



DAVID E. SCHWAGER

May 21, 2020

The Honorable John Fetterman, Lieutenant Governor of Pennsylvania
Chairman
Pennsylvania Board of Pardons
333 Market Street
15th Floor
Harrisburg, PA 17126

Dear Mr. Fetterman,

I write as President of the Pennsylvania Bar Association to indicate that the Association, as a whole, acting through its Board of Governors and House of Delegates, has endorsed a recommendation that advocates for changes to the process utilized by the Pennsylvania Board of Pardons in considering applications for clemency, that promote the objectives of the Juvenile Act and the Juvenile Courts of this Commonwealth by maintaining the intended confidentiality of those proceedings and not allowing those proceedings to prejudice (or appear to prejudice) in any way the applications for clemency submitted to the Board of Pardons.

The supported Recommendation seeks elimination of the section of the Application for Clemency which requires disclosure of all "Juvenile Charges, Adjudications of Delinquency and/or Consent Decrees", or the limitation of such requirement to the disclosure only of findings of responsibility for the crimes which Pennsylvania law specifies do not benefit from the confidentiality provisions of the Juvenile Act.

The attached Recommendation and Report presented by the Criminal Justice Section provides further explanation of our position. Please note that this Recommendation was also supported by the Civil and Equal Rights Committee, Judicial Administration Committee, and the Legal Services to the Public Committee.

Thank you for considering our Recommendation.

Very truly yours,

A handwritten signature in blue ink, appearing to read "David E. Schwager", is written over a light blue horizontal line.

David E. Schwager

Attachment

c: Honorable Josh Shapiro
Honorable Harris Gubernick
Honorable John P. Williams, MD
Honorable Marsha H. Grayson, Esq.
Brian J. Zeiger, Esq.
Barry M. Simpson, Esq.
Francis J. O'Rourke
Kelly L. Myers
Pamela K. Kance

**THE PENNSYLVANIA BAR ASSOCIATION
CRIMINAL JUSTICE SECTION**

Recommendation

The Criminal Justice Section recommends that the Pennsylvania Bar Association (PBA) advocate for changes to the process utilized by the Pennsylvania Board of Pardons in considering applications for clemency, that promote the objectives of the Juvenile Act and the Juvenile Courts of this Commonwealth by maintaining the intended confidentiality of those proceedings and not allowing those proceedings to prejudice (or appear to prejudice) in any way the applications for clemency submitted to the Board of Pardons.

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Further, this Recommendation calls on the Pennsylvania Board of Pardons, the Lieutenant Governor, and the Governor to cease requesting, investigating or considering Juvenile Court Records in Pardon Proceedings, except in those certain narrowly-defined circumstances.

Report

A. How this Recommendation Advances the Association’s Purposes

Consistent with the PBA’s Articles of Incorporation this recommendation, if adopted by the PBA, would advance several of the Association’s purposes:

- (1) Advancing the science of jurisprudence, by ensuring that the Board of Pardons, which is a criminal justice agency of the Commonwealth, decides matters entrusted to it consistent with the requirements of the Constitution, the laws protecting the confidentiality of proceedings involving minors, and with the behavioral science that recognizes the pre-frontal cortex of the brain is not fully formed in minors; and,
- (2) Promoting the administration of justice, by ensuring that the Board of Pardons, as a criminal justice agency, furthers its Constitutional role by utilizing policies and procedures that comport with law and the inalienable rights to due process and to reputation that are guaranteed by the Constitution of Pennsylvania, by protecting the expectation of privacy and ensuring that adults are not penalized for their actions as minors, except as allowed by law.

This recommendation is submitted pursuant to the charge given to the Section on Criminal Justice in the PBA’s Bylaws (Article VI, Section 633), which is to “take as its province the development, improvement and practical working of the criminal justice system of this Commonwealth and of the United States, both substantive and procedural,” because it affects core rights of individuals involved in the criminal justice system and the procedures utilized by

the state to consider them for clemency by the Governor, which is an opportunity granted by the Constitution to all.

This recommendation is also consistent with, and furthers, the purpose of the Recommendation by which the PBA supported “Clean Slate” legislation, which recognized the collateral consequences that criminal history records have and the serious, intergenerational harms those records impose on individuals and their families, and the shared objective of all Pennsylvanians to allow all citizens of this Commonwealth to reach their potential as contributing members of society.

B. The Legal Bases for the Recommendation

The Constitution of the Commonwealth of Pennsylvania, in Article 4, Section 9, gives to the Governor of the Commonwealth the power to grant pardons for any crimes except impeachment upon the recommendation of the Board of Pardons, to which all applications for clemency must first be submitted. The Board of Pardons has the discretion to decide the criteria by which to make its recommendations, and the information that must be provided in the application therefor.

As an agency of government, the Board of Pardons must act in compliance with the Constitutions and laws of the Commonwealth. In particular, Pennsylvania’s Constitution has consistently recognized (since 1873) the “inherent and indefeasible rights” that every citizen has in of “acquiring, possessing and protecting property and reputation.” Article 1, Section 1. We believe these rights are violated by the process now utilized by the Board of Pardons.

With very few exceptions, records of proceedings in Juvenile Court are confidential by statute. Juvenile Act, 42 Pa.C.S. §§ 6301 et seq. This Act expresses centuries-long public policies that are intended to protect individuals from having their lives and potentials permanently damaged because of bad decisions they made when they were children.

