

Revised May 2, 2023
Massachusetts Bar Association Clemency Task Force
PROPOSED
EXECUTIVE CLEMENCY GUIDELINES
To be issued by Governor Maura Healey

Clemency is a historic and vital remedy designed to ensure justice is served in criminal cases and to promote the successful re-entry into the community of individuals who are incarcerated. Clemency serves as an act of mercy and a failsafe when no other legal remedy is available. Clemency also provides a strong incentive for individuals to utilize available resources and engage in efforts that prepare them for successful return to society.

1. Source of 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.

2. Purpose of the Guidelines.

These Guidelines shall be made available to the public in the interests of transparency and to provide individuals who might seek executive clemency notice of the factors and criteria that the Advisory Board of Pardons (the "Board") and the Governor will typically examine in reviewing a petition. The Guidelines do not create any additional substantive or procedural rights enforceable by any person, including a petitioner, in any civil, criminal or administrative matter. The Guidelines do not limit the lawful prerogatives of the Governor or the Governor's Council with respect to clemency, including departure from the Guidelines as deemed appropriate.

3. Regulations.

The Board will issue regulations on clemency that are consistent with these Guidelines.

4. Types of Executive Clemency.

A. Pardons.

A pardon is primarily intended to remove or reduce barriers to the successful reintegration of the petitioner into his or her community often caused by a criminal record or history of incarceration. A pardon is an extraordinary remedy that may be granted only when no other relief is available to the petitioner.

B. Commutations.

The Governor views commutation as an integral part of the correctional process. Review of a petition for commutation of a sentence is not intended to serve as a substitute for an appeal or post-conviction relief. A commutation is an extraordinary remedy that may be granted only when no other relief is available. Commutations are also intended to serve as a strong incentive for confined persons to prepare for a successful return to society, including but not limited to use of resources for education, career training, self-improvement and personal growth, and beneficial support for others who are incarcerated.

5. Racial Disparities.

The Governor shall consider that racial disparities exist at every stage of the criminal legal system, from policing to charging decisions to sentencing, and that racial disparities and biases have resulted in the mass incarceration of Black and Latinx defendants at a rate far higher than their White counterparts. Black and Latinx individuals are more likely to be convicted and also receive longer and harsher sentences. The Governor shall interpret and apply the Executive Clemency Guidelines as a tool for remedying past racial injustice, but shall not require a petitioner to prove racial discrimination or bias in their individual case.

6. Burden of Proof.

The petitioner has the burden of proving facts by clear and convincing evidence.

7. Gathering of Input by the Board.

In addition to complying with all statutory and regulatory requirements for gathering information, the Board should make all reasonable efforts to solicit input from the following individuals if it is conducting a hearing on a petition: (a) the victim(s) of the offense(s) under consideration; (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.

8. Individualized Determinations.

The Governor shall address each petition for executive clemency on its own merits. As outlined above and below, there are a number of factors that the Governor will consider in deciding whether to grant a petition.

9. General Factors Applicable to All Clemency Petitions.

9.1. Nature and Circumstances of the Offense.

The nature and circumstances of the offense is one of two main considerations in deciding whether to grant clemency. The Governor will give significant consideration to the impact of the crime on the victim or victims and the impact of the crime on others and society as a whole. The more serious the offense, the more time that should have elapsed to minimize any impact clemency may have on respect for the law. The Governor shall also consider the extent to which credible information suggests the petitioner may be actually innocent of the underlying offense.

9.2. Character, Behavior, and Circumstances of the Petitioner.

As described in more detail below, character and behavior, particularly post-offense conduct of the petitioner, is the second main consideration in deciding whether to grant clemency. This includes but is not limited to efforts at self-improvement, personal growth, use of resources for self-development, education, and career training, and constructive support and help to others who are incarcerated.

In addition, the personal circumstances of the petitioner shall be considered. This includes, but is not limited to, the effect of continued incarceration on the petitioner, the petitioner's age and health conditions, trauma and victimization history, socioeconomic history, disabilities, commitment to sobriety, maturity level, and personal growth since the offense. A petitioner shall not be penalized for not participating in enough programs when few, if any programs, were available to the petitioner. The Department of Correction is encouraged to ensure restorative justice programs are available at every institution.

