's jury already weighed his lack of a prior criminal record as one mitigating factor. *See People v. Thompson*, 45 Cal.3d at 122. Ultimately, the jury concluded that the aggravating factors so far outweighed the mitigating factors that the death penalty was appropriate.

Finally, the fact that Thompson may have made a "positive" adjustment to prison and has an "excellent" disciplinary record (Petition at 19-21) cannot and should not alter the sentence imposed for his less "positive" actions for which he was convicted.<sup>5</sup>

In short, Thompson's lack of prior criminal convictions is not a persuasive basis upon which to reduce his sentence for his subsequent conviction for this particularly heinous crime--the deliberate and savage multiple stabbing of a twenty-year-old woman in connection with a rape.

#### *C. Thompson's Claim That The Prosecutor Pursued Inconsistent Theories At His And Leitch's Trials*

As a further ground for clemency, Mr. Thompson argues that the prosecutor pursued incompatible theories at his trial and that of his co-defendant, Mr. Leitch. He claims that at Leitch's trial, the prosecution argued that "Leitch had the sole motive and the opportunity to commit the murder, and that he was equally or more culpable than Mr. Thompson." (Petition at 36.) However, the fact that Leitch had the motive to murder Ms. Fleischli--apparently because he felt she was undermining his opportunity to reconcile with his ex-wife--does not exonerate Thompson. As the trial judge observed in a 1994 letter for Leitch's parole hearing, Leitch may have had the motive, but "[i]n Thompson, who portrayed himself as a Vietnam veteran, a mercenary and a killer, Leitch had finally found the person to do this dirty work."

Furthermore, the claim of inconsistent theories was litigated in Mr. Thompson's federal habeas petition, and both the district court and a unanimous three-judge panel of the Ninth Circuit found it to be without merit. *See Thompson v. Calderon*, 109 F.3d at 1371-2. In any event, the prosecution's theory in Leitch's trial in no way exonerated Thompson.

#### *D. Disparity In Sentences Imposed On Thompson And Leitch*

Although Thompson was sentenced to death, his co-defendant, David Leitch, received a sentence of 15 years to life. As a final ground for clemency, Mr. Thompson's clemency petition argues that it would be inequitable to execute him in light of the disparity in sentences "for co-defendants found guilty for [the] same crime." (Petition at 38.)

However, both defendants were not convicted of the same crimes. The disparate sentences are attributable to the fact that Leitch was acquitted of rape and was convicted only of second-degree murder.

Moreover, the fact that Leitch may have received a more lenient sentence than he deserved does not undermine the legitimacy of Thompson's sentence. If any injustice exists, it is that Mr. Leitch got less than he deserved.

## **V. Decision**

Thomas Thompson has had his day in court. He squandered it by feeding the jury lies and contradictions when he testified. Even today, while proclaiming his innocence, he offers no plausible explanation of the evidence against him. Instead, his claim of innocence is premised on the inherently incredible alibi that he slept through a struggle, a murder, an elaborate wrapping of the victim's head and body, and an extensive carpet scrubbing to remove her blood. I will not set aside the collective judgment of twelve jurors on the basis of a clemency petition premised on such an inherently incredible alibi.

Thompson's "newly" discovered evidence--the cornerstone of his claim of innocence--comes down to a single inconclusive statement of dubious accuracy and credibility by his co-defendant, which the U.S. District Court recently ruled was "contradicted both by some of [his co-defendant's] other statements, as well as the compelling physical evidence of rape."

I asked for the views of Judge Robert Fitzgerald, who presided over the trials and sentencing of both Thompson and Leitch. His July 11, 1997 response states:

Let me be explicitly clear about this matter: It would be an absolute tragedy and a travesty of justice to even seriously consider clemency in this case... . There is absolutely no basis for the granting of clemency to this man for such an outrageous, cowardly, and brutal crime against another defenseless human being... . I can assure you that this case and this defendant belong to that special category for which the death penalty was intended. The sentence selected by the jury and which I imposed over thirteen years ago should be carried out.

I agree. Despite the diligent and very skillful efforts of his attorneys, Thompson's arguments for clemency and his claims of innocence are built on sand--the sand of an inherently incredible alibi, which itself is inconsistent with the facts and which followed previous alibis, which Thompson now admits were merely lies.

No one can foreclose the possibility that one day an innocent man on death row will seek clemency, showing, with rectitude in accordance with a reasonable explanation from which he has never wavered, that a terrible mistake has been made. But Thomas Thompson is not that man, and he has not remotely approached making any such showing.

Ginger Fleischli's death sentence arrived within hours of her encounter with Mr. Thompson on September 11, 1981. By contrast, Mr. Thompson has had more than 16 years of life since he committed the ultimate crime. I will not stand in the way of his ultimate punishment.



Clemency is denied.

Dated: July 31, 1997

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Governor Pete Wilson

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Footnote 1. *Thompson v. Calderon*, CV 89-3630 DT (C.D.Cal. July 25, 1997).  
[RETURN]

Footnote 2. The prosecutor observed at trial that this sound seems to have disturbed Thompson's sleep, although he claimed the murder of Ms. Fleischli just a few feet away did not awaken him. Thompson at that point amended his story to claim that Mexican authorities had also shaken him awake. *People v. Thompson*, 45 Cal.3d 86, 101 n.12 (1988). [RETURN]

Footnote 3. All references to "R.T." refer to the reporter's transcript of the trial.  
[RETURN]

Footnote 4. Thompson takes exception to the testimony of the informants, Fink and Del Frate, and contends that his original counsel could have more effectively impeached them, based on their history of providing information to law enforcement in return for favors. However, this contention was thoroughly rejected by the Ninth Circuit. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9<sup>th</sup> Cir. 1996). The Ninth Circuit ruled that Thompson's counsel discredited Fink and "could hardly have impeached Del Frate more than he did." *Id.* [RETURN]

Footnote 5. In passing, I note that the claim in Thompson's petition that he intervened "to prevent the murder of a prison guard" (Petition at 20) has been thoroughly refuted. (See Declaration of Scott Powell.)

IN THE OFFICE OF THE GOVERNOR  
STATE OF CALIFORNIA

In the Matter of the Clemency )  
Request of )  
JATURUN SIRIPONGS )  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

Over fifteen years ago, a jury convicted Jaturun Siripongs of the violent robbery, burglary, and murder of Packovan ("Pat") Wattanaporn and Quach Nguyen, the co-owner and an employee, respectively, of the Pantai Market – a neighborhood Thai market in Garden Grove, California – where Mr. Siripongs worked on weekends. In the words of the judge who presided over the trial, Mr. Siripongs's criminal conduct exhibited "a high degree of cruelty, callousness, and viciousness." (Transcript, April 22, 1983, at 3753.) The Ninth Circuit Court of Appeals characterized the evidence of Mr. Siripongs's guilt – while circumstantial – as "strong" and "voluminous." *Siripongs v. Calderon*, 35 F.3d 1308, 1311 (9<sup>th</sup> Cir. 1994).

Mr. Siripongs now asks that he be granted clemency – not on the grounds of innocence or mitigating circumstances arising out of his crimes – but principally on grounds entirely unrelated to the individual circumstances of his crimes and his trial: Clemency is sought on the basis of our relations with Thailand, the Vienna Convention on Consular Relations, his excellent behavior as a prisoner, and his unfortunate childhood. The Thai Ambassador has also made an eloquent and dignified plea for clemency on humanitarian grounds, observing that Mr. Siripongs's mother has appealed for clemency.

As eloquent as the plea for clemency is, the murders are too brutal, and the individualized grounds for clemency too attenuated to justify a commutation. Granting clemency for two brutal murders where neither the responsibility for the crimes nor the due process afforded to the defendant is seriously contested, would set a precedent that would require that clemency be granted for virtually every death sentence. Clemency, after all, "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 412 (1993); it is not an instrument to undo the considered judgment of the people of this State in favor of enforcing the death penalty. There being no miscarriage of justice or mitigating

circumstances arising out of these murders, clemency is denied for the reasons set forth below.

## II. The Basis for the Clemency Petition

Mr. Siripongs's clemency petition raises eight arguments:

- (i) that "clemency reaffirms the strategic and economic alliance between the United States and Thailand" (Pet'n at 2-4);
- (ii) that "clemency and extradition relieves the financial burden on California of continued imprisonment" of Mr. Siripongs (Pet'n at 4);
- (iii) that clemency will rectify an asserted failure of the United States to comply with provisions in the Vienna Convention on Consular Relations (Pet'n at 4-7);
- (iv) that "clemency poses no threat" to public safety, since Mr. Siripongs "has been a model prisoner" (Pet'n at 7-8);
- (v) that "clemency demonstrates respect for family members of the victims" (Pet'n at 8);
- (vi) that Mr. Siripongs "consistently has expressed remorse for his role in the crime" (Pet'n at 8);
- (vii) that clemency is "justified given the compelling mitigation of Mr. Siripongs'[s] upbringing in Thailand" (Pet'n at 9-20); and
- (viii) that "jurors support clemency." (Petitioner's Reply at 5.)

In considering Mr. Siripongs's clemency application, I have carefully reviewed the well-researched materials submitted on his behalf, including his petition; the equally thorough materials submitted by the Orange County District Attorney's Office (which prosecuted Mr. Siripongs at trial); the eloquent and impassioned plea of Thailand's Ambassador to the United States; the correspondence from the Ministry of Foreign Affairs of the Kingdom of Thailand; the decisions of the California Supreme Court, Ninth Circuit Court of Appeals, and District Court for the Central District of California; relevant portions of the trial transcripts; the numerous statements and letters from supporters and members of the family of Mr. Siripongs, as well as from the victims' families and other interested parties; and the materials and recommendation provided to me by the Board of Prison Terms.

### III. Factual Background<sup>1</sup>

At approximately 2:00 p.m. on December 15, 1981, Surachai "Jack" Wattanaporn discovered his wife, Packovan "Pat" Wattanaporn, strangled to death on the blood-splattered storeroom floor in the back of the Pantai Market that they owned - and in which Mr. Siripongs occasionally worked. Next to her in a pool of blood was the body of Quach Nguyen, a store employee, who had been stabbed or slashed at least ten times. As Mr. Siripongs knew, Pat Wattanaporn had used the Garden Grove-located store to buy and sell jewelry, and jewelry that Pat Wattanaporn had been seen wearing that day was missing from the crime scene.

The following morning, Pat Wattanaporn's purse was found near the home of Mr. Siripongs's girlfriend - left in a dumpster located in a shopping complex that encompassed the laundromat used by Mr. Siripongs. Also in the dumpster were: a jacket owned by the sister of Mr. Siripongs's girlfriend (a significant piece of evidence since the jacket was one of the items of clothing that the sister kept at Mr. Siripongs's house and a letter found at the crime scene had been placed in that jacket prior to the murder); a bloodstained shirt, a pair of bloodstained pants and shoes (the last item of which was found to be Mr. Siripongs's size); a 12¼ inch, bloodstained Robinson serrated blade kitchen knife with a broken tip (which matched a set which Mr. Siripongs owned); a 7½ inch Konekut knife; three envelopes and a bank deposit slip from the Pantai Market; two pieces of cord identical to a segment of cord found wrapped around Quach's arm at the crime scene; and hair that was consistent with Pat Wattanaporn's hair.

The circumstantial evidence implicating Mr. Siripongs in these murders was extensive:

- A forensic analysis revealed that blood on four of the items of clothing in the dumpster was consistent with Mr. Siripongs's blood.
- The bloodstains on the shoes found in the dumpster were consistent with Quach's blood.
- The pieces of cord in the dumpster were identical (in dimensions, strand count, color, and chemical make-up) to the cord around Quach's arm, and the bloodstains on those pieces of cord were consistent with Mr. Siripongs's blood.
- On the day before the murders (December 14), Mr. Siripongs had asked his girlfriend's sister to telephone his supervisor the following morning to report that he was ill and would not be coming to work.

<sup>1</sup> These facts are taken from the opinions of the California Supreme Court in *People v. Siripongs*, 45 Cal.3d 548 (1988), and the Ninth Circuit Court of Appeals in *Siripongs v. Calderon*, 35 F.3d 1308 (9<sup>th</sup> Cir. 1994).

• At 3:00 p.m. on the afternoon of the murders, Mr. Siripongs arrived at his girlfriend's house with his fingers bandaged and bleeding, explaining that he had cut himself while working at his job as an optical lens grinder that day. (In fact, as noted, Mr. Siripongs had failed to report to his job on the day of the murders.)

• Shortly thereafter, on that same afternoon, Mr. Siripongs phoned a friend to whom he owed money, asking for help in selling some jewelry. And at 6:00 p.m. that evening, Mr. Siripongs handed the friend a bag containing nine pieces of jewelry, all of which -- with the exception of a single gold chain -- was later identified as belonging to Pat Wattanaporn.

• When Mr. Siripongs returned to work on December 17, 1981 -- two days after the murders -- he was questioned by his supervisor about the injury to his hands. He responded that he had tried to take a knife away from his girlfriend's sister as she attempted suicide following a fight with her lover. (The sister contradicted this story at trial.)

• Later that same day, December 17, 1981, Mr. Siripongs attempted to make a purchase at a department store with a credit card that belonged to one of the Wattanaporns. A credit check was performed on the card, and it was determined that the card had been lost or stolen. When asked for identification, Mr. Siripongs said that he had left his identification in his car and did not return.

• Later that same afternoon, Mr. Siripongs attempted to make a purchase at a Sears store with a credit card in the name of Jack Wattanaporn. When the store determined that the credit card had been stolen, the department store's security personnel detained Mr. Siripongs, who thereafter provided a false name and address to the security guards.

• Following his arrest and placement into custody by Garden Grove police, Mr. Siripongs placed a telephone call to his girlfriend and her sister, asking them in Thai to recover from his house various "presents," Buddha amulets, a camera, and a sugar jar. Those latter items turned out to contain dozens of pieces of jewelry that had belonged to the Wattanaporns. Unbeknownst to Mr. Siripongs, that telephone conversation was recorded on a concealed tape recorder by an officer who stood next to Mr. Siripongs during the call.

• A subsequent police search of Mr. Siripongs's car and residence led to the discovery of (1) jewelry matching descriptions of items belonging to Pat Wattanaporn, (2) credit card receipts for gifts dated after her death but bearing her name, (3) a piece of paper on which someone had practiced signing Pat's name, (4) Pantai Market bankbooks, and (5) a Robinson knife set consistent with the serrated knife found in the dumpster.

Following a trial that lasted from January 11 to February 11, 1983, a jury convicted Mr. Siripongs of murder and sentenced him to death. The California Supreme Court, in a 31-page opinion in which all of the Justices concurred, affirmed the conviction and sentence on direct appeal. See *People v. Siripongs*, 45 Cal.3d 548 (1988), cert. denied, 488 U.S. 1019 (1989).

A series of habeas corpus petitions followed. First, Mr. Siripongs filed a petition for writ of habeas corpus in the California Supreme Court, claiming, *inter alia*, ineffective assistance of trial counsel at the guilt and penalty phases of the trial. That petition was denied.

Second, Mr. Siripongs filed a petition for writ of habeas corpus in federal court. After a Ninth Circuit decision so ordering, see *Siripongs v. Calderon*, 35 F.3d 1308 (9<sup>th</sup> Cir. 1996), a federal district court conducted an eight-day evidentiary hearing, making extensive findings of fact, and entered judgment denying the writ. That judgment was affirmed unanimously by a three-judge panel of the Ninth Circuit. See *Siripongs v. Calderon*, 133 F.3d 732 (9<sup>th</sup> Cir. 1998). The Ninth Circuit concluded that Mr. Siripongs was *not* rendered ineffective assistance by his counsel and stated that its decision "is made with the confidence that must accompany a decision that upholds a sentence of death." *Id.* at 737. The U.S. Supreme Court denied further review on October 5, 1998. See *Siripongs v. Calderon*, \_\_\_ U.S. \_\_\_, 1998 WL 273542 (1998).

#### IV. Analysis

Each of the arguments raised on behalf of Mr. Siripongs in support of clemency is addressed below:

##### A. Relations between the United States and Thailand

Mr. Siripongs first argues that a grant of clemency would "affirm the vital political, security, and economic partnership begun in World War II between the United States and Thailand." (Pet'n at 2.)

In addition, Thailand's Ambassador to the United States has made a dignified and eloquent plea for clemency on humanitarian grounds, stating that Mr. Siripongs would be the first Thai national executed in California and observing that 49 American citizens imprisoned in Thailand have had their sentences reduced - largely for drug offenses but two of which were for murder - by the beneficence of the King.

California seeks to foster our excellent relationship with Thailand and appreciates the mercy shown by the King.

However, California has a policy of enforcing its criminal laws in an even-handed manner, regardless of the nationality of the defendant, and of protecting *all* residents of

this State, including foreign nationals. Here, a Thai national is not only the defendant, but a Thai and a Vietnamese national were also the victims.

Ultimately, a clemency decision must be decided on the basis of the individual circumstances arising from a case. To hold otherwise -- that California ought not to enforce the penalties established in its criminal laws based on a plea grounded on the nationality of the defendant -- would be discriminatory.

Accordingly, while our relations with Thailand should be a consideration in a clemency determination, it cannot be the only consideration.

Indeed, the long history of mutual respect between the U.S. and Thai governments extends to each country's sovereign right to carry out those punishments that are fair and just under the circumstances -- and in both countries, that punishment includes the death penalty.<sup>2</sup>

#### **B. The Financial Ramifications of Clemency**

Mr. Siripongs's petition maintains that "[e]xtradition will eliminate the financial costs of life imprisonment for the taxpayers of California, as these expenses will be borne completely by the Thai government." (Pet'n at 4.)

However, this State's criminal laws are not designed to secure cost savings, but "to promote justice." Cal. Penal Code § 4.

In any event, this argument falls if no commutation is granted. Under those circumstances, the State will not sustain any additional costs for incarceration.

#### **C. The Asserted Noncompliance of the United States with Vienna Convention Provisions**

Mr. Siripongs next asserts that "local officials in the United States did not comply with" the Vienna Convention, since "[a]t no time did any governmental official notify the Thai Consulate of Mr. Siripongs's arrest or notify Mr. Siripongs of his right to contact and receive assistance from the Thai Consulate." (Pet'n at 5-6.) An additional violation is claimed to have occurred in 1984 when the California Department of Corrections offered to inform prisoners of their right to contact their consulate but not to give a list of Thai nationals to the Consul-General of Thailand. (*Id.* at 6-7.) The petition concludes that an "act of executive clemency ... would remedy California's neglect of its obligations under the treaty." (Pet'n at 7.)

This argument is without merit. (Significantly, the Thai government has not raised this claim.)

<sup>2</sup> See, e.g., 29 Cornell Int'l L. J. 263, 273-74 (1996).

First, as a threshold matter, Thailand is not a signatory to the Vienna Convention; thus, the United States is not bound to administer the treaty's terms to Mr. Siripongs, a Thai national. See *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1095 (S.D. Cal. 1998) ("only the signatory nations generally have standing to enforce a treaty"); Aceves, "The Vienna Convention On Consular Relations: A Study Of Rights, Wrongs, And Remedies," 31 *Vand. J. Transnat'l L.* 257, 313-14 & n. 308 (1998) ("the Executive Branch has long noted the reciprocal nature of the Vienna Convention," citing S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 8 (1969)); Sims and Carter, "Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool," *The Champion*, Sept./Oct. 1998, at 29 (noting the "reciprocal obligations [the Vienna Convention] imposes on all signatories").

Second, while under customary international law and the 1966 Treaty of Amity and Economic Relations between the U.S. and the Kingdom of Thailand, upon demand of a foreign national in custody, the consular representative of his or her country is to be notified, there is no record that Mr. Siripongs made any such demand here. Additionally, Mr. Siripongs was informed in writing less than a year later in January of 1984 by California's Department of Corrections that he could, "if you wish, contact the Consul-General yourself." (Pet'n at Ex. 9.) (This fact further eliminates the claim that an additional violation of the Vienna Convention occurred in 1984 - assuming the Convention applied - since Mr. Siripongs was advised of his rights.)

Third, even if the Vienna Convention's protections were extended to cover Mr. Siripongs, they would not assist his clemency petition. As recently held by the U.S. Supreme Court in rejecting an argument by a Paraguayan citizen who sought reversal of a death sentence, it is "extremely doubtful" that even a "properly raised and proven" Vienna Convention violation "should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Beard v. Greene*, 118 S. Ct. 1352, 1355 (1998).

There is no showing of prejudice in this case from any failure to advise the Thai Consulate, only speculation. Although the petition argues that consular officials could have helped Mr. Siripongs's attorney understand Mr. Siripongs's Buddhist training and "life-long practice of Buddhism" (Pet'n at 5), the Ninth Circuit found that Mr. Siripongs "was not in fact a practicing Buddhist" and "was highly critical of Thai cultural values." 133 F.3d at 735. The petition also argues that Thai consular officials could have helped explain Mr. Siripongs's refusal to identify an alleged accomplice involved in the crimes. (Pet'n at 5). Yet, a mere three years before committing the murders, Mr. Siripongs had served as an informant, belying a cultural aversion to divulging accomplices. The petition also contends that Mr. Siripongs sought to have himself arrested after the murders as a result of his cultural values. However, far from allowing himself to get arrested, he abruptly left one department store when asked for identification, gave a false name to the security guards who detained him at another store, and asked his girlfriend and her sister to remove the objects containing the stolen jewelry on the day of his arrest.



In short, there is no violation of the Vienna Convention since Thailand is not a signatory, no showing of any violation of other international law, and no prejudice shown from any failure to advise the Thai Consulate of this case.

#### **D. Mr. Siripongs's Conduct As Prisoner**

Mr. Siripongs argues that he has been a "model prisoner" while incarcerated. (Pet'n at 7-8.) His argument is supported by a former warden and current correctional officer at San Quentin. (Petitioner's Reply at Ex. 1, pp. 1, 6.)

However, Mr. Siripongs's positive adjustment to the confined environment of prison cannot serve as the basis to alter his sentence for what he did *outside* prison.

#### **E. Respect for The Family Members of the Murder Victims**

Mr. Siripongs's petition next argues that clemency would "demonstrate respect[] for family members of the victims." (Pet'n at 8.) In support thereof, the petition attaches a statement of Jack Wattanaporn, the widower of Pat, favoring a commutation, and states that the widow of Quach Nguyen publicly stated in 1986 that she does not want Mr. Siripongs executed. (Pet'n at Ex. 11.)

However, there is no substantiation of the assertion that Quach Nguyen's widow supported clemency twelve years ago. Instead, Quach's daughter, Lan Quach, has expressed her family's distress upon reading a recent newspaper article that claimed that the family was supportive of clemency. She states that her mother has no recollection of supporting clemency. (Affidavit of Lan Quach dated November 3, 1998.)

Moreover, Lan Quach, acting as spokesperson for her family, and Pat Wattanaporn's eldest son, Vitoon, have stated that they *do not* oppose the imposition of the death penalty in this case. (Dist. Atty's Reply, attachments.)

And while Jack Wattanaporn has written that he does "not seek revenge for my wife's death" and asks for a commutation, he has also advised the Board of Prison Terms that he "will respect the decision of [the] Governor no matter what the out[]come may be."

While I give great weight to the views of the victims of any crime, the views here are mixed. More importantly, there is no basis for clemency based on the particular circumstances of this case: no mitigating circumstances arising out of the crimes; no miscarriage of justice for a governor to remedy; no denial of due process during the 15 years that this case was litigated.

## F. Mr. Siripongs's Upbringing in Thailand

Nor is clemency merited on the ground that the jury never learned of the "tragic facts" of Mr. Siripongs's background and upbringing. (Pet'n at 9.) Nothing in that background justifies the murder of an owner of the store which agreed to employ him and of a fellow employee.

### 1. Mr. Siripongs's Background

Through their diligent efforts, Mr. Siripongs's counsel have compiled a biographical sketch of his childhood that cannot help but evoke sympathy: Mr. Siripongs's parents separated when he was only two or three years old. He was raised in poverty by a mother who drank to excess and who engaged in a series of ill-fated relationships that would leave Mr. Siripongs and his siblings parentless for extended periods of time. (*Id.* at 10.)

Mr. Siripongs spent periods of his youth in unstable, impoverished and unclean surroundings, where he was exposed to criminal activity, drug use, and prostitution. (Pet'n at 11-13.) His performance in school began to suffer when he was ten years old, and in his adolescence, Mr. Siripongs began to cavort with juvenile delinquents, together with whom Mr. Siripongs broke into and unsuccessfully attempted to rob a department store. (*Id.* at 16.) Mr. Siripongs spent the ensuing two years incarcerated, where -- according to the petition -- he was a "model prisoner." (*Id.*)

However, after his release from prison, Mr. Siripongs entered the Buddhist monastery, where he completed a three-month course of study and ranked fourth in a class of 38 students. (Pet'n at 17.)

