

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

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Governor Christine Gregoire
Office of the Governor
PO Box 40002
Olympia, WA 98504-0002

Dear Governor Gregoire:

I am writing to support the Washington State Clemency and Pardons Board (the Board) recommendation that you reduce Barry Massey's sentence from life imprisonment without possibility of release to 25 years, conditioned on his continued good conduct. Because I am a public defender in the federal court system and Mr. Massey is a state prisoner, you should know why I am writing on his behalf. My interest comes from two sources, one specific to Mr. Massey's case, and the other more general and related to the policies and moral underpinnings of our system of punishment.

As to the former, Barry Massey's plight, conviction for murder at age 13 with a mental age of 9.9 years old and sentence to life without the possibility of release, came to the attention of two extraordinary and bright young lawyers at Perkins Coie. The two, Beth Colgan and Laura Mate, undertook *pro bono* representation of Mr. Massey. As an aside, I cannot overstate how fortunate we are to have lawyers like Ms. Colgan and Ms. Mate in our community. They epitomize the best in our profession. As it turns out, in 2001, Laura Mate was hired as an attorney in my office. She remains a close friend of Ms. Colgan. Mr. Massey's saga was the topic of many hours of lunchroom conversation in my office. Thus, my personal interest.

More generally, for the past two decades I have worked on behalf of Federal Defenders to bring our voice and contribute our views to the legislative process and to sentencing policy-makers. During that time I have learned a great deal about the frequently competing interests in the sentencing function, about the need for balance and about the deep-rooted importance of executive clemency in the process. Below, I share some of my thoughts on the history and critical role of executive clemency, but before I address clemency in general, I want to note two aspects of Barry Massey's story that I, like the Board, find particularly compelling.

First, Mr. Massey received the harshest possible punishment for his crime despite the fact that it was committed when he was 13 years old with a mental capacity of a ten-year-old. These are factors that necessarily mitigate his crime and should mitigate his punishment. This mitigation is more apparent now than it was when Mr. Massey was convicted in 1987. Since then, we have learned much about the brain development of children and the United States Supreme Court has recognized that juveniles lack the moral culpability of their adult counterparts.¹ The Court noted three general differences between juvenile and adult offenders that “render suspect any conclusion that a juvenile falls among the worst offenders.”² First, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”³ This susceptibility to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.”⁴ Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁵ Juveniles, therefore, “have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”⁶ Third, “the character of a juvenile is not as well formed as that of an adult.”⁷ Accordingly, “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character.”⁸ Indeed, “a greater possibility exists that a minor’s character deficiencies will be reformed.”⁹ And Barry Massey is reformed.

It is Mr. Massey’s reformation that is the second particularly powerful factor in his case for clemency. I am certain you have the benefit of the many details of Mr.

¹*Roper v. Simmons*, 543 U.S. 551, 571 (2005).

²*Id.* at 570.

³*Roper*, at 569, quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

⁴*Id.* at 570, quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

⁵*Id.* at 569.

⁶*Id.* at 570.

⁷*Id.* at 569.

⁸*Id.* at 570.

⁹*Id.*

Massey's progress and good works over the past two decades, so I will not belabor them here. It is worth emphasizing that, at age 15, Barry Massey entered a prison designed for incapacitating grown adults with sentences that promised no release – ever. Despite this, he survived, grew and ultimately dedicated his life to trying to help others and to contribute to society. For the past ten years, Mr. Massey has volunteered each month to speak to hundreds of at-risk youths about the choices they make and the consequences of certain behavior. This work has been recognized by students, teachers and the Department of Corrections. Mr. Massey has also volunteered to work toward improving the safety and security of prison staff through his participation in the Black Prisoners' Caucus, the Concerned Lifers' Organization, and the Prison Awareness Project. In addition, despite being incarcerated when he was in the seventh grade, he has managed to obtain his GED, a community college certificate and he has gained significant work skills through employment in correctional industry programs. The combination of these efforts will allow him to reintegrate in society should you accept the Board's recommendation.

