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Opinion No. 11-31

Constitutionality of Proposed "Victims of Crime Executive Clemency Notification Act"

QUESTION

Tennessee's governor has broad clemency powers, which currently consist of four distinct types of clemency. The "Victims of Crime Executive Clemency Notification Act" (HB 396) would require the governor, prior to making any clemency action public, to give at least ten days' notice of the impending action to the attorney general and the district attorney general of the judicial district in which the conviction occurred. The Act further requires the district attorney general, through his victim-witness coordinator, to notify the victim or victim's representative prior to any announcement of the governor's clemency action. Is this proposed legislation constitutional?

OPINION

The portion of the proposed legislation that attempts to regulate the governor's power to grant reprieves, pardons, and commutations, which is solely derived from and may be governed only by the state constitution, violates Article II, §2 of the Tennessee Constitution. The remainder of the proposed legislation that attempts to regulate the governor's statutory power to grant exonerations or any other type of clemency relief that the legislature might create in the future faces no such impediment and is constitutionally sound.

ANALYSIS

Clemency is a broad term defined as "[k]indness, mercy, leniency." *Black's Law Dictionary* 228 (5th ed. 1979). Tennessee's governor currently has authority to grant four distinct types of clemency from criminal convictions or sentences: (1) a reprieve, which postpones the execution of the sentence, *see Ricks v. State*, 882 S.W.2d 387, 391 n.10 (Tenn. Crim. App. 1994); (2) a pardon, which exempts an inmate from the punishments inflicted by the criminal law, *see Collins v. State*, 550 S.W.2d 643, 655 (Tenn. 1977); (3) a commutation, which reduces or shortens the sentence that an inmate is required to serve as a result of his criminal conviction, *see Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997), and (4) an exoneration, which is the complete and unconditional removal of an inmate's criminal record and the automatic restoration of citizenship rights, see Tenn. Code Ann. § 40-27-109 (2006).

The proposed legislation addresses all four types of clemency relief as well as possible future additions to the governor's clemency powers. The bill requires that, at least ten days prior to the publication of any grant of executive clemency—reprieve, commutation, pardon, exoneration, or any other form of executive clemency—the governor must give notice to the attorney general, the affected district attorney general and, through the district attorney general, to the victim or victim's representative. Because this legislation deals with all four currently existing clemency types as well as possible future clemency powers, it is necessary to examine the law governing these various types of clemency.

The majority of the governor's clemency powers were first provided for and are enshrined in the state constitution. Tenn. Const. art. III §6 provides that, "He [the governor] shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment." While the constitutional provision specifies only reprieves and pardons, the Supreme Court has recognized that the power to pardon a conviction entirely necessarily includes the lesser power of commutation—the shortening of the sentence to be served. *Carroll v. Raney*, 953 S.W.2d 657, 659 (Tenn. 1997). The governor's power to exercise these types of clemency relief is quite broad. For example, the governor has the authority to commute an inmate's sentence to one that was not statutorily available had it been imposed in a criminal trial. *Id*. at 660. The governor's decision to revoke a conditional pardon is absolute, not subject to review by the courts. *State ex rel. Rowe v. Connors*, 61 S.W. 2d 471 (Tenn. 1933).

The constitutional derivation of these three clemency types prohibits legislative or judicial intervention in their exercise based on the command of Tenn. Const. art. II, §2, which provides, "No person or persons belonging to one of these departments [legislative, executive, and judicial] shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." In light of this separation-of-powers mandate, Tennessee courts have repeatedly recognized that, as to the three constitutionally derived clemency powers, the governor's authority is limited only by the language of Art. III, §6. *Carroll v. Raney*, 953 S.W.2d at 659; *State ex rel. Rowe v. Connors*, 61 S.W.2d at 472. Accordingly, although there are also statutory provisions dealing with these three forms of clemency, Tenn. Code Ann. § 40-27-101, *et seq*., the statues are not controlling. *See Carroll*, 953 S.W.2d at 659 (Supreme Court has previously recognized that the governor's power to exercise his constitutional clemency powers cannot be controlled by the legislature). The Supreme Court initially explained this exclusive executive-branch control in *State v. Dalton*, 109 Tenn. 544, 72 S.W. 456 (1903), as follows:

> The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the state, and the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved.

72 S.W. at 457.

While the *Dalton* court was specifically answering the question of whether a trial court could, at a later term, grant a type of clemency from a prior judgment, the court's language was clear that neither the judicial nor legislative branches can exercise the clemency powers themselves, attempt to vest the powers in others, or interfere in any way with the governor's exercise of these constitutional powers. *Id.* Later courts spoke even more authoritatively, noting that neither the Legislature nor the judicial branch of government has the authority even to regulate, much less control, the governor's constitutional clemency powers. *Ricks v. State*, 882 S.W.2d 387, 391 (Tenn. Crim. App. 1994). *See also Connors*, 61 S.W.2d at 472. The Supreme Court in *Connors*, also noted that there had been prior legislative attempts to regulate the governor's constitutional clemency powers, but that such attempts were futile, 61 S.W.2d at 472. Indeed, the Court had previously specified that any legislative attempt to regulate the governor's power would be "an absolute nullity." *Dalton*, 72 S.W. at 457. Because the proposed legislation attempts to regulate the three constitutionally based clemency powers by requiring advance notice to others, it would violate Tenn. Const. art. II, § 2 and prior Supreme Court precedent, and under the holding of *State v. Dalton*, it would be "an absolute nullity" as applied to reprieves, pardons, and commutations.

This conclusion is consistent with the manner in which the United States Supreme Court has construed the President's parallel clemency powers. In similar fashion to Tennessee's constitutional provision, the United States Constitution Art. II, §2, cl. 1 provides in pertinent part, "the President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." The Court has held that the President's pardon power flows from the constitution alone and thus cannot be modified, abridged, or diminished by the Congress. *Shick v. Reed*, 419 U.S. 256, 266 (1974). The pardoning power, as an enumerated constitutional power, will find its limitation, if any, only in the constitution itself. *Id*. at 267.

By contrast, at least one state—Arizona—has allowed legislative intrusion into and some regulation of the governor's clemency powers, but that practice is based on the language of the state's constitutional provision. Ariz. Const. Art. V, §5, provides, "the Governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, *upon such conditions and with such restrictions and limitations as may be provided by law*." (emphasis added). Arizona courts have read the "as provided by law" language to grant express permission for the legislature to condition, limit, and restrict the governor's power. *McDonald v. Thomas*, 40 P.3d. 819, 824 (Ariz. 2002).

Based on the lack of similar authorizing language in Tenn. Const. art. III, §6, our legislature is prohibited from interfering with the constitutionally derived clemency powers. However, there is nothing barring the legislature from granting additional clemency powers to the governor. The legislature has already done so by adding to the governor's clemency arsenal the power to grant exoneration where the governor finds that a person did not commit the crime for which the person was convicted. Tenn. Code Ann. § 40-27-109 (2006). Since this type of clemency relief is outside the constitutionally derived powers and is purely a creature of statute, the legislature is free to

regulate or restrict its exercise as the General Assembly deems proper. The same would be true for any future clemency powers that the legislature might create that are covered by the "any other form of executive clemency" language of HB 396. Because these powers would also be extra-constitutional, they too may be regulated by statute. Thus, the proposed legislation is constitutional as to its regulation of the exercise of the governor's exoneration power.

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