Upon completing the course, Mr. Siripongs worked as a cook on a cargo ship that sailed to various ports in East and Southeast Asia. (Pet'n at 18.) At that time, he corresponded with a former inmate named Sak Sittijindakul, whom Mr. Siripongs had met while incarcerated. (*Id.*) Mr. Sittijindakul sought to enlist Mr. Siripongs in a scheme to smuggle drugs into Hong Kong when his ship docked there, and Mr. Siripongs responded by contacting the U.S. Drug Enforcement Administration ("DEA"). (*Id.*) DEA agents arranged a set up in which Mr. Siripongs, wearing a wire, delivered a shipment of heroin to Sittijindakul, resulting in the latter's arrest. (*Id.*) Mr. Siripongs was paid \$800 for his cooperation, which allowed him to travel to the U.S.

Mr. Siripongs thereafter arrived in Los Angeles. (Pet'n at 18.) Mr. Siripongs progressed through various jobs, beginning work as a clerk with U-Totem Market in Santa Ana, and receiving a promotion to Assistant Manager only a few weeks later. (*Id.* at 19.) Mr. Siripongs secured another job in the spectroscopy division of the Perkin-Elmer Corporation, where he received a favorable performance evaluation in June, 1981.

(*Id.*) Then, in August of 1981, Mr. Siripongs began working weekends at the Pantai Market, assisting in cleaning up the store. (*Id.*)

## 2. The Relevance of the Biographical Sketch to the Clemency Petition

However, this detailed depiction of Mr. Siripongs's life in Thailand and relocation to California does not present the type of mitigation that might serve as a basis to grant clemency. Countless people have experienced hardship and despair, yet lead righteous and law-abiding lives. Generations have endured calamities of all sorts – from war to persecution to famine – without later resorting to murderous conduct for financial gain.

Moreover, Mr. Siripongs's life was not altogether devoid of positive influences and role models. He appears to have had the benefit of loyal relationships with his three siblings and an aunt (*Pet'n* at Exs. 14-16, 19), mentoring by various teachers during his schooling in Thailand (*Id.* at Exs. 18, 22), and spiritual and religious counseling by a Buddhist monk. (*Id.* at Ex. 30). Further, Mr. Siripongs's siblings and other relatives, despite having experienced the same difficult upbringing as Mr. Siripongs, have managed to avoid resort to criminal conduct.

Most importantly, at the time of the murders, Mr. Siripongs had the good fortune of a place to live, a girlfriend, a favorable job performance evaluation, and both steady and weekend jobs. Yet, he murdered the owner of a store that had agreed to employ him. Far from mitigating his conduct, these circumstances further condemn it.

## G. Juror Statements

Although not part of the clemency petition, Mr. Siripongs now presents – for the first time – a declaration and letter submitted this month by two jurors who convicted and sentenced Mr. Siripongs in 1983. (*Petitioner's Reply* at 5, Exs. 2, 8.) By presenting these statements now and not during the past 15 years, the District Attorney and Attorney General have been deprived of an opportunity to respond. Signed more than 15 years after the jurors had reviewed the evidence, these statements do not constitute a persuasive ground for clemency.

One former juror claims that what “finally” caused her to “give in to the pressure” from the 11 other jurors and vote to sentence Mr. Siripongs to death was “information” she “learned from a media account ... that then-California Attorney General, Evelle Younger, had promised to ... review every death penalty case and commute the sentence in every case to life in prison without the possibility of parole.” (*Pet'n* at Ex. 2, ¶ 10.)

This statement is riddled with errors that raise questions about the juror's memory after the passage of 15 years: Evelle Younger had not been Attorney General for more than four years at the time the jury sentenced Mr. Siripongs to death (*see* Arnold, *California Courts and Judges Handbook* (6<sup>th</sup> ed. 1993), pt. 4, app. at 730), and the

California Attorney General, as a matter of law, is not empowered to commute a death sentence. *See generally* Cal.Const. art. V, §§ 8, 13.

Further, such a juror statement does not constitute admissible evidence under either California or federal law to overturn a verdict. *See* Cal. Evid. Code § 1150(a) ("No evidence is admissible to show the effect of [any] statement, conduct, condition, or event ... likely to have influenced the verdict improperly ... upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."); *McDowell v. Calderon*, 107 F.3d 1351, 1367 (9th Cir.) (under Federal Rule of Evidence 606(b), trial court properly excluded post-verdict juror declaration that "she voted for the death sentence because she thought that, notwithstanding the jury's verdict of death, [the defendant] would not be executed"), *rev'd on other grounds*, 130 F.3d 833 (9th Cir. 1997) (en banc).

Finally, another former juror "questions" in "retrospect" whether Mr. Siripongs "received fair representation" at trial. (Pet'n at Ex. 8.) However, we do not know whether this juror had the benefit of the judicial decisions on this subject. The issue of Mr. Siripongs's representation was the subject of an eight-day evidentiary hearing, and both the federal district court and the Ninth Circuit Court of Appeals concluded that there was no merit to Mr. Siripongs's claim of ineffective assistance of counsel.

Accordingly, the juror statements do not advance Mr. Siripongs's request for clemency because they do not present any reasoned basis for questioning the due process that Mr. Siripongs was afforded.

## V. Decision

Mr. Siripongs's counsel has ably advanced numerous arguments in support of clemency. The Thai Ambassador has made an eloquent and dignified plea for clemency.

Ultimately, however, no miscarriage of justice occurred here. Mr. Siripongs's case was examined by a jury, twice by the California Supreme Court, twice by a federal district court, and twice by the Ninth Circuit over a fifteen-year period. The cruelty of these tragic murders is compounded by their commission against the very people who offered Mr. Siripongs a job – at a time when he had a new life and opportunities in America. Yet, despite the overwhelming evidence against him, Mr. Siripongs pursued a 15-year litigation claiming that he was not fully responsible for his crimes – that the murderer was an accomplice whose name he won't disclose to this day – a claim which the federal district court has characterized as "self-serving" and "not credible, and a claim not raised in his clemency petition. Although the claim is raised in a letter from the Chair of the Standing Committee on Foreign Affairs of Thailand's House of Representatives – that Mr. Siripongs may be unwilling to disclose the identity of the murderer out of fear or indebtedness to the murderer – the contention is purely speculative and not a proper basis for clemency. As the Ninth Circuit observed, because Mr. Siripongs was personally

acquainted with the victims, it is unlikely that he would rob them and leave them alive to identify him.

In short, Mr. Siripongs's remorse is infrequent, his callous crimes unmitigated, his justifications nonexistent. His principal grounds for clemency – an unfortunate childhood, his good behavior while in confinement – are inadequate and could be invoked for nearly every death sentence. The fact that in this case a foreign national committed the crime should not make a difference under our system of law, which treats everyone as an individual with equal rights and responsibilities, regardless of race, gender, ethnicity, or national origin. Clemency is not an instrument to undo the considered judgment of the people of this State in favor of the death penalty, but to prevent a miscarriage of justice.

There being no miscarriage of justice, clemency is denied.

Dated: November 13, 1998.

  
Governor Pete Wilson

IN THE OFFICE OF THE GOVERNOR  
STATE OF CALIFORNIA

In the Matter of the Clemency  
Request of  
JATURUN SIRIPONGS

DECISION

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I. Introduction and Decision

This clemency appeal involves very serious crimes, including a violent and brutal double murder. In addition to the life of the accused that seeks clemency, there are many other lives impacted by the murder of two innocent people — the lives of their families, relatives, colleagues and acquaintances. This is a plea for mercy by a man sentenced to forfeit his life for capital crimes. However, it is also a plea by the innocent victims, their families, and friends to carry out a sentence imposed by a jury.

Sixteen years ago, a trial court and jury issued a verdict and sentence in this matter. The California Supreme Court has repeatedly considered this matter, issuing its most recent decision on February 4, 1999. The Federal Courts, including the U.S. Supreme Court, have repeatedly considered this matter. The California Board of Prison Terms has also considered this matter, and, on February 2, 1999, issued its most recent recommendation. Not one of these reviewers has found sufficient reason to question the evidence or overturn the verdict or the sentence in this case.

After due deliberation of the record and submitted materials, and having reviewed this matter anew, clemency is denied.

II. Background

Mr. Jaturun Siripongs was convicted by a jury 16 years ago of the robbery, burglary, and murder of Mrs. Packovan ("Pat") Wattanaporn, his employer, and Mr. Quach Nguyen, his co-worker.

Mrs. Pat Wattanaporn and her husband, Mr. Surachai ("Jack") Wattanaporn, owned a Thai market — the Pantai Market — in which Mr. Siripongs worked part-time. Mr. Quach Nguyen also worked for the Wattanaporns at the market.

During the afternoon of December 15, 1981, Mrs. Pat Wattanaporn and Mr. Quach Nguyen were brutally murdered inside the Pantai Market and their bodies discovered by Pat's husband. Mrs. Pat Wattanaporn had been violently strangled. Mr. Quach Nguyen had been stabbed numerous times.

Mr. Siripongs was arrested for these murders on December 17, 1981. Following a month-long trial, a jury convicted Mr. Siripongs of murder and sentenced him to death. Upon automatic appeal to the California Supreme Court, Mr. Siripongs' conviction was upheld.

For 16 years, Mr. Siripongs has pursued litigation claiming, among other things, that he did not commit these murders. While acknowledging that he participated in the robbery of

the victims, he has contended that the murders were not committed by him but by an unnamed, unidentified accomplice.

At trial substantial evidence was presented, including forensic analysis of blood that connects Mr. Siripongs to the murder scene and items found during a search of Mr. Siripongs' residence and car, including (i) jewelry matching the description of items belonging to Mrs. Wattanaporn; (ii) credit card receipts for items purchased after Mrs. Wattanaporn's death but bearing her name; (iii) a piece of paper on which someone had practiced signing Mrs. Wattanaporn's name; (iv) Pantai Market bankbooks; and (v) a Robinson kitchen knife set matching the bloodstained 12-inch serrated blade Robinson kitchen knife with a broken tip found in a dumpster close to the laudromat Mr. Siripongs used.

Mr. Siripongs has fully availed himself of the full gamut of our justice system. He has pursued at least 11 hearings in state and federal courts, including the United States Supreme Court. Each of these courts has considered every one of Mr. Siripongs' claims of innocence and has found them lacking merit.

In his petition, Mr. Siripongs requests a grant of clemency on a number of grounds, including a claim of innocence. Mr. Siripongs' plea has been considered, including relevant materials and the arguments made for and against clemency by counsel for Mr. Siripongs and prosecutors; the recommendation of the Board of Prison Terms; letters and statements from the victims' families; and the numerous letters expressing views concerning this extremely controversial and emotional issue.

### III. Clemency Petition

Mr. Siripongs' petition for clemency raises eight major arguments:

- (A) that "Mr. Siripongs is actually innocent of capital murder" (Pet'n at 5-10);
- (B) that Mr. Siripongs "consistently has expressed remorse for his role in the crime" (Pet'n at 10-11);
- (C) that "clemency accords respect for the decedents' families" (Pet'n at 11);
- (D) that "jurors support ... clemency" (Pet'n at 11);
- (E) that "clemency promotes the safety of corrections officers ..." (Pet'n at 12-15);
- (F) that "California governors consistently have granted clemency to inmates, like Mr. Siripongs, whose behavior in prison has been exemplary" (Pet'n at 16-18);
- (G) that "clemency promotes respect for international law and the Vienna Convention on Consular Relations" (Pet'n at 18-23); and
- (H) that clemency is "justified given the compelling mitigation of Mr. Siripongs' upbringing in Thailand ...." (Pet'n at 24-40.)

#### IV. Analysis

##### A. Claim of Innocence

In support of his claim of innocence, Mr. Siripongs contends that the "circumstantial and scientific evidence raises considerable doubt that [he] was the person who caused any physical harm to either decedent." (Pet'n at 5.) Mr. Siripongs contends that his personality traits exhibit a non-violence that is inconsistent with the commission of the homicides of which he has been convicted. He notes that his "neurological makeup" is not consistent with impulsive action as characterized by the violent crimes of which he has been found guilty. Mr. Siripongs argues, but has not proven, that an accomplice was either involved, or that any such accomplice committed these murders. To this end, he urges that additional scientific testing be performed on a number of physical pieces of evidence in an effort to substantiate his claim of innocence.

The claims that Mr. Siripongs raises in his clemency plea, *i.e.*, that he is innocent of these brutal murders, have been considered time and again by many courts over the sixteen year history of this case. For example, Mr. Siripongs raised the "accomplice defense" and the "forensic evidence" defense before the federal courts. Federal District Court Judge William D. Keller conducted an eight day evidentiary hearing in late December of 1995. After the hearing he issued findings of fact and conclusions of law and determined that there was no evidentiary support for these two defenses.

Judge Keller's opinion and conclusions were reviewed by a three-judge federal panel from the 9th Circuit Court of Appeals. The District Court and the Court of Appeals considered Mr. Siripongs' claims by capable attorneys that a more complete investigation was needed on the following forensic evidence:

- 12539. Blood Evidence;
- 12540. Hair and fingerprint evidence;
- 12541. Shoeprints; and
- 12542. Clothing found in the dumpster.

The same courts also considered the arguments of Mr. Siripongs that other suspects may have been involved in the commission of the two murders. These courts determined that there was insufficient evidence to support Mr. Siripongs' claim of innocence.

The federal district court judge and the three Court of Appeals Circuit judges from the 9th Circuit concluded that Mr. Siripongs' claim of innocence was not supported. In their published opinion, Circuit Court Judges Schroeder, Pregerson and Fernandez stated "The evidence of appellant's [Mr. Siripongs'] guilt was strong." *Siripongs v. Calderon* (9th Cir. 1998) 133 F.3d 732, 734. Similarly, these jurists considered the accomplice defense and stated, "Given the lack of any supporting evidence for the accomplice defense, we cannot say that the district court's conclusion was clearly erroneous or legally flawed." *Siripongs, supra*, at 736.

As recently as February 4, 1999, the California Supreme Court, in rejecting Mr. Siripongs'



third petition for a writ of *habeas corpus* once more rejected Mr. Siripongs' "accomplice theory" and specifically rejected his argument that more time is needed to prove his innocence.

Further, as to Mr. Siripongs' contention that his character is non-violent and, therefore, necessarily inconsistent with the nature of the brutal murders of which he's been duly convicted, his assertions are not convincing. He may or may not be non-violent in general, however, he was duly found to have been extremely violent in perpetrating the acts of which he has been convicted.

In sum, there is no substantial support to Mr. Siripongs' claim that any accomplice or other person committed the murders. Nor has his contention that a reexamination of the forensic evidence will cast a reasonable doubt on his conviction, been substantiated. Finally, his argument that his allegedly non-violent character is inconsistent with the violent nature of the double murders, is unpersuasive.

#### B. Remorse

Mr. Siripongs "...feels great remorse for his conduct and he feels that his punishment can never offset the harm he caused both [victims'] families through his thoughtless deeds, immaturity, and irresponsibility." (Pet'n at 10.) "Since the offense, he offers a daily penance for his deeds, for the shame he has brought to his family and ancestors, and for the suffering he has brought to others." (Pet'n at 11.)

These are important, perhaps even admirable sentiments. However, they do not go to the heart of this matter. Mr. Siripongs' remorse for whatever action or actions for which he feels that remorse, is not sufficient to override the due and deliberate verdict and sentence of the trial court and jury. Remorse is not sufficient to satisfy a capital sentence for a double murder.

Further, in this mercy proceeding, the victims' families have presented strong views on Mr. Siripongs' expressions of remorse. Mr. Vitoon Harusadangkul, the now adult son of one of the brutally murdered victims, Mrs. Packovan Wattanaporn, in his long and heartfelt letter of January 26, 1999 movingly expresses his family's sentiments as follows: "Remorse, does he feel any? To his lawyers and jailers, it is obvious that he thinks he does. But true remorse requires true actions. He has never attempted to contact me, my sister, my father, nor any of my family and communicate that he regrets [sic]. He only expresses regret to the people who have power to kill him. Isn't that odd? ... I believe this only can show that he's trying to NOT die. Thus, I am not of the opinion that he truly regrets."

Mr. Siripongs' remorse, even if it were relevant to the sentence duly imposed on him, does not satisfy at least one of the victims' families. Further, Mr. Vitoon Harusadangkul's January 26, 1999 letter goes beyond the issue of remorse, to the very heart of the matter when he emotionally pleads: "For God's sake, this case has been through so many appeals and every single jury has convicted, and every judge has sentenced him to death. Isn't that enough? How patient must family members of the victim be? We, especially, seek closure,

sir." Mr. Harusandangkul goes to the central point —the duly imposed and upheld sentence in this case is not overridden by remorse.

### C. Respect for Decedents' Families

The views of the decedents' families are a key concern, since they are the ones who continue to suffer most as a result of these murders. Several family members have expressed their positions on clemency in this case.

Mr. Vitoon Harusandangkul, the son of Mrs. Pat Wattanaporn, is opposed to clemency; Ms. Vipa Mary Harisandangkul, the daughter of Mrs. Pat Wattanaporn opposes clemency; Mrs. Minh Quach, son of Mr. Nguyen Quach, opposes clemency; Mrs. Lan Quach, daughter of Mr. Nguyen Quach, takes no position on clemency; Mr. Surachai Wattanaporn, former husband of Mrs. Pat Wattanaporn, favors clemency on religious grounds only, but not on the basis that Mr. Siripongs was not guilty or that the sentence was improperly imposed.

I am moved by the January 26, 1999 letter of Mr. Vitoon Harusandangkul where he states his and his sister's "adamant and unanimous feeling that the convicted felon, Jaturun Siripongs, should not be given the opportunity to continue with his life," and adds that after his mother's death his "life changed irrevocably and completely."

In a capital case, the views of family members regarding clemency may vary according to their personal or religious principles, the particular circumstances, or numerous other reasons. They deserve the utmost sympathy and respect for their feelings and views, whether they are for or against clemency. However, the larger purpose of the law, the determinations of the justice system, the clemency process, and the standards of our society are paramount. Accordingly, while the views of Mr. Jack Wattanaporn, are respected, a commutation of Mr. Siripongs' sentence on this basis alone is not warranted.

### D. Support by Jurors

The statements of two jurors proffered by Mr. Siripongs, while heartfelt, do not provide any credible information that the sentence in this matter was improperly determined or that its implementation would result in any miscarriage of justice. (Pet'n Exhibits 29, 30.) These statements do not support any other compelling reasons for clemency.

### E. Safety of Corrections Officers

Mr. Siripongs' submission cites "...more than 1500 pages of corrections files on Mr. Siripongs that document his unflinching respect for authority, positive relationships with other prisoners and guards, and constant day-to-day compliance with rules and regulations." (Pet'n at 12.) Several other sources are cited, including a former warden of the prison where Mr. Siripongs is incarcerated, Mr. Daniel Vasquez, for the proposition that he is a "model prisoner." (Pet'n at 13.) These and other factual citations are used to support the major premise that "Clemency Promotes the Safety of Corrections Officers as Mr. Siripongs, Without Transgression, Has Been a Model Prisoner." (Pet'n at 12, caption head'g.)

Mr. Siripongs' behavior while incarcerated and awaiting the carrying out of his sentence is commendable, and corrections officers may be safe in his presence currently, however, this has no bearing on Mr. Siripongs' actions outside of prison — actions for which he has been duly tried, convicted and sentenced.

The record has conflicting accounts regarding Mr. Siripongs' state of rehabilitation. While weight is accorded to former Warden Vasquez' evaluation that Mr. Siripongs has been a model prisoner for the 16 years of life for which his capital sentence has not been carried out, we also give great weight to the law enforcement official from the area of the two murders, Mr. Joseph Polisar, the Garden Grove Chief of Police, who, in his October 23, 1998 letter states that he is "...vehemently opposed to Jaturun Siripongs receiving any other sentence than he was given at trial," concluding, "we believe that Siripongs would definitely kill again ...."

The State of California has a right to expect that all its prisoners, including Mr. Siripongs, should behave well. The fact that Mr. Siripongs may have been a model prisoner for 16 years while his duly imposed capital sentence has not been carried out is beside the central point — model behavior cannot bring back the lives of the two innocent murder victims. These capital crimes can only be satisfied by the duly imposed sentence.

#### F. Clemency for "Good Behavior"

In his petition, Mr. Siripongs makes the improbable argument that "[v]irtually every California governor in the past half century has interpreted their clemency power as requiring consideration of an applicant's good conduct in prison." (Pet'n at 16, emphasis supplied.)

On the subject of clemency, California governors have broad discretion. California Constitution Article V, Section 8, provides "... on conditions the Governor deems proper, [he or she] may grant a reprieve, pardon, and commutation ...."

Assuming that Mr. Siripongs has behaved well in prison and may be a model prisoner, this does not suffice to mitigate the brutal murders of which he has been convicted or to reduce his duly imposed capital sentence.

#### G. Respect for International Law/Vienna Convention on Consular Relations

Mr. Siripongs' argues that "the failure of the State's law officials to provide Mr. Siripongs after his arrest with the opportunity to contact and receive assistance from Thailand's consular officials [was] a blatant violation of customary international law and the Vienna Convention on Consular Relations." (Pet'n at 18.)

As acknowledged in Mr. Siripongs' petition, Thailand is not a signatory to the Vienna Convention and the United States has no duty to apply the treaty's terms to Thai nationals such as Mr. Siripongs. See *United States v. Esparaza-Ponce*, 7 F. Supp. 2d 1084, 1095 (S.D. Cal. 1998).

As to the arguments that customary international law — or more general concepts or

respect for international law — should be determinative of the conviction, sentence or clemency of Mr. Siripongs, these have not convinced the many state and federal courts to which Mr. Siripongs has had full recourse, nor are they convincing here.

In fact, all such claims on these points of international law were considered and denied on the merits in the most recent denial of *habeas* by the California Supreme Court on February 4, 1999. Specifically, as to Mr. Siripongs' claim that "Petitioner is Entitled to Habeas Relief Because Orange County Law Enforcement Officials Failed to Honor His Right of Consular Access," the State Supreme Court answered that the claim is "denied on the merits." (Order of the California Supreme Court, February 4, 1999.)

Additionally, contrary to Mr. Siripongs' claim that his "defense was materially compromised by California's failure to provide consular assistance" (Pet'n at 19), there is no evidence, but only speculation, that he was prejudiced from any alleged failure to notify the Thai Consulate.

#### H. Compelling Mitigation

Mr. Siripongs' petition describes his long and difficult life in Thailand. Mr. Siripongs spent much of his youth in an unstable, poor and unhealthy environment surrounded by criminal activity. His parents' divorce and subsequent lifestyle of the custodial parent, his mother, had an impact on Mr. Siripongs' development. He began to keep the company of juvenile delinquents and persons of questionable character. In February 1975 he robbed a department store and was apprehended, tried and jailed. (Pet'n at 34.)

After his release from prison in 1978, Mr. Siripongs entered the Buddhist monkhood where he applied himself "earnestly to the precepts of Buddhism and the disciplines of being a good monk." (Pet'n at 37.) Mr. Siripongs ranked fourth among his class of 38 students and states that he received a certificate from the temple. (Pet'n at 37.) Having completed the three-month course of study, Mr. Siripongs started working on a ship where he gained knowledge that eventually became useful to the U.S. Drug Enforcement Administration in arresting a heroin smuggler. (Pet'n at 38.)

He came to the United States in May 1980 and in June 1980, Mr. Siripongs was employed as a stock boy and advanced to Assistant Manager two weeks thereafter. (Pet'n at 39.) He then moved to the Spectroscopy Division of the Perkin-Elmer Corporation in Irvine and in August 1981, started working weekends at the scene of the murders, the Pantai Market. (Pet'n at 40.)

It appears that Mr. Siripongs had a difficult life in Thailand but this experience is probably not unique to him. No doubt, other of his countrymen have overcome equal if not greater hardships and gone on to lead constructive lives.

Mr. Siripongs' arrival to the United States in 1980 may be viewed as a positive development in Mr. Siripongs' life. In the United States Mr. Siripongs was gainfully employed, well regarded and treated by his employers, lived in a stable home and neighborhood, had friends and a girlfriend. These new and apparently better life experiences would be expected to lead to a better and law-abiding life (especially when

coupled with spiritual and religious training as a Buddhist monk in Thailand). If anything, his better circumstances in the United States make the brutal murders of his employer and co-worker particularly inexplicable and reprehensible.