Turning to your role in exercising the prerogative of executive clemency, I write as both a participant in the criminal justice system and as a person whose beliefs have been shaped by the good fortune of my educational experience. I grew up in a house that is no longer there but sat where Gonzaga University's education building is now. I attended St. Martin's College and later returned to Gonzaga for law school. I learned from Benedictines and Jesuits who taught me that a society's worth is measured by the way we treat others, particularly the most unfortunate. When describing criminal justice and systems of punishment, these teachers uniformly advanced the ideal that punishment ought in no case to be more than what is necessary to achieve a defined social purpose. This principle of sentencing parsimony emerged from the Age of Enlightenment and was embedded in the writings of our founding fathers and the Constitution.

As a participant in the federal branch of our criminal justice system, I am exposed on a daily basis to the rigidity and severity of the Federal Sentencing Guidelines. While Washington's sentencing system is not as universally severe as its federal counterpart, clemency is the "fail safe" of our criminal justice system.¹⁰

Executive clemency operates as a hedge against punishment which, over time, proves to be too harsh. It also embraces the notion of mercy when mercy is appropriate. As Justice Anthony M. Kennedy has aptly said: "A people confident in its laws and institutions should not be ashamed of mercy. The greatest of poets reminds us that mercy

¹⁰*Herrera v. Collins*, 506 U.S. 390, 415 (1993).

is 'mightiest in the mightiest. It becomes the throned monarch better than his crown.'"¹¹ Washington's clemency and pardons system reflects our confidence in our laws and institutions. As Terry Sanford, former Governor of North Carolina, said:

The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation. . . . It falls to the Governor to blend mercy with justice, as best [s]he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.¹²

The necessity of executive clemency to a criminal justice system "is deeply rooted in our Anglo-American tradition of law."¹³ "In England, the clemency power was vested in the Crown and can be traced back to the 700's."¹⁴ The Framers of the U.S. Constitution regarded the executive pardon power "as necessary for a humane and effective scheme of government."¹⁵ Alexander Hamilton advocated for this power stating:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of

¹¹Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹²Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. Rev. 1345, 1356, *quoting* Governor Terry Sanford, On Executive Clemency (July 4, 1961), in *Messages, Addresses, and Public Papers of Terry Sanford, Governor of North Carolina, 1961-1965*, at 552 (Memory F. Mitchell ed., 1966).

¹³*Herrera*, 506 U.S. at 411-12.

¹⁴*Id.* at 412.

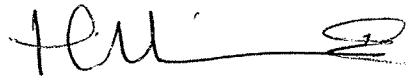
¹⁵Austin Sarat, *Schwarzenegger's Mistake: Clemency and Tookie Williams*, Jurist, <http://jurist.law.pitt.edu/forumy/2005/12/schwarzeneggers-mistake-clemency-and.php>.

unfortunate guilt, justice would wear a countenance too sanguinary and cruel.¹⁶

In the first clemency case to reach the United States Supreme Court, Chief Justice John Marshall described a pardon as “an act of grace, proceeding from the power entrusted with the execution of the laws.”¹⁷ Approximately twenty years later, the Supreme Court observed, “Without such a power as clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy.”¹⁸ Later, Justice Oliver Wendell Holmes clarified clemency is not just merciful but “part of the Constitutional scheme,” and that “[w]hen granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”¹⁹

Through this great history, our nation has established the moral and constitutional grounds for granting clemency to individuals such as Barry Massey. If you adopt the Board’s recommendation, Mr. Massey will have served 25 years in prison for an offense he committed at the age of 13. He has been punished severely. He has also demonstrated remarkable rehabilitation and commitment to a meaningful life that would benefit our community. Under these unique circumstances, “[a] people confident in its laws and institutions should not be ashamed of mercy.”²⁰ I respectfully urge that you adopt the Board’s recommendation. Thank you for your thoughtful consideration.

Very truly yours,



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¹⁶Alexander Hamilton, *The Federalist* No. 74.

¹⁷*United States v. Wilson*, 32 U.S. 150, 154 (1833); see also Austin Sarat, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 *Stan. L. Rev.* 1307, 1322 (2004).

¹⁸*Ex Parte Wells*, 59 U.S. 307, 310 (1856).

¹⁹*Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

²⁰Justice Kennedy Speech, *supra* note 11, at 4.

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bcc: Beth Colgan
Laura Mate