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## **EXECUTIVE CLEMENCY GUIDELINES**

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The exercise of executive clemency is a vital part of the criminal justice system. The power to pardon or commute a sentence is, first and foremost, a fail-safe that protects us as a society from perpetuating injustice. By issuing clemency, a governor can do what is right rather than what is merely expedient – correcting legal errors, righting systemic wrongs, addressing historical injustices, exercising compassion, showing mercy, promoting equity, and fighting racism. The mere possibility of executive clemency can provide hope and motivation to those who are incarcerated, encouraging them to work to improve themselves and their circumstances through reflection, introspection, education, training, counseling, dialogue, and restorative justice practices. The grant of executive clemency can do more, rewarding personal growth, recognizing the reality that people change over time, facilitating rehabilitation and reintegration into society, and ensuring that formerly incarcerated individuals are able to contribute to their families and communities to the full extent of their capacity consistent with public safety and the rule of law.

With all these factors in mind, the Governor intends to use clemency to make our Commonwealth more compassionate and more just.

Accordingly, the Governor is issuing these modernized clemency Guidelines to center responsibility, compassion, fairness, equity, and accountability. These Guidelines are designed to provide parameters to petitioners seeking executive clemency and to assist the Advisory Board of Pardons with reviewing petitions for executive clemency.

### **1. Authority**

The Constitution of the Commonwealth of Massachusetts provides that:

The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail

the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.

Const. Part 2, c. 2, § 1, Art. VIII, as inserted by Article of Amendment LXXIII.

The law provides the Parole Board, acting as the Advisory Board of Pardons (the “Board”), a significant role in advising the Governor with respect to deciding petitions for executive clemency. The Parole Board has issued regulations governing certain aspects of how it functions in its capacity as the Advisory Board of Pardons, and it shall issue amended or further regulations, if necessary, to implement these Guidelines.

These Guidelines are therefore intended to direct the Advisory Board of Pardons in its review of petitions for executive clemency and recommendations to the Governor. These Guidelines shall be made available to the public in the interest of transparency and to provide individuals who might seek executive clemency with notice of the factors and criteria that the Board and the Governor typically will examine in reviewing a petition.

The Guidelines are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable by any person, including any petitioner, in any matter civil, criminal, or administrative. Nor do the Guidelines place any limitations on the lawful prerogatives of the Governor or the Governor’s Council with respect to executive clemency. The Governor expressly reserves her prerogative to depart from these Guidelines in appropriate cases.

## **2. Types of Executive Clemency**

Massachusetts law recognizes two separate clemency powers. The first, a pardon, has the effect of treating the petitioner as if the offense had never been committed. The second, a commutation of a sentence, has the effect of releasing a petitioner from an ongoing sentence of incarceration. The Governor encourages petitioners to seek all relevant relief in their petitions. Guidance concerning both means of clemency relief are set forth below.

## **3. General Principles and Processes for Evaluating Petitions for Executive Clemency**

The Board shall observe all statutory and regulatory requirements for gathering information as part of the Executive Clemency process. The Board also should make all reasonable efforts to solicit input in a timely manner from the following individuals if it is conducting a hearing with respect to a petition so that they have a meaningful opportunity to be heard at such a hearing: (a) the victim(s) of the offense(s); (b) a representative of the District Attorney’s Office that prosecuted each offense under consideration or a representative of the Attorney General’s Office if the offense was prosecuted by the Attorney General’s Office; and (c) a representative of the primary law enforcement agency that investigated each offense under consideration. The Board shall consider information received from these individuals in evaluating petitions for clemency.

With respect to contacting victims, as that term is defined by G.L. c. 258B, § 1, the Board shall take efforts to avoid, as best as practicable, re-victimizing them when establishing contact, and

where victims are unable or unwilling to participate in the executive clemency process, the Board shall attempt to consult other relevant sources of information – including police reports, court transcripts, or other reliable written accounts – to ensure that victims’ voices are heard through all stages of the clemency process.

As set forth in the Board’s regulations, the burden of proving facts to the Board shall rest on the petitioner. To draw a conclusion or consider a fact, the Board must be satisfied that the conclusion or fact is supported by the weight of the evidence.

The Governor will address each petition for executive clemency on its own merits. As outlined below, there are several factors that the Governor will consider in deciding whether to grant relief sought by a petition.

#### **4. General Factors Applicable to All Executive Clemency Petitions**

Except as specified below in Section 8, in evaluating all petitions for executive clemency the Governor will focus primarily on three factors.

***First, the Governor views executive clemency as a means of addressing unfairness in the criminal justice system.*** Despite our best efforts as a society, innocent people may be convicted of a crime. Sentences imposed by different judges in different places and under different circumstances may vary in ways that are not just or fair. Statutes are blunt instruments that may require unjust results when considered in context of later statutory changes or in particular instances once individual or mitigating circumstances are taken into account. The Governor will consider whether issuing clemency would address a miscarriage of justice.

