

FLORIDA EXECUTIVE CLEMENCY: Seeking Mercy and Justice for Convicted Felons



by
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Florida Governor Rick Scott and the three state-wide elected members of the Florida Cabinet, acting as the Board of Executive Clemency (“the Board”), unanimously approved new clemency rules effective March 9, 2011.¹ The following major changes apply to all pending applications for:

▶ **Restoration of Civil Rights**

The person must file an application and be crime-free for at least five years to be eligible for approval “without a hearing,” and for the 35 most serious offenses be crime-free for seven years and must be approved at a hearing;

▶ **Full Pardon and Firearm Authority**

The ten- and eight-year respective waiting periods stay the same but these time periods may no longer be “waived;”

▶ **Prison Commutations**

A new “Request for Review” is a condition precedent and replaces the previous “waiver” requirement. The Governor plus one Cabinet member must approve this request for the applicant to earn a more detailed investigation and hearing opportunity; and

▶ **Prison Commutations**

Now require the inmate to serve

one-third of their sentence, or one-half if it is a mandatory minimum sentence, before being eligible to seek a “Request for Review.”

These major changes replace most of the April 2007 rules and are “intended to emphasize public safety and ensure that applicants desire clemency and demonstrate they are unlikely to re-offend.”²



WHO CAN BENEFIT FROM CLEMENCY?

Florida and certain out-of-state residents who have a previous felony conviction and have completed their prison sentence or probation often need information or legal counsel to seek clemency approval for Restoration of Civil Rights (RCR) or a Full Pardon. Clemency approval by the Board could be of valuable assistance to obtain certain jobs, business or professional opportunities, state licenses, bonds, government contracts and/or security clearances.

A convicted felon may seek firearm authority for personal and family safety reasons, business protection or recreational hunting. Inmates still serving state prison terms may seek to have the remainder of their sentence commuted to “time served,” converted to probation, reduced to a lesser term or if a mandatory minimum sentence applies—it removed to make an inmate eligible for parole.

ATTORNEY GENERAL'S SUPPORT WAS KEY TO PASSAGE OF LEGISLATION TO “DE-COUPLE” STATE LICENSES FROM RCRS

Florida Attorney General Pam Bondi’s strong support led to passage of legislation to “de-couple” state licenses from RCRs unless the felony conviction is “directly related” to the desired license. CS/SB 146 by Sen. Chris Smith and Rep. Dwayne Taylor provides, in part, “a state agency may not deny an application for a license, permit, certificate, or employment based on the applicant’s lack of civil rights.” The legislation would not apply to a concealed weapon or firearm.³

FORMS OF EXECUTIVE CLEMENCY

Executive Clemency is a power vested in the Governor by the Florida Constitution of 1968.⁴ Clemency is an act of mercy that absolves the individual upon whom it is bestowed from all or any part of the punishment that the law imposes.⁵

- ▶ **Full pardon;**
- ▶ Pardon without firearm
- ▶ Pardon for misdemeanor
- ▶ **Commutation of sentence;**
- ▶ Remission on fines and forfeitures
- ▶ **Specific authority to own, possess or use firearms;**
- ▶ **Restoration of civil rights; and**
- ▶ Restoration of alien status.

HEARINGS AND APPROVAL "FACTORS"

The Board is comprised of Governor Rick Scott and the three state-wide elected members of the Florida Cabinet: Attorney General Pam Bondi, Chief Financial Officer Jeff Atwater and Commissioner of Agriculture Adam Putnum. The Board meets four times a year in Tallahassee to hear public testimony and vote on clemency applications and, through its staff, periodically to consider "Requests for Review."

Approval by the Governor and two members of the Board is required to obtain any form of clemency.⁶ Approval by the Governor and one member of the Board is required to obtain a Request for Review.

The Board will consider these six factors when determining whether to grant an applicant clemency:⁷

- ▶ The nature of the offense;
- ▶ Whether the applicant has any history of mental instability, drug or alcohol abuse;
- ▶ Whether the applicant has any subsequent arrests, including traffic offenses;
- ▶ The applicant's employment history;
- ▶ Whether the applicant is delinquent on any outstanding debts or child support payments; and
- ▶ Letters submitted in support of, or opposition to, the grant of executive clemency.

