

**Testimony of James Thomson  
Before the California Commission on the  
Fair Administration of Justice**

**March 28, 2008, Santa Clara, California**

**- Clemency In California -**

**BACKGROUND**

I am in private practice. I spent the first half of my career in Sacramento, and I now practice out of Berkeley, California.

I am entering my thirty-first year of practicing law.

I am starting my twenty-sixth year representing capital-charged clients.

I have handled more than fifty death penalty cases at the trial, appellate & post-conviction levels.

I have consulted on hundreds of other capital cases.

I have tried eight capital cases to verdict, none resulting in a death sentence.

I have represented clients charged in death penalty cases in both state and federal courts.

I have represented capital clients in California, and in other jurisdictions, including Montana, Arizona, Florida, Nevada, Tennessee, Hawai'i and in the Territory of America Samoa.

I have qualified as an expert witness on right to counsel issues eight times.

I have represented clients in three clemency proceedings, two in California and one in Arizona. I have consulted on many other clemency matters.

Unfortunately, I also have witnessed the execution of two men in California. I now know, because of the *Morales* litigation, that these men were killed while suffering excruciating pain as a result of the fatal injection.

I am testifying on behalf of California Attorneys for Criminal Justice as a Past President (1994) and as its current Chair of the Death Penalty Committee.

## **OVERVIEW OF CLEMENCY PROCESS**

I represented the fourth and eighth men who were executed in California in the post-*Furman* era.

The clemency procedures and determination were set by the individual Governors, Pete Wilson and Gray Davis. In neither case, were we provided with any meaningful information about what the Governor was interested in hearing.

While we were told on both occasions that we could present whatever information we wanted, we were given no guidance about what information the Governor would consider, what he was interested in, or what he might be inclined to rely on in making his determination.

We were not given a copy of any of the materials that the Governor reviewed. Nor were we given access to the “black book,” as it is called.

We were not allowed to meet with the Governor.

Because we were never given the opportunity to address the matters that concerned the Governor or that might have affected his determination, we had no opportunity to address the questions the Governor had after his review of the clemency materials.

We were truly left in the dark as to how best to reach the Governor with regard to what might have mattered to him.

For purposes of my testimony, I accept Professor Carter and Moylan's conclusion that - from administration to administration - those charged with the investigation of California clemency petitions do so painstakingly and those charged with making a recommendation do so with an acute awareness of the enormity of their responsibility. However, the ultimate decision-maker, the Governor, is an elected official whose choice involves a calculus that is, by definition, unlike a judicial determination. The calculus may be influenced by factors such as political ambitions (or lack thereof), public sentiment, religious beliefs, personal values, and/or loyalty to interested groups.

Each Governor is different. Knowledge of the Governor's particular interests and concerns are key to understanding whether your approach to clemency is on target.

Those who work for the Governor are in his chain of command or his political circle. They will know him, have his ear, or be told what interests and what affects him. That group includes the Attorney General, the Board of Parole Hearings and the Department of Corrections and Rehabilitation. These state agencies provide information from the law enforcement and prosecutorial perspective solely. All have ample resources for investigation.

Petitioners and their appointed attorneys, of course, are outside that circle, and have sparse, if any resources.

And since clemency is an executive act, a highly personal act, without guidance from the Governor, it is reduced to a guessing game for the petitioner.

## **FOCUS QUESTIONS OF THE COMMISSION**

Are clemency procedures consistent from one Governor to the next?

- No, not procedurally or substantively.

Are California's procedures consistent with other states?

- In some ways yes, and in others, no.

Are the procedures adequate to assure a fair opportunity to be heard?

- No, without insight into what the Governor knows from his review of the black book, and without knowing the Governor's concerns in each case, an inmate has an opportunity to be heard, but he or she does not know what to say.

Are the procedures adequate to assure a principled decision in the matter?

- No, for the same reasons and because, at its heart, clemency is an executive decision, and the concept of a "principled decision" is different in the clemency context than it is in the judicial context.
- In courts, the concept of fairness and burdens of proof and persuasion are known by the parties and the arbiter. Not so in clemency because the act is truly individual.

## **CLEMENCY IS NOT A FAIL-SAFE**

This Commission should proceed in its determination with the understanding that clemency is not the fail-safe mechanism alluded to by the Supreme Court in *Herrera*.

As a constitutional matter - at least under current rulings - there is very limited judicial scrutiny of the process, and almost none when it comes to the substantive decision.

Clemency is the ultimate executive act. It is, by all accounts, a true political decision.

As such, it has developed through a process shaped by the politics, the values, the world view of each Governor.

Certainly, in California, in the post-*Furman* era, it can be said that each Governor has approached clemency with the view that the trial, appeal and post-conviction review - that is the judicial process - were without error.

The fact that a jury voted for death and the appellate courts have affirmed that decision are reasons why California Governors have determined that clemency should not be granted.

But, contrary to the Supreme Court's holding in *Herrera*, in the post-*Furman* era, California Governors do not view clemency as a "fail-safe" for the judicial process. Rather, as the Carter-Moylan report suggests, the Governors see the judicial process itself as fail-safe. Testimony before the Commission leaves no doubt that the Governors are mistaken.

Even before this Commission tackled capital punishment as a topic, it confronted the inadequacies and inequities in the state's criminal justice system.

Now, during three fact-laden days, the Commission has taken testimony about the pervasive deficiencies in the trials and appeals of poor persons in death penalty cases. The Commission has learned about the lack of funding for counsel and for necessary resources; the failure to enforce the ABA Guidelines; the disturbing evidence of race discrimination; the troubling facts regarding ineffective assistance of counsel; the intense prosecutorial resistance to scrutiny of charging practices; and the denial of a jury that truly comes from a fair cross section of the community.

As the Commission heard, the capital punishment system in California is not picture perfect. The system is broken from stem to stern.

As a constitutional and political matter, the Commission will likely face substantial obstacles effecting changes in the clemency regime. Indeed, the Commission has already experienced the rebuke of the Governor in vetoing bills passed by the Legislature based upon the Commission's recommendations.

True to your charge, the Commission should stay focused on the enormous changes that must be made in the legislative and judicial branches of government.

To the extent that the Commission can propose changes in the clemency process, the ones suggested by Professors Carter and Moylan would serve petitioners and the public, and should be adopted.

In sum,

Counsel for the men and women facing clemency must have access to the black book, if the process is going to be meaningful, let alone fair.

The Governor's precise concerns in the clemency matter must be communicated to the petitioner's counsel.

An opportunity to appear before the Governor should be required.

Finally, an ABA - driven clemency team with full funding for the clemency investigation and presentation should be appointed to represent the petitioner.

## **CONCLUSION**

Thank you for the opportunity to share this information with you. I hope that it assists you in reaching your findings regarding the fair administration of justice in California.

JAMES THOMSON