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REPORT OF THE MASSACHUSETTS BAR ASSOCIATION CLEMENCY TASK FORCE

The Massachusetts Bar Association (MBA) Clemency Task Force includes, but is not limited to prosecutors, defense attorneys, a former Supreme Judicial Court Justice, the policy director of Jane Doe, Inc. (Massachusetts Coalition Against Domestic Violence and Sexual Assault), an Assistant Attorney General, vice-president of the Massachusetts Black Lawyers Association, past president of the Hampden County Bar Association, a legal-aid attorney, and experts on clemency. The Task Force co-chairs are Sabrina E. Bonanno and Pauline Quirion, and members include the Honorable W. Travaun Bailey, the Honorable Robert J. Cordy (ret.), Patricia A. Dejunas, D'Andre Fernandez, Patricia Garin, Susan K. Howards, Professor Daniel S. Medwed, Shayla Mombeleur, Hema Sarang-Sieminski, Charu Verma, and Ying Wang. The Task Force thanks the Honorable Cesar Archilla (former parole board member), Dorothy Kelly Gay (former Governor's Council member), and Terrance Kennedy (Governor's Council member) for sharing their insights about the clemency process. The Task Force also thanks Lee Gartenberg (former member of the Parole Board and former Middlesex Sheriff's Office attorney) who served as a reviewer of the resolutions, and Stevie Leahy from the Northeastern University School of Law who shared research from her law students' *Legal Skills in Social Context* project on clemency.

Our shared mission was to examine the process for clemency in Massachusetts including commutation and pardons, and address problems related to the clemency process that result in denial of equal justice under the law and undermine the public trust and confidence in the clemency process and criminal legal system as a whole. We identified major areas for suggested reform after taking into account the feasibility, importance, and potential impact of possible changes to the clemency process. These areas include:

- Increasing the importance given to clemency by decision-makers;
- Using clemency as a tool to mitigate racial disparities in sentencing and incarceration;
- Changing the procedures that delay and impede access to hearings and clemency relief;
- Changing clemency guidelines substantively to ensure more fairness in clemency cases;
- Modernizing guidelines to reflect brain research for offenses committed by young adults;
- Modernizing guidelines to reflect the increased elderly population in prisons;
- Modernizing guidelines to reflect needs of women and LGBTQ+ populations;
- Modernizing guidelines on clemency petitions for more successful re-entry after prison;

- Broadening the knowledge and composition of the Advisory Board on Pardons; and
- Improving data collection and transparency.

RESOLUTIONS ON CLEMENCY

RESOLVED, That the Massachusetts Bar Association (MBA) which has long supported equality under the law, access to justice, and protection of rights afforded by the United States Constitution and the Massachusetts Declaration of Rights, acknowledges the importance of clemency as a fail-safe measure to ensure that justice is served in all criminal cases, particularly in light of studies documenting racially disparate sentencing practices and rates of incarceration. Accordingly, the MBA urges the Governor, lawmakers, policymakers, and the Massachusetts Advisory Board of Pardons (the “Board”) to adopt the principles listed below and take steps to ensure that guidelines and procedures used in clemency matters are fair, and in practice do not make a clemency hearing or allowance of a clemency petition a rare event.

RESOLUTION 1 THE ROLE OF CLEMENCY IN THE CRIMINAL LEGAL SYSTEM

Clemency is a vital part of the criminal legal system and a historic remedy designed to address and prevent miscarriages of justice, and to promote the rehabilitation and successful re-entry into the community of individuals who are incarcerated. Accordingly, clemency should be valued rather than abandoned in its usage as has occurred in recent decades.

Rationale

Clemency includes the power to shorten a prison sentence and to pardon an underlying conviction, but governors have rarely granted clemency in recent decades.¹ “Clemency 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.” *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). In the *Federalist Papers*, Alexander Hamilton opined that clemency was vital to temper the harshness of criminal codes because “without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”² The guidelines that apply to clemency in Massachusetts similarly characterize clemency “an integral part of the correctional process.”³

¹ The number of people granted clemency declined steeply in the 1980’s. See, e.g., Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. St. Thomas L.J. 373, 398 (2020); Deborah Becker, *Charlie Baker Has Never Commuted a Prison Sentence. Lawyers for William Allen Hope His May Be the First*, WBUR News, May 27, 2020, <https://www.wbur.org/news/2020/05/27/massachusetts-coronavirus-prisoners-commuted-sentence>.