Behavioral science has firmly grounded the wisdom of these policies: research has clearly demonstrated that the brain (specifically, the pre-frontal cortex which controls impulses, manages emotions, and allows prediction of the consequences of one’s actions) is not fully developed until age 25. This science has been repeatedly recognized and embedded into the law of this country by decisions of the Supreme Court of the United States over the past fifteen years.

In the seminal case of *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court recognized “the susceptibility of juveniles to immature and irresponsible behavior”, and held that the Constitution required juveniles to be treated differently than adults. Five years later, the Court noted that “[d]evelopments in psychology and brain science continue[d] to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham v. Florida*, 560 U.S. 48 (2010). It is therefore beyond question that, as a legal matter, the Commonwealth is obligated to recognize that “‘youth is more than a chronological fact.’ It is a time of immaturity, irresponsibility, ‘impetuousness[,] and recklessness.’ It is a moment and ‘condition of life when a person may be most susceptible to influence and to psychological damage.’ And its ‘signature qualities’ are all ‘transient.’” *Miller v. Alabama*, 567 U.S. 460 (2012) (citations omitted).

Pennsylvania's Criminal History Records Information Act ("CHRIA"), 18 Pa.C.S.A. § 9123, incorporates those policies and protections. CHRIA sets forth when and how criminal history records are to be created, maintained, accessed, and erased (expunged). With particular regard to records involving the Juvenile Court, it requires that judges "shall" expunge all juvenile records except when the individual had been found delinquent for certain crimes of violence that are specified in 42 Pa.C.S.A. § 6302. *See* 18 Pa.C.S.A. § 9123(a).¹ The law also allows judges to make other exceptions for "cause shown".

C. The Board's Policies and Practice At Issue

The Board of Pardons' Application for Clemency contains no such limitations. Among many other things, the Board of Pardons requires every applicant to disclose whether they have "ever been arrested, taken into custody, held for investigation or questioning, charged by any law enforcement authority, or convicted in any court ... as a juvenile."²

In its regulations, the Board of Pardons has identified crimes of violence as meriting heightened scrutiny if the applicant for clemency is currently incarcerated. *See* 37 PA Code §§ 81.202, 81.231(a) (definition of "crime of violence"). This follows the exception to confidentiality specified in CHRIA. Even so, the Board has not limited to those crimes the obligation to disclose juvenile records.

Nor has it identified any other "good cause" for which juvenile records could be requested. For example, the Board could specify a number of years between the date of the application for clemency and any finding of delinquency that needed to be disclosed. This was done, for example, by the Pennsylvania legislature in deciding that a period of ten years had to elapse before certain convictions would be automatically sealed ("Clean Slate").

Rather, the obligation to disclose applies to all applicants regardless of the offense, regardless of whether it was ever proven or admitted, and regardless of the number of years that have passed between the date of their juvenile record and the date of the crime for which they are seeking clemency.

The Board requires these disclosures to be made in a public document³ and there are no limitations placed on the use of any such information in the "full hearing in open session" that the Constitution requires precede any action by the Board on any application for clemency.

D. Conclusion

¹ For its part, the Board of Pardons has itself identified crimes of violence as meriting heightened scrutiny if the applicant for clemency is currently incarcerated. *See* 37 PA Code §§ 81.202, 81.231(a) (definition of "crime of violence").

² See attached excerpt from the current (November 15, 2019) Application for Clemency.

³ 37 PA Code § 81.227 provides that "[t]he application will be available for public inspection."

The Pennsylvania Bar Association has long supported efforts to eliminate the lifelong stain that the public availability of criminal records has caused, and is deservedly proud of its support of “Clean Slate” which will automatically seal 30 million adult criminal records by July 2020.

Mandating the public disclosure of all juvenile arrests, questionings, charges, consent decrees and findings of delinquency is completely contrary not just to our Constitution and well-settled law, but to our society’s shared interest in not penalizing people for misdeeds made while they were minors, and in granting civic forgiveness to those who have demonstrated through their conduct that they have earned the opportunity for a second chance.

Respectfully Submitted,

Brian J. Zeiger, Chair
Section on Criminal Justice

March 27, 2020

Excerpt from the Application for Clemency, PA Board of Pardons

Section 4: Additional Criminal Information and Driver History				
Aside from the offense(s) for which you seek clemency, have you ever been arrested, taken into custody, held for investigation or questioning, charged by any law enforcement authority, or convicted in any court, either as a juvenile or an adult, for any other incident? You are not required to list charges that were expunged. <input type="checkbox"/> Yes (If yes, please provide the information below.) <input type="checkbox"/> No				
Juvenile Charges, Adjudications of Delinquency and/or Consent Decrees:				
Date of Incident:	County (if known) and State:	Offense(s):	Adjudicated Delinquent:	Disposition/Sentence:
			<input type="checkbox"/> Yes <input type="checkbox"/> No	
			<input type="checkbox"/> Yes <input type="checkbox"/> No	
			<input type="checkbox"/> Yes <input type="checkbox"/> No	
			<input type="checkbox"/> Yes <input type="checkbox"/> No	
			<input type="checkbox"/> Yes <input type="checkbox"/> No	

The full/current Application for Clemency may be found at:

<https://www.bop.pa.gov/Apply%20for%20Clemency/Documents/Application%20Packet%20-%20Revised%2011-22-19.pdf>

****Unanimously approved by the Board of Governors May 6, 2020.***

*****Approved by the House of Delegates May 8, 2020.***