

Daily Journal

www.dailyjournal.com

FRIDAY, MARCH 22, 2024

PERSPECTIVE

Commute them all, revisited

By David A. Carrillo
and Brandon V. Stracener

What's the difference between asking 400 times for sentences to be commuted, and asking once for 400 commutations? None at all.

Last year we argued that California's governor could commute all pending capital sentences to life without parole, using sole executive power for those with one felony and by asking the California Supreme Court to concur in commuting the 400 or so capital inmates with two or more felonies. That article built on a first foray into this topic five years ago, which argued that the current execution moratorium was at best a temporary stopgap until Gov. Gavin Newsom leaves office.

This idea has received some recent attention: Jason Marks argued that the California Supreme Court can and should approve a mass commutation for twice-convicted felons, while Ron Matthias argued that such a blanket commutation would be an abuse of power. We respond here by unpacking the core concept at issue: a governor's clemency power.

Executive clemency is nearly unlimited and practically unreviewable. California constitution article 5, section 8(a) empowers the governor "on conditions the Governor deems proper" to grant a reprieve, pardon, or commutation after sentence. Judicial review primarily checks for procedural compliance; the separation of powers doctrine bars a more aggressive review. Thus, the California Supreme Court's view is that the clemency power "rests with the Governor, and may

be exercised by him for reasons of his own." *Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation* (2018) 4 Cal.5th 897, 901 (citation omitted).

That the court has even this limited review flows from historical concerns about abuse of the clemency power involving political pressure or untoward influence. *Id.* at 899. Unrestrained power is ripe for abuse, particularly from corruption, and the court's primary concern here has long been to avoid clemency involving political influence or pressure from connected friends and family of the convicted. This is a realistic concern: see for example *Santos v. Brown* (2015) 238 Cal.App.4th 398, 406 where the court notes evidence of backroom dealings and political favoritism in a grant of clemency. If California's high court sees a corrupt governor selling clemency for political considerations, it can and should refuse its concurrence.

Yet a single request bearing 400 names and the same overall principled justification suggests no corruption at all—each inmate receives the same benefit, political connections or not. When a governor can avow a belief that no capital inmate (no matter their number of felonies) should not be killed by the state because killing as punishment is always wrong, it is irrelevant whether that governor files one request with 400 names or files 400 separate requests. In commuting them all on the same principled basis, the end result is identical: the California Supreme Court may either grant the one omnibus request or stamp 400 separate orders. Either way, the court's inquiry circles

back to the same point about whether the governor is sincere about this broadly applicable moral conviction. If so, there is no abuse of power.

Mr. Matthias argues that blanket clemency would contravene the electorate's will. But clemency *always* counters the voters and the sentencing jury. Although the voters can use their statutory initiative power to rebuff the legislature because those two actors share the state's lawmaking power, that power isn't implicated here. The voters have no executive powers to override the governor's express and sole constitutional clemency power.

So the question isn't whether the electorate's will would be perverted, or whether blanket clemency would be an abuse of power. Instead, what matters here is the undisputed and unlimited power of executive mercy. Clemency is an act of grace to forgive wrongs done against the state. It is a stan-

dardless grant of relief from punishment, on whatever moral, religious, or ethical grounds move a governor's heart. This is a bit like asking someone why they have faith: it's a matter of personal conviction. When a governor is moved to be merciful, the courts recognize that's between the governor and the Almighty. The rest is politics.

Politics do matter. That voters rejected a 2016 proposal to convert all capital sentences to life without parole matters, as does their adoption of Proposition 66 that year to expedite the execution process. But political reality also matters. The California Supreme Court held in *Briggs v. Brown* (2017) 3 Cal.5th 808 that the deadline to complete capital merits appeals was not mandatory. Indeed, the last time California executed anyone was Clarence Ray Allen in 2006; he was 76 years old and had been on Death Row for 23 years. In the 48 years since capital punishment resumed in 1976, California has

David A. Carrillo is executive director of the California Constitution Center at Berkeley Law. **Brandon V. Stracener** is an attorney in private practice.



managed to execute just 13 people, out of nearly 700 inmates with death sentences. Recognizing these facts, California's prison system announced this week that it is "phasing out its segregated death row units" and capital inmates are being transferred to other housing. The idea that California will move on executions anytime soon isn't a realistic conversation – that's the political reality.

If the California Supreme Court receives a request for concurrence in commuting all capital inmates with more than two felonies, this is our proposed form of order:

California's governor has requested that this Court concur in commuting the sentences of 400 inmates with more than two felony convictions from death to life without possibility of parole. Under Admin. Order 2018-03-28 (2018) 4

Cal.5th 897, the exercise of executive clemency rests primarily on extrajudicial considerations: the executive has the power to grant clemency on whatever grounds they deem appropriate. This Court's review serves only to ensure procedural compliance and to confirm that an act of executive clemency does not represent a flagrant abuse of that power. This Court does not conduct substantive review of

that decision; we are instead concerned only with whether there exists a legitimate basis on which the Governor could choose to grant clemency to the applicant(s). Upon review, and being mindful of this Court's limited role, at least four justices of this Court concur as required by article V, section 8 of the California Constitution for the Governor to grant these sentence commutations.