The Governor will also 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 violence committed by the victim(s) against the petitioner.

9.2.1 Acceptance of Responsibility.

The Governor will consider whether the petitioner has clearly demonstrated acceptance of responsibility for the offense for which the petitioner is seeking clemency. Acceptance of responsibility, however, should not be a factor in the clemency assessment when a petitioner has consistently maintained actual innocence or responsibility for a lesser offense and there is credible information suggesting there may be validity to such a claim.

9.2.2 Changes in the Law.

The Governor shall consider changes and new developments in the law that have occurred since the conviction(s). This includes, but is not limited to changes in the law related to felony-murder offenses, the availability of defenses based on battered women's syndrome, and the Supreme Judicial Court's recognition of research on brain development suggesting that younger individuals are less culpable for their actions and have a greater capacity for change.

9.2.3 Pending Appeals and Other Post Conviction Litigation.

Generally, a petitioner's exercise of his or her legal rights to appeal a conviction or other challenges to a conviction or sentence through litigation shall not be considered as inconsistent with acceptance of responsibility.

9.2.4 Restitution.

The Governor will give stronger consideration to petitioners who have made restitution in a prompt manner, except where the petitioner lacks the ability to pay the restitution.

9.2.5 Substantial Assistance to Law Enforcement.

The Governor will take into consideration 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, the Attorney General or other law enforcement describing the nature, extent, timeliness, and completeness of the petitioner's assistance, any injury suffered or danger or risk incurred by the petitioner or his or her family resulting from the petitioner's assistance, and any and all benefits or consideration the petitioner received in exchange for that assistance.

9.2.6 Military, Public, and Charitable Service.

The Governor will give stronger consideration to a petitioner who has contributed to society through service in the military, AmeriCorps, Peace Corps, VISTA, other public service, work for a non-profit organization, or volunteer or charitable work in support of others, and civic or community engagement.

9.2.7 Survivors of Sexual & Domestic Violence and Trafficking (SDVT).

The Governor shall give particular consideration to petitioners who are victims of sexual assault, domestic violence and/or human trafficking (SDVT) and who incurred their offenses in connection with being a victim of such acts. A victim of SDVT is defined as a person who is the victim of act(s) constituting (i) abuse as defined in section 1 of chapter 209A; (ii) human trafficking as defined by section 20M of chapter 233 or a victim of trafficking in persons under 22 U.S.C. 7102; and/or (iii) act(s) that by force, threat or duress causes another to involuntarily engage in sexual relations.

SDVT impacts all demographics and is disproportionately experienced by younger people ages 12-34, LGBTQQI+ individuals, people with disabilities, BIPOC women, and other marginalized communities. It is important that the unique needs, experiences, and vulnerabilities survivors of sexual and domestic violence or trafficking not be overlooked. The Board and the Governor shall consider credible evidence of abuse of the petitioner including, but not limited to testimony of the petitioner in determining eligibility for relief under this section.

Any official documentation from any local, state or federal community-based or governmental agency or court of the defendant's status as a victim of SDVT shall create a rebuttable presumption that the defendant's participation in the offense was a result of their victimization, but shall not be required for granting a petition. For purposes of this subsection, "official documentation" shall be defined as any document issued by a local, state or federal community-based or government agency in the agency's official capacity, or by a court.

9.2.8 Age and Lack of Maturity at the Time of the Offense.

Age and lack of maturity at the time of a criminal offense are mitigating factors that the Governor shall consider in granting of clemency. While research continues, studies show that parts of the brain that control behavior are not fully developed until early adulthood and into a person's twenties. Accordingly, the age of a person at the time of commission of an offense is a relevant factor to be considered when evaluating a request for clemency.

9.2.9 Advanced Age, Frailty, and Chronic Illness.

The Governor will consider a person's advanced age and diminished health. Recidivism declines with age and chronic health conditions and age-related vulnerabilities or lack of access to treatment or an environment that is conducive to healing, recovery, or management of health conditions suffered by an elder (age 50 or older) are relevant factors.

9.3 Prior Petitions.

Absent a substantial change of circumstances or a compelling reason, the Governor will not grant clemency to a petitioner within one year of denial of a petition by the Governor.