² The *Federalist* No. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³ Governor Charles D. Baker, Executive Clemency Guidelines, § 2.2 (Feb. 21, 2020).

The question of how to reinvigorate clemency has become urgent in this age of mass incarceration across the nation, and racial disparities in sentencing.⁴ Clemency is an exercise of mercy rather than punishment that should be used to achieve just results based on the circumstances.⁵ Innocent people may be convicted of a crime, judges may impose unduly harsh sentences, and some sentencing statutes are blunt instruments that require long sentences without consideration of the individual or mitigating circumstances.⁶ People who are imprisoned may become rehabilitated or pose no danger to the public. They may be old, or suffer from illness, trauma, or other conditions made worse by incarceration that also impose financial burdens on the state.⁷ “Clemency, properly exercised and freed of political pressures, represents an ideal vehicle for remedying many of the problems inherent in an imperfect, overloaded, and increasingly rigid system of criminal justice.”⁸

RESOLUTION 2 REGARDING RACIAL INJUSTICE

Clemency is a historic remedy designed to address and prevent miscarriages of justice. As stated by the Supreme Court of the United States, clemency is a “fail safe” that allows chief executives to remedy injustices in individual cases where judicial process has been exhausted.⁹ In the Commonwealth of Massachusetts, the power of clemency is an under-utilized tool that should be applied on a case-by-case basis to address systemic failures, such as the racial injustice that permeates every step of our criminal legal system. Hence, we urge the following corrective action:

1. The Board shall conduct biannual implicit bias trainings for all board members and staff.
2. The Board shall consider that racial disparities exist at every step of the criminal justice system, from policing to charging decisions to sentencing.
3. The Board shall consider 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.

⁴ Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 Fed. SENT. REP. 153, (2009). A recent report on the Massachusetts criminal system indicates there are stark differences in sentencing that correlate with the race of a defendant. Elizabeth Tsai Bishop et al., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM- A REPORT BY THE CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, 1-4 (Sept. 2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf>.

⁵ Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 613 (1991).

⁶ Paul J. Larkin Jr., *Revitalizing the Clemency Process*, 39 Harv. J.L. & Pub. Pol’y 833, 865-868 (2016).

⁷ See, e.g., Barkow, *supra* note 4 at 156.

⁸ Kobil, *supra* note 5.

⁹ *Herrera v. Collins*, 506 U.S. 390, 415, 412 (1993).

4. The Board shall interpret and apply the clemency guidelines as a tool for remedying past racial injustice.
5. The Board shall not require a petitioner to prove racial discrimination or bias in their individual case.

Rationale

In 2016, former Chief Justice Ralph D. Gants announced that data collected from the Massachusetts Sentencing Commission revealed wide-ranging racial injustice and a “great disparity in the rates of imprisonment of Whites, African-Americans, and Latinx in this Commonwealth.”¹⁰ The Sentencing Commission’s analysis of data from 2014 showed that the racial disparities in Massachusetts prisons and jails are more severe than in many other states: we imprison Black people at a rate of 7.9 times that of White people and Latinx people at a rate of 4.9 times that of White people. A 2016 study shows that Massachusetts has the highest level of disparities for Latinx people and the 13th highest for Black people.

In pursuit of racial justice, Chief Justice Gants asked researchers at Harvard University to gather and analyze data from multiple sources within the criminal legal system. The Harvard report concludes that “Black and Latinx people are less likely than White people to have their cases resolved through less severe dispositions such as pretrial probation or continuances without finding (CWOs). Among those sentenced to incarceration, Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts [.]”¹¹ Other disparities occur in charging decisions, jury trials, and plea bargaining.

Drastic steps must be taken to reduce the unacceptably high levels of racial injustice in Massachusetts. Because racial discrimination is difficult if not impossible to prove in individual cases, the clemency process can and should be used as a tool to combat systemic injustices.

RESOLUTION 3 PROCEDURAL ASPECTS OF THE CLEMENCY PROCESS

Justice delayed is justice denied, and the clemency procedure should include prompt decisions at each stage of the process, transparency, and easy public access to all hearings and decisions. Accordingly, it is unacceptable that it now takes years to receive a hearing on a clemency petition. Changes need to be made immediately to ensure that petitions for clemency are reviewed promptly, hearings are expedited, and decisions are made in a timely fashion throughout the clemency process. It is recommended that:

¹⁰ Chief Justice Ralph D. Gants, Mass. Sup. Jud. Court, Annual Address: State of the Judiciary (Oct. 26, 2017) (transcript available at <https://www.mass.gov/doc/2017-state-of-the-judiciary-address-by-sjc-chief-justice-ralph-d-gants-oct-26-2017/download>).

