DOCKET NO. 38031

BEFORE THE ILLINOIS PRISON REVIEW BOARD
APRIL 2022
ADVISING THE HONORABLE J.B. PRITZKER, GOVERNOR
IN THE MATTER OF MARILYN LEMAK
PETITION FOR EXECUTIVE CLEMENCY

RESPONSE IN OPPOSITION TO PETITION FOR EXECUTIVE CLEMENCY

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I. INTRODUCTION

The Petitioner/Defendant, Marilyn Lemak, seeks executive clemency from the Governor of this State pertaining to her 2002 convictions for the first-degree murders of her three young children. Petitioner was found guilty following a jury trial which revealed that on March 4, 1999, the defendant drugged and suffocated her children, Thomas (3), Emily (6) and Nicholas (7). At the time, Petitioner was going through a divorce from her husband and father of the children. That afternoon she gave each of her children peanut butter sandwiches laced with Zoloft and Ativan, and once they fell asleep, covered their mouth, and pinched their nose until they suffocated. She murdered her three children in their home because she was distraught about her impending divorce and her husband's new romantic involvement.

Petitioner was sentenced to natural life imprisonment without the possibility of parole pursuant to 730 ILCS 5/5-8-1(c)(ii) (West 2002) which mandated natural life for the murder of two or more individuals. Her convictions and sentence were upheld by the Illinois Appellate Court, Second District in 2003 (*People v. Lemak*, No. 2-99-0598 (Rule 23 Order, November 10, 2003)).

Petitioner believes that despite her unspeakable actions she should be able to leave prison after serving only 22 years of her mandatory natural life sentence. She posits there are "extenuating circumstances surrounding [her] conviction for killing [her] three children ... that might, under the law, be categorized as legal 'innocence.'" Pet., p.1. Additionally, she claims she is rehabilitated, remorseful and at risk for COVID. For the reasons that follow, the People of the State of Illinois urge that Governor JB Pritzker and this Board reject Marilyn Lemak's bid for executive clemency.

II. STATEMENT OF FACTS

A. Trial and Sentencing

Petitioner plead not guilty by reason of insanity. She was tried by a jury. The following facts were elicited at trial.[1]

Petitioner and David Lemak were married in 1985. Petitioner was a nurse and David Lemak was in medical school at the time. The couple had three children, Nicholas, Emily and Thomas, who were the victims in this case. At the time of their murders, Nicholas was seven, Emily was six and Thomas was three.

Petitioner became unhappy with the marriage, feeling frustrated with a perceived lack of attention by David to her and the children. She sought treatment for depression in the summer of 1993 when she was having suicidal and angry thoughts. Petitioner was prescribed Prozac and began to feel better. But her issues with parenting persisted and in the summer of 1994 she began seeing a psychologist when she was again displaying anger and frustration. Petitioner and David sought counselling for issues in their marriage in 1996 when Petitioner indicated she wanted a

[1] These facts are summarized from the Appellate Court's order affirming the defendant's convictions and sentences on direct appeal,. *People v. Helgesen*, No. 2-95-0735 (Rule 23 Order, p. 2-7), attached as People's Exhibit A.

separation from David. Petitioner filed for divorce in 1997 but the couple reconciled and began seeing another marriage counselor. But by June 1998, Petitioner filed for divorce again. David remained in the marital home but slept in a separate bedroom.

In mid-January 1999, David began seeing dating a woman he met at a work function. When Petitioner found a picture of David and the woman in a nightstand in the room David was staying in, she became angry and told David he could not live in the house and date someone else. She wired the doors to the house shut and pulled the intercoms from the wall when David was out with his girlfriend. She entered his bedroom while he was in bed and stood at the end of his bed angrily. On February 11, 1999, David moved out to a house he rented close to the marital home and near the children's school. Over the course of the next couple of weeks she gave David a Valentine card and balloon and when he came to the family home, she suggested reconciliation. When the suggestion was rebuffed, she became angry and told him to leave. Then she sent another Valentine card. At the time Petitioner was seeing a doctor that she had seen for some time and was taking Zoloft for depression and Ativan for her sleeplessness as well as Zantac for stomach problems. She saw her doctor on March 2, 1999, complaining of stomach flu, but she told him she otherwise felt much better and had accepted that her marriage was over.

On the morning of March 4, 1999, Petitioner sent Nicholas and Emily off to school and stayed home with Thomas. She proceeded to cancel the cleaning lady and the babysitter, telling the babysitter that Thomas and Nicholas were sick. She picked Emily up from morning kindergarten and when they arrived back home, she prepared peanut butter sandwiches laced with crushed Ativan pills. When they fell asleep, she covered their mouths and pinched their noses until they suffocated. After Nicholas arrived home from school in the afternoon, she gave him a peanut butter sandwich that had also been laced with Ativan and suffocated him as well.