As part of this first factor, the Governor will consider if continued incarceration would constitute gross unfairness in light of the basic equities involved, including, but not limited to the severity of the sentence received in relation to sentences received by other equally culpable and similarly situated defendants, the extent of petitioner’s participation in the offense, and intervening changes in the law.

With respect to this first factor, the Governor is also mindful that racial disparities exist at every stage of the criminal legal system and that racial disparities and biases have resulted in the mass incarceration of Black and Latino defendants at a rate far higher than their White counterparts. The Governor will take the persistence of racial disparities, and their root causes, into account in determining whether issuing clemency would address a miscarriage of justice.

Ethnic and cultural minorities, migrants, veterans, people with disabilities, women, those who are LGBTQ+, those who are poor, and others continue to face unequal treatment within our criminal justice system. The Governor will take the persistence of stigma, bias, and systemic inequality into account when considering requests for clemency.

No petitioner shall be required to prove racial bias or other discrimination in their criminal case to support a request for clemency.

**Second, the Governor will use executive clemency to ensure accountability with compassion.** The nature and circumstances of the offense are major considerations in deciding whether to grant clemency. The Governor will consider the impact of the crime on the victim or victims and the impact of the crime on society. The Governor also will consider circumstances that aggravate or mitigate culpability, including science-based evidence that bears on the petitioner's actions. The age, maturity, and intellectual abilities of the petitioner at the time of a criminal offense may be mitigating factors that support granting of clemency. The Governor's consideration of these factors will be informed by research, such as studies tending to show when the parts of the brain that control behavior become fully developed and how the process of development impacts behavioral decision-making.

**Third, the character and behavior, particularly post-offense behavior, of the petitioner will be considered in evaluating all clemency applications.** The Governor recognizes that our character can be measured by a collection of actions over time, accounting without hesitancy for the worst things we have done but also owning responsibility for what we do next. With accountability, compassion, and mercy, the analysis under the third factor should focus on the petitioner's conduct and what it reveals about character, considering the petitioner's efforts at improvement, rehabilitation, or reintegration into society, and assessing whether the petitioner will pose a risk to public safety.

As it relates to this third factor, the Governor will give significant consideration to petitioners who have clearly demonstrated that they accept responsibility for their past actions, without giving negative consideration to petitioners who pursue an appeal or other legal challenge to their convictions. A criminal defendant's exercise of due process is not inimical to executive clemency, and a petitioner's unwillingness to accept responsibility for an offense may sometimes reflect the petitioner's actual innocence rather than any shirking of responsibility for past actions. Petitioners who maintain their innocence, like other petitioners, shall be eligible for clemency as the circumstances warrant.

In addition, the Governor will give positive consideration to petitioners who have made restitution to their victims. The failure to pay restitution, however, will not be a factor in the consideration of a petition where a petitioner is unable to pay restitution. A petitioner's participation in restorative justice or other similar programs will be a consideration in the Governor's decision to grant clemency.

As part of considering the character and behavior of the petitioner, the Governor also will weigh the effect of continued incarceration on the petitioner or continued maintenance of a criminal offense on the petitioner's record.

The Governor also will take into consideration when evaluating the character and behavior of the petitioner the fact that a petitioner has provided substantial assistance to law enforcement in the investigation or prosecution of other more culpable offenders. The Governor will not consider any claimed substantial assistance of a petitioner unless it is verified by a written statement from a District Attorney or from the Attorney General describing the nature, extent, timeliness, and completeness of the petitioner's assistance, any injury suffered or danger or risk incurred by the

petitioner or their family resulting from the petitioner's assistance, and any and all benefits or consideration the petitioner received in exchange for that assistance.

The Governor also will give stronger consideration to a petitioner who has contributed to society through service in the military or other public service, good conduct that is helpful to others, or through charitable work, because such actions demonstrate good character and behavior.

## **5. Special Factors Applicable to Pardons**

In addition to the above general factors, the Governor will consider the following factors relevant to pardon applications.

The Governor will not give executive clemency lightly. Petitioners must demonstrate a compelling need for a pardon. The Governor recognizes that many consequences flow from a criminal conviction. Many petitioners will have a compelling need to seek clemency. Injustice is itself a weight to bear; most employers require criminal background checks as a precondition of employment; immigrants can suffer adverse immigration consequences because of a conviction; those who are convicted may lose the right to vote; and some may lose the ability to seek public resources, including housing, that would support their reintegration in the community after release from prison. Petitioners may support their requests for a pardon by explaining how their criminal convictions hamper them and how a pardon would help them contribute to their families and their communities to their fullest potential.