¹¹ Bishop et al., *supra*, note 4.

1. The Board shall review every clemency petition within ten weeks of receiving it to 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.
2. Once the Governor receives the Board's recommendation to grant a petition, the Governor should take action on the petition within six months by affirmatively stating whether the petition is granted or denied.
3. 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 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.
4. A petitioner who is granted a hearing shall have the right to an in-person hearing.
5. 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. If the hearing will be held 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 can access the hearing.
6. 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.
7. 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.

Rationale

Governor Baker took office as the 72nd Governor of the Commonwealth of Massachusetts on January 8, 2015, and was inaugurated for a second term on January 3, 2019. The current Executive Clemency Guidelines were issued by Governor Baker on February 21, 2020. The Guidelines do not detail important procedural aspects as to how the hearings should be conducted, including timelines for hearings.

During Governor Baker's entire six-year tenure, there has only been one commutation hearing and that hearing was for Thomas Koonce, who filed his commutation petition in August 2014 and had his commutation hearing on October 27, 2020. The Advisory Board of Pardons voted to commute Mr. Koonce's sentence and they sent their recommendation to the Governor in January 2021. Between January 8, 2015 and the present, there have been no commutations or pardons granted.

The right to request clemency is not a meaningful remedy unless people are afforded the opportunity to have their cases heard and decided within a reasonable amount of time. Petitioners who filed applications years ago are still waiting for hearings. This practice is unacceptable. Setting specific deadlines for the Board to review a clemency petition, make a decision, schedule a hearing if appropriate, and forward the Board's recommendation to the Governor, will ensure that petitioners have meaningful access to the clemency process.

General Laws c. 127, section 154 provides specific timelines for the Board to review petitions for pardons, but not for commutations. The statute provides in part that:

"[w]ithin ten weeks of the original receipt of any petition, the advisory board shall transmit the original petition to the governor, together with its conclusions and recommendations and together with such recommendations as have been received from the above officials; except that if the board shall determine that adequate consideration of the case requires a hearing on its merits by the board, said board shall not be required to submit its recommendations at the end of ten weeks but shall notify the governor of its intention to hold a hearing; but such hearing shall be held and a report made to the governor within six months of the original receipt of the petition by the board. If the board shall determine that such hearing shall be held, in the case of a petitioner who is confined under sentence for a felony, the attorney general and the district attorney shall be notified of the hearing and they or their representatives given the opportunity to appear, examine the petitioner's witnesses and be heard...."

While the statute, which the Board has repeatedly ignored for a long time, governs only pardon petitions, deadlines should not be any longer for commutation petitions.

Clemency and parole hearings are important to ensure that justice is served by the sentence imposed on a defendant. "For all inmates serving life sentences, the initial parole release hearing and any subsequent parole review hearings are public proceedings." 120 CMR 301.06(2).¹² This section recognizes the importance of hearings being open to the public and ensuring the hearing is conducted in the appropriate manner, including assigning seats in consideration of security and space availability, having individuals sign in with their name and

¹² Other states, including Connecticut, publish clemency hearing information online so that members of the public may attend. This is one avenue to ensure public access to hearings.

address, and the ability to search persons and their effects. Transparency and true public access to hearings means every member of the public is afforded the same type of access to the clemency proceedings. Persons with a hearing impairment have no access to hearings if the hearings are broadcast only by phone as opposed to both video and audio. Hearings viewable by video may also allow members of the public to use close captioning services.

Parole hearings involve presentation of available evidence and testimony from people advocating on behalf of the individual seeking parole and on behalf of the victim(s) and/or their family members. 120 CMR 301.06(4). Similarly, petitioners at a clemency hearing are entitled to a fair hearing and must be able to present any available evidence or testimony that supports their request for relief just as the Commonwealth, the victim, and the victim's family members may present evidence or testimony in opposition.

RESOLUTION 4

SUBSTANTIVE ASPECTS OF THE CLEMENCY PROCESS

Massachusetts has failed to grant clemency despite the enormous growth of the prison population, and lags behind many of its neighbors, including Connecticut, in the extent to which it dispenses mercy to deserving people who are incarcerated. The Executive Clemency Guidelines must be revised to ensure a fair, racially unbiased, and timely decision-making process.

