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Do Battered Women Deserve Clemency?: Governor Improperly Restricted Use of Pardoning Power

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State Bar Bulletin

Supplement to the San Francisco Daily Journal and the Los Angeles Daily Journal

July 28, 1993

Point-Counterpoint

Do Battered Women Deserve Clemency?

Legal Test Prevents License to Kill by Battered Women



Michael W. Sweet, Esq.

Sixteen women incarcerated at the California Institution for Women recently petitioned Governor Wilson to reduce their sentences, claiming the crimes they committed resulted from being battered by their husbands. The governor exercised the authority granted him by the state Constitution and granted clemency in two cases. He denied clemency for the others and articulated the test he used in considering the clemency petitions based on the battered woman's syndrome (BWS). The test is whether "the petitioner had the option to leave her abuser." Put another way, the inquiry focuses on whether the homicide "realistically was her only chance to escape." A clemency petition is considered only if there is compelling, abundant, independent corroborative evidence that supports the woman's contention that she had no choice but murder. The governor admitted that the test is narrowly drawn in order to prevent "the manipulation of BWS as a rationalization for cold-blooded, premeditated murder."

The governor's policy recognizes the plight of battered women and demonstrates an understanding of the battered woman's syndrome. It

continued on page 3



Governor Improperly Restricted Use of Pardoning Power

Cookie Ridolfi, Esq.

Despite his professed sympathy for and commitment to the cause of battered women, Governor Wilson applied a misguided and disturbing test when he reviewed the petitions for clemency submitted by battered women convicted of killing their abusers. Wilson stated that "mercy is not about a legal analysis of battered woman's syndrome" and refused to consider the inadequacy and unfairness of the law as applied in those cases as a proper grounds for granting clemency. Instead, the governor created a standard of his own which asks, "Did the petitioner have the option to leave her abuser, or was the homicide realistically her only chance to escape?" With this test, Wilson places improper restrictions on the exercise of clemency, reflecting a basic misunderstanding of the nature, history and intent of the pardoning power. Moreover, the governor cannot fairly answer his own test without consideration of the very issues he refuses to consider.

A central issue in the cases of women who kill their partners is their ability to present and establish claims of self-defense. Existing law, which requires an honest and reasonable fear of imminent harm, has in many cases been applied in ways that discount a woman's experience with

continued on page 3

Top of the News

Fourteen Candidates Vying for 5 Board of Governors' Seats

Fourteen candidates are vying this summer for five open seats on the State Bar Board of Governors. The candidates are:

- **District 4 (San Francisco and Marin counties):** Philip H. Albert, Jerome M. Garchik, Kay del Carmen Holley and John H. McGuckin Jr., all of San Francisco. The winner will succeed Judy Johnson.

- **District 6 (Riverside, San Bernardino, San Luis Obispo, Santa Barbara and Ventura counties):** Ward W. Albert of Riverside, Michael W. Case of Ventura and Jill L. Friedman of Santa Barbara. The winner will succeed Dallas Holmes.

- **District 7, Office 1 (Los Angeles County):** Eileen Noriko Kurahashi and David V. Rose. The winner will succeed Margaret M. Morrow, who will take over as the first woman president of the State Bar on October 9 (see feature story on page 2).

- **District 7, Office 2 (Los Angeles County):** Jaime Rene Roman and Thomas G. Stolpman. The winner will succeed Lawrence W. Crispo.

- **District 8 (Orange County):** Maurice L. Evans, James E. Hawes and Matthew Kurilich Jr. The winner will succeed Arthur W. Gray Jr.

Active members of the bar in good standing as of July 23 may vote in their district. Ballots will be mailed on August 2 and must be returned by September 9.

Inside

- In this month's feature story, Margaret Morrow prepares to take over the reins as the first woman president of the State Bar of California following her first-ballot election victory on July 16. *Page 2*

- *Dear Ms. Ethics* advises there are limits on fees an attorney may charge for negotiating a sports contract. *Page 4*

- At *Barside*, "Empowerment" will be the theme of the State Bar's fifth annual Minority Attorneys' Conference in San Francisco in September. *Page 4*

...Ridolfi

domestic violence. The case of petitioner Brenda Aris illustrates the point dramatically.

According to the governor's own report, Rick Aris, Brenda's husband and batterer, "was chronically guilty of the most extraordinary cruelty and severe physical abuse." During their 10-year marriage, Brenda left Rick on several occasions but returned because she believed his threats to kill her and her family were real. Immediately before Rick's death, Brenda was padlocked in her room and endured weeks of daily beatings. On the day she shot him, Rick beat her and promised she would not live until morning. Brenda believed Rick would kill her, waited 10 minutes to make sure he was asleep, and then shot him.

The trial judge refused to instruct the jury on self-defense. Taking the decision from the jury, the judge imposed his own belief that Brenda could not have acted in self-defense because, in his view, as a matter of law, she could not have reasonably feared a sleeping man. A thorough understanding of domestic violence supports Brenda's claim that her actions were reasonable. Yet, as articulated in Aris, the law of self-defense in California leaves no room for adequate consideration of her very real plight.