FULL PARDON (INCLUDES RCRS AND FIREARM AUTHORITY)

Rule 4.I.A. states "a Full Pardon unconditionally releases a person from punishment and forgives *guilt for any Florida conviction*. It restores to an applicant all of the rights of citizenship possessed by the person before his or her conviction, including the right to own, possess, or use firearms." *At least 10 years must have passed* since you completed your sentence or conditions of supervision to seek a pardon. This previous option to "waive" this time period is no longer available.

The Information and Instructions on

Applying for Clemency states "A pardon *will not erase or expunge* the record of conviction and it will not indicate innocence; therefore, it still will be necessary to report the conviction where such information is required."⁸

The Board can and does grant less relief than is requested. For example, if there is anything in the applicant's background that would cause the Board to withhold the firearm authority it may grant a "Pardon Without Firearm Authority" described in Rule 4.I.B.

RESTORATION OF CIVIL RIGHTS "WITHOUT A HEARING"

Rule 4.I.G., governs Restoration of Civil Rights which "restores to an applicant all of the rights of citizenship—voting, serving on a jury, and seeking elected office—in Florida enjoyed before the felony conviction, *except* the specific authority to own, possess or use firearms." New Rule 9. A. establishes who is eligible for restoration of civil rights without a hearing.

Governor Scott and the Board made major rule changes which **create two distinct categories of eligibility:**

Most significant, the rules now require the applicant to wait five years after conclusion of prison or probation to be eligible and the person must actually submit an application.

In addition, felons convicted of 35 of the most serious crimes are *ineligible* for approval without a hearing. As before, the applicant must complete their sentence and conditions of supervision, pay restitution, have no outstanding detainers, and not have any new arrests or convictions during the five-year waiting period.

RESTORATION OF CIVIL RIGHTS "WITH A HEARING"

Per new Rule 10. A. there is a new seven-year waiting period for 35 of the most serious Florida crimes and any offense committed in another jurisdiction (whether an out-of-state or federal conviction) that would be an offense

listed in new Rule 9.A. just as if that offense had been committed in Florida.

The new rules will require waiting periods and more hearings but applicants will still have a tough but open path to demonstrate rehabilitation and earn the opportunity for RCRs.

COMMUTATION OF STATE PRISON SENTENCE

During the last 30 years, the Board approved 145 commutation applications: 21 by Gov. Bob Graham (1979-1986); 16 by Gov. Bob Martinez (1987-1990); 65 by the late Gov. Lawton Chiles (1991-1998); 10 by Gov. Buddy MacKay (1998 and 1999); 20 by Gov. Jeb Bush (1999-2006), and 13 by Gov. Charlie Crist (2007-2010).⁹

Rule 4.D. states:

"A commutation of sentence may adjust an applicant's penalty *to one less severe* but does not restore any civil right, and it does not restore the authority to own, possess, or use firearms."

Rule 5.B. regarding eligibility to apply for a commutation states:

"A person *may not* be considered for a commutation of sentence unless...he has been *granted a Request for Review* pursuant to Rule 8 or has had his case placed upon a Clemency Board agenda pursuant to Rule 17."

Rule 8.A. provides an inmate applicant who receives a *mandatory minimum sentence* must serve at least *one-half* of their sentence and all other applicants must serve one-third of their sentence before being eligible to apply.

Public clemency meetings to consider prison commutations are often attended by victims, victim's family members, state attorneys, law enforcement, advocacy groups and the media. The applicant is in state prison and thus not allowed to personally appear before the Board. The applicant's family, lawyer and other supporters represent the inmate. The inmate may submit written information for consideration.