1. The Guidelines should focus on a petitioner's circumstances and efforts at rehabilitation, including whether the petitioner will pose an unreasonable risk to public safety upon release and reintegration into society.
2. The Guidelines should acknowledge that racial disparities in sentencing exist and that clemency is a tool that should be utilized to address sentences that are overly harsh, unfair, disproportionate to similarly situated offenses and defendants, and/or inconsistent with a just result based on the circumstances. See Resolution 2.
3. The current Guidelines provide that a petitioner must have "clearly demonstrated acceptance of responsibility for the offense for which the petitioner is seeking clemency," but are unfair in that they equate an appeal, challenges to the underlying conviction, raising of any defenses, or exercise of constitutionally protected rights related to a criminal prosecution, with a failure to accept responsibility. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Accordingly, the language in the Guidelines to the effect that appealing or challenging the underlying conviction or sentence are inconsistent with acceptance of responsibility should be removed. Otherwise, diligent representation will tip the scales against allowance of clemency in most instances.

4. The Guidelines should acknowledge that a petitioner's unwillingness to accept responsibility in some cases may not stem from denial, but rather from the fact that they are actually innocent of the underlying crime. In those cases, otherwise deserving petitioners should be considered for clemency.
5. The Guidelines provide that clemency is rarely granted to a petitioner who has not "made full restitution" to victims economically injured by the petitioner's crime(s), giving "stronger consideration to petitioners who have made restitution in a prompt manner." The Supreme Judicial Court (SJC) has stated that "[t]he payment of restitution, *like any court-imposed fee*, should not cause a defendant substantial financial hardship." *Commonwealth v. Henry*, 475 Mass. 117, 127 (2016) (emphasis added). The SJC defined "substantial financial hardship" as payment of fees that would "deprive the defendant of his or her dependents of minimum basic human needs." *Id.* The current Guidelines fail to consider that many criminal defendants are indigent and unable to make full or even partial restitution. Accordingly, payment of restitution should not be a factor unless the petitioner has the ability to pay restitution.
6. The Guidelines provide that a petitioner's public service will lead to "stronger consideration" of clemency, but fail to define what is considered "public service." The Guidelines should broadly define "public service" to include good conduct that is helpful to others during the incarceration period.
7. Given that so few programs exist or are offered at prisons, a petitioner shall not be penalized for their inability to participate in unavailable programs.
8. The Guidelines provide that the Board must consider the character and behavior of the petitioner. The criteria should be expanded to include consideration of the effect of continued incarceration on the petitioner. This includes, but is not limited to, the petitioner's age and health conditions, trauma and victimization history, socioeconomic history, disabilities, commitment to sobriety, maturity level and personal growth of the petitioner since the offense, education and trade certificates, the availability of treatment options, programs, training, and other opportunities for the petitioner to engage in efforts towards rehabilitation and self-improvement.

Rationale

The current Guidelines identify "two paramount considerations in deciding whether to grant clemency": (1) the "nature and circumstances of the offense" (e.g. the impact on the victim and on society as a whole), and (2) "the character and behavior of the Petitioner," particularly post-offense behavior. As described above, the criteria should be expanded. A recent Harvard study indicates that Black and Latinx individuals have higher conviction rates and receive

harsher sentences than White defendants.¹³ Thus, reform of the criteria for clemency is necessary to remedy racial disparities, unfairness, and erosion of public confidence in the criminal justice system. The “nature and circumstances of the offense” is an important part to consider, but should not be the sole controlling factor.

The current Guidelines provide that a petitioner must have “clearly demonstrated acceptance of responsibility for the offense for which the petitioner is seeking clemency.” However, a petitioner should not be disadvantaged in his future clemency petitions to the Governor for exercising his or her legal right to appeal or challenge a conviction, regardless of the justification. Otherwise, the exercise of constitutionally guaranteed rights is discouraged, and petitioners are punished for decisions largely made by their attorneys, whose judgments they reasonably relied on. Massachusetts, in particular, recognizes the importance of constitutional rights and that the exercise of such rights shall not be punished.

Likewise, making “acceptance of responsibility” a prerequisite to clemency renders a portion of potential petitioners virtually ineligible, namely, those who may be actually innocent yet have not yet been vindicated through the judicial process. To rectify that problem, the guidelines should leave room for the possibility that in cases with signs of a possible wrongful conviction, a petitioner’s refusal to accept responsibility should not bar consideration for clemency. The judicial system is not always able to correct injustices that occur.