Mr. Siripongs' life experiences, whether negative, positive or neutral, do not mitigate the brutal murders of which he has been duly convicted and sentenced. All people living in America, whether citizens or not, are held to the same standards under the law. An abused and difficult childhood, while regrettable, does not justify illegal behavior — much less double murder.

#### V. Mr. Siripongs' February 4, 1999 Memorandum

On February 4, 1999, Mr. Siripongs' attorneys submitted an additional memorandum in support of the request for clemency. Much of the memorandum is a restatement of arguments set forth in Mr. Siripongs' clemency petition of January 19, 1999. It's also worth noting that virtually all of these arguments were presented to, and rejected by, the California Supreme Court on Mr. Siripongs' petition for *habeas corpus* which was denied on February 4, 1999.

Mr. Siripongs' memorandum also includes various exhibits consisting of declarations, letters and other documentation. The memorandum and exhibits have been duly considered. However, they do not present information that is persuasive for a grant of clemency.

#### VI. Conclusion

In 1983, Mr. Siripongs was duly tried, convicted and sentenced for the brutal murders of two innocent human beings, his employer, Mrs. Packovan ("Pat") Wattanaporn and his co-worker, Mr. Quach Nguyen. In the following 16 years, at least four different state and federal courts (and most recently the California Supreme Court on February 4, 1999), as well as the California Board of Prison Terms have all examined, re-examined, considered and re-considered every possible and conceivable factual, evidentiary and legal argument that Mr. Siripongs and his able and capable attorneys have raised.

Each and every one of these bodies has rejected the nearly identical arguments included in this plea for clemency. Nothing in this clemency petition can bring back the lives of two innocent, decent and hard-working people, Mrs. Pat Wattanaporn and Mr. Quach Nguyen, nor remove the anguish and pain of their family and loved ones.

On December 15, 1981, when Mrs. Wattanaporn was mercilessly and wantonly murdered, she had a family — a husband, a former husband, children and many other relatives. One of them, her daughter Vipa Mary Harisdangkul, a Thai national and practicing Buddhist, was a nine-year old innocent little girl whose mother was needlessly murdered. I am moved by her honest, direct and eloquent plea in her letter of January 19, 1999, the concluding portion of which follows:

"Mr. Siripongs has had 16 years to appeal his sentence. Many courts have reviewed the evidence and the sentence should now be respected. I know that the Thai government has

been trying to help Mr. Siripongs and to tell you the truth, I am hurt that they have never considered my feelings or even asked me how I feel about this. I have been contacted by a representative of the Thai government who called me to tell me they were working with Mr. Siripongs's lawyers to try to help him. I asked him whether or not they had contacted the prosecutors or the police in the U.S., so that they could look at all the evidence, but my question was ignored. I know for a fact that they have not and they have no intention to either. They never bothered to find out my mother's background. They don't know that she was not wealthy and that she sweated for every penny she earned. They don't care that she was deprived of living the better life she always worked for. Nothing has changed the way I feel and I still believe that I am doing the right thing appealing to you. I have been a good citizen and I feel betrayed that neither my mother nor I mean anything to the Thai Government .... I do not understand why this is happening. I feel that it is useless to try to change their attitude now and that is why I have decided to write to you for your help. My intention is not to seek revenge, but to see that justice is done and that this serves as an example for anybody who thinks that they can get away with committing such a serious crime in a country outside their own. After all, this has nothing to do with culture or nationality because we are all human and should be treated equally no matter what. Thank you very much for taking time to consider this matter and let me once again tell you how strongly I feel that clemency should not be granted. Governor Davis, I am pleading with you on behalf of my family members as well as myself to please do what is right so that my mother can finally rest in peace."

#### VII. Decision

After due deliberation of the record and submitted materials, clemency is denied.

Dated: February 6, 1999.

\*\*\*\*\*Signed\*\*\*\*\*

Governor Gray Davis

**IN THE OFFICE OF THE GOVERNOR  
STATE OF CALIFORNIA**

In the Matter of the Clemency )  
Request of )  
MANUEL PINA BABBITT )  
\_\_\_\_\_ )

**DECISION**

**I. INTRODUCTION AND DECISION**

Over eighteen years ago, Leah Schendel, a 78-year-old mother, grandmother and great grandmother, was brutally robbed and murdered in her own home. Mrs. Schendel was a slight woman. She weighed less than 100 pounds and was only 4'-10" tall. Despite evidence of a valiant struggle to defend herself, Mrs. Schendel was unable to preserve her life at the hands of her 31-year old able bodied, male attacker.

The beating of Mrs. Schendel was ruthless. She was struck with such force that her upper lip was cut to the bone and her denture was shattered. A blow to her forehead caused the skin to split apart leaving about an inch long gap that extended all the way to the bone. There was another one inch cut in the scalp area with gaping edges that was so deep that it exposed the bone. Many other severe cuts and bruises were evident on Mrs. Schendel's face. There is evidence that Mrs. Schendel's attacker may have attempted to rape her (Reporter's Transcript (RT) 2510-2511). In the process of murdering Mrs. Schendel, her assailant ransacked her home, and stole jewelry and other personal property. As a result of the inhuman and traumatic beating at the hands of her assailant, Leah Schendel's heart stopped, and she died sometime before 7:00 a.m., on December 19, 1980.

Later that same day, another defenseless woman, Mavis Wilson, was savagely beaten into a state of unconsciousness because she resisted the theft of her car. The same assailant who attacked Mrs. Schendel, also attacked Ms. Wilson and attempted to rape her.

Manuel Pina Babbitt, the man who has been duly tried, convicted, and sentenced for these crimes, and whose sentence has been upheld by every reviewing authority and court, now seeks clemency. Seventeen years ago, a jury and trial court issued a verdict and sentence in this matter after a full trial, sanity hearing, and penalty phase. State and federal courts have fully and fairly considered Mr. Babbitt's case and found no legal or factual errors. The California Board of Prison Terms has also considered this matter and on April 26, 1999, issued its unanimous recommendation to deny commutation of Mr. Babbitt's sentence. None of these reviewing authorities has reversed Mr. Babbitt's capital sentence.

I have considered Mr. Babbitt's clemency application and the submitted materials, and clemency is denied.

## II. BACKGROUND

### A. **The Murder, Burglary, And Attempted Rape Of Leah Schendel**

On December 19, 1980, Leah Schendel was found dead in her home at a senior citizens' complex. Mrs. Schendel's apartment was located on a route between Mr. Babbitt's home and a bar where Mr. Babbitt spent most of the day of December 18, 1980, drinking alcohol and using drugs. At the trial, it was established that Mr. Babbitt cut open the screen door to Mrs. Schendel's home with a sharp instrument, entered her home, and repeatedly struck her with a blunt instrument, possibly his fist, with such force that he inflicted severe wounds to her head and body. Her pillow was heavily soaked with blood, and there were other bloodstains and blood spatters throughout Mrs. Schendel's home.

Mrs. Schendel's body was found on the bedroom floor by her neighbors. Her body was covered from the waist up with a mattress and was nude from the waist down. Her nightgown and pajama top were pulled above her breasts. A small red tea kettle was set on top of her pubic area. A leather strap was tied to her left ankle and another leather strap lay on the floor. An electrical cord was lying across the lower part of Mrs. Schendel's legs.

The apartment furniture was in disarray and the apartment was ransacked. A purse, playing cards, broken glass and other items were strewn on the living room floor. Drawers and their contents were scattered all over Mrs. Schendel's bedroom. A drawer from a jewelry box was on the box spring laying on top of her body. Mrs. Schendel's shattered dentures were on the living room floor—a different room from where her body lay.

A silver cigarette lighter engraved with Mrs. Schendel's initials, money, an enameled mirror, and a gold watch with diamonds were taken from Mrs. Schendel's home and later found among Mr. Babbitt's belongings. Five fingerprints matching Mr. Babbitt's were found on the handle of the red tea kettle and other items in Mrs. Schendel's home. Blood was found on his shoes and clothes.

When Mr. Babbitt arrived at his home at around 1:00 or 2:00 a.m. on December 19, 1980, he had cuts on one of his hands. His sister-in-law, Linda Babbitt, who was watching television, noticed the cuts on Mr. Babbitt's hands and asked about them. Mr. Babbitt told his sister-in-law that he had gotten into a fight at the neighborhood bar. He showed her some paper money. When asked where he got the money, he told his sister-in-law that he had won it playing pool. He then gave his sister-in-law a boxed pen and pencil set that he apparently took from Mrs. Schendel's apartment.

At around 11:00 a.m. or 12:00 noon on December 19, 1980, Mr. Babbitt showed his sister-in-law some loose coins under a corner of the family room carpet. There were about four or five silver dollars and other coins totaling about 14 to 15 dollars. When his sister-in-law



asked Mr. Babbitt where he got the money, he said that he had been saving it. Sometime on Saturday, December 20, 1980, Ms. Babbitt and her husband, Mr. William Babbitt, the brother with whom Mr. Babbitt was staying, looked into the closet where Mr. Babbitt kept his belongings and found a sock containing a couple of watches, a pocket watch, and a new wristwatch. There were also one or two cigarette lighters one of which had the initials "L.S." The Babbitts put these items back into the sock and stuffed the sock back into Mr. Babbitt's duffel bag in the closet. About an hour later, when Linda, William, and Mr. Babbitt were leaving to go shopping, Mr. Babbitt retrieved the sock and gave it to William's stepson telling him to get rid of it as it contained nothing but a bunch of old lighters that were no good and useless.

Sometime during the weekend of December 20-21, 1980, William, Mr. Babbitt's brother, read about the death of Mrs. Schendel and, believing that his brother may have been involved in her death, called the Sacramento police. Mr. Babbitt was arrested on December 21, 1980, and questioned about his involvement in Mrs. Schendel's death. He was asked about some of Mrs. Schendel's property that was found among his belongings, and he told the police that he had found those items in some bushes. He was then asked what he had done with those items, and said that he had given them to his nephew to get rid of because he somehow knew that they were stolen and did not want his nephew to be accused of stealing them. During the police interview of Mr. Babbitt, he also was asked whether his route home in the early morning hours of December 19<sup>th</sup> may have taken him by Mrs. Schendel's apartment. He said that it was possible, but was certain that he "came home,...directly home." (RT 2914-2917)

#### **B. The Robbery and Attempted Rape of Mavis Wilson**

Mavis Wilson was returning to her home around 10:30 p.m. on December 19, 1980 in her two-day-old Volkswagen Dasher. As she was getting out of her car, Ms. Wilson was grabbed from behind, her arms pinned to her body, and forced to the rear of her car. Her assailant, Mr. Babbitt, demanded her car keys but Ms. Wilson threw the keys up the driveway. Despite her struggle, Mr. Babbitt overpowered her and dragged Ms. Wilson behind some juniper bushes near her garage. When she screamed, Mr. Babbitt beat her with his hand until she lost consciousness. When she regained consciousness she was on the ground, lying on her back. Mr. Babbitt was standing over her and was trying to pull off her pants. Ms. Wilson again lost consciousness. A houseguest of Ms. Wilson's was leaving her home and noticed Mr. Babbitt running away. He also saw Ms. Wilson lying unconscious on the lawn of the neighbor's house. She had a head gash and many other injuries to her face and was naked from the waist down. Her purse's contents were scattered all over the neighbor's lawn. Paper money, a ring, a watch, and a pendant were missing. She was taken to the hospital in an ambulance where she remained for about five days.

While at the hospital Ms. Wilson was shown a photographic lineup and identified Mr. Babbitt as her attacker.

Mr. Babbitt was convicted of the murder and attempted rape of Mrs. Schendel and the robbery and attempted rape of Ms. Wilson. The jury, after a full trial, sanity hearing and penalty

phase, imposed the death sentence. The conviction and sentence have been upheld by the many state and federal courts and reviewing authorities that have considered Mr. Babbitt's case.

### **III. CLEMENCY PETITION**

Mr. Babbitt's 55-page Petition for Clemency ("Petition") supplemented by a 50-minute videotape ("Videotape"), and a Reply to Response to Clemency Petition ("Reply") raises five major arguments:

- A. Mr. Babbitt had a better mental state defense, Post Traumatic Stress Disorder (PTSD), and it was not properly presented (Petition at 30-36). This same point is raised in the Videotape and reiterated in the Reply.
- B. Defense counsel was not competent and did not provide Mr. Babbitt a constitutionally valid defense (Petition at 36-43). This is also discussed in the Reply.
- C. Prosecutors took advantage of Mr. Babbitt's counsel's incompetence and made legally inappropriate closing arguments to the jury (Petition at 43-49).
- D. Mr. Babbitt is remorseful (Petition at 51).
- E. Mr. Babbitt's difficult childhood, civilian life, and military service, and two tours of duty in Vietnam are important mitigating factors that compel the commutation of his capital sentence to life imprisonment without the possibility of parole and that these mitigating considerations make the capital sentence inappropriate (Petition at 3-36 and 51-55). The Videotape also raises these issues through interviews of relatives, friends, and former Vietnam Marines.

### **IV. ANALYSIS**

#### **A. The Post Traumatic Stress Disorder (PTSD) Defense**

The jury was presented with substantial evidence on the issue of whether he was sane when he beat Mrs. Schendel to death. At the trial Mr. Babbitt relied on a mental-state defense presented through the testimony of family members and medical experts. After hearing all the expert medical evidence that was presented and after full deliberation, the jury concluded that Mr. Babbitt was sane when he committed the heinous crime against Mrs. Schendel and imposed the death sentence rather than imprisonment without possibility of parole.

##### **1. Expert Medical Testimony During the Trial**

Medical experts offered their medical opinions about Mr. Babbitt's mental state when he brutally murdered Mrs. Schendel. Among these medical experts who testified was Dr. Allen David Axelrad, a physician and psychiatrist and a forensic psychiatrist. Dr. Axelrad, testifying for the defense, presented testimony on the PTSD defense. He also listed the psychiatric disorders he

diagnosed Mr. Babbitt as having when he viciously murdered Mrs. Schendel and robbed and attempted to rape Ms. Wilson (Tab 49 of Reply).

Dr. Elmer F. Galioni, a forensic psychiatrist and assistant clinical professor at the University of California at Davis Medical School, was appointed by the court (Exhibit T to District Attorney's Submission, April 14, 1999 ("D.A.)) to examine Mr. Babbitt and diagnosed him as having a passive-aggressive personality disorder. Dr. Galioni stated that this disorder does not carry any severe incapacitating implications. Dr. Galioni explained that he did not diagnose PTSD because, among other reasons, the behavior of Mr. Babbitt on the date of Mrs. Schendel's attack was not always avoidant in nature. Significantly, Dr. Galioni believed that Mr. Babbitt's asserted amnesia about the brutal killing of Mrs. Schendel was either "functional amnesia" that was developed after the fact to eliminate or blot out unpleasant memories, or a "feigned amnesia." (RT 4662-64). In other words, Dr. Galioni expressed the belief that Mr. Babbitt either had a convenient memory lapse about his beating to death a 78-year-old grandmother in order to suppress the unpleasant memory or he just simply lied about not remembering.

Having heard the expert medical evidence and the testimony from family members, the jury, on April 20, 1982, unanimously found Mr. Babbitt guilty. On May 7, 1982, the jury further determined that Mr. Babbitt was sane and had the mental capacity to form the intent to commit murder, and that Mr. Babbitt was not so disturbed as to make the death penalty inappropriate (See, Exhibit N, p. 2, line 23 to p. 3, line 14, D.A.).

The state and federal courts determined that Mr. Babbitt had a fair and full consideration of his mental-state defense and was duly convicted of the crimes charged. Mr. Babbitt's clemency submission has not presented any information to establish that there was a miscarriage of justice. I am not persuaded that Mr. Babbitt's sentence should be commuted to life without possibility of parole.

## **2. Mr. Babbitt's Contention That A Better Mental Defense Could Have Been Presented At Trial And Its Inconsistencies**

In the Petition, Mr. Babbitt now contends that a better mental-state defense was available and was not presented to the jury. In support of this claim, Mr. Babbitt has submitted the declarations of medical experts (Tab 22, Dr. Charles Marmar and Tab 4, Dr. Daniel Weiss) who were retained after the trial, and who offered evidence during the post-trial *habeas corpus* proceedings, and declarations from family members, friends, and fellow veterans, among other written submissions.

Mr. Babbitt's more expanded mental-state defense arguments were presented in lengthy submissions to the federal district court, which discussed them in detail. United States Magistrate Judge Peter A. Nowinski, in his 54-page opinion dated October 15, 1996 (Exhibit D, D.A.), having conducted an exhaustive review of the new defense stated:

There was no evidence that [Mr. Babbitt] had ever before suffered the 'altered states' that he now contends overtook him twice within about a 24-hour period on December 18-19, 1980. While

[Mr. Babbitt's] habeas expert, Dr. Marmar, believes that [Mr. Babbitt's] 27 burglaries in 1972 were explicable by post traumatic stress disorder because patrols took trinkets from Vietnam villages, [Mr. Babbitt] remembered those burglaries in detail. [Footnote 31: Petitioner stated that he took from the summer cottages various knickknacks, a suitcase to put them in and one rocking chair.] The most the two attacks realistically have in common is that they involved defenseless old women, violence, sexual abuse and robbery. [Mr. Babbitt] was broke and had a motive for robbery. He had a prior history of robbery,<sup>1</sup> automobile theft [his brother's car] and sexual abuse unattenuated by any "altered state". After the Schendel murder, [Mr. Babbitt] did not tell his brother and sister-in-law that he did not remember how he obtained the loot but lied. (Magistrate's Decision pp.34-35. Emphasis added).

Magistrate Judge Nowinski concluded by stating that "[t]he defense that [Mr. Babbitt] contends his trial counsel should have presented is implausible and inferior to the defense presented at trial." (Magistrate's Decision, p. 36. Emphasis added).

In his Reply, submitted on April 20, 1999, Mr. Babbitt attempts to discredit Magistrate Judge Nowinski's substantive and exhaustive legal and factual analyses by pointing to alleged factual errors that were not necessarily germane to his ultimate conclusions (Reply, at 8-12). However, none of the federal courts that extensively reviewed the Magistrate Judge's 54-page opinion, found any reversible errors in his analysis.

On February 25, 1997, United States District Court Judge William B. Schubb reviewed Magistrate Judge Nowinski's findings and recommendations and adopted them. In doing so, Judge Schubb stated that, "As required, [Magistrate Judge Nowinski] looked at all the evidence a reasonable juror would have to consider, and not just the facts supporting [Mr. Babbitt's] cause. The magistrate judge's analysis merely demonstrates the strength of the evidence against [Mr. Babbitt], and the relative weakness of the evidence [Mr. Babbitt] now offers. Based on this evidence, the magistrate judge correctly concluded that even with all of the evidence now offered, a reasonable jury could not have found in [Mr. Babbitt's] favor" (Order, *Babbitt v. Calderon*, Civ. No. S-89-1047-WBS-PAN, February 25, 1997, p. 3, lines 17-25).

On July 30, 1998, a unanimous three-judge panel of the Ninth Circuit Court of Appeals reviewed Mr. Babbitt's arguments and found no error and affirmed the federal district court's decision (*Babbitt v. Calderon* (1998) 151 F. 3d 1170).

On February 22, 1999, the United States Supreme Court denied Mr. Babbitt's request to review and reverse the lower federal courts' opinions and the matter was sent back to the Superior Court for a public hearing and the setting of an execution date (*Babbitt v. Calderon* (1999) 119 S. Ct. 1068).

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<sup>1</sup> Mr. Babbitt was convicted in 1973 of robbing two gas stations at gunpoint. (See Exhibit H, D.A.).

In sum, based on the above discussion and on the record, I am not convinced that a grant of clemency is warranted.

Although two former jurors have now submitted written support for Mr. Babbitt's clemency plea (Tabs 29 and 30), these statements, while heartfelt, do not convince me that the sentence the jury imposed 18 years ago was improperly determined or that its implementation would result in a miscarriage of justice. Therefore, the jurors' statements do not provide any other compelling reasons for clemency.

**B. The Incompetence of Counsel Argument**

**1. The Allegation that Counsel Failed to Present a Proper Defense**

The Petition and the Reply state that Mr. Babbitt's former defense counsel was ineffective because he failed to provide a full and adequate PTSD defense (former defense counsel declaration at Tab 25), and because he drank excessively during the trial. In support of this latter allegation, Mr. Babbitt has submitted the declarations of two of his former defense counsel's paralegals (Tabs 26, 27, and 45) who state that on at least one occasion during the trial, they witnessed the consumption of four double vodkas during a luncheon meeting and that this may have been defense counsel's custom during the Babbitt trial.

Except for the new statements claiming defense counsel consumed alcohol during the trial, all the other claims regarding Mr. Babbitt's trial counsel were raised before, fairly and fully considered, and rejected by the California Supreme Court, by a magistrate judge, by a United States district judge, by three appellate judges from the Ninth Circuit Court of Appeals, and by the United States Supreme Court. All the reviewing courts determined that his defense counsel properly represented Mr. Babbitt. In fact, United States District Court Judge William B. Schubb, in his April 8, 1997 Order, reviewed the magistrate judge's opinion and wrote:

[Mr. Babbitt's] present attorneys apparently refuse to accept this court's finding that his trial attorney presented a very good defense—a better one, in fact, than the defense they argue in hindsight should have been presented. (Order, *Babbitt v. Calderon*, Civ. No. S-89-1047-WBS-PAN, April 8, 1997, p. 2, lines 21-24).

The Ninth Circuit Court of Appeals, in its published opinion, reviewed the decision of Judge Schubb and a three judge panel stated that Mr. Babbitt's counsel "conducted a quite thorough investigation and certainly presented a constitutionally adequate" performance during the guilt, sanity and penalty phases of Mr. Babbitt's 3-month long trial. (*Babbitt v. Calderon* (9<sup>th</sup> Cir. 1998) 151 F.3d 1170, 1175-1176).

The United States Supreme Court denied Mr. Babbitt's petition for certiorari on February 22, 1999 (*Babbitt v. Calderon* (1999) 119 S. Ct. 1068).

Mr. Babbitt's argument, that his former defense counsel prejudicially failed to properly investigate and present his case to the jury, has been considered and rejected by the California

Supreme Court, the United States Federal District Court, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

In short, the state and federal courts determined that Mr. Babbitt had effective legal representation.

## 2. The Allegation That Mr. Babbitt's Former Defense Counsel Drank Alcohol

Two of Mr. Babbitt's former defense counsel's assistants have submitted declarations which, for the first time, raise the issue of defense counsel's alcohol consumption during the trial lunch recesses (Declaration of Anthony Walker, Tab 26; Declarations of Timothy Yearnshaw, Tabs 27 and 45).

The declaration of another assistant to the former defense counsel, Mr. Richard D. Opich, who has also submitted a declaration for Mr. Babbitt (Tab 44 of Reply), stated that he does not recall seeing defense counsel drink nor appear under the influence during the trial (Exhibit Q, D.A.). Mr. Opich believed that defense counsel was completely committed to Mr. Babbitt's case and worked tirelessly to present a full and competent defense. Mr. Opich's declaration that was submitted on behalf of Mr. Babbitt (Tab 44 of the Reply), does not in any way dispute Mr. Babbitt's counsel's competent defense.<sup>2</sup> Significantly, Mr. Opich states that in the seventeen years that have elapsed since the verdict was entered, neither Mr. Walker nor Mr. Yearnshaw ever told him that he was concerned about the adequacy of defense counsel's efforts in the case. (Exhibit Q, D.A.).

Other declarations address the "drinking issue". A deputy attorney general who admittedly was assigned to defend the verdict during the various *habeas corpus* proceedings, interviewed Mr. Yearnshaw, one of the two paralegals, in May of 1996, and does not recall the paralegal ever mentioning defense counsel's alcohol consumption during the Babbitt trial (Exhibit S, D.A.).

Finally, C. T. Cleland, Deputy District Attorney for Sacramento County, the prosecutor who tried the case for the People of the State of California, also submitted a declaration attesting to the adequacy of Mr. Babbitt's legal defense. The prosecutor also notes that he never knew Mr. Babbitt's defense counsel to abuse alcohol prior to or during the trial. The prosecutor also states that "Judge DeCristoforo was of such a character that he would not have tolerated a practitioner in his court if there was even the slightest hint that alcohol was affecting the effort being made before him" (Exhibit R to D.A.). The declarations attached to the Reply do not present information that is persuasive for a grant of clemency.

In light of the holdings of the state and federal courts that Mr. Babbitt had constitutionally adequate counsel, I am not convinced that defense counsel's alleged consumption of alcohol during trial, even if true, is an appropriate reason for granting clemency.