SPECIFIC AUTHORITY TO OWN, POSSESS OR USE FIREARMS

Rule 4.I.F. states:

"The specific Authority to Own, Possess, or Use Firearms restores to an applicant the *right to own, possess, or use firearms which were lost as a result of a felony conviction*. Due to federal firearms laws, the Clemency Board will not consider requests for firearm authority from individuals convicted in federal or out-of-state courts. In order to comply with the federal laws, a Presidential Pardon or a Relief of Disability from the Bureau of Alcohol, Tobacco and Firearms must be issued in cases involving federal court convictions. A pardon or restoration of civil rights with no restrictions on firearms must be issued by the state where the conviction occurred."

Rule 5. D. states:

"A person may not apply for the specific authority to own, possess, or use firearms unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including but not limited to, parole, probation, community control, control release, and conditional release, *for a period of no less than eight years*. The applicant may not have outstanding detainers, or any pecuniary penalties or liabilities which total more than \$1,000 and result from any criminal conviction or traffic infraction."

EXPEDITING A CASE FOR "EXCEPTIONAL MERIT" PER RULE 17

Rule 17 provides that in cases of "exceptional merit" any member of the Board may place a case on an upcoming agenda for consideration. Historically, this was infrequently done and only time will tell if and when new Board members exercise this prerogative. Also unclear is if Rule 17 will be used to expedite only pending applications or whether otherwise time-ineligible

persons can be considered.

CLEMENCY IS DIFFERENT THAN "EXPUNCTION" OR SEALING OF CRIMINAL HISTORY INFORMATION

Neither a full pardon, nor any other type of clemency, will expunge or facilitate the expungement of a criminal record. Please contact the Florida Department of Law Enforcement at seal-expunge@fdle.state.fl.us or call 850/410-7870 to obtain an "Application for Certification of Eligibility" to seek expunction or sealing of a criminal history record.

There is a \$75 fee and very specific and limited eligibility criteria established by Florida law.¹⁰ If FDLE approves eligibility, an applicant must then file a petition in the circuit court where the criminal proceeding originally occurred to seek court approval.

Expunction is when a criminal history record is physically destroyed so no one would have access to it. **Sealing** is when a criminal history record becomes inaccessible to any person not having a legal right to access criminal history records or the information contained or preserved in those records. Police, military, local, state and federal government agencies continue to have a legal right to access sealed records but most employers and the public generally do not.

Expunction or Sealing Eligibility will not occur if you: have a conviction (was adjudicated guilty) for any criminal offense (including traffic, misdemeanor, or felony); committed one of 22 serious crimes even if you received a "withhold of adjudication;" were adjudicated delinquent as a juvenile of certain charges; violated probation or community control resulting in the initial withhold

of adjudication being converted to an adjudication of guilt; have an open case, unpaid restitution or court costs; or have ever previously had a record sealed or expunged in any jurisdiction, including another State.

In 1999, the Board specifically declared that the granting of a full pardon *does not* remove a condition of ineligibility for expunging or sealing a criminal history record, and directed FDLE accordingly.

NO STATE APPLICATION OR COURT DOCUMENT FEES

There is no state fee or cost to seek clemency. Likewise, Florida law provides the certified copies of court records required for all types of clemency shall be furnished by the clerk of court to the applicant *free of charge* and without delay.¹¹ The free court records specifically include the criminal "information" or indictment (also called "charging documents"), judgment and sentence.

Applications and the new clemency rules can be obtained from: clemencyweb@fpc.state.fl.us or by calling the Office of Executive Clemency at 850/488-2952.

NEW FLORIDA PAROLE COMMISSION CLEMENCY STUDY

The Florida Legislature directed the Florida Parole Commission to conduct a detailed study on the impact of the new rules, its plan to implement them, and the status of case backlogs and other administrative and management issues. The study results must be provided by October 1, 2011 to the Governor's Office of Planning and Budgeting, and to the presiding officers of the Florida Legislature.¹²

SEE PAGE 40

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how confusing it can be:

- ▶ “Morphine 4mg IV Q4° PRN pain” — In translation, this is an order that says “You can give the patient 4mg of morphine as often as every 4 hours, when he asks for it, through his intravenous line.”
- ▶ “Increase O2 to 6lpm for sats <95%, notify MD for sats <90%” — This is an order from the doctor that says “**IF** his oxygen saturation goes below 95%, you can up his oxygen to 6 liters; if his oxygen saturation drops below 90%, I want you to call me” “If” is the key word here—it means the orders are anticipatory, not reactive.