After killing the children, the defendant spent the evening alone and she was seen driving alone in her van in the neighborhood. She decided to kill herself and she cut her wrists and took Ativan and about 30 aspirin at about 3:00 a.m., March 5, 1999. When she awoke called 9-1-1. Petitioner told police that she decided to kill the children because she and the children were not David's number one priority, David did not want to pick up the kids from school and she wanted to give David his freedom.

During the investigation of the murders on March 5, 1999, an evidence technician, located a bloody wedding dress and a photo of David and Janice Ryan with an Exacto blade sticking through David's chest.

Dr. Jeffrey Harkey testified that the children died of cerebral anoxia due to suffocation. Ingestion of Zoloft and Ativan indirectly contributed to the deaths. There were no other signs of trauma.

Friends, neighbors, and co-workers described Petitioner as a loving mother and a good co-worker. They also testified to her anger at David for dating another woman while they were still married. She admitted to a psychiatrist, Dr. Syed Ali, that she was angry at David when she killed the children. Petitioner's expressions of anger at David were corroborated by writings she had made on the underside of furniture in the marital home. She told her own psychiatrists that she killed the children so she and they could go to a "happy place" together.

A number of medical professionals testified regarding treatment of or interviews with Petitioner and opined in varying ways on her ability to appreciate the criminality of her actions at the time of the murders. A jury rejected Petitioner's insanity defense as well as a guilty but mentally ill verdict. She was found guilty on all counts. The mandatory natural life sentence was imposed pursuant to statute.

B. Direct Appeal

On direct appeal, Petitioner challenged the constitutionality of Illinois' insanity defense statute among other things. The Illinois Appellate Court, Second District affirmed her convictions and natural life sentence. *People v. Lemak*, No. 2-02-0397 (Rule 23 Order, Nov. 10, 2003) (attached as People's Exhibit A). She has not sought any other post-conviction relief.

III. REASONS FOR DENYING CLEMENCY

The avenues for achieving executive clemency are limited. The purpose of executive clemency is to serve as a final layer of protection when the judicial process has failed a particular petitioner. The purpose of executive clemency is summarized as follows:

> Section 13 of Article 5 of the Illinois Constitution gives the Governor the "power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor." Indeed, "clemency proceedings are not part of trial—or even the adjudicatory process." *Ohio Adult Parole Authority v. Woodward,* 523 U.S. 272, 284 (1998). Clemency procedures are not intended to determine the guilt or innocence of the defendant. *Id.* Nor are they intended primarily to enhance the reliability of convictions or sentences existing as a result of the trial process. *Id.* Clemency is an executive function independent of trial, direct appeal, and collateral relief proceedings. *Id.* The purpose of clemency is to "prevent miscarriages of justice." *Herrera v. Collins,* 506 U.S. 390, 412 (1993). It is traditionally available to defendants as "a final and alternative avenue of relief," "exist[ing] to provide relief from harshness or mistake in the judicial system." *Woodward,* 523 U.S. at 284-85. Executive clemency provides the "fail safe" in our criminal justice system. *Herrera,* 506 U.S. at 415. "The defendant in effect accepts the finality of the [conviction] for purposes of adjudication, and appeals for clemency as a matter of grace." *Woodward,* 523 U.S. at 282. It is not a perfect system. Clemency is designed to catch those cases that fall through the cracks. It is a shield to protect those limited few for which the system of police, courts, juries, prosecutors, and defense attorneys have failed. David A. Wallace, "*Dead Men Walking- An Abuse of Executive Clemency Power in Illinois.*" 29 U. Dayton L. Rev. 379-403 (2006).

Petitioner's request for commutation does not fall within the category of limited cases where a miscarriage of justice has occurred or where the judicial system has failed. She does ask the Governor to consider what she characterizes as "extenuating circumstances" surrounding her

convictions for the murders of her three children that she asserts "might, under the law, be categorized as legal 'innocence.'" Pet., p. 1. Petitioner is referring to her assertion that the Zoloft she was taking at the time of the murders may have been the cause of "antidepressant induced violence," that caused her to kill her children and hurt herself. Petitioner also urges the Governor that she is "completely 'rehabilitated'" and poses no threat, and that she is at high risk for COVID, as additional bases for clemency.

The People submit Petitioner has not demonstrated a legitimate basis to conclude that there has been a miscarriage of justice in her case that would necessitate the Governor's action.