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<sup>2</sup> The declaration of Pam Poli (Tab 47 of Reply) attesting to former defense counsel's drinking relates to the period June 30, 1995 to July 28, 1995, some 13 years after Mr. Babbitt's trial.

### **C. The Prosecutorial Misconduct Argument**

Another argument that Mr. Babbitt raises in his submission to support his plea for clemency is that the prosecution ridiculed the psychiatric defense offered by his trial counsel and inappropriately commented on the attempted rape evidence (Petition, 43-49).

Mr. Babbitt raised this argument in the various state and federal courts, and as with the PTSD defense and the ineffective assistance of counsel arguments, it too was considered by these courts and it was found to be without support.

The California Supreme Court, the United States District Court, the Ninth Circuit Court of Appeals and the Supreme Court effectively dealt with Mr. Babbitt's prosecutorial misconduct argument and did not reverse the duly imposed conviction and sentence.

Mr. Babbitt's argument that there were inappropriate comments by the prosecutor on the attempted rape evidence does not warrant the setting aside of a jury decision that was reached after a three month trial. In the Petition, Mr. Babbitt sets out some of the expert medical evidence that was before the jury on this issue (Petition, p. 47). Although Mr. Babbitt now asserts that the admission of this evidence was improper because it was so emotionally charged, based on the record, I am not persuaded that this information warrants the grant of clemency.

### **D. Remorse**

In the Petition and in the Videotape, Mr. Babbitt makes reference to his remorse for the death of Leah Schendel (Petition, Tab 35, pp. 16-17, 51).

Mr. Babbitt's statement of remorse is a qualified one because he states that he has no memory of the evening of Mrs. Schendel's murder (Petition, p. 51). In the videotape interview, Mr. Babbitt, when asked whether he had anything to say to the family of Mrs. Schendel, said, "I don't know if I killed her," and later on the same tape tells the granddaughter of Mrs. Schendel "...don't torture yourself because of history."

Mr. Babbitt's remorse, for whatever action or actions he feels that remorse, is not sufficient to override the due and deliberate verdict and sentence of the trial court and jury. Remorse is not sufficient to satisfy a capital sentence duly imposed by a properly constituted jury of Mr. Babbitt's peers and affirmed by our state and federal courts.

Further, Mrs. Schendel's family has presented poignant and heartfelt views on Mr. Babbitt's expression of remorse. Laura Thompson, the granddaughter of Mrs. Schendel, submitted a taped statement (Exhibit P, D.A.), in which she states as follows:

Regard for human life? That is the one thing that Manuel Babbitt has never shown, at least in civilian life. He has never shown remorse for the life that he took or the lives that he tore apart.

Mr. Babbitt's remorse does not satisfy the victim's family nor is it sufficient for clemency.

**E. Mitigation: Mr. Babbitt's Childhood, Civilian Life, and Marine Corps Service**

Much of the Videotape and the Petition that have been submitted contain information regarding Mr. Babbitt's difficult childhood, his military service in Vietnam, and a plea for clemency from several former United States Marines who saw combat at Khe Sanh.

Mr. Babbitt's character and background are proper factors to consider in a plea for mercy. However, nothing in Mr. Babbitt's background, as presented by him and his able counsel, justifies the brutal murder of a defenseless 78-year old woman and the senseless beating and attempted rape of another defenseless woman. As difficult and unsettled as Mr. Babbitt's childhood, military service and return to civilian life may have been, such harsh life experience is not the type of mitigation sufficient to grant clemency for a brutal capital crime. Countless people have suffered the ravages of war, persecution, starvation, natural disasters, personal calamities and the like. But such experiences cannot justify or mitigate the savage beating and killing of defenseless, law-abiding citizens in order to steal their personal property.

Mr. Babbitt's lifelong and violent criminal activities do not support Mr. Babbitt's plea for clemency. He burglarized 27 summer cottages in 1972; he was convicted of armed robbery for having held up two gas stations at gunpoint in 1973; he repeatedly beat his common law wife, Theresa Babbitt; he was arrested and charged for the assault and sodomy of his 13-year old babysitter in 1979<sup>3</sup>; he was tried for attacking and raping a female in 1980<sup>4</sup> and he savagely beat and attempted to rape two women, Mrs. Schendel and Ms. Wilson in December 1980 (Exhibits F, G, and H, D.A.).

Some former U.S. Marines have submitted declarations and others who appear on the Videotape urge clemency for Mr. Babbitt (Tab 10). Other former U.S. Marines and servicemen have written and expressed outrage over Mr. Babbitt's cowardly and inhuman murder of Mrs. Schendel. (See, Letter from Gary W. Walker to Governor Gray Davis, dated March 15, 1999; Letter from Richard D. Blomgren, Sgt. Major USMC Ret., LAPD Ret., to Governor Gray Davis, dated March 15, 1999).

Honorable service to the United States in the United States Marine Corps and the other military branches is service to country and worthy of the highest commendation. However, Mr. Babbitt's service in the Marine Corps does not justify nor excuse the brutal killing of a defenseless 78-year-old woman. We pay high homage and deep respect to those servicemen who have served honorably, to those who have sacrificed their lives and others who have suffered life threatening and permanent war wounds for our country.

Our society properly recognizes veterans' sacrifice for their country with parades, monuments, G.I. education benefits, mortgage assistance, lifelong medical attention for the

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<sup>3</sup> Mr. Babbitt was apparently not tried for this assault and sodomy.

<sup>4</sup> Mr. Babbitt was acquitted of this charge on August 20, 1980 after a two-day jury trial (Exhibit H, D.A.).



injured and employment return rights. We expect our veterans to act honorably both in war and upon their return home. In any event, even the most honorable military service would not excuse the savage beating to death of an innocent and defenseless grandmother.

Although, while in prison, he received the Purple Heart for his war wounds, the Videotape and Petition do not present the full picture of Mr. Babbitt's U.S. Marine Corps service. As a U.S. Marine, Mr. Babbitt was disciplined several times and was also court martialed. On July 31, 1969, he assaulted two military police officers by twice striking one of them in the face with his fist and kicking another in the leg. At the same time, he showed disrespect toward a superior officer by saying to him "I'll slap your face to, [sic] Lt., or words to that effect." (Exhibit E, D.A.) While stationed at the Quonset, R.I. Marine Base, Mr. Babbitt continued to knowingly violate the U.S. Marine Corps' rules of conduct.

Behavior like this prompted his superior officers to make entries in his military record such as:

Pvt BABBITT has displayed a total disregard for authority during the past three months. His repeated unauthorized absences shows a lack of responsibility and reliability here at this command. His performance of duty is below average. He seemingly has neither respect for the Marine Corps nor motivation to execute his duties. This man is undesirable and should not be retained in the Marine Corps (Exhibit E, D.A.).

Finally, Mr. Babbitt was judged unsuitable for military service and discharged from the U.S. Marine Corps "for reasons of unsuitability." The Commanding Officer at Quonset Point, Rhode Island, wrote to the Commandant of the Marine Corps the following about Mr. Babbitt's discharge:

3. ...His total disregard for regulations and continuous unauthorized absences are a detriment to the morale of this command. Private BABBITT's immaturity and inability to lend himself to discipline causes him great difficulty in adjusting to military service and acceptance of any responsibility....Additionally, Private BABBITT is a proven liar on numerous occasions and does not possess the required integrity expected of a Marine. Private BABBITT by his actions is a discredit to this command, the United States Marine Corps, and the Naval Station (Exhibit E, D.A. Emphasis added).

Mr. Babbitt's military record together with the statements that have been submitted by former servicemen, lead me to conclude that, despite his war wounds and commendation for them, his service did not live up to the standards of the U.S. Marine Corps. However, even if Mr. Babbitt had served in the armed forces with unquestioned honor and distinction, that would not mitigate the capital sentence duly imposed for a brutal murder.

Gary W. Walker, a decorated Vietnam veteran who received the Silver Star and two Purple Hearts and who served as a rifle squad leader in the Marines in 1968 and 1969 in Vietnam, wrote as follows: "I know Mr. Babbitt lived through some terrible things while in Vietnam. I feel you and I did also. Regardless, he must be responsible for his actions. No matter what he did in Vietnam he should not commit a terrible crime and get special treatment because he is a Vietnam veteran. Mr. Babbitt is a convicted criminal of a brutal crime against an elderly defenseless woman. He should be treated just like any other violent criminal." (Letter from Gary Walker to Governor Gray Davis, March 15, 1999).

The sentence imposed by the jury and affirmed time and again by the numerous state and federal courts is not inappropriate and carrying it out would not be a miscarriage of justice. I am therefore not convinced that the aforementioned mitigating factors suffice to grant clemency.

#### **V. THE VIEWS OF VICTIMS OF VIOLENT CRIMES AND THEIR FAMILIES ARE A KEY CONCERN IN CLEMENCY PROCEEDINGS**

In a capital case, as in any violent crime, the views of the victims and their families are a key concern, since they are the ones who continue to suffer most for the loss of their loved one.

In this matter, one of the victims of Mr. Babbitt's violent crimes, Ms. Wilson, is still alive and has expressed her feelings about the savage beating she received at the hands of Mr. Babbitt. The relatives of Mrs. Schendel have also expressed their views.

The record reflects that Ms. Wilson was severely traumatized by Mr. Babbitt's attack. She described the attack as a permanent violation of her life, and indicated that the residual trauma she feels is a daily occurrence. Eighteen years later, she still sleeps with a light on, is constantly on the verge of tears, suffers daily flashbacks of the assault, and is reluctant to develop close relationships with men. She also believes that the brutal attack has caused her daughters, who were 17 and 20 at that time, to be less trusting of men as a result of the beating and attempted rape.

Ms. Wilson has written:

They say Manuel Babbitt was hallucinating when he beat and murdered Leah Schendel. They say he was suffering post-traumatic stress syndrome and thought he was back in Vietnam. He thought he was fighting the enemy, not Mrs. Schendel. He was sick, out of his mind, a victim.

How is it, then, that less than 24 hours later, Manuel Babbitt committed another violent crime and did so very purposefully, with a clear and precisely expressed goal. He knew what he was doing and why. No hallucination, no phantom battlefield. He spotted a car, recognized it as brand new by the new car sticker still appearing on the side window. He ran up to

the lone woman driver and grabbed her, stated to her "I want your car!" When she tossed away the car keys in her hand, he beat her savagely, pulled the jewelry off her body, stole from her purse, and attempted to rape her. Had the attack not been discovered, he would have continued to assault her until she was dead. I am sure of this. I am the victim. I was there. Miraculously, I survived. (Letter from Mavis S. Wilson to Hon. Gray Davis, Governor, April 14, 1999).

Heartfelt communications from Mrs. Schendel's family also describe the loss and anguish that they all feel because of the death of their beloved relative. Joyce Weinberg, a niece of Mrs. Schendel writes: "Our family has suffered extensively from the loss of dear Leah and this suffering has created an emptiness that can never be replaced. Our suffering has not lessened the emotional upheaval of this crime in over 18 years." (Letter to Governor Gray Davis from Joyce Weinberg, dated April 6, 1999.)

In addition to victims' families, we also look to the views of local law enforcement where crimes were perpetrated. Arturo Venegas, Jr., Chief of Police of the City of Sacramento, where these horrible crimes were committed, has also stated that "The Sacramento Police Department believes that the trial jury's decision and the court's sentence were correct and proper. This has been confirmed during eighteen years of appeals." (Letter from Arturo Venegas, Jr., Chief of Police to Governor Gray Davis dated March 30, 1999).

Finally, Laura Thompson, a granddaughter of Mrs. Schendel, wrote a letter on behalf of her family. In her March 11, 1999, letter she describes the suffering and anguish of the rest of the family and goes to the gist of the matter as she writes:

Mr. Babbitt's attorney would have us believe that he is the victim of a difficult and trying life and that his traumatic experiences in Viet Nam led him to commit the crimes that he committed. The simple truth is that he is nothing more than a criminal with a long history of violent crime, even before he came into contact with my grandmother. His vicious crime has left a tremendous void in our family, the kind of void that can never be filled. You cannot replace a loved-one. Even today, my grandmother's eighty-seven year old sister struggles with the loss of her sibling. Leah Schendel also leaves a brother, a son, and a host of grandchildren and great grandchildren to come to terms with this senseless crime. (Letter to Governor Gray Davis from Laura Thompson, dated March 11, 1999).

## VI. CONCLUSION

In 1982, Mr. Babbitt was duly tried, convicted, and sentenced for the brutal murder of a defenseless 78-year-old beloved mother, grandmother, and great grandmother, Leah Schendel. He was also duly tried, convicted, and sentenced for the senseless beating and attempted rape of

Ms. Mavis Wilson on the same day. He received a fair trial. Twelve jurors heard the evidence and at that time fully deliberated and decided to impose the death penalty rather than life imprisonment without possibility of parole, for the vicious murder of Mrs. Schendel. An experienced trial judge, who presided over the trial, agreed with the jury's verdict and sentence. In the intervening seventeen years, the state and federal courts, and most recently the Board of Prison Terms, have all considered, reconsidered, examined, re-examined, and fully weighed and re-weighed substantially all factual, legal and related arguments that Mr. Babbitt and his able counsel have raised.

Each and every one of these reviewing authorities has rejected the many arguments included in Mr. Babbitt's plea for clemency.

Nothing in this clemency petition can bring back the life of Mrs. Schendel or erase the pain that her family has experienced by her tragic loss. Nor can the residual trauma that Mr. Babbitt's other victim, Ms. Wilson, experiences daily can be wiped out.

When Mrs. Schendel, an elderly woman of slight stature, was beaten to death by Mr. Babbitt, a 31-year old able-bodied man, she left behind a loving family—brothers, sisters, children, grandchildren, and great grandchildren who have been denied the ability to know her and love her.

Mrs. Schendel's granddaughter's taped statement that was submitted by the District Attorney is poignant and strikes at the heart of the matter. Ms. Laura Thompson states:

Eighteen years ago the senseless actions of one man ended her life and left a devastating void in our family. My Grandmother was 78 years old when she died, a small, frail woman who was no match for the ex-marine who broke into her house and savagely attacked her, beating her until she lay dead at his feet. It was a brutal, vicious attack. I will never forget the feelings of horror I felt when I went with my family to her home a few days later. The place was turned upside down. There was blood on the walls in every room. Cabinet drawers had been pulled out, their contents strewn about the floor. I watched as my mother kneeled down and picked up a pillow that was saturated with blood. The sound of her heart-wrenching scream will follow me to my grave.

In the years that have followed our family has tried to come to terms with this unspeakable crime. My mother passed away a number of years ago. I don't believe that she ever fully recovered from this ordeal, never found a way to heal the sense of loss that troubled her heart until the end. Every member of our family continues to grieve in one manner or another and there are a lot of us, children, grandchildren, great-grandchildren, brothers, sisters, cousins and friends. We all look for answers that will never come.

Why did this innocent woman have to die? Why did she have to die so horribly or suffer the way she did? Why does our family have to live without one of its most important members? There are no answers to these questions." (Exhibit P, D.A.).

## VII. DECISION

After due deliberation of the record and submitted materials and the matters raised in those submissions, I am not persuaded that there is reason to overturn the jury's verdict and its affirmance by the judicial system of this state and the United States. On the basis of the record, no miscarriage of justice has occurred.

Accordingly, clemency is denied.

Dated: April 30 1999

A handwritten signature in black ink that reads "Gray Davis". The signature is written in a cursive style with a stylized initial "G".

---

GRAY DAVIS  
Governor

IN THE OFFICE OF THE GOVERNOR

STATE OF CALIFORNIA

)  
In the Matter of )  
) **DECISION**  
The Clemency Request of )  
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DARRELL KEITH RICH )  
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**I. INTRODUCTION AND DECISION:**

During a two-month period in the summer of 1978, Darrell Rich kidnapped, raped, and murdered four women - one of them an 11-year old child. Over the same two-month period, he also ruthlessly beat, sodomized, and raped four other young women. A ninth female victim was viciously beaten and left for dead because she rejected his sexual advances. Mr. Rich attacked most of his young victims when they were walking along the roadside, usually alone. The Ninth Circuit Court of Appeals three-judge panel that reviewed Mr. Rich's case noted, "To even the most hardened eye, the crimes were almost unimaginably brutal - savage attacks on defenseless young women, all sexually ravaged." (*Rich v. Calderon* (1999) 187 F.3d at 1067.)

Mr. Rich committed these horrifying crimes more than twenty-one years ago - nearly twice the lifetime of Mr. Rich's youngest murder victim, 11-year-old Annette Selix.

Mr. Rich does not dispute that he murdered four women. Nor does he dispute that he beat and raped four other young women. He made several detailed confessions, both to his friends and to law enforcement investigators. During a jury trial, Mr. Rich was clearly linked to these crimes by substantial physical evidence. The jury determined that Mr. Rich is responsible for these cruel attacks and brutal murders.

After a three-month trial, a Yolo County jury convicted Mr. Rich in December of 1980 of four murder counts and multiple counts of sodomy, forcible oral copulation, kidnapping, and rape. The jury found that Mr. Rich was sane at the time he committed each of these crimes, and determined that death was the appropriate punishment for two of the murders.

In dozens of procedural and substantive proceedings over twenty-one years, five different courts have reviewed Mr. Rich's case. Not a single court has found any reason to overturn the verdict of the jury.

The Board of Prison Terms considered the application for clemency on March 6, 2000, and issued its unanimous recommendation that clemency be denied.

I have considered Mr. Rich's clemency application and the submitted materials. Mr. Rich acted in a callous and almost unbelievably brutal manner when he kidnapped, raped, and murdered four women - one of which was an 11-year-old child. There is absolutely nothing about Mr. Rich's brutal behavior that warrants clemency. Clemency is denied.

## **II. BACKGROUND:**

### **A. The kidnapping, rape, and murder of Annette Edwards**

Annette Edwards, age 19, walked alone to Lake Redding Park to watch Fourth of July fireworks on the evening of July 4, 1978. Mr. Rich drove up beside her in his car and offered her a ride. She declined. A short time later, he approached her on foot, forcing her down a 50-foot slope from the side of the road. Mr. Rich then raped Annette. As he raped her, he attempted to quiet her cries by beating her in the head with a rock.

Mr. Rich arrived at the home of his girlfriend late on the night of July 4. When asked to explain a bleeding finger, he said he had hurt it by setting off fireworks in the park with a friend. That friend and several others denied that Rich had been at the park. During an argument a few days later, Mr. Rich told his girlfriend that he had killed a girl.

was discovered on July 7, 1978, at the bottom of a steep embankment along a road on the way to the park. Annette was lying on her back, with her slacks and underwear pulled down below her knees. Mr. Rich struck Annette in the face so hard that her jaw was crushed, the bone forced through her eye socket, skull, and brain.

### **B. The kidnapping, rape, and murder of Patricia "Pam" Moore**

Pam Moore, age 17, was staying in a motel during a 1978 summer visit to Redding. She left her motel room on August 3, leaving her luggage behind.



Mr. Rich picked up Pam Moore as she hitchhiked. He asked her if she wanted to "make love," and she refused. Mr. Rich drove Pam out to a remote area, where he raped and killed her.

weeks later at the Igo dump. She was seated in the lotus position, naked. The front part of her head had been crushed. Nearby rocks were found to contain Pam's hair, proving that the rocks had been used to crush her skull. Pam also had injuries to her neck, indicating that she had been manually strangled.

Mr. Rich later told several friends that he had killed Pam Moore because she was "in the wrong place at the wrong time."

### **C. The kidnapping, rape, and murder of Linda Slavik**

Linda Slavik was 28 years old in 1978, married, and the mother of a nine-year-old boy.

On the evening of August 8, 1978, she went to a Chico bar with a girlfriend. During the evening, Linda was seen in the company of Mr. Rich by another man at the bar. Linda disappeared while her girlfriend was away from the bar between 1 and 2 a.m. She was not seen alive again by her friends or family.

Mr. Rich later bragged to his friends that he had "punched-out" Linda Slavik in the bar's parking lot, and forced her into his car. While holding her head down, he drove to his home in Cottonwood, where he raped her. He then took her to the Igo dump where he left Pam Moore, whom he had killed five days before. Mr. Rich shot Linda a

Days later, in front of several friends, Mr. Rich reenacted how Linda had pleaded for her life. He imitated her female voice, crying, "Don't do it, don't do it!" Mr. Rich said he put a 22-caliber pistol in Linda Slavik's mouth and fired twice.

Mr. Rich took a friend of his to see the bodies of Pam Moore and Linda Slavik on August 20, 1978, on the

#### **D. The kidnapping, rape, and murder of Annette Selix**

Annette Selix, age 11, left her mother's home in Cottonwood to walk to a nearby store on the evening of August 13, 1978. At approximately 9:30 in the evening, Annette bought two tubs of margarine and several cans of soda at the Holiday Market. Annette's mother and the mother's boyfriend fell asleep that night without realizing that Annette had not returned.

That same evening, Mr. Rich argued with his girlfriend. He drove off alone. Mr. Rich encountered Annette at some point during her walk home. She probably had no reason to fear Mr. Rich, as Annette's family had known Mr. Rich for approximately eight years. Annette's mother had worked at the same company as Mr. Rich, and he had been to their home.

Mr. Rich kidnapped Annette on her walk home from the market. He drove her to his home, where he raped her, sodomized her, viciously bit her on the thigh, and beat her. He drove north from Cottonwood and stopped along a high bridge near Shasta Lake. Mr. Rich threw Annette from that 105-foot high bridge while she was still alive. Her bloodstained underpants. The coroner's report indicates that Annette survived lungs indicated that she had inhaled her own blood before she died.

When news of Annette's murder became public, Mr. Rich bragged to a friend that he had consensual sex with Annette Selix. Annette's groceries were later found at Mr. Rich's home. Two unused tubs of margarine were in Mr. Rich's refrigerator, Holiday Market bags were in his house, and several full cans of soda were in his burn pile.

### **E. Other assaults and rapes**

Between June 13, 1978, and July 19, 1978, Mr. Rich attacked five other women, who were between the ages of fourteen and twenty-five. His attacks were well-planned and described by one of his victims as "professional." His pattern was to kidnap each victim, force or drive the victim into an isolated area, and brutally assault her sexually. Mr. Rich raped and sodomized four of these women, all four of whom positively identified Mr. Rich as their attacker.

## **III. CLEMENCY PETITION**

Mr. Rich's (i) five-page clemency petition ("*Petition*," ) (ii) nine-page reply ("*Reply*") to the opposition by the District Attorney, and (iii) three-page letter dated March 10, 2000, raise four principal arguments for clemency:

- A. Remorse for the Crimes.
- B. Exemplary Institutional Record.
- C. Proposed Moratorium.
- D. Ethnic Background.

## IV. ANALYSIS

### A. Remorse

Mr. Rich claims that he "has been and is very remorseful about the pain he has caused to the family and friends of the deceased victims, as well as to the surviving victims." (*Petition at page 3.*) He states that his confessions to authorities, and his refusal to deny his involvement in the crimes, evidence his remorse.

The record does not support Mr. Rich's claim of remorse. Prior to his arrest, Mr. Rich did not go to the authorities. Instead, he led a friend to the bodies of two of his victims, claiming to have "found" them. Then, he bragged about his crimes to several of his friends, saying that he killed for money or because his rape victims could identify him. He even mocked one victim by imitating, in a high-pitched voice, how she pleaded for her life moments before he killed her. (*Reporter's Transcript (RT), pages 2912-2915.*)

Furthermore, Mr. Rich changed his physical appearance by shaving his face and cutting his hair after a detective told him that he resembled the composite sketch of the suspect in the murders. (*District Attorney's Opposition to Clemency at page 5; RT, page 2917.*) Mr. Rich made his confessions to police only after police questioned him as a possible witness in the Annette Selix murder, and only after he had failed a polygraph test.

Mr. Rich eventually confessed to his crimes in a methodical, organized manner. He wrote out a list of the crimes for which he claimed responsibility, and gave the list to an investigating detective. But while he readily admitted to these crimes, he did not appear to be remorseful. A 1979 psychological report by Dr. John Robinson stated that Mr. Rich had "an

apparent lack of genuine remorse" for his actions. (*Psychodiagnostic Evaluation by Dr. John Robinson, dated March 12, 1979.*)

As recently as February 10, 2000, a psychological evaluation of Mr. Rich states that he "has expressed no remorse, nor has he explained the motives for the crimes...." (*Evaluation by Jeanne Hoff, M.D., Ph. D., San Quentin Staff Psychiatrist, report dated February 10, 2000.*)

In his clemency petition, Mr. Rich claims that he now feels remorse. Even if his remorse were genuine, Mr. Rich himself states, "remorse will not bring the victims back to life, nor erase the suffering...inflicted." (*Petition at page 3.*) I agree. Remorse is not sufficient reason to halt the punishment that was appropriately imposed by a jury and affirmed by the state and federal courts.

