

Case No. S278446

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re Application of Atlas, Tyson

On Clemency,

On an executive request for clemency, arising from San Bernardino County Superior Court Case # FVA701479, Court of Appeal Case # G040611, Supreme Court Case # S185653

MOTION OF THE SAN BERNARDINO COUNTY DISTRICT ATTORNEY'S OFFICE FOR BRIEFING AND ARGUMENT

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for Executive Clemency,

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MOTION FOR BRIEFING AND ARGUMENT

The Governor submitted this matter to the Court seeking leave to commute the Life Without Parole sentence of Tyson Atlas, pursuant to the requirements of article V, section 8, subdivision (a) of the California Constitution, following Mr. Atlas's conviction for the First Degree Murder of Greg Smith, with True findings for the Special Circumstances of Lying in Wait, (Pen. Code, § 190.2, sub.(a)(15)), and Criminal Street Gang Murder, (Pen. Code, § 190.2, subd. (a)(22)), along with a finding of Personal Discharge of a Firearm Causing Death, (Pen. Code, § 12022.53, subd. (d)) in San Bernardino Superior Court case number FVA701479. (*People v. Atlas* (July 19, 2010, G040611.) Approximately one year after his 2008 Murder conviction, Mr. Atlas was also convicted of the Attempted Murder of Mykel Jackson in San Bernardino Superior Court case number FWV700538.

In support of his request, the Governor submitted a 79-page redacted packet of information addressing Mr. Atlas's efforts at rehabilitation. This Court is thus tasked with

addressing whether the Governor's commutation request represents an abuse of his executive clemency power. (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation* (2018) 4 Cal.5th 897, 902.) Since the only information provided to this Court to address the issue comes from the Governor himself, the San Bernardino County District Attorney's Office (SBCDA) moves this Court for leave to present briefing and argument to the Court so that a more balanced and complete record informs the review.

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**MEMORANDUM IN SUPPORT OF MOTION FOR BRIEFING
AND ARGUMENT**

In most circumstances, California’s Governor possesses plenary power over clemency under article V, section 8 of the California Constitution. (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 418.) As this Court is well aware, a check on the power appears in the case of recidivists. “The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.” (Cal. Const., art. V, § 8, subd. (a).)

This Court recognized that historical inconsistency peppered the interpretation of article V, section 8. (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation* (2018) 4 Cal.5th 897, 900 (*Procedures*).) The Court consequently issued *Procedures* to explain the Court’s view of its role in the process when the Governor wishes to use executive clemency power for twice-convicted felons. (*Id.* at p. 897.) As the Court described, its

role is not to determine whether a clemency applicant deserves the relief sought. (*Id.* at p. 902.) Rather, the Court’s involvement is to provide a “more conventionally judicial judgment: Does the claim have sufficient support that an act of executive clemency, should the Governor decide to grant it, would not represent an abuse of that power?” (*Ibid.*)

Although generally occurring in different settings, this Court and other appellate courts throughout California understand that discretionary power merits a great deal of deference. In addressing the discretionary power of the trial courts, for example, the familiar abuse of discretion standard means that the exercise of that discretion should not be disturbed “unless it appears there has been a miscarriage of justice.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Such discretion must therefore “be exercised within the confines of the applicable legal principles.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) Similarly, in the agency setting setting, a court reviewing the actions of an administrative official looks to whether discretion has been abused by asking whether the official’s decision was “arbitrary, capricious, entirely lacking in evidentiary support or contrary to required legal procedures.” (*Golden Drugs Co., Inc., v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1465, citation and internal quotes omitted.)

Difficulty in determining the absence or existence of abuse of discretion occurs, however, when only the person whose discretion is being reviewed is able to provide information and analysis. Without an adversarial process by

which the Court may weigh and consider positions of opposing interests, the Court's contemplation of the Governor's request ventures uncomfortably close to an advisory opinion. Of course, "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of [the] court." (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.)¹

In the absence of an opportunity for briefing and argument, the single-source nature of the information presented in the Governor's request becomes quite apparent, as does the difficulty in ascertaining whether or not his power has been abused. As would be expected, the Governor's redacted Clemency Record of Tyson Atlas (Clemency Record) lays particular emphasis on material addressing ostensible rehabilitation, expressions of remorse and potentially mitigating factors related to his involvement in the crimes. While *some* materials speak to the circumstances of his offenses, such as a probation report and a summarized objection to clemency from SBCDA (Clemency Record at pp. 49 – 60, 71 – 79),² other materials, such as the trial court's records and the unpublished opinion of Division 3 of the Fourth

¹ The federal courts, of course, are constrained against advisory opinions by operation of the United States Constitution. (See, e.g., *Flast v. Cohen* (1968) 392 U.S. 83, 95 – 97.) Although California courts do not have the same controlling mechanism, "[t]he courts of this state are not authorized to issue advisory opinions." (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1046.)

² SBCDA relies on a count of the pages for this purpose, as consecutive pagination within the Clemency Record is not present.

District Court of Appeal are not present. Indeed, the lack of a formalized adversarial process inhibits this Court's ability to truly render a "conventionally judicial judgment." (*Procedures, supra*, 4 Cal.5th at p. 902.)

It stands to reason that limited resources impact this Court's ability to comb through the complete record of every case submitted by the Governor for potential clemency for twice-convicted felons. However, in a case in which an inmate stands convicted of a special circumstance murder and an unrelated attempted murder, and in which that inmate has served less than seventeen years, the gravity of the case and potential relief call for the benefits of a fully-developed record and briefing.

For these reasons, SBCDA respectfully requests the opportunity for briefing and argument as to the Governor's Request for Recommendation for Clemency.

April 28, 2023

Respectfully Submitted,



Robert P. Brown
Assistant District Attorney
San Bernardino County
District Attorney's Office

PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed by the San Bernardino County District Attorney's Office, located at 303 West Third Street, San Bernardino, California 92415.

On April 28, 2023, I served copies of the foregoing Motion of the San Bernardino County District Attorney's Office for Briefing and Argument; Memorandum in Support by depositing true copies of it enclosed in sealed envelopes with postage paid in the United States mail, in the County of San Bernardino, California, addressed as follows:

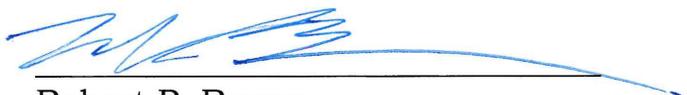
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 28, 2023, San Bernardino, California.


Robert P. Brown