Legal Innocence

The focus of Petitioner's request for clemency is a legal one. She contends that she was unable to mount a defense of involuntary intoxication due to the state of the law at the time she murdered her children. (Pet., p. 3). Because she was taking Zoloft, prescribed by her doctor to help treat her depression, Petitioner suggests she was not legally responsible for killing her children. By means of her petition, she asks the Governor to determine that any such defense would have been successful. She believes she has legal avenues available to her to raise such a challenge to her convictions – a successful challenge would result in the opportunity for a new trial. (Pet., p. 4). But Petitioner would "much prefer Executive Clemency from the Board and Governor in the form of commutation to "time served"…" (Pet., p. 4). The People urge that this statement itself demonstrates that Petitioner is not an appropriate candidate for clemency – no miscarriage of justice can have occurred if there remains an avenue in the justice system for Petitioner to bring her claims and obtain relief.

Involuntary intoxication is an affirmative defense which if proven, relieves an accused of criminal responsibility for their actions. The defense is set forth in the Illinois Criminal Code at

720 ILCS 5/6-3 and provides that an accused must demonstrate that they were in an involuntarily induced intoxicated or drugged condition that "deprived them of the substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of the law." Here, Petitioner claims that her prescription for Zoloft may be the culprit that deprived her of criminal responsibility for her actions.

At her trial, Petitioner raised an insanity defense and asked the jury to determine that she was not criminally responsible for her actions – the jury was asked to find that she lacked substantial capacity to appreciate the criminality of her conduct. (See, 720 ILCS 5/6-2). The jury was presented with the testimony of several medical professionals who provided various opinions about Petitioner's state of mind when she killed her three children. They were presented with testimony regarding her depression and the medications prescribed to her, most significantly, Zoloft. The jury heard that her family doctor, Dr. Hubbard, first prescribed Zoloft for her in response to her complaints of depression and menopause symptoms. And the jury heard that over the course of eight or nine months, Dr. Hubbard gradually increased the Zoloft prescription to address Petitioner's continued complaints of symptoms and stress related to her divorce.[2] Ultimately, that jury determined that Petitioner was not insane at the time of the crimes – in other words, the jury found that she **did** have the capacity to appreciate the criminality of her conduct.

Throughout the petition and the attorney's letter in support, there is reference to the case of *People v. Hari*, 218 Ill.2d 275. Petitioner and her attorney present the *Hari* case as support for

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[2] Petitioner characterizes the 200 mg dosage Zoloft that she was taking at the time of the murders as "very high." (Pet., p. 6). Her lawyer characterizes the dosage as "massive." (Pet., Exh. A). The People observe that the Zoloft information attached to the petition reflects that clinical trials for major depressive disorder, Zoloft were done with dosages in a range of 50 to 200 mg/day. The 200 mg/day Petitioner was taking was a therapeutic dosage. Additionally, she references the "black box" warnings now on the Zoloft box; it should be noted that those warnings are directed at use of the drug in children and adolescents. Again, the exhibits included with the petition include these warnings.

her assertion that she has an involuntary intoxication defense. The People feel it is imperative for this Board and the Governor to understand what *Hari* actually means for Petitioner. In *Hari*, the defendant sought the ability to bring an involuntary intoxication defense based in part on the Zoloft he was taking pursuant to prescription. At the time of David Hari's case, the defense was not available for persons taking drugs prescribed by a doctor. David Hari was taking Zoloft and Tylenol PM, as well as consuming alcohol – both of which are contraindicated for Zoloft -- when he shot his wife and killed a man she was dating. The holding of the *Hari* case was merely that David Hari was entitled to a new trial at which he could raise an involuntary intoxication defense based in part on the prescribed Zoloft. What *Hari* means for Petitioner is that she has the opportunity to ask for a new trial at which she could present a defense of involuntary intoxication based on her Zoloft prescription.

What *Hari* does not represent is any suggestion that Petitioner's prescription for Zoloft rendered her unable to conform her conduct to the law. The *Hari* court did not even find that David Hari's prescription Zoloft, in combination with Tylenol PM and/or alcohol, rendered **him** unable to conform his conduct to the law. All it did was determine that a person could bring the defense of involuntary intoxication based on a prescription drug. Both Petitioner and her attorney suggest that David Hari's dosage of Zoloft was significantly lower than Petitioner's, as if that has some meaning. It does not. First, David Hari was taking another contraindicated medication while taking Zoloft and he was consuming alcohol – this is significant. But more importantly, as stated above, the *Hari* decision did not find that David Hari's dosage of Zoloft rendered him unable to conform his conduct to the law. It made no judgment on his guilt or innocence. *Hari* certainly does not establish that Petitioner was not legally responsible for the murders of her children.