### **B. Exemplary institutional record.**

Mr. Rich states that he has been a "model inmate" and that he has an "exemplary institutional record" in prison, arguing that he therefore merits clemency. (*Petition at page 4 and Reply at page 6.*) His petition cites no specific record of "model" or "exemplary" behavior other than a general reference to his entire prison file.

The record indicates that Mr. Rich does not appear to have misbehaved while a prisoner during his twenty years on death row. However, acceptable behavior while incarcerated is the State's legitimate expectation from every prisoner serving in California, and is not sufficient to override the verdict in a capital case.

Furthermore, Mr. Rich's contention that his prison behavior indicates that he is no longer a threat to others is not convincing. As Mr. Rich told friends, "Once you have killed, it is easy to kill again." (*RT, page 2885.*) In 1979, Mr. Rich also told psychologist Dr. Kaldor that it [a rape and murder by Mr. Rich] would "probably" happen again. (*Psychological report by Dr. Bruce Kaldor, dated March 20, 1979.*) Such statements override any mitigation by acceptable behavior in prison.

Whether or not Mr. Rich behaved appropriately while in prison, the fact remains that he sexually brutalized and murdered four women, beat another woman into unconsciousness, and viciously beat and raped another four women. The brutal and calculated nature of these callous crimes is not outweighed by acceptable behavior in prison.

### **C. Proposed Moratorium**

The arguments raised in the clemency petition regarding a proposed moratorium on death penalty executions are neither relevant nor appropriate, especially in this case, where there is no dispute over Mr. Rich's guilt or the appropriateness of his sentencing. Mr. Rich was convicted of these horrible murders and sexual assaults by a jury that found him guilty beyond a reasonable doubt. Furthermore, he has confessed repeatedly to these crimes, most recently in his Petition and his Reply.

### **D. Clemency Based on Ethnic Background**

Regardless of ethnicity, all people in California are held to the same standards under the law. No one's ethnicity should mitigate the brutal commission of four murders and multiple sexual assaults.

## **V. THE VIEWS OF VICTIMS OF VIOLENT CRIMES AND THEIR FAMILIES ARE A KEY CONCERN IN CLEMENCY PROCEEDINGS.**

The surviving victims and the families of all the victims of these crimes are a significant concern. They have suffered, and continue to suffer, greatly because of the heinous crimes of Mr. Rich.

Several of the surviving victims and members of the numerous victims' families have commented on Mr. Rich's plea for clemency. Even twenty-one years after Mr. Rich committed these crimes, these survivors continue to suffer pain, anxiety, fear, and a loss of peace.

Linda Slavik's son, Christopher, stated, "I was only 9 years old when Darrell Rich took my mother away from me. ... I suffered countless difficult times throughout my childhood and teenaged years as a result of Darrell Rich's actions. ... Because of the life he has so casually disregarded and discarded, and the agony his surviving victims will suffer to this day, clemency for Darrell Rich should not be granted." (*Transcript of Board of Prison Terms Executive Clemency hearing, March 6, 2000, pages 20-23.*)

One of the surviving victims of Mr. Rich relates that she has nightmares that will only end once Mr. Rich is dead. Another surviving victim states that Mr. Rich "still controls and victimizes [her] today," because she experiences panic attacks, and she fears any man who physically resembles Mr. Rich.

The heinous crimes that Mr. Rich committed caused, and continue to cause, immense pain for each of his surviving victims and the families of the murdered and surviving victims. They are not swayed by his plea for clemency and plead that the State's laws be carried out in Mr. Rich's case.

## **VI. CONCLUSION**

Mr. Rich was a ruthless predator who terrorized the entire Shasta County community during the summer of 1978. Before his arrest, the community coined the name "Hilltop Rapist" to describe the serial killer who stalked, brutalized, and murdered local young women and a little girl.

The Honorable Warren K. Taylor, who presided at Mr. Rich's trial, observed, "The manner in which each of these victims was killed showed a complete lack of regard for human life and involved brutal, barbarous methods of killing." (*Order Denying Application for Modification of Verdicts, Yolo County Superior Court, January 23, 1981.*)

For these heinous crimes, the jury has meted out a severe and just punishment. That punishment has been affirmed by the state and federal appellate courts. Nothing in Mr. Rich's Petition or Reply, or in the submitted materials, has made a convincing case for clemency, and I find no reason to grant clemency.

## **VII. DECISION**

I have reviewed the submissions in this matter and find no reason to overturn the decision of the jury and the many courts that have reviewed this case.

Accordingly, clemency is denied.



Dated: MARCH 10, 2000 \_\_\_\_\_

GRAY DAVIS

Governor

**IN THE OFFICE OF THE GOVERNOR  
STATE OF CALIFORNIA**

In the Matter of )

)

) **DECISION**

The Clemency Request of )

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STEPHEN WAYNE ANDERSON)

**I. INTRODUCTION AND DECISION**

Stephen Wayne Anderson has described himself as a professional burglar and "hit man." His record bears that out. By 1971, at the age of 18, he was imprisoned, first in New Mexico, then in Utah. In 1977 he murdered another inmate of the Utah State Prison. Two years later, he escaped from prison. In early 1980, while a fugitive, he committed at least one murder for hire in Utah.

By May 1980 he had drifted to San Bernardino County. There, he occupied an abandoned house from which, for several days, he watched the home of Elizabeth Lyman. Mrs. Lyman was an 81-year old retired teacher.

Shortly before midnight, on the eve of Memorial Day, 1980, Mr. Anderson dressed himself completely in black. He pulled on a pair of gloves and walked to Ms. Lyman's house. He knew Mrs. Lyman was home alone. So, he painstakingly broke into her house without a sound. With gun drawn, he went from room to room. He entered the bedroom and walked towards the

bed. When he was less than two feet away, Mrs. Lyman sat up. Mr. Anderson shot Mrs. Lyman in the face. He picked up the spent shell and left her to bleed to death as he ransacked the house. His burglary completed, Mr. Anderson cooked dinner and watched television in his victim's home until officers, alerted by a neighbor, arrived two hours later.

Caught at the scene, Mr. Anderson confessed with no show of remorse. He told officers of eight additional murders he claimed to have committed in Utah and Nevada. Two of these were confirmed. The homicide sergeant said that in his 25 years investigating 200 murders, Mr. Anderson's crime was the most cold-blooded he had seen:

"During my 25 years in law enforcement, I have come across a lot of cold-blooded individuals ... but in my opinion, Stephen Wayne Anderson is without doubt the coldest I have ever dealt with. I think that if you had any item that Anderson wanted he would kill you and take it without giving it a second thought. The death penalty is a fair and just punishment for him."  
(Letter of Sergeant Dennis O'Rourke.)

Mr. Anderson was brought to trial the next year. He was convicted and sentenced to death. In 1985 his sentence was set aside due to errors in the jury's instructions. In 1986 a second jury retried the special circumstances and penalty issues. That jury, too, imposed the death penalty.

Judge Turner, who presided over Mr. Anderson's retrial, concluded that he has absolutely no concern for other people's rights or lives: "I think he is the type of a person who really doesn't care whether somebody else lives or dies

at all and if it suits his convenience that somebody else dies and it's within his power, they die. [I]f there is to be a death penalty, there is no legitimate excuse why it should not be applied to his case."

In numerous proceedings over the following 16 years several state and federal courts have reviewed Mr. Anderson's case. No court found any reason to overturn the jury's verdict. Twice the California Supreme Court unanimously upheld his sentence. Twice the United States Supreme Court unanimously refused to entertain his claims. The San Bernardino Superior Court has scheduled his execution for January 29, 2002.

Mr. Anderson submitted an extensive clemency petition, including four volumes of exhibits. It was considered by the Board of Prison Terms on January 18, 2002. The Board unanimously recommended against clemency.

I have thoroughly reviewed and considered the arguments and materials Mr. Anderson submitted. I have also reviewed the response of the San Bernardino District Attorney. In addition, I have considered the written opinions of the courts that adjudicated Mr. Anderson's case.

Mr. Anderson has spent time in prison enjoying academic and artistic pursuits. He has written extensively. There are people who care for him.

There is no dispute that Mr. Anderson, with an IQ of 136, is an extremely intelligent man. But his intelligence, ironically, also makes the brutality and indifference of his crimes all the more reprehensible. Clearly he had the capacity to know better. Clearly he has the capacity to accept responsibility

for the consequences of his actions. The fact remains that, despite his intellect, Mr. Anderson committed at least three cold-blooded, heartless murders.

I cannot conclude that the factors that weigh in favor of clemency outweigh those on the other side of the scale. Mr. Anderson chose to pursue a lifetime of crime. He confessed to multiple, cold-blooded murders. Mr. Anderson was duly tried and convicted of the cold-blooded murder of a defenseless 81-year old grandmother as she slept in her bed. Two different juries imposed the death penalty. His sentence was repeatedly reviewed and affirmed by numerous state and federal courts over the past 20 years, including twice by the California Supreme Court. There is no question of his guilt. I can find neither a miscarriage of justice nor sufficient mitigating factors to stay the course of justice. Clemency is denied.

## **II. BACKGROUND**

### **A. The Murder of Elizabeth Lyman**

The facts of the crime were largely undisputed at trial. In May 1980 Elizabeth Lyman was an 81-year old grandmother and retired teacher. She lived alone in her house in Bloomington, San Bernardino County. There she had lived for 40 years; there she raised her daughters. Mr. Anderson was a 26-year old escapee from Utah State Prison. He described himself as a professional burglar and "hit-man." He was a fugitive, aimlessly riding the rails, when he decided to stay in a vacant house in Bloomington. For several days, he watched Mrs. Lyman's house, which was nearby. Knowing the

house and its occupant were vulnerable, Mr. Anderson decided to burglarize them.

Mr. Anderson arrived at Mrs. Lyman's home a little before midnight on the eve of Memorial Day, May 26, 1980. Having observed her habits, he knew that she would be home alone. An experienced burglar, Mr. Anderson was dressed completely in black and wore gloves. He was armed with a loaded .45 caliber pistol, the safety disabled by tape. Mr. Anderson later stated that he carried a gun during his burglaries to intimidate anyone he encountered. He had used his gun in a number of prior burglaries.

Mr. Anderson cut through a screen on the rear door of Mrs. Lyman's house and entered the patio. Using a knife he removed hinge pins from a second door leading to the kitchen, but was unable to gain entry. He worked for an hour to remove molding from around a pane of glass on the interior door before he was able to remove it and reach inside to open the door. Mr. Anderson gained entry shortly after 1:00 a.m. He made his break-in with a great deal of care and caution to avoid waking anyone, later bragging to officers that he was a good, professional burglar. He used the nickname "El Gato" (the cat), proud of his prowess as a cat burglar.

Once inside and seeing a light on in the living room, Mr. Anderson located and cut the telephone line as a precaution to prevent anyone from telephoning for help. He said he did this out of "habit" as a burglar. With his gun in hand, he began checking each room. He testified that he had his gun drawn because he might have to use it if there were residents. When he entered Mrs. Lyman's bedroom, she awoke terrified and screamed as she sat

up in bed. Mr. Anderson immediately shot her under the left eye with a hollow-point bullet from a distance of less than two feet. He told officers, "I just turned and fired - what can I say?" He explained, "I sleep with my gun. Somebody come at me and I'm going to blow them away. You know, that's the first thing I thought of."

Although rendered unconscious, Mrs. Lyman did not die instantly. Medical experts testified that she bled to death over period of a few minutes. Mr. Anderson testified that after shooting Mrs. Lyman, he "got his senses together" and continued with the burglary. First, he looked through a window to see if anyone heard the shot. Then he returned to the bedroom. He threw some blankets over Mrs. Lyman and picked up the incriminating shell casing, which had been expelled from his gun. For the next two hours he methodically ransacked each room of the house looking for money everywhere it could be "stashed." He found \$112.

His search completed, Mr. Anderson turned on the television, cooked a dinner of noodles, poured himself a glass of milk and sat down in Mrs. Lyman's kitchen to eat. Mr. Anderson later told a psychiatrist that he was not concerned about killing Mrs. Lyman when he prepared dinner, saying her murder did not upset his stomach because he "blocked it out."

A suspicious neighbor observed Mr. Anderson in the house and called authorities. He was still eating when three San Bernardino County Sheriff deputies arrived. His first thought was to kill the officer approaching the door, but he quickly realized there were more officers. He later told investigators his motto was "when the police come after you [and] you [are] outnumbered, you don't have a gun-down unless you have enough artillery."

Mr. Anderson met deputies at the door. Told by deputies that they were investigating suspicious circumstances, he demanded to know if they had a warrant. He told them that he lived there. He said he was Mrs. Lyman's son and she was asleep. As they talked, the deputies saw Mr. Anderson attempting to remove his gloves. When asked for identification, he pretended he left his identification in another room and sought to escape the house. However the deputies had stationed men at each exit, and Mr. Anderson ran directly into an officer.

Mr. Anderson struggled briefly, but was subdued. Deputies discovered and confiscated his gun. He later told officers, "If I'd have had my M-1 carbine ... I'd have come out [fighting] but I didn't have it." Once handcuffed, deputies asked Mr. Anderson where Mrs. Lyman was. He replied simply, "she screamed."

Mr. Anderson had the murder weapon, the spent cartridge, gloves, a knife and the hinges from the kitchen door in his possession when arrested. He laughed as he subsequently described his arrest to sheriff investigators: "They come up to the door, and there I was standing there, black turtleneck with gloves on and I says, 'Oh, I live here.' They caught me cold. I mean, you know, I was stupid to stay there." He also joked, "You guys didn't let me finish [eating]."

After Mr. Anderson was transported to the station, deputies found a handcuff key under the back seat of the patrol car. He admitted the key was his and that he had intended to use it to escape, but the handcuffs were too tight. Mr.



Anderson's wallet had identification for "Robert McKenna," but he told officers he was "Felix Smith." He admitted that his hair was dyed and that he frequently changed its color. Mr. Anderson eventually volunteered that he was an escapee from prison in Utah. When San Bernardino County Sheriff deputies contacted Utah officials, they learned that "Felix Smith" was his alias.

Following his arrest, Mr. Anderson freely and fully confessed to the burglary of Mrs. Lyman's home and to shooting her. He stated that he had cased her house for several days, checking the mailbox and newspapers. He repeated his confession three hours later on film after detectives took him back to Mrs. Lyman's house. He repeated his confession again two days following his arrest in an interview with psychiatrist Dr. Flanagan. Based upon his interview, Dr. Flanagan concluded that Mr. Anderson was sane, oriented and sober at the time of the crime.

Mr. Anderson did not present a defense at the guilt phase of his trial. During the retrial of the penalty phase he agreed that the jury's verdict was "righteous." He also stated that Mrs. Lyman did not deserve to die, explaining, "She couldn't have done me any harm." In fact, Mrs. Lyman was only 5'2" tall and weighed 145 pounds.

In 1981 a jury convicted Mr. Anderson of first degree felony murder with special circumstances and sentenced him to death. The California Supreme Court affirmed the conviction, but set aside the special circumstances finding and penalty due to a failure to instruct the jury that it had to find that Mr. Anderson had the intent to kill, as then required by California law.

On retrial in 1986, a second jury found that the murder of Mrs. Lyman was intentional and again imposed the death penalty. The California Supreme Court unanimously upheld this judgment, and the United States Supreme Court unanimously denied his petition for certiorari. The California Supreme Court unanimously denied his subsequent petition for habeas relief. Thereafter the United States District Court and Ninth Circuit Court of Appeals upheld Mr. Anderson's conviction and sentence. The United States Supreme Court again unanimously denied his petition for certiorari. Mr. Anderson sought a renewed petition for rehearing, which was again denied by a majority of the justices of the Ninth Circuit Court of Appeals.

#### **B. Mr. Anderson's Prior Murders**

When he murdered Mrs. Lyman, Mr. Anderson was an escapee from the State of Utah, where he had been serving sentences for convictions of burglary and aggravated assault upon an inmate with a knife. During his initial confession to Mrs. Lyman's murder, he volunteered that he had committed two other murders in Utah and six additional contract murders as a hit man in Las Vegas. These were unsolved crimes, of which the San Bernardino County Sheriff deputies were unaware. While officials were unable to verify the six murders he claimed to have committed in Las Vegas, the two Utah murders were confirmed and presented to the jury in determining Mr. Anderson's sentence.

##### **1. The Murder of Robert Blundell**

Mr. Anderson told authorities that in 1977, while an inmate in Utah State Prison, he stabbed and killed fellow inmate Robert Blundell. He recounted

that the two were working in the kitchen when they got into an argument over Mr. Blundell's reputation as an informant. When Mr. Blundell went into a cooler to get some milk for his coffee, Mr. Anderson picked up a large kitchen knife, followed him into the cooler and stabbed him. In Mr. Anderson's words, "I ran him straight through" low in the stomach.

Mr. Anderson left the area and began washing off the knife, but Mr. Blundell managed to walk out of the cooler. When Mr. Blundell slipped and fell, Mr. Anderson went over and stabbed him approximately six more times, killing him. Splattered with blood on his face, shirt and shoes, Mr. Anderson threw the knife into the sink with the water running and went to the prison laundry to change clothes. Thinking that officers would eventually check the laundry, he cut the numbers off his clothes and threw them in the trash.

Mr. Anderson explained that he killed Mr. Blundell because "he got in my face at the wrong time and probably caught me in the wrong mood you might say." His confession was consistent with the physical evidence at the scene and Mr. Blundell's autopsy. In addition, he provided details that could only be known to law enforcement or the killer, and Utah authorities had always considered him a prime suspect in Mr. Blundell's murder.

## **2. The Murder of Timothy Glashien**

Mr. Anderson also told officers that after he escaped from prison in Utah in November 1979, he was hired by a group of drug dealers in Salt Lake City to kill Timothy Glashien, who they suspected was an informant. He explained that he picked up Mr. Glashien in Salt Lake City and drove him to

a remote area in the mountains where Mr. Glashien had been led to believe a drug transaction would take place. Mr. Anderson shot him twice in the chest and then twice in the head from a distance of 2 or 3 feet. Mr.

Mr. Anderson told officers he had used the same gun that he used to kill Mrs. Lyman. This was confirmed by scientific tests. Mr. Anderson told officers he owned the gun since he was a "youngster" and that friends had "stashed" it for him while he was in prison. He said he was paid \$1,000 for murdering Mr. Glashien. In describing the murder he told officers, "You gotta figure a killing for hire is safe." When Mr. Anderson was booked for the killing of Mrs. Lyman, one of several aliases he gave officers was "Timothy Glashien."

Mr. Anderson had been a suspect in Mr. Glashien's murder, his account was consistent with the evidence and he described details that only law enforcement or the killer would have known.

### **C. Mr. Anderson's Prior Criminal History**

Mr. Anderson has been in prison, on parole or a fugitive his entire adult life.

#### **1. The New Mexico Burglaries**

Mr. Anderson was arrested for several thefts and burglaries as a juvenile. In 1970, at age seventeen, he left home and dropped out of school in Farmington, New Mexico. He lived in the hills and committed burglaries for income. The record contains no evidence that he sought gainful employment. In 1971 he was arrested for burglary, but was reportedly given the option of joining the Army to avoid jail. However, he did not fit in and,

after just thirteen weeks, was absent without leave ("AWOL"). Eventually, he was given an undesirable discharge.

On November 19, 1971, at about 10:45 p.m., police officers in Farmington, New Mexico, responded to a report of burglary at a school. Upon arrival they found a broken window. Officer McQuitty took a position outside with his spotlight on the building, while Officer Hardy went inside and began checking the rooms. When Officer Hardy turned the light on in one classroom, he saw Mr. Anderson standing at a window with a Winchester rifle pointed out the window in the direction where Officer McQuitty was standing. Mr. Anderson had his hand in the trigger area. He turned and pointed his gun at Officer Hardy, who drew his weapon and ordered Mr. Anderson to drop the rifle. For a second Mr. Anderson continued to point his gun at Officer Hardy, but then dropped it. (At trial, the officer testified that the rifle had a bullet in the chamber and was in condition to fire.)

Upon his arrest, Mr. Anderson admitted to committing several other burglaries. He pled guilty to aggravated burglary and was sentenced to 1-to-5 years in prison. He served seven months before being paroled to a halfway house. But he violated his parole by leaving the halfway house, and resumed committing burglaries.

On May 3, 1973, Mr. Anderson was arrested for three more counts of burglary. He again pled guilty, and this time was sentenced to 10-to-50 years in prison. Mr. Anderson arrived in New Mexico Prison in March of 1973. In 1975 he was transferred to Utah State Prison to complete his sentence.

## **2. The Utah Aggravated Assault by an Inmate**

On April 4, 1976, while in Utah State Prison, Mr. Anderson stabbed fellow inmate William Allen Austin with a knife as they watched a movie. The stabbing was over a debt. He pled guilty to aggravated assault by a prisoner by use of a deadly weapon.

### **III. CLEMENCY PETITION**

Mr. Anderson's 62-page clemency petition ("*Petition*"), 40-page reply to the response by San Bernardino County District Attorney Dennis Stout ("*Reply*") and 90 supporting exhibits raise nine principal arguments for clemency:

- A. Extenuating Circumstances of the Crime
- B. Mitigating Circumstances
  - C. Ineffective Assistance of Counsel
  - D. Misconduct by the State
  - E. Respect for the Victims' Families
- F. Support by Some Jurors
- G. Suffering of Mr. Anderson's family
  - H. Remorse for the Crime
- I. Institutional Record and Accomplishments

### **IV. ANALYSIS**

It is noted that many factual assertions made in the clemency petition are not supported by the evidence and record in this case.

#### **A. Extenuating Circumstance of the Crime**

Mr. Anderson asserts that the death penalty is excessive due to what he calls "extenuating circumstances" of his crime. (*Petition* at pages 7-9.) He alleges that the killing of Mrs. Lyman was not premeditated or intentional, he was inebriated at the time and that he suffered from an impaired mental state. These arguments were presented to, and rejected by, the jury. I agree. Based upon my review, these contentions are refuted by the evidence - including Mr. Anderson's own statements.

### **1. Mrs. Lyman's Murder was Intentional**

Mr. Anderson decided to burglarize Mrs. Lyman after watching her house and habits for several days, knowing the elderly woman lived alone and would be asleep. He broke in after midnight, taking great care so as not to awaken her. Once inside, he cut the telephone line and then proceeded room-to-room looking for Mrs. Lyman, his gun drawn and the safety disabled. Finding her in bed, Mr. Anderson shot her in the face from less than two feet away with a hollow-point bullet intended to cause maximum harm. He then left her to bleed to death as he spent two hours in her house cooking and eating dinner while watching television.

The sole issue that required retrial of the special circumstance phase was whether Mr. Anderson had the intent to kill Mrs. Lyman. The jury was instructed that it had to make this finding, and it did. The petition still argues that Mr. Anderson shot Mrs. Lyman spontaneously out of fear, not intentionally. (*Petition* at page 8.) However, this is entirely inconsistent with his actions. First, if the shooting were truly accidental, one would expect Mr. Anderson to call for help, rather than let Mrs. Lyman bleed to death. Second, as the California Supreme Court observed, the fact that he had the presence

of mind to cook and eat dinner calmly after killing Mrs. Lyman indicates a lack of concern or remorse expected of an accidental or unintentional killing. (*People v. Anderson* (1990) 52 Cal.3d 453, 471.)

Judge Donald A. Turner, who presided at Mr. Anderson's trial, summarized: "The jury did not believe and I do not believe that there was any sudden startling event that caused the gun to sort of fire spontaneously when the woman woke up. I think the evidence indicates that he decided it was simply easier to dispose of Mrs. Lyman as a potential witness than to try to quiet her down and tie her up and calm her hysterics and go about the burglary and perhaps face her in court at some later time." (*Reporter's Transcript (RT)* at page 5484.) Based upon my review of the record, I agree.

## **2. Mr. Anderson Was Not Inebriated**

Mr. Anderson alleges that he drank a pint of vodka on the evening of the crime. (*Petition* at page 7.) This claim is inconsistent with the record. When sheriff deputies first encountered him, he displayed no signs of being under the influence of alcohol, had no odor of alcohol, and his ability to walk and speak were not impaired. A test taken after his arrest showed a zero blood-alcohol level.

Additionally, in his confession Mr. Anderson denied consuming any alcohol on the night of the murder. When filming a second confession three hours after his arrest, he told officers that he was not drunk and was fully aware of what was going on during the crime. He later told officers that he was "cold sober," explaining he was a professional burglar who would never commit a crime like that unless in full control of himself and his faculties. (*RT*, pages



5484-5485.) Finally, two days following his arrest, he told psychiatrist Dr. Flanagan that he was "sober" when the killing took place and that the alcohol he had consumed several hours earlier had no influence on his actions.