The statistics surrounding incarceration in the U.S. is staggering, with little evidence that incarceration actually decreases the rate of crime. The U.S. prison population has increased by 500% over the past 40 years. More Black men are in prison today than were enslaved in 1850. Half of all adults in America have had a family member in jail or prison. Incarceration disrupts and financially burdens many families as well as affecting the emotional well-being of children whose parents are incarcerated. In addition to the emotional impact of having a family member incarcerated, many families also bear financial burdens of imprisonment.¹⁴

The average cost of incarcerating someone in the Department of Corrections for 30 years is over two million dollars.¹⁵ For every \$1 spent on prisons, there is an additional \$10 in social costs — most of it borne by families, and especially people of color. 34% of families go into debt to pay for phone calls or visitation. 87% of these were women. 65% of families with an incarcerated member are unable to meet their families’ basic needs.¹⁶

¹³ Bishop et al., *supra*, note 4.

¹⁴ *Criminal Justice System Facts and Figures*, Soc. Just. Res. Ctr., (2019), <https://socialjusticeresourcecenter.org/facts-and-figures/criminal-justice-system/>.

¹⁵ This prospective figure is a low estimate based on the fiscal Year 2018 cost per year to hold a person in a Massachusetts prison which was \$70,892.56. MASS. DEP'T CORR. RSCH. & PLAN. DIV., FREQUENTLY ASKED QUESTIONS (January 1, 2019), <https://www.mass.gov/doc/frequently-asked-questions-january-2019/download>.

¹⁶ *Criminal Justice System Facts and Figures*, Soc. Just. Res. Ctr., (2019), <https://socialjusticeresourcecenter.org/facts-and-figures/criminal-justice-system/>.

RESOLUTION 5

THE ROLE OF CLEMENCY IN JUSTICE FOR SURVIVORS OF SEXUAL AND DOMESTIC VIOLENCE

Whereas clemency is a humanitarian remedy designed to address and prevent miscarriages of justice, and incarcerated women and transgender people are disproportionately likely to have experienced sexual and/or domestic violence in their lifetime, and incarceration is fundamentally incompatible with trauma-informed healing, justice for survivors of sexual and domestic violence demands increased exercise of clemency for incarcerated survivors.

Rationale

The traumatic toll of sexual and/or domestic violence can significantly and adversely affect a survivor's safety, physical and mental health, economic security and housing stability, access to education and employment, and cumulative vulnerability to further harm. For survivors who experience the additional trauma of structural violence, specifically survivors of color, LGBTQ+ survivors, immigrant survivors, and/or survivors with disabilities, among others, these vulnerabilities are only heightened. It is against this backdrop that some survivors of sexual and domestic violence engage in behaviors or actions that are criminalized (such as self-defense, theft, substance use or trade, or sex work).

Approximately 84% of incarcerated women have experienced sexual and/or domestic violence prior to their incarceration.¹⁷ Instead of timely support, access to resources to meet basic needs, and an opportunity to heal, these survivors are punished for actions stemming from their trauma through incarceration.¹⁸ The vast majority of these survivors pose no danger to the public and require community-support and robust services to heal from the often-lifelong harms

¹⁷ See Elizabeth Swavola et al., *Overlooked: Women and Jails in an Era of Reform* (Vera Institute of Justice 2016), <https://www.vera.org/publications/overlooked-women-and-jails-report>. These survivors are also disproportionately people of color. *A Few Quick Statistics, [Race, Gender, Incarceration]* SURVIVED AND PUNISHED, <https://survivedandpunished.org/quick-statistics/> (last visited March 9, 2021).

¹⁸ "Most crimes committed by women are motivated by survival, whether it is economic, mental, or physical." Elise Barlow, *Understanding Women in Prison, a Review of Gender Specific Needs and Risk Assessments and their Policy and Research Implications* (2014) (Thesis, Portland State University) (on file with the University Library, Portland State University).

they have suffered.¹⁹ Instead, within a prison setting, these survivors experience continued re-traumatization²⁰ and harm.²¹

Clemency is a crucial remedy in righting the wrongs of a justice system that often overlooks the unique needs and experiences of survivors of sexual and domestic violence. The present guidelines for clemency should be expanded to consider the unique circumstances and needs of incarcerated individuals who are survivors of sexual and domestic violence.

RESOLUTION 6 CLEMENCY CONSIDERATIONS BASED ON AGE AT THE TIME OF THE OFFENSE

The Governor's guidelines on clemency should be modernized to provide that age and lack of maturity at the time of a criminal offense are mitigating factors that support 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.