The petition for clemency states "there are extenuating circumstances surrounding my conviction for killing my three children, Nicholas, Emily and Thomas, **that might**, under the law, be categorized as legal 'innocence'..." (Pet., p. 1). Rather than test her hypothesis of legal innocence within the justice system, Petitioner "would much prefer" a commutation of her sentence. Her attorney's letter in support states that he believes she is "entitled to a new trial so she can assert this legitimate defense which was not available to her in 2001." (Pet., Exh. A). But he goes on to say that he "hope[s] that the Board and the Governor will conclude that no such new trial is necessary. It would be expensive. It would be highly publicized. And it would open old emotional wounds for all concerned." (Pet., Exh. A).

It should be noted that Petitioner has not availed herself of the system. Her petition and certainly her attorney's letter in support of the position holds that possibility over the petition as sort of a challenge – grant me clemency or I will seek a new trial. If Petitioner has such confidence in her legal arguments, she should make them in the appropriate forum. The People submit she may not be as confident as she would have one think; this doubt is legitimate in light of the fact that a jury already rejected her insanity defense.

Petitioner wants this Board and the Governor to act in place of a judge or jury to determine that she could demonstrate a complicated legal defense, one that is very similar to that that was rejected by the jury at her trial. Clemency procedures are not intended to determine the guilt or innocence of the defendant. *Ohio Adult Parole Authority v. Woodward,* 523 U.S. 272, 284 (1998). Executive clemency is a fail-safe to be used where all other avenues within the system have failed. If Petitioner believes she has an available valid legal defense, then she should not be asking this Board to recommend commutation to the Governor. She should not be permitted to short-circuit the legal system. Where legal avenues of relief remain available, it would be imprudent for the

Governor to exercise a power designed for situations where the system has failed, and no avenues of relief remain.

Rehabilitation

Petitioner also asserts commutation is warranted because she is fully rehabilitated. She attaches certificates from the many programs she has taken advantage of during her incarceration. (Pet., Exh. I). And she includes letters of support from friends and family. (Pet., Exh. I). Yes, she has taken advantage of educational and work opportunities and the People do not doubt that she has performed well. But to suggest that a commitment to the opportunities to do something different in prison, to get a change of pace or scenery, even being a mentor to others in the Baking Apprentice Program, warrants putting aside a natural life sentence imposed for killing her three young children is disingenuous.

Petitioner states that she has "paid a heavy price" for her "part in" her actions of killing her three children. She cites her "loss of freedom for the past 20+ years" and the "deterioration of many friendships and family relationships." (Pet., p. 6). She notes her remorse and that she has taken "full responsibility for her part" in her actions. But the "heavy price" she has paid is incomparable to the opportunities that she took from her children to grow up, have their own children, make a difference in the world. Or the price paid by their father and other family members to see them grow up. David Lemak's letter is filed with this response. He reminds us that Petitioner's rageful actions cost him those that he most cherished and loved. Petitioner would like the Governor to give her the opportunity to "live out the remainder of [her] life outside of prison." She did not afford her children the chance at lives at all.

Filed with this Response are eighteen (18) letters requesting denial of clemency. They outline the horror of the murders and the burden borne by family and friends in the wake of the

loss of the young lives of the Lemak children. And another theme in the letters is the need for the sentence of life imprisonment to mean something. If Petitioner is tired of incarceration after 20+ years, that is as it should be. Natural life imprisonment is a mandatory sentence for the murder of more than one person. Illinois puts a price on the lives of its people and that price is high. To commute Petitioner's sentence after only 22 years disrespects the lives of those three children.

COVID-19

Finally, Petitioner notes that she is a 64-year-old woman with chronic health conditions, including high blood pressure and high cholesterol, which put her a high risk for a COVID-19 infection. She presents this as an additional basis for her release. Petitioner does not indicate whether she has received COVID-19 vaccinations which would dramatically decrease any potential serious complications should she become infected. This factor should not be a consideration for this Board or the Governor regarding the propriety of a grant of clemency.

SUMMARY

Petitioner is not one for whom the clemency process is intended. She is not using the process as a "fail safe" in our criminal justice system to prevent a miscarriage of justice. The theme of her petition is that her Zoloft made her kill her children. The People do not accept that. But she admits she has an avenue to seek consideration of her position within the court system. This Board and the Governor should not accept the role of trier of fact. The Governor's powers are designed to catch those cases that fall through the cracks; nothing has fallen through the cracks with Petitioner's case.

The murders of Nicholas, Thomas and Emily Lemak were awful – poisoning and suffocation at the hands of their own mother. Young lives snuffed out by a woman who could not handle the end of her marriage. This is not the case where the system failed and clemency is

appropriate. There is no need for the Governor to intercede where the system has worked and remains an available avenue for Petitioner to air her claims. Petitioner's request for clemency should be denied.

IV. CONCLUSION

For all of the above reasons, the People of the State of Illinois urge this Honorable Board and the Honorable Governor of this State to deny executive clemency to Marilyn Lemak.

Respectfully Submitted,

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