Mr. Anderson now asserts that his blood-alcohol level at the time of the crime was .16. (*Reply* at page 19.) This is twice the blood-alcohol level allowed for driving a car. But such inebriation is inconsistent with the record. Mr. Anderson's methodical planning and meticulous execution of his crime refutes the notion that he was inebriated when he killed Mrs. Lyman. As the Ninth Circuit Court of Appeals found, "...the manner in which Anderson admitted to breaking into Mrs. Lyman's residence required a degree of mental acuity and dexterity uncharacteristic of a highly intoxicated person." (*Anderson v. Calderon* (9<sup>th</sup> Cir 2000) 232 F.3d 1053, 1083.) The United States District Court was more direct: "The evidence presented ... led to only one reasonable conclusion - Anderson was sober when he entered the Lyman residence and was sober when he shot and killed Mrs. Lyman." (*Anderson v. Calderon* (C.D.Cal. 1998) CV92-0488 [Order on Record Based Claims] at page 9.) The trial judge also found the claim that Mr. Anderson was inebriated contrary to the evidence, his statements and the officers' observations. "There is nothing to indicate that there was anything that deprived him of his normal rationale and thinking." (*RT* at page 5485.) Those courts that have reviewed the facts found no evidence to support Mr. Anderson's claim that he was inebriated when he planned and carried out this crime. My own review of the facts confirms that. I cannot find any basis to conclude that Mr. Anderson was intoxicated when he committed the crime. Indeed, all of the evidence is that he was sober.

### **3. Mr. Anderson's Mental State Was Not Impaired**

Mr. Anderson asserts that he has post traumatic stress disorder, resulting from what the Ninth Circuit Court of Appeals described as a horrible event he suffered in the past. (*Petition* at page 8.)<sup>[1]</sup> He alleges that, because of this impairment, he shot Mrs. Lyman "spontaneously" out of fear, not knowing she was there. (*Petition* at page 8.) While I accept that Mr. Anderson suffered through a terrible event, I find no evidence that it resulted in any lasting mental impairment sufficient to excuse his conduct.

This argument was also presented to, and rejected by, the jury. As with the related claim of inebriation, the assertion that Mr. Anderson was suffering from any mental impairment is refuted by his methodical, well-planned actions before, during and after murdering Mrs. Lyman. It is also inconsistent with his confessions, which included several statements indicating that he knew exactly what he was doing that night.

Mr. Anderson has an IQ of 136. Two days after the murder Dr. Flanagan found him to be sane and oriented at the time of the crime, competent to stand trial and not suffering from any mental disease or defect that substantially impaired his capacity to appreciate the nature of his conduct. At trial, a second psychiatrist testified that there was no evidence of brain impairment or damage to support the claim of diminished capacity. In upholding his conviction the Ninth Circuit Court of Appeals stated, "While there was some evidence of diminished capacity, it was slight. In contrast, there was an overwhelming amount of evidence illustrating that Anderson was fully aware of his actions on the night in question." (*Anderson v. Calderon, supra*, 232 F3d. at page 1083.)

As recently as December 21, 2001, the Chief Psychiatrist at San Quentin examined Mr. Anderson and found no indication of any psychotic or organic impairment of his thought process. During the interview Mr. Anderson said, "I am as sane as you can get."

#### **4. Mr. Anderson Committed a Barbaric Crime**

Mr. Anderson states that his shooting of 81-year old Mrs. Lyman in the face from less than two feet away and then leaving her to bleed to death while he spent two hours in her house cooking dinner and watching television was "neither gruesome nor heinous." (*Petition* at page 7.) He argues there is nothing to distinguish his crime from other killings committed during burglaries that were not charged as capital crimes.

While proportionality in the application of the death penalty is an appropriate factor to consider, Mr. Anderson's argument is premised upon a distortion of the facts of his crime. As discussed above, his murder of Mrs. Lyman was planned, methodical and cold-blooded. The victim, an 81-year old grandmother, living alone and asleep in her bed, was particularly vulnerable. His statement that he would have initiated a gun battle with officers had he been better armed further evidences his readiness to react violently when given the opportunity. Years later, while being transported from San Bernardino to San Quentin, Mr. Anderson told officers that, if they knew what really had happened to Mrs. Lyman, it was so bad that they would want to "blow his head off." The District Attorney calls Mr. Anderson's crime barbaric and brutal. (*District Attorney's Response* at page

13.) I agree. There are no extenuating circumstances making the sentence imposed by two different juries excessive.

**B. Mitigating Circumstances of Mr. Anderson's Childhood and History**

Mr. Anderson's petition and exhibits discuss at length his childhood and the incident of particular violence he suffered as a young man. (*Petition*, pages 14-30.) It is argued that the "tragic circumstances" of his life justify clemency. First, it must be observed that the statements presented in the clemency petition are inconsistent with Mr. Anderson's testimony in court.

Declarations were submitted with the clemency petition to show that Mr. Anderson had an abusive, loveless childhood. However, these are inconsistent with his own testimony that his father was a "good man," a "fair" man who was gone a lot because of his work. He also testified that he got along all right with his mother, saying that he had the "usual" mother-son relation. He told his attorneys and defense investigators that he had a "normal family environment" and did not tell them of any physical or emotional abuse or neglect.

Mr. Anderson's background is a proper factor to consider in a plea for mercy. Perhaps there is some truth to each version of Mr. Anderson's background. However, even if I were to accept as true the information presented in the declarations, it cannot justify or excuse his repeated, cold-blooded killings.

As difficult as Mr. Anderson's childhood and prison experiences may have been, they do not excuse his life of crime - much less the multiple murders

he claimed to have committed. As the District Attorney states, "Many people throughout the world undergo similar or worse childhood experiences, but they choose not to lead a life of crime and they do not kill others." (*District Attorney's Response* at page 21.) I agree. The mitigating factors presented are not sufficient to merit clemency.

### **C. Ineffective Assistance of Counsel**

Mr. Anderson's present attorneys argue at length that his death sentence is "unreliable" because his two trial lawyers were allegedly ineffective. (*Petition*, pages 14-42.) The petition cites a host of supposed failings, ranging from the lead attorney's argument to the accuracy of his billings. These charges have been repeatedly reviewed and rejected. The California Supreme Court unanimously rejected this claim, as did the United States District Court following an exhaustive eight-day, evidentiary hearing. The District Court's 130-page decision was thoroughly reviewed by the Ninth Circuit Court of Appeals, which twice denied the claim that Mr. Anderson was denied effective representation. Twice the United States Supreme Court unanimously refused to accept the argument. I have reviewed his claims and find them unpersuasive. The major allegations are as follows.

#### **1. Failure to Present All Evidence Available in Mitigation**

Mr. Anderson argues that a more detailed account of the circumstances of his childhood and the violence he suffered should have been presented. However, much of this material *was* presented at trial. Mr. Anderson gave over 100 pages of testimony describing his childhood and experiences in prison, and their effect upon him. (*RT*, pages 4660-4761 and 4989-4996.) The second jury also received evidence of his writings and heard his "death

row redemption" defense, claiming that he matured and redeemed his life while in prison following his conviction.

Whether additional material would have produced a different result is entirely speculative. But Mr. Anderson's trial attorneys cannot be faulted for failing to stress his childhood because the simple fact is that Mr. Anderson testified about his childhood. As noted above, his sworn testimony was of a "usual" mother-son relation and a father who was a "good man." Indeed, Mr. Anderson told the jury that he did not ask his father to attend the trial because, "this is my own affair. I put myself in this position. He didn't."

Mr. Anderson's current lawyers also fault trial counsel for not calling other witnesses to discuss Mr. Anderson's childhood. But the evidence is clear. Mr. Anderson directed that his family not be called to testify. Despite that, trial counsel did try contacting his family to obtain additional testimony. Yet several potential witnesses, such as Mr. Anderson's father, stepmother and the mother of one of his sons, refused to testify. In addition, at the time of trial, his brother failed to provide defense investigators with the information now offered in his declaration. When all is said and done, Mr. Anderson does not deny that his trial attorneys presented precisely the defense that he requested and directed.<sup>[2]</sup>

## **2. Failure to Challenge Mr. Anderson's Confession to the Utah Murders**

Mr. Anderson's current attorneys assert that trial counsel should have put on evidence "contradicting" his confessions to the murders of Mr. Blundell and Mr. Glashien. (*Petition* at page 37.) The Ninth Circuit aptly dismissed this

argument as "bordering on the ridiculous" given that the core of the defense strategy was Mr. Anderson's own testimony. Attempting to refute his prior confessions would weaken Mr. Anderson's credibility with the jury.

More to the point, trial counsel can hardly be considered "ineffective" for refusing to suborn perjury. Mr. Anderson confessed to the murder of Mr. Glashien. His attorneys believed him. For them to present false evidence would be an unethical fraud on the court. (*Anderson v. Calderon, supra*, 232 F.3d at page 1095.) The failure to present false evidence does not constitute ineffective assistance of counsel.

### **3. Inadequate Defense at the Guilt Phase**

Mr. Anderson was charged with one count of burglary and one count of murder, with the special circumstance that the murder occurred during the commission of a felony, i.e. the burglary. If convicted of "felony murder," Mr. Anderson faced the death penalty. (Pen. Code 190.2(17)(G).) In an attempt to avoid the death penalty, his trial attorneys argued that the jury should find him guilty of murder without the special circumstance.

Mr. Anderson's present attorneys criticize this strategy. They argue that, in conceding Mr. Anderson committed murder, trial counsel "abandoned" their role as advocates and "served instead as an adjunct to the prosecution." (*Petition*, pages 35 and 42.) After extensive review, including a full evidentiary hearing, the United States District Court and Ninth Circuit Court of Appeals both rejected this claim. I have considered Mr. Anderson's arguments and the trial record. I agree with the decision of the federal courts.

As the District Court noted, Mr. Anderson's trial attorneys faced a "Herculean task" in defending him at the guilt phase. He was arrested at the scene in possession of the murder weapon, admitted to the burglary and murder, stated that he was sober and there was no evidence that he was intoxicated or mentally impaired. The Court concluded that his attorneys "essentially had no defense." (*Anderson v. Calderon, supra*, (C.D.Cal. 1998) CV92-0488 [Order on Evidentiary Hearing Claims] pages 15-16.)

Realizing that the jury was unlikely to acquit, Mr. Anderson's attorneys made a strategic calculation to seek conviction upon murder alone. This strategy had two possible benefits. One, if successful, it would spare their client the death penalty. Two, if not successful, at least it would preserve the defense's credibility with the jury for the separate penalty phase yet to come. As the Ninth Circuit Court of Appeals explained, in hindsight it is very easy to criticize counsel's argument as risky. But trial counsel made a reasonable decision that his only hope for a defense centered on avoiding conviction under the felony murder rule, believing it unlikely the jury would let Anderson off the hook completely. "Anderson simply cannot demonstrate that there was a reasonable probability' that the result of the trial would have been different had this argument not be made." (*Anderson v. Calderon, supra*, 232 F.3d at 1089-1090.)

The District Court and Ninth Circuit Court of Appeals both concluded that Mr. Anderson's trial counsel were not ineffective in selecting this strategy, given the limited options available. While his present attorneys now criticize this strategy, I note they do not explain what trial counsel should have done differently in this regard.



#### **4. Other Cases Handled by Trial Counsel**

The petition makes much of the fact that one of the trial attorneys had convictions in two unrelated death penalty cases overturned. (*Petition*, pages 31-39.) The United States District Court addressed this claim and correctly noted that the United States Supreme Court has ruled that any claim of ineffective assistance of counsel must be resolved on the facts and circumstances of the present case - not the attorney's conduct in any other case.

Mr. Anderson's lead attorney at trial was an experienced attorney who had tried some 25 homicide cases. In two of those 25 cases his representation was deemed inadequate. However the facts of those two cases are very different and have no bearing on this case. Indeed here, the courts have found that the trial attorneys' representation was not deficient at the guilt, special circumstances or penalty phases. (*See, e.g. Anderson v. Calderon, supra*, (C.D. Cal. 1998) [Order on Evidentiary Hearing] pages 9, 16, 26 and 38.)

Judge Turner, who presided over the trial, stated that Mr. Anderson received a fair trial: "He had excellent representation. Every possibility that could be explored was explored." (*RT* at page 5486.) The Ninth Circuit Court of Appeals was more to the point: "The fact remains that the defendant is guilty of a cold blooded murder." Even if trial counsel had done what present counsel suggest, the result would have been no different. (*Anderson v. Calderon, supra*, 232 F.3d at 1097-1098.)

I agree. While another attorney might have employed a different strategy or trial tactics, this does not mean Mr. Anderson's counsel were ineffective. The question is whether Mr. Anderson received a fair trial conducted by counsel who did a capable job of presenting the case created by defendant's actions. They did.

**D. Misconduct by the State**

Mr. Anderson asserts that his sentence was "procured through State misconduct," and that "many" judges have found serious constitutional errors and unfairness. (*Petition* at page 43.) His major complaint is that he was not arraigned within 48 hours of arrest, during which time he confessed to the two Utah murders. (*Petition*, pages 44-45.) Mr. Anderson's claims of State misconduct were thoroughly reviewed and rejected by the United States District Court and Ninth Circuit Court of Appeals. To the extent the clemency petition raises a point of law, it has been determined, adverse to Mr. Anderson, by the appropriate courts and I do not disagree with them. To the extent the petition raises a matter of equity, I have explored it, considering, among others, the facts set forth below. I find Mr. Anderson's treatment by law enforcement to be fair and appropriate.

Mr. Anderson was arrested at 3:37 a.m. on Monday, May 26, 1980, Memorial Day. At 6:00 a.m. San Bernardino County sheriff detectives sought to interview him. They read him his *Miranda* rights. Mr. Anderson waived his rights. He confessed to the murder of Mrs. Lyman crime and volunteered to tell about additional murders he had committed in Utah. However, he said he first wanted to meet with officials from Utah. The detectives respected that request. As Mr. Anderson asked, they called for a

sergeant from the Salt Lake County Sheriff's Office. He arrived on May 28, 1980. Mr. Anderson was again advised of his *Miranda* rights. Again he waived his rights. He confessed to the murders of Mr. Blundell and Mr. Glashien.

Ten years later, the United States Supreme Court ruled that individuals should generally be arraigned within 48 hours of arrest. Mr. Anderson argues that since he was not arraigned until May 29, 1980, his confessions to the two Utah murders should have been suppressed. But there is little equity in that position in this case. Here, the delay was the result of Mr. Anderson's request to meet with Utah officers. The San Bernardino County Sheriff's detectives accommodated that request. Moreover, when the Salt Lake City officer arrived, Mr. Anderson freely confessed to the murders of Mr. Blundell and Mr. Glashien, as he had to the murder of Mrs. Lyman. I agree with the Ninth Circuit: the investigation was "remarkably free" of any pressure or tactics designed to induce him to talk. (*Anderson v. Calderon, supra*, 232 F.3d at page 1068.) There was nothing inherently inequitable about Mr. Anderson's treatment by law enforcement officials. Indeed, there appears to have been no official misconduct at all.

Mr. Anderson did not receive the death penalty because of misconduct by law enforcement officers. He was sentenced to death because on at least three different occasions he committed cold-blooded murders. There is no equity in his position that his confession to the Utah murders should have been suppressed because the San Bernardino officers did what Mr. Anderson requested - bring a Salt Lake City officer to hear his confession to those crimes.

### **E. Respect for the Victims' Families**

The views of the victims' families are a key concern, since *they* are the ones who continue to suffer the most as a result of Mr. Anderson's murders. Here, Mrs. Lyman's son-in-law submitted a statement on behalf of himself and two of her daughters requesting to be "left out" of the clemency process, explaining they do not want or need Mr. Anderson to pay with his life for her death. The mother of Mr. Blundell submitted a similar statement on behalf of herself and her two sons. There was no submission from Mr. Glashien's family.

The District Attorney questions the reliability of these letters. He argues that because the clemency petition seriously misstates the record in many places, it calls into question the representations that were made to obtain these statements. (*District Attorney's Response* at page 11.) I need not resolve that question. I am inclined to accept those statements as representing the wishes of those who made them. In a capital case, the views of family members regarding clemency may vary according to their personal or religious principles, the particular circumstances, or numerous other reasons. They deserve the utmost sympathy and respect for their feelings and views, whether they are for or against clemency.

However, I must consider more than the views of the victims' families. Just as I do not decide a clemency petition solely on the strength of a statement from a victim's relative asking me to deny clemency, so too I cannot decide a clemency petition on the strength of a contrary statement. It has been said, "when a chief executive considers clemency, he or she acts as the distilled

conscience' of the citizenry." Accordingly, while the views of the victims' families weigh in favor of commutation of Mr. Anderson's sentence, it should not be, and is not the sole criterion in my decision.

**F. Support by Jurors**

Three jurors submitted statements supporting clemency, almost 16 years after their verdict. (*Petition*, pages 12-13, exhibits 5, 6 and 7.) Their statements are based largely upon speculation as to how they might have voted had the facts or evidence been different.

Again, the District Attorney urges they be viewed with suspicion in light of the numerous and serious misrepresentations made in the clemency petition. (*District Attorney's Response* at page 17.) I need not go that far. For, while heartfelt, these statements do not provide sufficient information that the sentence in this case was improperly determined or that its implementation would result in a miscarriage of justice.

Finally, the assertion that the trial judge pressured the jury was reviewed and rejected by the United States District Court.

**G. Suffering of Mr. Anderson's Family**

Mr. Anderson states that his family has maintained its devotion to him and would be devastated by his execution. (*Petition* at page 45.) The material submitted by Mr. Anderson contains three statements: one from his brother, one from the mother of one of his sons, and another from a couple who visited Mr. Anderson through a prison program. All request clemency.

I do not take the views of the family lightly. However I have tried to assemble a more complete picture of the facts that bear on this claim. Mr. Anderson has been incarcerated most of his adult life. When not in prison, he was a fugitive and a drifter having no real contact with his family. Prison records show he has not been visited by family for at least the last nine years.

Both of his parents are deceased. However, his father was alive during the trial and refused to testify on behalf of his son. So did Mr. Anderson's stepmother. Mr. Anderson has two sons. He never married either mother. The mother of one of his sons refused to testify on Mr. Anderson's behalf, telling defense investigators that she did not want to be involved in anything involving Mr. Anderson. Although she now supports clemency, she indicates that Mr. Anderson has never had a strong father-son relationship with their son. Finally, the couple who visited Mr. Anderson in Utah also refused to testify on his behalf at trial, telling defense investigators "not knowing any of the circumstances surrounding his abhorrent behavior, we cannot, in good conscience, offer testimony to offset his death sentence." That was understandable, but it suggests the limits on their personal knowledge of Mr. Anderson's behavior.

I am sympathetic to the emotions that Mr. Anderson's family must feel, particularly his two sons. However, Mr. Anderson alone is responsible for the sufferings caused by his life of crime. Experts found him "cold," "hedonistic," "self-absorbed" and an "anti-social personality" interested only in his own self-interest and self-gratification. The record confirms this assessment. The suffering he continues to cause innocent members of his

family, while unfortunate, offers insufficient basis for setting aside the jury's lawfully imposed sentence, which has been upheld by numerous state and federal courts.

#### **H. Remorse**

The petition states Mr. Anderson was so "overwhelmed" by shame and remorse at Mrs. Lyman's death that he "did nothing" to prevent detection or capture, but instead "waited to face the consequences" of his crime. (*Petition*, pages 8 and 10.) This misrepresents the facts.

Mr. Anderson said that, when surprised by officers, his first thought was to kill them. He later told officers that if he had been better armed, he would have shot it out. Not being able to "shoot it out," he tried to avoid arrest by telling the officers that he was Mrs. Lyman's son and she was asleep. When that failed, he attempted to flee, but was apprehended. While being transported to jail, he made another attempt to escape using a hidden handcuff key. Finally, he gave officers several aliases. In short, Mr. Anderson did everything possible to avoid arrest and face the consequences of his crime.

Nor did Mr. Anderson express any remorse in his confessions. The videotaped confession shows a man who seems unaffected by the fact that he murdered an 81-year old woman just hours earlier.

Later, he laughed about his capture. He told officers that upon shooting Mrs. Lyman, he said to himself, "Well, you know, that's it." Sheriff's Homicide Detective Wesley Daw, who initially interviewed Mr. Anderson, states that

in his 29 years in law enforcement Mr. Anderson was the most cold-blooded individual he interviewed. Detective Daw was astounded at how "matter of fact" Mr. Anderson was in describing Mrs. Lyman's murder, and the eight additional murders he confessed to committing in Utah and Nevada. (*District Attorney's Response*, letter from Detective Daw.) Mr. Anderson's only regret was that he was "stupid" for staying so long in the house and being caught. He later told investigators, "When I walked out the back door and saw the sheriff's deputies, I knew I had made a mistake."

Two days after the killing, when interviewed by Dr. Flanagan, he again expressed no remorse for having taken Mrs. Lyman's life, saying her murder did not upset his appetite because he was able to block it out. Even later, when Mr. Anderson had time to reflect on what he had done, he still did not express remorse. The Probation Report noted that at no time did he express any concern for the suffering of the victim or her family.

Finally, the claim that Mr. Anderson has now accepted complete responsibility for his crime and feels remorse is contradicted by the petition itself. It asserts that clemency should be granted because he was inebriated, mentally impaired and did not intend to kill Mrs. Lyman. It faults his family, childhood, attorneys and misconduct by the State. But noticeably absent from the petition is any statement from Mr. Anderson himself expressing remorse or his current state of mind. Indeed, when given the opportunity, Mr. Anderson refused to provide the Board of Prison Terms with any statement. Accordingly, the petition fails to demonstrate that he has "accepted complete responsibility" for his crime and the suffering he has caused.



## **I. Institution Record and Accomplishments**

Mr. Anderson claims to be a "most unusual" inmate, having used the twenty years spent in prison while appealing his sentence to study, read, write and enjoy artistic pursuits. (*Petition* at page 48.) His application for clemency includes several of his writings, which have been published and received awards. He also stresses that he has served his recent years with good behavior. (*Petition* at page 61.)

It is clear that Mr. Anderson's conduct has improved over the years. While incarcerated in San Bernardino County, he repeatedly threatened officers that he would kill them to escape without hesitation or a second thought. (*District Attorney's Response*, letters from officers Gonzales, Watkins, Lupercio and Daw.) During his initial years at San Quentin, he was involved in several fights with other inmates. While he has been discipline free in recent years, the State of California has a right to expect that every prisoner shall be well behaved. Obeying prison rules alone does not override the verdict in a capital case.

It is also true that Mr. Anderson has spent the past 20 years reading, writing and pursuing artistic pleasures. He has written poetry that demonstrates a capacity to reflect on his circumstances and articulate his feelings. The petition stresses the insights and feelings expressed in his poetry. But there is something missing here. For all his reflection, Mr. Anderson has still not accepted responsibility for his criminal behavior, as noted above. In 20 years, he has not used his abilities to come to an understanding that what he did was wrong, and that he must hold himself to account for it.

Mr. Anderson's conduct and accomplishments in prison are appropriate factors to consider in determining whether clemency is warranted. There is no dispute that Mr. Anderson, with an IQ of 136, is an extremely intelligent man. But his intelligence, ironically, also makes the brutality and indifference of his crimes all the more reprehensible. Clearly he had the capacity to know better. Clearly he has the capacity to accept responsibility for the consequences of his actions. The fact remains that, despite his intellect, Mr. Anderson committed multiple, cold-blooded, heartless murders.

#### **V. CONCLUSION**

Mr. Anderson was duly tried and convicted of the cold-blooded murder of a defenseless 81-year old grandmother as she slept in her bed. Two different juries imposed the death penalty. His sentence was repeatedly reviewed and affirmed by numerous state and federal courts over the past 20 years, including twice by the California Supreme Court. Twice the United States Supreme Court refused to entertain his claims. These courts rejected most of the arguments now advanced for clemency - including that claim that trial counsel was ineffective. Based upon full review and consideration of the petition and its supporting materials, I agree.

Mr. Anderson's writings have earned praise in some circles. This is commendable. But this does not outweigh a lifetime of crime, which includes at least three, cold-blooded murders.

Every law enforcement officer and court to comment on this case has noted Mr. Anderson's extraordinary callousness. Homicide Sergeant Dennis

O'Rourke, after a career investigating 200 murders, says "During my 25 years in law enforcement, I have come across a lot of cold-blooded individuals ... but in my opinion, Stephen Wayne Anderson is without doubt the coldest I have ever dealt with. I think that if you had any item that Anderson wanted he would kill you and take it without giving it a second thought. The death penalty is a fair and just punishment for him." (*District Attorney's Response*, O'Rourke letter.)

