



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
100 HIGH STREET NE
PO BOX 12869
SALEM, OR 97309-0869

DAVID LEITH
Circuit Court Judge
503-588-5160

3/1/2022
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March 1, 2022

Kevin Mannix
Kevin Mannix PC
2009 State Street
Salem OR 97301

Marc Abrams
Oregon Department of Justice
100 SW Market Street
Portland OR 97201

Re: Douglas Marteeny, et al vs Katherine Brown, et al.
Marion County Circuit Court Case No: 22CV02609

Dear Counsel,

Plaintiffs seek to prevent Governor Brown from granting clemency under Article 5, section 14, of the Oregon Constitution in the absence of an “application” from the convicted person, and they seek to compel her compliance with various statutory requirements that follow upon an application. They also contend that Governor Brown has unlawfully delegated her clemency power and has exercised that power in a manner that purports to extend it beyond her time in office. Finally, they allege the Governor has failed to attend to statutory requirements related to reporting and documenting clemency actions. They seek a writ of mandamus preventing her from doing so in the future.

Defendants raise jurisdictional objections to the petition. They and their supporting *amicus* also defend the Governor’s clemency actions and procedures on the merits.

The various issues are resolved at this stage as follows.



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STANDING

The Court will assume without deciding that a rigorous jurisdictional standing requirement applies in this context. Plaintiffs must show injury to a beneficial interest not shared generally with the public at large. They must show that the injury is real or probable, not merely hypothetical. And they must show that this Court's decision in their favor would practically vindicate their interest. The merit of plaintiffs' claims will be assumed at this stage of the analysis and addressed substantively in the later sections of this letter.

The gravamen of plaintiffs' lead claim is that the relevant statutes comprehensively apply to all clemency actions in Oregon, and that under those statutes, district attorneys have specific rights and duties. Plaintiffs contend that the DA in the county of conviction has *inter alia* a right to notice of prospective clemency actions and a duty to relay that notice to any victims and to be a conduit for victim input. Those alleged interests are not general, but are specific to DAs, those interests were not recognized in the complained-of clemency actions, and those interests would be vindicated by the relief sought.

The standing of the victim-plaintiffs is more problematic. Because of the nature of the harm -- a lack of notice -- they learned of the alleged injury too late to act. To the extent available, this Court would exercise discretion to hear their claims as "evading review." But it is not necessary to resolve that issue, given there are other plaintiffs with standing.

With respect to plaintiffs' claims alleging unlawful delegation, the Court concludes that the DA in the county of conviction retains an interest in preventing the judgment of conviction from being unlawfully diminished. Defendants' standing arguments are rejected.

MANDAMUS STANDARDS

A writ of mandamus may be available where there is no plain, speedy, and adequate remedy at law. The defense has conceded that declaratory judgment would not provide such a remedy, but that concession seems to be based, at least in part, on the premise that plaintiffs would lack standing to bring these claims. This Court has concluded otherwise.



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On this record, the Court is ill-equipped to find that plaintiffs do have an adequate remedy by way of Declaratory Judgment. Moreover, if that remedy were available, and if it would foreclose mandamus relief, this Court would convert the petition into a complaint for Declaratory Judgment. The substantive legal issues would be identical.

THE MERITS

1. Applicability of ORS 144.650.

ORS 144.650 begins, “When an application for a pardon, commutation, or remission is made to the Governor,” and then it sets forth procedural requirements that follow. The statutory reference to an “application” is carried forward from predecessor statutes going back to the Deady Code. In those early days, prevailing jurisprudence might well have supported the notion that every clemency action would begin with an application from the offender. Thus, plaintiffs argue that an application from the offender is a mandatory predicate under the statute for any clemency action, and that the procedures in ORS 144.650 apply comprehensively to all clemency actions.

But nothing in the language of the statute requires an application before the Governor may exercise her power. Moreover, such a construction should be avoided, because it would impose an unconstitutional substantive restriction on the Governor’s clemency power. It would effectively divide the universe of offenders into two classes, one eligible for clemency because an application has been made, and one purportedly beyond the clemency power based on the lack of an application. This Court construes ORS 144.650 to apply only following an application, according to its terms, but not as limiting the Governor to exercising the clemency power only upon application from the offender.

The Court has considered whether the statute nevertheless may be read as providing a comprehensive process for all clemency actions by interpreting it to allow and require the Governor (or others within the government) to initiate the



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process by making an “application.” The government’s own application would then trigger the procedures for DA and victim input under ORS 144.650.