10. Special Factors Applicable to Commutations.

10.1 Commutation of First-Degree Murder Offenses.

The Governor is unlikely to consider a petition for commutation of a sentence for first degree murder until the petitioner has served fifteen years of the sentence, the minimum amount of time for a person serving a sentence for second degree murder to become eligible for parole, unless a petitioner has consistently maintained actual innocence or responsibility for a lesser offense and there is credible information suggesting there may be validity to such a claim.

10.2 Lack of Alternative Remedy.

Commutation is not a substitute for the availability of medical parole (G.L. c. 127, § 119A) or standard parole, or a mechanism to appeal adverse decisions of the Parole Board.

The Governor will rarely grant a commutation to a person who is seeking release from a correctional institution and for whom the Parole Board has denied an application for parole. The Governor is more likely to consider a petition for commutation from a person who is not yet parole eligible.

10.2. Behavior in Correctional Institutions.

The Governor will give strong consideration to a request to commute a sentence of a petitioner who has made consistent and substantial improvements in self-development or preparation for successful return to society, and would be a law-abiding citizen 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 will also closely examine any record of good conduct by the petitioner while the petitioner is serving the sentence for which he or she is seeking commutation, including voluntary participation in rehabilitative programs, restorative justice or similar programs, substance abuse treatment programs and work, vocational, educational and other available programs. The Governor shall also consider personal growth and constructive support, mentoring, and help to others who are incarcerated.

11. Special Factors Applicable to Pardons.

11.1. Good Citizenship.

Absent compelling circumstances, a petitioner seeking a pardon should demonstrate both good citizenship and a compelling need for a pardon as set forth below.

11.1. Ongoing Incarceration, Parole and Supervision.

The Governor will rarely grant a pardon to a petitioner who is still serving a sentence, be it in a correctional facility or on parole or under the supervision of a probation department.

Generally, the Governor will grant a pardon only if the petitioner has demonstrated the ability to maintain good citizenship over a significant period of time without the structure provided by government supervision. Petitioners still serving sentences who seek clemency should generally seek a commutation before seeking a pardon.

11.2. Behavior While Not Incarcerated, Under Parole, or Under Probation Supervision.

The Governor will rarely grant a pardon to a petitioner who has not demonstrated good citizenship, without the structure provided by government supervision over a period of at least three years for misdemeanors and seven years for felonies. This period begins on the first day that the petitioner is not incarcerated and not under supervision of either the Parole Board or the Probation Department. Good citizenship means more than refraining from committing new offenses as evidenced by a lack of guilty findings or admissions to sufficient facts. Good citizenship means leading a responsible and productive life and contributing to one's community in a positive manner. In determining whether a petitioner has demonstrated good citizenship, the petitioner should disclose and the Board should make all reasonable efforts to investigate and verify, among other things: (a) whether the petitioner has been the subject of any restraining order during the period of claimed good citizenship; and (b) the circumstances surrounding any criminal charge that resulted in a nolle prosequi, dismissal, or finding of not guilty unless the offenses are sealed or expunged.

11.3 Compelling Need for a Pardon.

In making a determination as whether a petitioner has a compelling need for a pardon, the Governor shall consider that the Commonwealth has a compelling interest in reducing recidivism and promoting employment and successful re-entry of people released from incarceration and/or convicted of an offense.

A pardon is an act of mercy that eliminates collateral consequences of a conviction in order to promote successful reintegration of the petitioner into their community. Criminal background checks are routine in many contexts and a conviction may result in disqualifications and barriers to employment, occupational licensing, training, professional advancement, housing, and other opportunities.

11.3.1. Lack of Alternative Remedy for a Pardon.

A petitioner has not demonstrated a compelling need for purposes of these Guidelines if the need can be met by means other than a pardon. For example, if the petitioner's articulated need may be satisfied by statutorily sealing (G.L. c. 276, §§ 100A to 100C) or expunging (G.L. c. 276, §§ 100F to 100H, § 100K to 100K 1/4) the record of conviction, then the petitioner has not demonstrated a compelling need for a pardon.