Judge Turner, who presided over Mr. Anderson's retrial, concluded that he has absolutely no concern for other people's rights or lives: "I think he is the type of a person who really doesn't care whether somebody else lives or dies at all and if it suits his convenience that somebody else dies and it's within his power, they die. [I]f there is to be a death penalty, there is no legitimate excuse why it should not be applied to his case." (*RT*, pages 5486-5487.)

Finally, the Board of Prison Terms, after independent review and hearing, unanimously recommends against clemency. I agree. Nothing in Mr. Anderson's clemency petition makes a convincing case for setting aside the sentence imposed by two different juries and upheld by numerous state and federal courts.

## **VI. DECISION**

I have reviewed the extensive arguments and submissions and find no reason to overturn the lawfully imposed sentence. No miscarriage of justice has occurred.

After due deliberation, clemency is denied.

Dated: \_\_\_\_\_

GRAY DAVIS

Governor

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<sup>[1]</sup> Mr. Anderson submitted separate, confidential supplements to both his *Petition* and *Reply*, with supporting exhibits, regarding a specific event of violence that occurred and the alleged post traumatic stress disorder that resulted. Mr. Anderson's testimony regarding this event and all documents relating to it were ordered sealed by the San Bernardino County Superior Court. I have considered these materials, but find them insufficient to warrant a commutation setting aside the verdict of two juries. The court orders still in effect prohibit discussion of the details.

<sup>[2]</sup> As to the circumstances under seal, trial counsel persuaded the court to issue a rare order closing the courtroom in order to allow Mr. Anderson to testify in private. The Ninth Circuit found counsel's examination of Mr. Anderson on this material to be well-prepared, thorough and compelling. (*Anderson v. Calderon, supra*, 232 F.3d at 1096.)

His current attorneys argue that this event caused Mr. Anderson to suffer post traumatic stress syndrome, which should have been explored. (*Petition* at page 8.) However, the United States District Court found no reasonable possibility that such a defense would have produced a different result. The court characterized much of the testimony of the defense experts as hyperbole and exaggeration and based upon hearsay.

## **Governor Schwarzenegger Denies Clemency to Convicted Murderer Kevin Cooper**

Governor Arnold Schwarzenegger issued the following statement today regarding his decision not to grant convicted murderer Kevin Cooper clemency:

"I have carefully weighed the claims presented in Kevin Cooper's plea for clemency. The state and federal courts have reviewed this case for more than eighteen years. Evidence establishing his guilt is overwhelming, and his conversion to faith and his mentoring of others, while commendable, do not diminish the cruelty and destruction he has inflicted on so many. His is not a case for clemency."

The full text of the Governor's decision is below.

### **STATEMENT OF DECISION**

In the Matter of the Petition for Clemency by Kevin Cooper

On June 2, 1983, Kevin Cooper escaped from a California prison and fled on foot to a neighborhood in Chino Hills. While hiding from authorities, he entered the sanctity of a family's home and brutally murdered Douglas and Peggy Ryen, their 10-year-old daughter Jessica, and an 11-year-old houseguest, Christopher Hughes. Eight-year-old Joshua Ryen, although severely injured, survived the attack.

A jury found Mr. Cooper guilty of four counts of first-degree murder and one count of attempted murder, and imposed the sentence of death. He is scheduled to be executed on February 10, 2004.

Mr. Cooper has submitted a petition for executive clemency in the form of a reprieve or a reduction in his sentence.

I have given serious consideration to Mr. Cooper's case. I am fully cognizant of the arguments and supporting materials submitted by Mr. Cooper's legal counsel. I am fully aware of the District Attorney's opposition to the petition, and have taken note of the many letters from citizens who have expressed their views on the death penalty and the appropriateness of granting clemency in this case. I have also considered the views of those who will be most impacted by my decision - Mr. Cooper and his family and friends, and the family and friends of the Ryen family and of Christopher Hughes.

Based on the arguments and materials presented in Mr. Cooper's petition and the District Attorney's opposition, I have concluded that this case does not present factual questions that warrant investigation or a hearing. I have also concluded that Mr. Cooper's petition and supporting materials do not demonstrate either manifest injustice or mitigating evidence sufficient to outweigh the circumstances of his crime.

The record in this matter speaks volumes. Mr. Cooper's conviction and sentence have been thoroughly reviewed and upheld by our highest state and federal courts. Notably, California's highest court concluded that evidence established Mr. Cooper's guilt of these horrible murders "overwhelmingly" and that the circumstances of the crimes supported the death penalty in this case. Additionally, Mr. Cooper's claims concerning the fairness of his trial and his claim that he is innocent have been the subject of litigation in the state and federal courts for more than eighteen years. I will not second guess the decisions of these courts, and I will not disturb the jury's verdict of guilt and sentence of death.

Mr. Cooper's attorneys argue that he should be granted clemency because he may have a mental deficiency from an auto accident that occurred when he stole a car while he was a juvenile. However, the record shows that Mr. Cooper's trial counsel investigated the possibility of mental deficiency at trial, but found no evidence to support it. Additionally, Mr. Cooper's writings and statements attached to his clemency petition, as well as the court decisions reviewing his case, do not support this claim.

I also note that Mr. Cooper sought and obtained recent DNA testing of evidence and, when that testing further proved his guilt, Mr. Cooper claimed that law enforcement authorities had tampered with the tested evidence. There are no facts which lead me to believe this claim has any merit.

A responsible jury, after hearing all the evidence, determined that Mr. Cooper murdered two adults and two children, and that he attempted to murder another child. To date, all state and federal courts have affirmed his conviction and death sentence. I can find no reasonable or compelling reason to disagree with these thorough evaluations of Mr. Cooper's case.

Although I am grateful that Mr. Cooper has found solace in God during his incarceration, I find that the aggravating circumstances of these brutal murders and Mr. Cooper's long history of criminal conduct and violence against others outweigh any mitigating factors and I can find no compelling reason to grant clemency in this case.

I have sworn to uphold the Constitution and the laws of the State of California, and I am deeply committed to that solemn duty. My respect for the rule of law and my review of the facts in this case lead me to my decision. Kevin Cooper's request for clemency is denied.

## **Governor Schwarzenegger Denies Clemency to Convicted Murderer Donald Beardslee**

Governor Arnold Schwarzenegger issued the following statement today following his decision not to grant clemency to convicted murderer Donald Beardslee:

"I have given serious consideration to Donald Beardslee's petition for clemency including all supporting evidence and testimony. The state and federal courts have affirmed his conviction and death sentence, and nothing in his petition or the record of his case convinces me that he did not understand the gravity of his actions or that these heinous murders were wrong. I do not believe the evidence presented warrants the exercise of clemency in this case."

The full text of the Governor's decision is below and attached. Also attached is the full text of the Board of Prison Term's recommendation to the Governor in this case.

### **STATEMENT OF DECISION**

Request for Clemency by Mr. Donald J. Beardslee

Mr. Donald J. Beardslee was convicted by a jury of two counts of first degree murder and sentenced to death. He is scheduled to be executed for one of these murders on January 19, 2005. These are not the first killings Beardslee has committed.

In December of 1969, Beardslee met Laura Griffin in a Missouri bar and accompanied her to her home. After they arrived, he strangled Ms. Griffin with his hands, held her head underwater in the bathtub, and stabbed her in the throat. He later confessed to the killing and pled guilty to second-degree murder. After serving seven years in a Missouri penitentiary, he was paroled in 1977 to California.

Four years later, Beardslee was still on parole for the Missouri murder and was living in a Redwood City apartment. On April 24, 1981, he returned home from work and discovered his roommate, Ricki Soria, and a few of her friends making plans to harm 19-year-old Stacy Benjamin over a drug-related monetary dispute. This group, consisting of Soria, William Forrester, and Frank Rutherford, planned to lure Ms. Benjamin to Beardslee's apartment and then force her to give them the money.

While Soria, Forrester, and Beardslee were waiting at the apartment for the two women to arrive, Rutherford tied a piece of wire to some shotgun shells, fashioning a garrote. Ms. Benjamin and her friend Patty Gedding then arrived, and Beardslee answered the door. Once the women were inside the apartment, Beardslee closed the door, and Rutherford fired a double-barreled sawed-off shotgun, striking and wounding Ms. Gedding in the shoulder.

Eventually, Beardslee put Ms. Gedding into a van driven by Forrester and told her they were taking her to a hospital. Soria followed them in Beardslee's car. Instead of stopping at a hospital, the two vehicles drove south along the California coast until Beardslee told Forrester to turn off the main road. After coming to a stop, the men exited the van and Beardslee retrieved and loaded the sawed-off shotgun and handed it to Forrester. Ms. Gedding pleaded for her life, but Forrester shot her twice. Beardslee then reloaded the gun and shot Ms. Gedding two more times. Forensic evidence showed that Beardslee shot Ms. Gedding in the head and that his shots actually killed her.

The trio left Ms. Gedding's body in a ditch and fled the area, Soria driving the van and Beardslee driving his car. When the van ran out of gas, the threesome abandoned the vehicle, wiped it clean of fingerprints, and returned to Redwood City in Beardslee's car.

Beardslee and Soria later dropped Forrester at another location and traveled to a different apartment where Ms. Benjamin was being held. Shortly thereafter, Beardslee, Rutherford, Soria, and Ms.

Benjamin got into Beardslee's car and drove north to Pacifica. All of them used cocaine while they were in transit.

Once the foursome crossed the Golden Gate bridge, they continued north to Lake County and stopped on a deserted road. Rutherford coaxed Ms. Benjamin from the car, and Beardslee and Soria wandered away from the vehicle. After walking a short distance, Beardslee turned back and found Rutherford strangling Ms. Benjamin with a wire. He thought he noticed a "pleading look" on her face, so he punched her in the temple. He then took one end of the wire from Rutherford and pulled on it. When the wire broke, Beardslee asked Rutherford for his knife, and used it to cut Ms. Benjamin's throat. Forensic evidence showed that Ms. Benjamin died from the knife wound.

Beardslee was arrested by police several days after the murders. A jury, after hearing the evidence, found him guilty of murdering both young women. Following the two first-degree murder convictions, a jury returned a death verdict for the killing of Patty Geddlng. To date, all state and federal courts have affirmed Beardslee's conviction and death sentence.

With the assistance of his attorneys, Beardslee has appealed to me for an act of executive clemency. He is asking that I exercise my power under Article V, section 8(a), of the California Constitution to commute his sentence of death to one of life in prison without the possibility of parole.

Beardslee advances several reasons why his life should be spared. He argues that death is an unjustly severe punishment when his role in these crimes is compared to his associates. However, Beardslee was the only one of the accomplices with a prior murder conviction. In fact, he was on parole for this prior murder when he committed the grisly and senseless killings of Patty Geddlng and Stacy Benjamin. He was also the only of the partners in crime who administered the coup de grace to each of the murdered women. Given these facts, I cannot disturb the jury's penalty of death on this basis.

Beardslee also argues that his model behavior for years in prison warrants mercy. While I commend Beardslee for his prison record and his ability to conform his behavior to meet or exceed expected prison norms, I am not moved to mercy by the fact that Beardslee has been a model prisoner. I expect no less.

Finally, and most significantly, Beardslee argues that his life should be spared because his criminal acts were performed as a result of his being in a dissociative state at the time of the crime due to long-standing mental impairments that compromised his executive functioning and judgment when he was under extreme stress. Beardslee claims that the stress of the fatal events of the evening of April 24, 1981, interfered with his ability to make reasoned decisions, rendered him unable to process emotions, and caused him to dissociate from events into some kind of fugue state. This claim warrants more extensive discussion.

The evidence supporting Beardslee's application suggests that he suffers from a mental impairment that has resulted-at least in part-from serious injuries he sustained prior to the murders. There is also some reason to believe that some of his mental impairment has existed since birth. But we are not dealing here with a man who is so generally affected by his impairment that he cannot tell the difference between right and wrong. We also are not dealing with a claim that Beardslee's mental condition has resulted in subaverage intellectual functioning or impairments in his adaptive skills of everyday living. That is not the case.

Beardslee can function at a very high level. In fact, the expert neuropsychologist retained by his lawyers in connection with these clemency proceedings stated at the Board's hearing that in many areas Beardslee performs quite a bit better than the average person. His reading and comprehension scores are good. He got B's and C's in high school. He had a good personnel record in the Air Force where he was a jet engine mechanic. He earned A's, B's and C's when he attended the College of San Mateo while he was on parole for the Missouri murder. He had a good work history at Hewlett Packard where he was employed as a fabricator. Over the course of his life, Beardslee has been employed as a machine operator, machine set-up man, apprentice machinist, and employment counselor. He also



did a good job in all of his prison work assignments in both Missouri and California. Indeed his prison behavior has been described as exemplary.

The question for me is whether Beardslee acted in a dissociative state due to mental impairments when he murdered two women in the course of the horrific events that transpired on April 24, 1981. And, if so, whether that fact sufficiently impeded his comprehension of the heinous nature of his crimes such that it inspires in me mercy compelling enough to set aside the jury's sentence and commute death to life in prison without parole.

It seems consistently reported that on the evening of April 24, 1981, Mr. Beardslee showed little or no emotion once Ms. Gedding was shot when she entered his apartment. In fact, many observers have reported that Beardslee has had such a flattened affect for much of his life. It is argued that this lack of emotion is a symptom and byproduct of his mental deficiency. That may be. But in and of itself, the fact that Beardslee had a flat affect the evening of April 24, 1981, does not have persuasive value that he acted on "autopilot" that evening and had no capacity to make reasoned decisions. This is especially true when one understands that this flattened affect is usually present in his personality.

Moreover, the argument that Beardslee acted in some sort of dissociated fugue state is not clearly supported by his actions or his numerous accounts of the events of that horrible night. On the afternoon of the murders, Beardslee agreed with the other participants that Ms. Gedding and Ms. Benjamin would be taught a lesson that evening in Beardslee's apartment. Beardslee drove to pick up one of the participants, Rutherford, and brought him back to the apartment. [Frank Rutherford by all accounts appears to be the evil protagonist in this tragedy. He was sentenced to life in prison without the possibility of parole for the murder of Stacy Benjamin. He died in prison.] Rutherford brought with him the shotgun. Beardslee directed another accomplice to go out and buy tape that could be used to bind and gag the victims.

After the women arrived at Beardslee's apartment and Ms. Gedding was shot, Beardslee explained to an inquiring landlord that the noise he heard was a firecracker that Beardslee intended to throw out the door but missed. Of the murder of Patty Gedding, in his confession Beardslee says he was committed to murdering her "from the first". After her murder, in addition to wiping down the abandoned van for fingerprints before they again met up with Rutherford, Beardslee and Soria vacuumed his car at a San Mateo car wash. Beardslee also disposed of the empty shotgun casings in a bay slough where they would not be found. Later, after the pair joined up with Rutherford and murdered Stacy Benjamin, Beardslee pulled the dead women's pants down in an effort to make it appear she was sexually assaulted. The day after the murders, he continued to clean his apartment and replaced cushions on his living room couch that had blood on them. These actions show Beardslee's consciousness of guilt and the nature and consequences of the murders he committed.

Looking back in time to the state of Beardslee's mind on April 24, 1981, his counsel urge that I grant a reprieve to allow him to be administered a Magnetic Resonance Imaging or similar examination. But such a diagnostic tool is only a "snapshot" of a person's brain at a particular time, and it is questionable that such an examination would reveal information that could reliably form the basis for an appraisal of the condition of Beardslee's brain more than twenty three years ago. Moreover, while such a diagnostic tool may show anatomic injury to Beardslee's brain, the injury may not tell us anything about his behavior. [Ruben C. Gur, Andrew J. Sakin, and Raquel E. Gur, *Neuropsychological Assessment in Psychiatric Research and Practice*, in Robert Michaels, ed., *PSYCHIATRY*, revised edition -- 1991 (Philadelphia: J. P. Lippincott Company, 1991), ch. 72, pp. 1-16, at pp. 5-6.] Finally, records of the interview of Beardslee performed by the neuropsychologist retained on his behalf in connection with his clemency application do not appear to be comprehensive.

The extent of Beardslee's involvement and action in the murders of each of the young women, and perhaps more significantly his recollection and after-the-fact recounting of these events to police, make it hard for me to accept that Beardslee was dissociated and disconnected from the events of that fateful night. From a review of the events and Beardslee's actions following them, there is no question in my mind that at the time Beardslee committed the murders he knew what he was doing-and he knew it was wrong.

Nothing in Beardslee's application, supporting papers, or testimony on his behalf before the Board convinces me that he did not understand that he committed two grisly murders and that his decision to take those actions was wrong. Clemency is not designed to undo the considered judgment of the people in favor of the death penalty, but to prevent the miscarriage of justice.

The Board of Prison Terms unanimously recommended that I deny clemency to Beardslee. A copy of their recommendation is attached to this decision. After my own independent study and analysis, I agree with the Board.

Although I have given serious consideration to Beardslee's plea for mercy, I do not believe the evidence presented warrants the exercise of clemency in this case. For this reason, Donald J. Beardslee's application for clemency is denied.

## STATEMENT OF DECISION

(corrected version)

### Request for Clemency by Stanley Williams

Stanley Williams has been convicted of brutally murdering four people during two separate armed robberies in February and March 1979. A California jury sentenced him to death, and he is scheduled for execution on December 13, 2005.

During the early morning hours of February 28, 1979, Williams and three others went on a robbery spree. Around 4 a.m., they entered a 7-Eleven store where Albert Owens was working by himself. Here, Williams, armed with his pump-action shotgun, ordered Owens to a backroom and shot him twice in the back while he lay face down on the floor. Williams and his accomplices made off with about \$120 from the store's cash register. After leaving the 7-Eleven store, Williams told the others that he killed Albert Owens because he did not want any witnesses. Later that morning, Williams recounted shooting Albert Owens, saying "You should have heard the way he sounded when I shot him." Williams then made a growling noise and laughed for five to six minutes.

On March 11, 1979, less than two weeks later, Williams, again armed with his shotgun, robbed a family-operated motel and shot and killed three members of the family: (1) the father, Yen-I Yang, who was shot once in the torso and once in the arm while he was laying on a sofa; (2) the mother, Tsai-Shai Lin, who was shot once in the abdomen and once in the back; and (3) the daughter, Yee-Chen Lin, who was shot once in her face. For these murders, Williams made away with approximately \$100 in cash. Williams also told others about the details of these murders and referred to the victims as "Buddha-heads."

Now, his appeals exhausted, Williams seeks mercy in the form of a petition for clemency. He claims that he deserves clemency because he has undergone a personal transformation and is redeemed, and because there were problems with his trial that undermine the fairness of the jury's verdict.

Williams' case has been thoroughly reviewed in the 24 years since his convictions and death sentence. In addition to his direct appeal to the California Supreme Court, Williams has filed five state habeas corpus petitions, each of which has been rejected. The federal courts have also reviewed his convictions and death sentence. Williams filed a federal habeas corpus petition, and the U.S. District

Court denied it. The Ninth Circuit Court of Appeals confirmed this decision.<sup>1</sup> Williams was also given a number of post-trial evidentiary hearings, and he and his lawyers had the opportunity at these hearings to present evidence that was not heard at trial. The jury's decision has withstood these challenges.

In all, Williams' case has been the subject of at least eight substantive judicial opinions.<sup>2</sup> Prior to the filing of the clemency petition, the state court habeas process was completed on June 21, 1995 when the California Supreme Court denied Williams' fourth state habeas corpus petition.<sup>3</sup> The federal court habeas process was completed on October 11, 2005 when the United States Supreme Court denied Williams' writ of certiorari.

The claim that Williams received an unfair trial was the subject of this extensive litigation in the state and federal courts. The courts considered the sufficiency of his counsel, the strategic nature of counsel's decisions during the penalty phase of Williams' trial, the adequacy and reliability of testimony from informants, whether Williams was prejudiced by security measures employed during his trial, whether he was competent to stand trial, whether the prosecutor impermissibly challenged potential jurors on the basis of race, and whether his jury was improperly influenced by Williams' threats made against them. There is no need to rehash or second guess the myriad findings of the courts over 24 years of litigation.

The possible irregularities in Williams' trial have been thoroughly and carefully reviewed by the courts, and there is no reason to disturb the judicial decisions that uphold the jury's findings that he is guilty of these four murders and should pay with his life.

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<sup>1</sup> Some have suggested that the U.S. Court of Appeals for the Ninth Circuit has endorsed Mr. Williams request for clemency. (*Williams v. Woodford* (2004) 384 F.3d 567, 628.) However, a careful reading of the opinion shows that Ninth Circuit panel merely noted that Williams' redemption arguments were properly addressed to the Governor, not the court, without expressing an opinion on the appropriateness of clemency.

<sup>2</sup> *People v. Williams* (1988) 44 Cal.3d 1127 [direct appeal and state habeas corpus petition]; *In re Stanley Williams* (1994) 7 Cal.4<sup>th</sup> 572 [state habeas corpus petition]; *Williams v. Calderon* (C.D. Cal. 1998) 41 F.Supp.2d 1043 [federal habeas corpus petitions]; *Williams v. Calderon* (C.D. Cal. 1998) 48 F.Supp.2d 979 [federal habeas corpus petition]; *Williams v. Calderon* (C.D. Cal. 1998) 1998 WL 1039280 [request for discovery for federal habeas corpus petition]; *Williams v. Calderon* (C.D. Cal. 1999) 1999 WL 1320903 [motion for relief of judgment on federal habeas corpus petition]; *Williams v. Woodford* (9<sup>th</sup> Cir. 2004) 384 F.3d 567 [affirming denial of federal habeas corpus petition]; *Williams v. Woodford* (9<sup>th</sup> Cir. 2005) 396 F.3d 1059 [denying petition for rehearing *en banc*, with dissent].

<sup>3</sup> On December 10, 2005, Williams' counsel filed a fifth habeas corpus petition in the California Supreme Court. On December 11, 2005, the Court unanimously denied his petition.

The basis of Williams' clemency request is not innocence. Rather, the basis of the request is the "personal redemption Stanley Williams has experienced and the positive impact of the message he sends."<sup>4</sup> But Williams' claim of innocence remains a key factor to evaluating his claim of personal redemption. It is impossible to separate Williams' claim of innocence from his claim of redemption.

Cumulatively, the evidence demonstrating Williams is guilty of these murders is strong and compelling. It includes: (1) eyewitness testimony of Alfred Coward, who was one of Williams' accomplices in the 7-Eleven shooting; (2) ballistics evidence proving that the shotgun casing found at the scene of the motel murders was fired from Williams' shotgun; (3) testimony from Samuel Coleman that Williams confessed that he had robbed and killed some people on Vermont Street (where the motel was located); (4) testimony from James and Esther Garrett that Williams admitted to them that he committed both sets of murders; and (5) testimony from jailhouse informant George Oglesby that Williams confessed to the motel murders and conspired with Oglesby to escape from county jail. The trial evidence is bolstered by information from Tony Sims, who has admitted to being an accomplice in the 7-Eleven murder. Sims did not testify against Williams at trial, but he was later convicted of murder for his role in Albert Owens' death. During his trial and subsequent parole hearings, Sims has repeatedly stated under oath that Williams was the shooter.

Based on the cumulative weight of the evidence, there is no reason to second guess the jury's finding of guilt or raise significant doubts or serious reservations about Williams' convictions and death sentence. He murdered Albert Owens and Yen-I Yang, Yee-Chen Lin and Tsai-Shai Lin in cold blood in two separate incidents that were just weeks apart.

But Williams claims that he is particularly deserving of clemency because he has reformed and been redeemed for his violent past. Williams' claim of redemption triggers an inquiry into his atonement for all his transgressions. Williams protests that he has no reason to apologize for these murders because he did not commit them. But he is guilty and a close look at Williams' post-arrest and post-conviction conduct tells a story that is different from redemption.

After Williams was arrested for these crimes, and while he was awaiting trial, he conspired to escape from custody by blowing up a jail transportation bus and

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<sup>4</sup> Williams' Clemency Reply, p. 10.

killing the deputies guarding the bus. There are detailed escape plans in Williams' own handwriting. Williams never executed this plan, but his co-conspirator implicated Williams in the scheme. The fact that Williams conspired to murder several others to effectuate his escape from jail while awaiting his murder trial is consistent with guilt, not innocence. And the timing of the motel murders—less than two weeks after the murder of Albert Owens—shows a callous disregard for human life.