Such a construction would preserve the legislature’s apparent objective to provide victim input, among other things, without doing violence to the Governor’s unlimited prerogative to choose who gets clemency. Indeed, it may seem anomalous to provide detailed procedures for clemency actions where they are initiated by the offender, but to have no process whatsoever where the offender has not applied.

The language of the statute, however, does not admit such an interpretation. If the legislature wanted to require an application from the Governor (or others in her administration) in order to self-initiate a clemency action, the legislature could have said so. Here, the statute applies only where there is an application *to* the Governor. It says nothing about applications *from* the government.

This Court is forced to conclude that the statutory procedures relied on by plaintiffs, including those requiring notice and victim input, do not apply where the clemency action is self-initiated by the Governor or her administration, without an application. Accordingly, plaintiffs are not entitled to relief on this claim.

2. Delegation of clemency authority.

Plaintiffs allege that the Governor has impermissibly delegated her clemency powers. First, they contend the Governor has granted commutations based on lists solicited by her from the Department of Corrections and the Oregon Youth Authority.

It is within the Governor’s prerogative to utilize her agencies to assist in identifying offenders for potential clemency. So long as the ultimate decision to grant clemency is taken by the Governor herself, there is no issue of unlawful delegation. Therefore, plaintiffs’ claims that the Governor has unlawfully delegated clemency powers to the Department of Corrections and to the Oregon Youth Authority must be rejected.

Plaintiffs also challenge the Governor’s action to provide parole hearings for certain offenders who were found guilty of offenses while they were juveniles. SB 1008 provided such parole hearings, but it applied only prospectively. The



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commutation order at issue purports to provide similar hearings retroactively to similar offenders convicted before the operative date. Plaintiffs argue the commutation order effectively delegates the ultimate clemency decision to the Board. Plaintiffs also contend that the Governor's clemency actions cannot expand the Board's statutorily delegated authority.

Defendants respond that the commutation consists specifically and exclusively of providing the parole hearing. According to defendants, what action the Board may take is simply the result of an administrative process, not a clemency action. As to the Board's organic authority, defendants maintain that the Governor lawfully may expand the Board's delegated authority by her clemency actions, at least insofar as legislation does not foreclose such expansion.

This Court finds that latter proposition untenable. An administrative agency, whether exercising a legislative or an adjudicative function, is a creature of statute, with its authorities circumscribed by statute. Before the Governor's challenged clemency order, the Board lacked delegated authority to hear the parole cases of the offenders at issue. It was only the clemency order that purported to provide that authority. An executive action -- even a clemency action -- cannot lawfully expand administrative jurisdiction.

In addition to having sole constitutional authority to delegate and circumscribe administrative jurisdiction, the legislature holds the power of the purse. While considering the equities of retroactivity in this context, the legislature also would have weighed the additional burden on the Board and the resources needed to meet any new fiscal demand. The Governor alone could not constitutionally appropriate any resources needed to meet that fiscal impact.

While the parole hearings provided by the Governor's order would be unlawful in this Court's view, the question remains whether mandamus relief is available. Specifically, it was discussed at the hearing whether plaintiffs would have an adequate remedy by raising the jurisdictional objection within the parole hearings themselves. Defendants confirmed through counsel, however, that plaintiffs would not have the rights of a party in that forum and could not seek judicial review. Accordingly, that remedy would be inadequate. A writ must issue, therefore, on this claim.



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Given that disposition, the court need not consider plaintiffs' alternative contention that the commutation at issue unconstitutionally delegated the Governor's clemency power to the Board.

3. Reporting and documentation requirements.

Plaintiffs perceive deficiencies in the Governor's clemency reports to the legislature and her documentation of the various clemencies. Those arguments, however, are predicated on applicability of ORS 144.650 to all clemencies, including clemencies initiated by the government. As discussed above, the Court has found that provision inapplicable to the clemencies at issue here. The Governor's reports and documentation are appropriate in the circumstances. Accordingly, these claims must be denied.

CONCLUSION

For the reasons discussed above, a writ will issue precluding the Board from hearing parole cases delegated to it by the Governor's commutation order that gave retroactive effect to SB 1008. Defendants' motion to dismiss is granted in all other respects.

The parties may submit stipulated or competing forms to memorialize these rulings. Forms will be due by e-filing and email to my judicial assistant by 3:30 p.m. today.

Sincerely,

David E. Leith
Circuit Court Judge

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