Rationale

Both the Supreme Court and the Supreme Judicial Court have acknowledged there are fundamental differences between adult and young adult brains. *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669-671 (2013). Studies show that brain development is not complete until early adulthood and into a person's mid-twenties. *Commonwealth v. Garcia*, 482 Mass. 408, 413 (2019) ("researchers continue to study the age range at which most individuals reach adult neurobiological maturity, with evidence that ... [certain] brain functions are not likely to be fully matured until around age twenty-two").²² Thus, "consideration of the person's circumstances at the time of the offense

¹⁹ See, e.g. Barlow, *supra*; Elizabeth Piper Deschenes et al., Recidivism among Female Prisoners: Secondary Analysis of the 1994 BJS Recidivism Data Set (2007) (U.S. Dep't of Just., Report Doc. No. 216950, 2007), <https://www.ojp.gov/pdffiles1/nij/grants/216950.pdf> The majority of females in a study who served prison time for violent offenses did not reoffend with a violent crime. Deschenes et al., *supra*.

²⁰ Prisons are known for victimization, including sexual and physical assaults by corrections staff and others who are imprisoned. Nancy Wolff et al, *Patterns of Victimization among Male and Females Inmates: Evidence of an Enduring Legacy*, 24 Violence & Victims, 469-484 (2009), <https://pubmed.ncbi.nlm.nih.gov/19694352/>. The Federal Bureau of Justice Statistics indicated that transgender persons were victimized at rates nearly ten times more than others at prisons. *Federal Survey: 40% of Transgender Prisoners Are Sexually Abused Each Year*, ADVANCING TRANSGENDER EQUALITY, (Dec. 18, 2014, 11:50 AM) [hereinafter *Federal Survey*], <https://transgenderequality.wordpress.com/2014/12/18/federal-survey-40-of-transgender-prisoners-are-sexually-abused-each-year/>.

²¹ Incarceration is deeply traumatizing. Standard procedures from strip searches, supervision while showering, close quartered living, solitary confinement, and other measures can reactive trauma and trigger symptoms of PTSD. Swavola et al., *supra* note 16.

²² See also, e.g., Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L.J. 1, 23 (2005) (young adults are less culpable because the brain develops into a person's mid-twenties); Laurence Steinberg et al, *Around the World, Adolescence is a Time of Heightened Sensation Seeking*

may prove instructive in assessing his or her likelihood of recidivism or success.” *Commonwealth v. Pon*, 469 Mass. 296, 318 (2014), citing *Diatchenko*, 466 Mass. at 669-671. “For example, significant criminal justice research suggests that younger individuals have a great capacity for rehabilitation and should not face the harshest consequences for their youthful indiscretions.” *Id.*

RESOLUTION 7 CLEMENCY FOR INDIVIDUALS WHO ARE ELDERLY, FRAIL, OR CHRONICALLY ILL

The Governor’s guidelines on clemency should be revised to include a person’s advanced age and diminished health as specific factors that support clemency. 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 that support a grant of clemency.

Rationale

A recent report by the Sentencing Project found that 203,000 persons are serving life sentences in the United States, 30% are over 55 years old, and over two-thirds of those serving life sentences are people of color.²³ Massachusetts also ranks the highest in the country for prison populations over the age of 50.²⁴ In prison, individuals who are age 50 or older are considered elders. It is generally accepted that people who are imprisoned age much faster, and are more susceptible to chronic medical conditions that increase the cost of imprisonment two to three-fold, and have histories of substance use disorders, inadequate preventive and primary care, and stress linked to the isolation and sometimes violent environment of prison life.²⁵ Most correctional systems have inadequate resources, processes, and personnel to properly care for or manage an elderly population.²⁶ Elders who are frail or suffering dementia, mental health problems, or who are unable to maintain basic hygiene also may suffer abuse from others who are incarcerated.²⁷ The COVID-19 pandemic also has compounded health risks related to incarceration, especially for the elderly and people with comorbidities, who are at risk of death from COVID-19.

Studies also show that recidivism declines with age, and most people including those who committed violent offenses, mature out of criminal conduct before middle age and it is

and Immature Self-Regulation, *Developmental Science*, 21 DEVELOPMENTAL SCIENCE (ISSUE 2, ARTICLE 14) 1, 2 (2018)(“self-regulation continues to develop into the nmed-20’s”), <https://www.ncbi.nlm.nih.gov/pubmed/28150391>.

²³ Tom Jackson, *Study: 1 in 7 U.S. prisoners is serving life, and two-thirds of those are people of color*, WASHINGTON POST (March 2, 2021).