Williams has written books that instruct readers to avoid the gang lifestyle and to stay out of prison.<sup>5</sup> In 1996, a *Tookie Speaks Out Against Gang Violence* children's book series was published. In 1998, "Life in Prison" was published. In 2004, Williams published a memoir entitled "Blue Rage, Black Redemption." He has also recently (since 1995) tried to preach a message of gang avoidance and peacemaking, including a protocol for street peace to be used by opposing gangs.

It is hard to assess the effect of such efforts in concrete terms, but the continued pervasiveness of gang violence leads one to question the efficacy of Williams' message. Williams co-founded the Crips, a notorious street gang that has contributed and continues to contribute to predatory and exploitative violence.<sup>6</sup>

The dedication of Williams' book "Life in Prison" casts significant doubt on his personal redemption. This book was published in 1998, several years after Williams' claimed redemptive experience. Specifically, the book is dedicated to "Nelson Mandela, Angela Davis, Malcolm X, Assata Shakur, Geronimo Ji Jaga Pratt, Ramona Africa, John Africa, Leonard Peltier, Dhoruba Al-Mujahid, George Jackson, Mumia Abu-Jamal, and the countless other men, women, and youths who have to endure the hellish oppression of living behind bars." The mix of individuals on this list is curious. Most have violent pasts and some have been convicted of committing heinous murders, including the killing of law enforcement.

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<sup>5</sup> Williams' perennial nominations for the Nobel Peace Prize and Nobel Prize in Literature from 2001-2005 and the receipt of the President's Call to Service Award in 2005 do not have persuasive weight in this clemency request.

<sup>6</sup> Breaking the cycle of hopelessness and gang violence is the responsibility of us all, not just the most affected African-American or inner city communities. It is important to work together with respect, understanding and patience if we are to one day succeed.

But the inclusion of George Jackson on this list defies reason and is a significant indicator that Williams is not reformed and that he still sees violence and lawlessness as a legitimate means to address societal problems.<sup>7</sup>

There is also little mention or atonement in his writings and his plea for clemency of the countless murders committed by the Crips following the lifestyle Williams once espoused. The senseless killing that has ruined many families, particularly in African-American communities, in the name of the Crips and gang warfare is a tragedy of our modern culture. One would expect more explicit and direct reference to this byproduct of his former lifestyle in Williams' writings and apology for this tragedy, but it exists only through innuendo and inference.

Is Williams' redemption complete and sincere, or is it just a hollow promise? Stanley Williams insists he is innocent, and that he will not and should not apologize or otherwise atone for the murders of the four victims in this case. Without an apology and atonement for these senseless and brutal killings there can be no redemption. In this case, the one thing that would be the clearest indication of complete remorse and full redemption is the one thing Williams will not do.

Clemency decisions are always difficult. But the constitutional power of the Governor to grant clemency does not stand in isolation. It must be balanced with the Governor's constitutional duty to see that the laws are faithfully executed. Here, Williams is clearly guilty, and the evidence and clemency materials supporting Williams' claim of personal redemption are equivocal.

Therefore, based on the totality of circumstances in this case, Williams' request for clemency is denied.

DATED: December 12, 2005

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ARNOLD SCHWARZENEGGER  
Governor of the State of California

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<sup>7</sup>George Jackson was a militant activist and prison inmate who founded the violent Black Guerilla Family prison gang. Jackson was charged with the murder of a San Quentin correctional officer. In 1970, Jackson's brother stormed the courtroom with a machine gun, and along with three inmates, took a judge, the prosecutor and three others hostage in an attempt to leverage his brother's freedom. Shooting broke out. The prosecutor was paralyzed from a police bullet, and the judge was killed by a close-range blast to his head when the shotgun taped to his throat was fired by one of the accomplices. Jackson's brother was also killed. Then, three days before trial was to begin in the correctional officer murder case, George Jackson was gunned down in the upper yard at San Quentin Prison in another foiled escape attempt on a day of unparalleled violence in the prison that left three officers and three inmates dead in an earlier riot that reports indicate also involved Jackson.

## **Governor Schwarzenegger Denies Clemency to Convicted Murderer Clarence Ray Allen**

Governor Arnold Schwarzenegger issued the following statement today following his decision not to grant clemency to convicted murderer Clarence Ray Allen:

"My respect for the rule of law and review of the facts in this case lead to my decision to deny clemency to Clarence Ray Allen. While serving a life sentence for murder, Allen executed a plan to silence witnesses. Allen's crimes are the most dangerous sort because they attack the justice system itself. The passage of time does not excuse Allen from the jury's punishment."

The full text of the decision is below.

### STATEMENT OF DECISION

#### Request for Clemency by Clarence Ray Allen

Clarence Ray Allen has been convicted of murdering three people in an attempt to prevent witnesses from testifying against him in a possible retrial. Allen ordered these witness executions from his cell in Folsom Prison, where he was serving a life sentence for an earlier murder. A California jury sentenced Allen to death for these murders, and he is scheduled for execution on January 17, 2006. Allen now requests that his death sentence be commuted to life in prison without the possibility of parole or, in the alternative, that he be granted a 120-day reprieve to provide him more time to prepare his clemency petition.

Allen was the leader of a group that he referred to as the "Allen Gang." This group committed a series of crimes, including burglary and armed robbery, in the Central Valley in the 1970s. In 1974, members of this group burglarized Fran's Market, a small grocery store in Fresno that was owned and operated by Ray and Frances Schletewitz. Allen knew the Schletewitz family, and he had previously been a tenant of theirs.

One of Allen's accomplices in this burglary was Mary Sue Kitts, the 17-year-old girlfriend of Allen's younger son Roger. After the burglary, Ms. Kitts told Bryon Schletewitz (son of the owners of Fran's Market) about her role in the crime.

When he learned of Ms. Kitts' conversation, Allen called a meeting of some of the accomplices, and asked for a vote on whether to kill Ms. Kitts or not. Fearing that Allen would retaliate if they did not go along, the vote to kill Ms. Kitts was unanimous. Allen ordered the murder of Ms. Kitts.

Ms. Kitts was invited to a party attended by some of Allen's accomplices. There, after an aborted attempt to poison Ms. Kitts, one of the accomplices, Eugene Furrow, started to strangle her. In the midst of Furrow's attempt to strangle Ms. Kitts, Allen called Furrow on the telephone, and asked Furrow if Kitts was dead yet. When Furrow said no, Allen ordered him to "do it." Furrow finished strangling Ms. Kitts, killing her. Allen then ordered Furrow and some of his other accomplices to dump Ms. Kitts' body in a canal, which they did.

After this murder, Allen warned members of his group that if they cooperated with law enforcement "he would get them from inside or outside prison." Allen was arrested and tried in 1977 for his role in Ms. Kitts' murder. Based on testimony from a number of witnesses, including his accomplices and Ray and Bryon Schletewitz, Allen was convicted and sentenced to life in prison.

While serving this life sentence, Allen devised a plan to kill some of the witnesses who testified against him in the Kitts murder trial presumably so he would prevail on retrial if he won his appeal. He enlisted another inmate, Billy Ray Hamilton, in this plan. Hamilton was due to be paroled in the summer of 1980, and the plan was for Hamilton to carry out the murders upon his release. Allen told Hamilton and



another inmate that he wanted certain people taken "out of the box, killed." Allen arranged for his older son Kenneth to provide money and guns to Hamilton. Allen promised to pay Hamilton for the job.

In late August 1980, Hamilton was paroled. Kenneth Allen wired him transportation money and met him at a Fresno bus depot. Hamilton and Kenneth Allen discussed the planned murders, and Hamilton confirmed that he intended to murder Ray and Bryon Schletewitz. Kenneth Allen provided Hamilton with a sawed-off shotgun and a revolver.

Just before closing time on September 5, 1980, Hamilton and his girlfriend Connie Barbo went to Fran's Market looking for Ray and Bryon Schletewitz. When they arrived, they found Bryon Schletewitz and employees Douglas Scott White, Josephine Rocha, and Joe Rios. Hamilton ordered the four to the stockroom and told them to lie down. Hamilton proceeded to shoot Bryon Schletewitz at close range with the shotgun, and next shot Douglas Scott White and Josephine Rocha, both at close range. Joe Rios attempted to escape, but was shot by Hamilton at close range, and survived only because he used his arm to shield himself from the shotgun pellets. While Allen was age 50 at the time, each of his victims was young-Bryon Schletewitz was 27, Douglas Scott White was 18, Josephine Rocha was 17, and Joe Rios was 23.

Shortly after the murders, Kenneth Allen was arrested on drug charges, and he told law enforcement about the involvement of Hamilton, Barbo, and Clarence Ray Allen in the Fran's Market murders. When Hamilton was arrested, the police found that he had a list containing the names and addresses of eight witnesses, including Ray and Bryon Schletewitz, who had testified against Allen at the Mary Sue Kitts trial.

Allen was tried on three counts of murder and one count of conspiring to murder. The jury heard from 58 witnesses over 23 days, and they convicted Allen of all three murders with special circumstances and conspiracy to commit murder, and sentenced him to death.

Before submitting his clemency petition, Allen exhausted his state and federal appeals, and all reviewing courts have affirmed his convictions and death sentence. Allen challenged his convictions and sentence on many grounds, including grounds that he re-argues in his clemency petition: miscounting the special circumstances; misleading arguments and instructions about the jury's discretion to impose a death sentence; inadequate representation by Allen's counsel during the penalty phase; and "lingering doubt" about Allen's guilt based on unreliable testimony of two witnesses, including Allen's son Kenneth. The courts that have reviewed Allen's case have found overwhelming evidence of his guilt and that any errors in his trial were harmless.

Allen now seeks executive clemency, based primarily on his advanced age and poor health. Allen will be 76 at the time of his execution, and his counsel argue that he is too old to receive the sentence that the jury found he deserved. Allen's death sentence will be carried out at the age of 76, in part, because he committed these crimes when he was 50. His conduct did not result from youth or inexperience, but instead resulted from the hardened and calculating decisions of a mature man.

Allen's death sentence has been delayed due to litigation. Our justice system provides Allen the right to challenge his convictions and sentence, and he has done so for the last 23 years. Allen should not escape the jury's punishment because our system works deliberately and carefully.

Allen also stresses his infirmities, including heart disease and diabetes, and claims that his weak physical condition results from substandard health care and poor living conditions at San Quentin. Allen does not complain that he was singled out for poor treatment, but instead asserts that San Quentin provides poor treatment to all inmates. Problems and improvements in the correctional system are best addressed on a system-wide basis, not by clemency cases where the focus is on the unique situation of an individual inmate. In fact, the living conditions at San Quentin and the quality of health care provided to California inmates continue to be the subject of class-action litigation and remedial plans.

Allen argues that he is no threat to anyone, because of his age and poor health, and therefore life in prison is an appropriate punishment. But Allen was already serving a life term when he reached out with his self-described "long arm" and killed Bryon Schletewitz, Douglas Scott White, and Josephine Rocha. Allen even glorified this type of killing in a "poem" that boasts "we rob and steal and for those who squeal are usually found dying or dead." Allen's crimes to silence witnesses are the most dangerous sort because they attack the justice system itself. Further, contrary to Allen's plea for clemency, the death penalty serves the dual purpose of retribution and deterrence in this case. The Ninth Circuit Court of Appeals concluded that "*f the death penalty is to serve any purpose at all, it is to prevent the very sort of murderous conduct for which Allen was convicted.*"

*Allen alternatively argues that he should be granted a 120-day reprieve so that he can undergo SPECT and MRI testing to determine if he has a "mood disorder" that might be linked to brain damage. Allen submits a December 2005 declaration from a forensic psychiatrist who hypothesizes that Allen may have suffered brain damage from a beating that he received in 1946, or from a bout of viral encephalitis that same year. But this is speculation. SPECT and MRI testing have been available for years, and none of the mental-health experts who previously examined Allen found evidence of brain damage. And Allen's counsel, based on a 1991 psychological report, was notified long ago of Allen's viral encephalitis and a childhood head injury.*

*My respect for the rule of law and review of the facts in this case lead to my decision. Allen's jury reasonably concluded that life in prison was not the appropriate punishment for someone who orders the killing of witnesses while already serving a term of life in prison. And all of the reviewing courts agree that this case is appropriate for the death penalty. The depravity of Allen's crimes has not diminished with the years. Allen's request for clemency, in the form of a commutation or a reprieve, is denied.*

DATED: January 13, 2006

ARNOLD SCHWARZENEGGER  
Governor of the State of California

## **Governor Schwarzenegger Denies Clemency to Convicted Murderer Michael Morales**

Governor Arnold Schwarzenegger issued the following statement today following his decision not to grant clemency to convicted murderer Michael Morales:

"There is no compelling evidence that the jury's punishment is not appropriate in this case. All the reviewing courts have upheld the jury's punishment. Morales' claim that he is a changed man does not excuse the brutal murder and rape of Terri Winchell."

The full text of the decision is below. [Link here to a PDF of the decision.](#)

### STATEMENT OF DECISION

#### Request for Clemency by Michael Angelo Morales

Michael Angelo Morales has been convicted of brutally murdering and raping 17-year-old Terri Winchell. Morales killed Ms. Winchell in a premeditated, surprise attack that occurred while the two were riding in the same car. During this attack, Morales strangled Ms. Winchell with a belt, bludgeoned her 23 times with a hammer, and stabbed her four times with a knife. Morales also raped Ms. Winchell as she lay dying.

A jury found Morales guilty of first-degree murder, with special circumstances, and sentenced him to death. With his execution scheduled for February 21, 2006, Morales requests that his sentence be commuted to life in prison without the possibility of parole.

In early 1981, 21-year-old Morales and his 19-year-old cousin Rick Ortega plotted to kill Ms. Winchell out of jealousy. Ortega was involved in a homosexual relationship at the time and had learned that his lover was dating Ms. Winchell. Ms. Winchell did not know about the Ortega relationship.

To carry out the plot, Ortega invited Ms. Winchell to go shopping. The planned attack occurred while Ortega, Morales, and Ms. Winchell were in Ortega's car. Ortega was driving, Ms. Winchell was in the passenger seat, and Morales sat behind Ms. Winchell in the back seat. Morales had a belt, a hammer, and a knife with him.

Taking the belt, Morales reached towards the front seat where Ms. Winchell was sitting, and he began strangling her. Ms. Winchell struggled and the belt broke.

Morales then began hitting Ms. Winchell with the hammer. As Ms. Winchell fought back and screamed for Ortega to help her, Morales continued hitting her with the hammer, striking her 23 times on the head.

With the car stopped, Morales dragged Ms. Winchell out of the car and into a vineyard where he raped her. Before leaving her there, he stabbed her four times in the chest. Ms. Winchell was found dead at the vineyard.

Based on the evidence of his guilt, a jury convicted Morales of first-degree murder, with special circumstances, and rape. On automatic appeal, the California Supreme Court affirmed the convictions and sentence. Morales subsequently filed habeas corpus petitions in both the state and federal courts. In his federal habeas corpus petition, he pursued 59 legal claims. The federal court considered and rejected on the merits 57 of Morales' claims. Morales appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's findings. Morales then appealed to the United States Supreme Court, which declined to review his case.

Since filing his clemency petition, Morales has continued to litigate his case in state and federal courts. Morales has litigated many issues, including some of the same ones raised in his clemency petition. Now Morales seeks executive clemency based on a plea for mercy and justice.

Morales' request for clemency is based, in part, on his regret, remorse, and rehabilitation. He states that he has demonstrated remorse and atonement for the last 25 years, and that he is a changed man capable of contributing positively to society.

Morales points to his actions after Ms. Winchell's murder, his verbal statement to the court before he was sentenced, and his handwritten statement included with his clemency petition. He highlights that: (1) just hours after the crimes and after he regained his sobriety, he expressed his "despair at having failed to prevent his cousin Rick Ortega from drawing him into a foolhardy attempt to frighten Terri Winchell" and his sorrow for allowing events to go awry and for harming her; (2) at sentencing, he conceded his guilt by telling the court that it was hard for him even to try to correct what he had done and that he realized and regretted how much pain was caused; and (3) more recently, in connection with his request for clemency, he wrote about his acceptance of responsibility for the consequences of his actions.

Morales' sentiments of remorse and responsibility for the crimes he committed against Ms. Winchell are overshadowed by his statements attributing blame to his cousin Ortega and to his alcohol and PCP use. Also, he expressed remorse and regret at sentencing, but at the same time referred to the horrific murder he committed as a "mistake." And in his written statement, he used no form of the word "murder" or "kill" to describe the actions for which he says he accepts responsibility, nor did he acknowledge the rape or any of the specific acts he perpetrated against Ms. Winchell.

Morales additionally points to his efforts in prison to "change his heart" as support for his clemency plea. He identifies his "exemplary" institutional record, a re-established relationship with God, close and supportive relationships with family and friends, and reformation reflected through his artistic talents.

The changes in Morales' life do not override the jury's decision of guilt and sentence, which have been upheld by all the reviewing courts. Being a changed man today does not change the nature of the murder and rape Morales committed against Ms. Winchell when he was younger.

In his clemency plea, Morales also argues that the death penalty is inappropriate in his case because: (1) his cousin Ortega was the mastermind and architect of Ms. Winchell's murder; (2) his (Morales') intoxication on the night of the murder resulted in a psychotic, disinhibited state that produced his homicidal behavior; (3) false testimony by a jailhouse informant at his trial "unquestionably moved the jury to vote for death;" and (4) the prosecutor's decision to seek the death penalty was discriminatory.

Morales cannot avoid responsibility for his crimes by casting blame on Ortega. Morales, not Ortega, attempted to strangle Ms. Winchell with a belt, used a hammer to hit her on the head 23 times, and dragged her into a vineyard where he raped and stabbed her.

Morales claims that, because of alcohol and PCP, he was not completely aware of the events of that night, and was not in control of his actions. This claim is belied by his actions before and after the brutal murder and rape. A few months before the murder, Morales told his girlfriend Raquel Cardenas that his "friend" has "gotten hurt by a girl, and... that he was feeling close to his best friend since he got hurt by that girl." The day before the murder, Morales "practice[ed]" the strangulation on his housemate Patricia Flores by wrapping the belt around Flores' neck and then tightening it. And on the day of the murder, Morales told his girlfriend Cardenas that "he was gonna do Rick a favor" and "hurt this girl... [and] strangle her." After the crimes, the broken belt, the hammer, and Ms. Winchell's purse were found in the home where Morales lived. The belt was found under a mattress, the hammer was found in a refrigerator crisper, and the purse was found in a closet.

This evidence shows that Morales was aware and in control of his actions and their consequences. The federal district court also found that a mental impairment defense based on PCP usage was wholly inconsistent with Morales' actions on the day of the crimes and with his detailed memory of the crimes.

Morales insists that he has a compelling case for clemency because trial witness Bruce Samuelson lied on the stand. Morales claims that it was Samuelson's testimony alone that convinced the jury to prescribe a sentence of death, instead of life in prison without the possibility of parole.

This argument was recently reviewed and rejected on the merits by the California Supreme Court. Samuelson's testimony was not the only lying-in-wait evidence presented to the jury. Cardenas testified that Morales admitted to attacking Ms. Winchell while she was sitting with her back towards him in the car.

Flores also described the way Morales attempted to strangle Ms. Winchell. And Ortega's testimony at his own trial lends further support for the way Morales attacked Ms. Winchell in the car. The courts have confirmed that Morales' actions in this case qualify as lying in wait for purposes of the special circumstances statute.

Morales places great weight on a January 25, 2006 letter from the trial judge in his case. In this letter, the judge supports clemency based on Samuelson's testimony being the only evidence in support of the lying-in-wait special circumstance that made Morales eligible for the death penalty, and it being the source of the prosecution's substantial aggravating circumstances.

A review of the evidence and trial transcripts reveals that the judge's letter is not an accurate reflection of the record before the jury and courts because there is other evidence supporting the lying-in-wait special circumstance. Also, through the cross-examination of Samuelson, the jury and judge were well aware of the fact the Samuelson was a jailhouse informant and was providing his testimony in return for a deal on his own pending criminal charges.

As for aggravating factors, the prosecutor primarily relied upon the horrific nature of the crimes committed by Morales and the statements made by Morales to others. In addition to the aggravating factors presented by the prosecutor, Morales' counsel presented mitigating factors that were also considered by the jury and judge.

Morales also asserts that the prosecutor's charging decision was biased by race, gender, and ethnicity. This claim was rejected by the federal district court because Morales failed to present any evidence that the prosecutor intentionally discriminated against Morales. The court also rejected the claim because the statistical evidence submitted by Morales did not show purposeful discrimination in his case.

Nothing in the record or the materials before me compels a grant of clemency. The pain Ms. Winchell's loved ones have been forced to endure at the hands of Morales is unfathomable as is the brutality of the acts he perpetrated.

Based on the record and the totality of circumstances in this case, Morales' request for clemency is denied.

DATED: February 17, 2006

ARNOLD SCHWARZENEGGER  
Governor of the State of California

## Appendix D

### ABA Death Penalty Moratorium Project's Clemency Recommendations

The Assessment Guide is a tool for evaluating each aspect of the capital punishment process, including clemency. The Guide uses the specific recommendations or “protocols” for each area of the process that were identified in an earlier, June 2001 ABA project, “Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States.”

The following is the complete text on clemency from “Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States,” [www.abanet.org/irr/finaljune28.pdf](http://www.abanet.org/irr/finaljune28.pdf) at 23-27 (June 2001):

#### “III. Clemency Proceedings

##### A. Overview

Clemency is the act of a Governor or state executive body either to commute a death sentence to life imprisonment or to grant a pardon for a criminal offense. The clemency process traditionally was intended to function as a final safeguard to evaluate thoroughly and fairly whether a person should be put to death. The process cannot fulfill that critical function, however, when exercise of the clemency power is influenced more by political considerations than by the fundamental principles of justice, fairness, and mercy that underlie the power.

It is essential that governors and clemency boards recognize that the clemency power requires an inquiry into the fairness of carrying out an execution in each case in which clemency is sought.

In recent years, however, clemency has been granted in substantially fewer cases than it was prior to the U. S. Supreme Court's 1972 decision declaring the death penalty unconstitutional (*Furman v. Georgia*, 408 U.S. 238 (1972)). Among the factors accounting for this decline may be a changing political climate that encourages “tougher” criminal penalties and the erroneous belief that clemency is unnecessary today because death row inmates receive “super due process” in the courts.

In fact, the need for a meaningful clemency power is more important than ever. Because of restrictions on judicial review of meritorious claims, including those involving actual innocence (see Part II (A), above), clemency often is the State's last and only opportunity to prevent miscarriages of justice. A clemency decisionmaker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decisionmaking. Yet, as the capital punishment process currently functions, meaningful review frequently is not obtained, although procedural rules are served.

The State's clemency authority exists precisely to ensure that justice is done when all else fails.

Full and proper use of the clemency process is essential to guaranteeing fairness in death penalty administration.

### **B. Guidelines for Review of Clemency Proceedings**

1. What limitations exist concerning the scope, operation, or application of clemency decisions? What is the articulated justification for such limitations?
2. Is consideration given, during the clemency process, to:
  - a. Constitutional claims (a) that were held barred in court proceedings due to procedural default, non-retroactivity, abuse of the writ, statutes of limitations, or similar doctrines, or (b) whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;
  - b. Constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
  - c. Lingering doubts of guilt;
  - d. Facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims; and
  - e. Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction?
3. Are death row inmates provided counsel and access to investigative and expert services prior to and during clemency proceedings?
  - a. How are counsel compensated?
  - b. Are counsel provided sufficient time to investigate and otherwise prepare for clemency proceedings?
4. Are clemency proceedings formally conducted in public? If so, by whom?
5. If the clemency authority is exercised by an official who previously participated in the administration of the death penalty as a prosecutor or state attorney general, what safeguards are in place to ensure that the authority is insulated, to the extent possible, from conflicts of interests?
6. How are clemency decisionmakers educated about their responsibilities and their powers concerning clemency decisions?
7. How are clemency decisions insulated from political considerations?

### **C. Recommendations for Improving Clemency Proceedings**

1. The clemency decisionmaking process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.
2. The clemency decisionmaking process should take into account all factors that might lead the decisionmaker to conclude that death is not the appropriate punishment.
3. Clemency decisionmakers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.
4. In a jurisdiction that does not bar the execution of mentally retarded offenders, those with serious mental illness, those who were juveniles at the time of their offenses, or those whose cases pose a lingering doubt about guilt, clemency proceedings should include consideration of such factors.
5. Clemency decisionmakers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.
6. In clemency proceedings, the death row inmates should be represented by counsel whose qualifications are consistent with the recommendations in Part I (C), above.
7. Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.
8. Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.
9. If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decisionmakers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.
10. Clemency decisionmakers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.
11. To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.”