Both the federal and California state constitutions give broad discretion to the executive to grant clemency. In adopting the pardoning power into this state's constitution, the framers explained, "A power to pardon seems indeed indispensable under the most correct administration of the law...the law may be broken, and yet the offender...excused on moral and general justice, though not in the strictness of the law." The discretion given to the governor was not meant to restrict its use; to the contrary, the pardoning power was created to be as "unfettered as possible" in order to allow its application in every case in which justice requires it. Wilson's position that a consideration of clemency cannot include any review of the legal issues in a case ignores this long history.

The petitions submitted to Gov. Wilson raised many claims, most rooted in the failure of our criminal justice system to judge fairly the situation of a battered woman confronted by the threat

continued on following page

...Sweet

acknowledges that there may be occasions when a woman has run out of options, and it extends clemency when that occurs.

However, the policy also recognizes that there are few instances or circumstances in which it can be said that there was no option but murder. The governor's policy does not forget that these are homicide cases where self-defense did not apply. These women killed their abusers to avoid future confrontation, not to protect themselves from imminent death or great bodily injury.

Since the governor's inquiry focused on the individual, each petition was evaluated on its own merits to determine whether the petitioner had the option to leave her abuser. Despite the hoopla and publicity surrounding these petitions, each one was carefully examined with an eye to the newly-created policy. Although it would have been easier to succumb to the political pressure surrounding this issue and merge the petitions into one battered woman's syndrome petition from which to grant clemency, that would have been irresponsible. Each petition had to turn on its own distinctive set of facts and circumstances. This methodology afforded an opportunity to view each petition clearly and to allow the record of the case to speak. And speak it did.

The facts in these petitions are quite disturbing. Most of the cases are nothing more than calculated, callous murders. They are not even close cases for clemency. Take for instance petitioners D, E, G and H. These petitioners killed their husbands to obtain the proceeds of a life insurance policy. Petitioner F murdered her two young children because she was upset that her ex-husband had a new girlfriend. Petitioner C killed her 19-year-old daughter after discovering that she was involved with petitioner's boyfriend. Petitioner

B committed unspeakable acts of molestation on her children. Petitioner I engaged in acts of prostitution with the 73-year-old victim, burglarized his home and killed him. On it goes. As I said, they are not even close calls.

The battered woman's syndrome theory can become a convenient excuse. Unfortunately, these false claims denigrate the plight of battered women. There is a significant difference between a woman who falls within BWS and a woman who is involved in a domestic relationship in which violence is one facet of the relationship. BWS identifies women who have suffered physical and/or emotional abuse to such an extent that they no longer believe they can get out of that relationship. A sort of "learned helplessness" grips and pervades them. A woman under the syndrome likely demonstrates "victim" characteristics. She is powerless, helpless, defenseless. The governor's policy properly distinguishes between these situations and exposes fabricated cases.

There has been some criticism of the governor's policy and his refusal to grant clemency for the other petitioners. Critics appear to have expected the governor to grant clemency simply because these women alleged they had been victimized by those they killed. However, this type of sweeping response does not promote justice. While it is important to recognize that domestic violence is a devastating problem, the answer is not mass clemency.

Justice is only served if a woman's assertion of BWS is supported by the facts of her case and there is overwhelming evidence that the homicide was the result of the abuse. Anything less is a license to kill.

Michael W. Sweet is executive director of the California District Attorneys Association.

continued from page 1

In the Spotlight

...Morrow first woman to lead California bar

continued from page 2
maintaining peace and order in our society. We should explore the creation of partnerships involving lawyers, judges and members of the business, consumer and public interest communities to deliver this message broadly throughout California. We should also investigate possible creation of a consortium of judges, lawyers, legislators and members of the public to explore the court funding model which will best suit all of California's needs.

We should also continue our efforts to help women lawyers and attorneys of color, achieve full equality of opportunity in the profession. With the large number of women entering the profession annually, one of the biggest issues for female attorneys has become access to power within the profession. Whether through statewide networks or otherwise, we must create strategies by which women can gain admission to the highest levels of law firms, public agencies, bar associations and courts. The problems confronting attorneys of color are somewhat different. Statistics show that the percentage of minority attorneys is still quite low as compared to the general population. We must encourage more persons of color to enter law school so that the ethnicity of our profession will mirror the public it serves. Such efforts should probably begin as early as junior high school and take the form of mentoring, counseling and law-related education programs.

Finally, I think we need to look at the problem of law practice economics and career dissatisfaction. A large percentage of California's lawyers practice alone or in small firms. It is these lawyers who, by and large, render the legal services the middle class and working poor currently receive. The economic burdens on these practitioners are particularly acute. We need to find ways to provide assistance for these lawyers. Mentoring networks, and perhaps even purchasing cooperatives through which these lawyers can obtain necessary management and support services, should be investigated.