²⁴ Matt McKillop & Alex Boucher, AGING PRISON POPULATIONS DRIVE UP COSTS PEW (Feb. 20, 2018) <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Stan Stojkovic, *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse*, 19 J. Elder Abuse & Neglect (Issue 3-4) 97, 105 (2007).

understood that long sentences do little to prevent crime.²⁸ Thus, a prison sentence that outlasts a person's likelihood of reoffending is not only a burden on taxpayers, but has little upside for public safety.²⁹

RESOLUTION 8 COMPOSITION OF THE ADVISORY BOARD OF PARDONS (MASSACHUSETTS PAROLE BOARD)

Justice demands change in the structural and institutional ways that clemency is administered in the Commonwealth. The Advisory Board of Pardons whose members are the same as the individuals who comprise the Massachusetts Parole Board should reflect not only the perspective of prosecutors and law enforcement officials, but also that of other stakeholders, among them, defense attorneys, formerly incarcerated persons, experts in the topic areas of substance use disorders, mental health, aging, recidivism, and brain development, and representatives from the LGBTQ+ community and low-income communities of color disproportionately affected by incarceration.

1. The Advisory Board of Pardons or Massachusetts Parole Board should strive to represent the different community perspectives across the Commonwealth.
2. The Board should be expanded to include nine members and reflect the following constituencies, many of which would provide essential perspectives that the Board currently lacks:
 - a. No more than three members of the Board should have experience as district attorney office employees, law enforcement or corrections personnel;
 - b. Two members should have expertise on issues of mental health, substance abuse, aging, recidivism, and/or brain development, with at least one of them being a licensed mental health professional;
 - c. One member should be nominated by Prisoners' Legal Services of Massachusetts;
 - d. One member should be a practicing member of the criminal defense bar nominated jointly by the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers, and the Massachusetts Bar Association;
 - e. One member should be nominated by the National Association for the Advancement of Colored People of Massachusetts; and
 - f. One member should be a formerly incarcerated person.
3. Legislation should be enacted requiring that the Governor shall appoint nominees to the Board recommended by the above organizations. This is to ensure that membership in

²⁸ Dana Goldstein, *Too Old to Commit Crime?* Marshall Project, (March 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime>.

²⁹ *Id.*

the Board is balanced and provides a variety of perspectives, including communities of color disproportionately affected by incarceration.

Rationale

The Advisory Board of Pardons recommends petitioners deemed worthy of clemency to the Governor's office. The Board carries seven full-time, salaried officials, appointed to five-year terms by the Governor with the consent of the Governor's Council. There are currently six sitting members of the Board, and one vacancy.³⁰ Four of the six have backgrounds in law enforcement. The present Board does not have the breadth of experience and knowledge to ensure fair decision-making on clemency requests. The Board is also very far behind in its work. Until recently, it had not reviewed requests for commutations and pardons for years. Sitting as the Parole Board, the Board is far behind in scheduling timely parole release hearings for people with life sentences, and it routinely takes the Board over seven months to issue a fully prepared Record of Decision after a lifer parole release hearing.³¹

The membership of the Board has been heavily criticized over the past few decades. The need for a diversified parole board has long been recognized by criminologists, other social scientists, and the Massachusetts legislature. Throughout the 1970's and 1980's, the Board had a relatively diverse membership. That changed in the 1990s, and ever since then law enforcement and government personnel have dominated the Board, including former prosecutors and victim witness advocates from their offices, corrections representatives, and police officers. The heavy presence of law enforcement and government employees tips the scales against allowing clemency petitions. It is important to note that there has only been one commutation granted since 1997 and only six pardons, all near the end of Governor Patrick's tenure. Public confidence in the clemency process, especially in communities of color, has been lost because the clemency process itself appears to be hostile to petitioners.³² A larger, more diverse Board is necessary to ensure timely, more equitable, and fairer clemency decisions.

RESOLUTION 9

CLEMENCY AND SUCCESSFUL RE-ENTRY AFTER INCARCERATION

Clemency in the form of a pardon functions as forgiveness of an offense to "remove the barriers that are sometimes associated with a criminal record, thereby facilitating the reintegration of the petitioner into his or her community."³³ Whereas criminal background checks are routine in many contexts and the Commonwealth has a compelling interest in reducing recidivism and promoting employment and successful re-entry of people released from

³⁰ A former prosecutor announced her resignation this week.