So you can see how these Standing Orders may appear, to the untrained eye, like the patient had frequent dosing of narcotics and his oxygen saturations were

low and in truth none of that occurred. I highly recommend review by a medical expert if you are looking for information that is *this* specific.

The last thing I want to cover is abbreviations. It is literally impossible to understand the medical records without knowing at least a few of the common abbreviations. For your benefit, Table 1 is a list of common medical abbreviations and their definitions.

Ultimately, medical records are complex, often disorganized, and may be confusing if the reader is not a medical professional. This article provides a groundwork to help you answer basic questions and get an overall summary. When looking for answers to specific questions regarding the events, surgeries, complications or procedures, the review is best left to the medical experts. 🏠

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DUI NOTES • from page 29

than one based on a perceived threat of violence unless of course the violence is well documented and provable as in cases of riots or natural disasters. In either case, the defendant cannot use the reason as a basis to continue to drive after it is no longer necessary.

CONCLUSION

It is unlikely that in the multitude of DUI cases that will be defended this year that any of us will come across fact patterns that will lend themselves to *Entrapment* or *Necessity*, but if you are lucky enough to have such a case you now know what to do and how difficult it will be to establish. 🏠

¹ *State v. Brown*, 14 Fla. L. Weekly Supp. 1133a (1st Judicial Circuit Santa Rosa County 2007).

² *Herrera v. State*, 594 So.2d 275, 277 (Fla. 1992). Section 777.201(2), Florida Statutes.

³ Section 777.201(2) Florida Statutes.

⁴ Section 777.201(1), Florida Statutes; *State v. Brown*, 14 Fla. L. Weekly Supp. 1133a (1st Judicial Circuit Santa Rosa County 2007).

⁵ *Jenks v. State*, 582 So.2d 676 (Fla. 1st DCA 1991).

CROSS EXAMINATION • from page 31

Rule #3:

Cross examine in a logical progression to a specific goal.

Again, you must have a specific goal or objective in mind. It may be to establish favorable facts that this witness has to offer. It may be to completely undermine the witness's credibility. But you must know what you are attempting

to do. Ask leading questions, one fact at a time, going from the general to the specific. Posner and Dodd suggest thinking of a funnel, broad at the beginning and narrowing down. With that mental image in mind, it is easier to organize a cross examination.



This is spring training, just a quick

review of the basics. Things you already know. If you haven't done so, read *Cross Examination: Science and Technique*. It has many more helpful suggestions in it (over six hundred pages worth). The ones reviewed here are the basics. Remember them. They have to be instinctual, just like hitting the cut-off man. If you practice them and make them part of your routine, even a Joe Garagiola can look like Joe DiMaggio. 🏠

CLEMENCY • from page 33

Note: This article is intended as only general information and not specific legal advice.

¹ Unless otherwise noted, all rule citations are to the Florida Rules of Executive Clemency

(Fla.R.Ex.C.), effective March 9, 2011.

² Governor Scott's Remarks Prepared for Delivery, March 9, 2011.

³ CS/SB 146, 2nd Enrolled, pages 3 and 4, lines 77, 78 and 83–88, (2011-____, Laws of Florida).

⁴ See Fla. Const. art IV, section 8 (a).

⁵ Fla. R. Ex. C. 1 Statement of Policy.

⁶ See Fla. Const. art IV, section 8 (a).

⁷ Information and Instructions for Applying for Clemency per Form ADM 1501.

⁸ Clemency Form ADM 1501.

⁹ Florida Parole Commission response dated March 25, 2011 to author's Public Records request.

¹⁰ Section 943.0585, Fla. Stat. for expunction; Section 943.059, Fla. Stat. for sealing.

¹¹ Section 940.04, Fla. Stat.

¹² Conference Report on SB 2000, the General Appropriations Act, Item 1319, pages 188 and 189 proviso (2011 - _____, Laws of Florida).