11.3.2 Employment and Other Opportunities.

A petitioner claiming a compelling need for a pardon in order to secure employment, higher compensation, professional advancement, or access to other opportunities should provide evidence, including but not limited to the petitioner's testimony about how the conviction is adversely affecting employment or other opportunities. If the offense is eligible for sealing or expungement, the petitioner shall explain why sealing or expungement of the record is insufficient.

11.3.3 Licensing.

A petitioner claiming a compelling need for a pardon to obtain a license from a governmental entity should also provide evidence that his or her conviction is preventing the issuance of that license in the form of a denial of a licensing application based on the conviction and other documentary evidence that the issuance of a pardon will likely result in the issuance of the license.

11.3.4 Firearm Licensing.

The Governor will rarely issue a pardon to enable a petitioner to receive a firearms identification card, license to carry firearms, or license to possess a machine gun if the petitioner has: (a) experienced a history of emotional or mental health problems; (b) had an order entered against that petitioner pursuant to G.L. c. 140, 131S or 13 IT; or (c) has, within fifteen years of the petition been convicted of or received a continuance without a finding, as an adult, for any of the following crimes: (i) any "violent crime" as that term is defined in G.L. c. 140, 121; (ii) assault and battery; (iii) indecent assault and battery or rape; (iv) any crime involving the use of a firearm; (v) a civil rights violation; (vi) violation of a restraining order; (vii) stalking; (viii) any crime of domestic violence; or (ix) any other crime that otherwise involves conduct that similarly demonstrates a lack of suitability to possess a firearm.

A petitioner claiming a compelling need to obtain a firearm license should also provide proof that the issuance of a pardon will likely result in the issuance of the firearm license in the form of a letter from the licensing authority stating that the license would be granted if the pardon were issued.

12.00 Procedures for Clemency.

12.1 Procedure for Recommendations Submitted to the Office of the Governor's Legal Counsel.

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 behind the recommendation, including specific reference to these Guidelines.

12.2 Additional Information from the Advisory Board of Pardons.

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

12.3. Additional Information from the Petitioner.

The Governor, at any time while a recommendation is pending before him, 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 his or her petition.

12.4. Timelines and Process for Clemency Petitions.

The Board shall review every clemency petition within ten weeks of receiving it and determine whether it will be denied or whether a hearing should be held. If the Board determines a hearing should be held, then the Board shall hold the hearing and the Board's report and recommendation shall be submitted to the Office of the Governor's Legal Counsel within six months of receiving the petition.

A petitioner who is granted a hearing shall have the right to an in-person hearing. If an in-person hearing is not possible due to the COVID-19 pandemic or some other compelling reason, the petitioner shall be entitled to decide whether to wait until in-person hearings resume or proceed with a virtual hearing.

Petitioners shall have the opportunity to have counsel represent them and to present any evidence they feel supports their claims for a commutation or a pardon, including documentary evidence or live witnesses.

The length of the hearing shall not be unduly restrained. Petitioners shall have sufficient time to present their cases, including testimony by any relevant witnesses who will speak on their behalf.

Once the Governor receives the Board's recommendation to grant a petition, the Governor shall take action on the petition within six months by affirmatively stating whether the petition is granted or denied.

13. Public Access to Clemency Hearings.

13.1 Public access and viewing of the hearing.

Members of the public shall be permitted to attend any hearings. A list of clemency hearings shall be posted by the first day of the month online at the official state government website (www.mass.gov) to facilitate greater public access and transparency as to how each clemency case proceeds. The list shall indicate the date and time of the hearing, hearing type (whether pardon or commutation), location of the hearing, and the address of the hearing.

13.2 Virtual hearings.

If the hearing will be conducted virtually, the public shall be provided the link and information necessary to access the hearing remotely as well as by phone. Mere telephone access to the hearing is not acceptable because members of the public, including but not limited to family members of the petitioner or a victim, may have disabilities, including hearing impairments. Virtual hearings must include video as well as a call-in feature so that all members of the public may easily access the hearing.

14. Sealing of Records after Governor's Council Approves a Pardon.

Upon approval of a petition for pardon by the Governor's Council, the Governor shall forthwith direct the Commissioner of Probation and all proper officers to seal all records relating to the offense for which the person received the pardon. See G.L. c. 127, § 152.

**MAURA HEALEY
GOVERNOR**

Commonwealth of Massachusetts