In addition to weighing the general factors for clemency addressed above, pardon relief will usually be reserved for those petitioners who have demonstrated a substantial period of good conduct and social responsibility after the criminal offense. The Governor will give serious consideration to pardon requests where: (1) the petitioner has neither been convicted nor confined under sentence during the past 10 years (in the case of felonies) or 5 years (in the case of misdemeanors), and (2) the petitioner has demonstrated the ability to lead a responsible and productive life for a significant period after conviction or release.

To inform this evaluation, a petitioner shall disclose: all criminal charges (regardless of the disposition of the case), all restraining orders taken out against the petitioner in the last five years, including the date the order issued, the name of the court that issued the order, the docket number, and the name of party who requested the order, and any court orders issued against the petitioner for civil infractions (such as contempt orders) in the last five years, including the date the order issued, the name of the court that issued the order, the docket number, and the caption of the case.

Petitioners who seek clemency while still serving sentences – whether in a correctional facility, on parole, or under the supervision of a probation department – generally should seek a commutation before seeking a pardon.

## **6. Special Factors for Commutations**

In addition to the above general factors, the Governor will consider the following factors relevant to commutation applications.

Although commutation is not a substitute for the availability of medical parole (G.L. c. 127, § 129A) or standard parole, consideration should be given to a petitioner's age (over 50 years old) or diminished health as a factor that supports a request for a commutation.

The Governor will give strong consideration to a request to commute a sentence of a petitioner who has made exceptional strides in self-development and self-improvement and likely would be a valuable and law-abiding contributor to society upon release from custody. The Governor will closely examine the petitioner's institutional record and disciplinary history. The number and degree of seriousness of disciplinary reports shall be considered. The Governor also will closely examine any record of good conduct by petitioners while they are serving the sentence for which they are seeking commutation, including voluntary participation in rehabilitative programs, restorative justice or similar programs, substance abuse treatment programs and work, vocational, educational, and other programs that are available. The Governor also shall consider personal growth and constructive support, mentoring, and help to others who are incarcerated.

The Governor acknowledges that survivors of sexual assault, domestic violence, or human trafficking, and those who are LGBTQ+ are often at heightened risk of harm and experience additional trauma while incarcerated. The Governor will take the unique circumstances of incarcerated individuals who are LGBTQ+ and those who are survivors of sexual assault, domestic violence, or human trafficking into account in considering whether additional incarceration is merited and whether a petitioner will pose a safety risk upon release.

## **7. Procedure for Processing Applications for Clemency**

The Advisory Board of Pardons should submit its report and recommendation to the Office of the Governor's Legal Counsel. The Advisory Board of Pardons should include in its report and recommendation all information specified in the applicable regulations, a list of persons or entities whose input was solicited, as well as the reasoning for the recommendation, making specific reference to these Guidelines.

The Governor, at any time while a recommendation is pending before her, may: (a) return a petition to the Board for further action or investigation; or (b) otherwise request further information from the Board.

The Board, at any time while a recommendation is pending before the Governor, should advise the Governor of new information, not previously known to the Board, and may, based on that new information, withdraw, or amend its recommendation.

The Governor, at any time while a recommendation is pending, may request further information directly from the petitioner. A petitioner's failure to provide information in response to such a request may result in the denial of the petition.

The Board shall review all petitions for clemency within 10 weeks of receiving them to determine whether such petitions will be denied or whether a hearing should be held. If a hearing is held, then the Board shall hold the hearing publicly – either in person or virtually – and issue its report and recommendation to the Governor’s Legal Office within six months of having received the petition, unless additional evidence from the petitioner is necessary to make the recommendation.

Whenever the Board recommends that the Governor deny a petition and the Governor does not take any action with respect to the recommendation within 90 days after the later of: (a) the date of its submission to the Governor; or (b) the date of any additional submission pursuant to these Guidelines, the Board and the petitioner shall presume that the Governor concurs in that adverse recommendation. After the 90-day period has elapsed, the Board shall advise the petitioner and close the case.

Whenever the Board recommends that the Governor grant a petition and the Governor does not take any action with respect to the recommendation within one year after the later of: (a) the date of its submission to the Governor; or (b) the date of any additional submission to the Governor pursuant to these Guidelines, the Board and the petitioner shall presume that the Governor disagrees with that positive recommendation and will not grant the petitioner executive clemency. After the one-year period has elapsed, the Board shall advise the petitioner and close the case.

The Board shall adopt rules to ensure that all hearings held relating to petitions for executive clemency are fair, public, and provide petitioners with an opportunity to be heard.

## **8. Supplemental Executive Clemency Guidelines**

Periodically, the Governor may issue additional supplemental guidelines for executive clemency to address specific issues. The Board shall evaluate relevant petitions under such supplemental guidelines, as appropriate.