An issue directly related to law practice economics is career satisfaction. In a March 1992 survey by the California Lawyer magazine, 59 percent of the lawyers responding said they were unhappy; 36 percent of those said they were so unhappy they would change careers. Such dissatisfaction impacts directly on the quality of legal services received by the clients. Consequently, it would serve both our members and the public to explore the underlying causes of this dissatisfaction and attempt to craft solutions for them.

Dear Ms. Ethics

Excessive Fees for Sports Contracts Are Prohibited

Dear Ms. Ethics:

Question: *Is there a limit on the amount of fees that may be collected by an attorney who negotiates a professional sport service contract for an athlete?*

Answer: Yes, a limit is stated in Business and Professions Code §6106.7. §6106.7 provides that it shall constitute a cause for the imposition of discipline for an attorney to negotiate a professional sport service contract, as defined by subdivision (d) of §1500 of the Labor Code, and in willful violation of subdivision (b) of §1531 of the Labor Code, to collect a fee that in any calendar year exceeds 10 percent of the compensation that the athlete is receiving in that calendar year under the contract.

Additionally, rule 4-200, California Rules of

Professional Conduct (*Fees for Legal Services*), states a general limitation on fees for legal services. Rule 4-200(A) provides that an attorney shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. Subdivision (B) of rule 4-200 lists factors to be considered in determining the conscionability of a fee.

The above information is intended to provide attorneys with basic guidance on the issue of "Fee Limit on Negotiation of Professional Sport Contracts." Attorneys should, however, review Business and Professions Code §6106.7 and rule 4-200 in their entirety as well as all other applicable authorities.

Barside

Fifth Annual Minority Attorneys' Conference Slated September 11

"Empowerment" will be the theme of the fifth annual Statewide Minority Attorneys' Conference, scheduled for September 11 at the Miyako Hotel in San Francisco. The conference offers an opportunity to meet minority attorneys, judges, law professors and bar leaders.

Joyce London Alexander, a U.S. District Court Magistrate Judge from Boston, will deliver the keynote address at the luncheon. Alexander became the country's first black woman U.S. Magistrate Judge in 1979. Eva Jefferson Paterson, executive director of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, will deliver the opening remarks, and Angela Oh, a Korean-American attorney active with Rebuild LA and a partner with Beck, De Corso, Werksman, Barrera & Oh in Beverly Hills, will be a panelist.

Topics to be addressed at the eight workshops include racial and gender bias in the legal profession, stress and chemical dependency, minorities on boards and commissions, how to expand your practice, opportunities for law professors of color, career paths for public attorneys, winning trial strategies and litigation styles, and defending civil rights.

Participants in the conference may earn up to three hours of continuing legal education credit.

A \$75 registration fee includes registration, luncheon and a reception, which will begin at 5 p.m. Pre-registration before September 1 is recommended.

Further information about the conference is available by contacting Cora Thompson, 415/561-8200, extension 7418.

...Ridolfi

continued from page 3

of her batterer. In some cases, judges improperly excluded key evidence, and in others, petitioners did not have adequate assistance of counsel. Some women were convicted under law which, as applied, failed to mete out justice, and for others, the mitigating circumstances were so extraordinary that the punishment mandated by law far exceeds what justice requires. For all the women, the judicial process of reviewing their claims has ended. The pardoning power was intended to provide a safety net for precisely these kinds of cases.

In his test, the governor asks, "was homicide realistically her only chance to escape?" at the same time he refuses to consider any evidence of battered woman's syndrome. His test ignores existing social science evidence which has established that evidence of a battered woman's experience is crucial to the question of whether or not she reasonably believed escape to be an option. To consider these cases without going beyond the limitations faced by these women at trial leaves them at the same disadvantage they faced in court. The whole point of the pardoning power is to make up for inadequacies within the existing system.

Finally, the part of the test which asks, "did the petitioner have the option to leave her abuser?" contains many incorrect assumptions about violent relationships. It incorrectly assumes that leaving stops the abuse, it erroneously assumes that the battered woman has not left her batterer in the past, and it wrongly assumes that leaving is possible, when in many cases it is physically and economically impossible.

Advocates on behalf of battered women are not seeking the release of all women convicted of killing their abusers. The inflammatory rhetoric that argues that a grant of clemency in these cases would establish a license to kill is a simplistic dismissal of a complicated and serious problem. Existing laws do not adequately protect battered women and children. To judge women who have tried to protect themselves and their children by standards which do not appreciate the very real perception of the very real danger is wrong.

Dozens more petitions submitted by battered women remain on the governor's desk. We hope that with these cases, Gov. Wilson will have the courage to exercise properly the pardoning power in the way it was intended. If he does, he will be acting in the interest of justice on behalf of all of us.

Cookie Ridolfi is an associate professor of law at Santa Clara University School of Law and a member of the California Coalition for Battered Women in Prison.

State Bar Annual Meeting
October 7-10
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State Bar Bulletin

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