³¹ See Coalition for Effective Public Safety's Letter to the Governor on behalf of 70 community groups, <https://d279m997dpfwgl.cloudfront.net/wp/2021/01/CEPS-Parole-letter.1.5.2021.pdf>

³² *Id.*; Ben Notterman, *Willie Horton's Shadow: Clemency in Massachusetts*, 8 (Courtney M. Olivia ed. Dec. 18, 2019), https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf [Accessed 22 February 2021].

³³ Governor Charles Baker, Executive Clemency Guidelines, § 2.1 (Feb. 21, 2020).

incarceration, the guidelines that apply for clemency determinations should be updated to include the following requirements:

1. The Guidelines should be revised to require that the Board recognize that any criminal record creates the risk of barriers to jobs, housing, and other opportunities;
2. The Guidelines should be revised to require that the Board shall recognize that the Commonwealth has a compelling interest in reducing recidivism and that stable employment is associated with reduced recidivism;
3. The Guidelines should eliminate the requirement that a person seeking a pardon must produce written documentation that the particular conviction is preventing employment because employers may not contact a job applicant, let alone send a rejection letter once they receive a criminal background report that includes a conviction.

Rationale

Use of criminal background checking has increased exponentially over the last several decades, and particularly after the September 11 attacks.³⁴ There is little doubt that countless people are shut out of the economy due to a past criminal record.³⁵ Most employers decline to hire job applicants with even minor criminal charges, and Black applicants fare the worst.³⁶ Stable employment, however, is associated with reduced recidivism and success after incarceration. As the Supreme Judicial Court (SJC) has acknowledged, the Commonwealth has “compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants.” *Commonwealth v. Pon*, 469 Mass. 296, 315 (2014). The Guidelines, however, do not place emphasis on this consideration.

The Guidelines require that a person must provide written documentation that the conviction is preventing employment, but this mandate is difficult or impossible to meet because many employers do not provide written rejection letters and many applicants never hear from the employer after the background check. The SJC rejected a similar requirement where a defendant alleged that he applied unsuccessfully for hundreds of jobs, and said that it was not dispositive “that the defendant cannot demonstrate that the specific charges he seeks to seal

³⁴ Megan Kurlychek et al., *Enduring Risk? Old Criminal Records and Short Term Predictions of Criminal Involvement*, 53 *Crime & Delinquency* 64 (2007).

³⁵ See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. of Soc.* 937, 955, 958-959 (2003).

³⁶ *Id.*; Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 *J.L. & Econ.* 451, 453-454 (2006); Megan Kurlychek et al., *Enduring Risk? Old Criminal Records and Short Term Predictions of Criminal Involvement*, 53 *Crime & Delinquency* 64 (2007); Devah Pager, Bruce Western, & Bart Bonikowski, *Discrimination in a Low Wage Labor Market: A Field Experiment*, 74 *Am. Soc. Rev.* 777-779 (October, 2009).

are the ones that have prevented his employment,” and found that credible allegations were sufficient to demonstrate meaningful employment disadvantages stemming from the availability of his record. *Pon*, 469 Mass. at 319-320 (2014). Given the evidence of the long-term collateral consequences of criminal records, judges, for example, also may take judicial notice that “the existence of a criminal record, regardless of what it contains, can present barriers to housing and employment opportunities.” *Id.* at 315. The Board’s approach to pardons needs to be updated to consider the undisputable effects of convictions in today’s workplace, especially in light of the pandemic that has increased competition for jobs.

RESOLUTION 10 ENHANCED DATA COLLECTION TO ENSURE FAIRNESS, EQUITY, AND INCLUSION IN THE CLEMENCY PROCESS

Collecting and analyzing data about the nature, character and demographics of petitions for clemency will lead to (a) more informed discussions regarding biases, (b) identify and expose patterns of racism, and (c) help shape future policy decisions. In an effort to increase accountability and transparency to bolster public trust, the Task Force on Clemency makes the following recommendations for promoting integrity and trust in the clemency process:

1. Recognition that the guarantee to all persons of equal protection under the law is an essential principle of our democracy, the Board should adopt policies that ensure that clemency petitions are processed and heard in a non-discriminatory manner.
2. Recognition that the Board should routinely collect data regarding race, age, ethnicity, and gender of all persons who have filed a petition for clemency. This data should be collected even where a petition has not been granted.
3. That the Board create a task force comprised of entities in the criminal legal system, community members and citizen group representatives to collaborate in designing and implementing procedures for data collection.
4. Recognition that this data should be published online at the official state government website (www.mass.gov) on an annual basis.

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