

## CASE NOTE:

# *McDONALD V. THOMAS*: REGULATING THE GOVERNOR'S CLEMENCY POWER

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### I. INTRODUCTION

Before 1994, a person convicted in Arizona of a felony involving the use or exhibition of a dangerous instrument while on probation for a felony offense received a mandatory life sentence.<sup>1</sup> The Arizona legislature, believing the existing law had resulted in many unreasonably harsh sentences,<sup>2</sup> amended the relevant statute in 1994, making the life sentence presumptive rather than mandatory.<sup>3</sup> The change in the law created a discrepancy in sentencing between those convicted of violating certain laws before and after the effective date of the change.<sup>4</sup> In response to the discrepancy, the Arizona Legislature enacted the Disproportionality Review Act (“the Act”) to review the inconsistent sentences.<sup>5</sup> The Act provided that if the Arizona Board of Executive Clemency (“the Board”) “unanimously recommend[s] commutation and the governor fails to act on that recommendation within 90 days after receiving the recommendation, the recommendation for commutation automatically becomes effective.”<sup>6</sup>

When Kevin Lewis McDonald was convicted of aggravated assault with a golf club, he was sentenced to life in prison, with no possible parole eligibility for twenty-five years, because he committed the crime while on probation for felony drug and property offenses.<sup>7</sup> In accordance with the Disproportionality Review Act, McDonald applied in 1995 to the Board for a review hearing. The Board unanimously recommended that his sentence be commuted to eight and one half

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1. ARIZ. REV. STAT. § 13-604.02 (Supp. 1993) (repealed 1994).
  2. *McDonald v. Thomas*, 40 P.3d 819, 822 (Ariz. 2002).
  3. ARIZ. REV. STAT. § 13-604.02 (West 2004).
  4. *Id.*
  5. *See* 1994 Ariz. Sess. Laws ch. 365, § 1(G) (effective July 1994 and repealed June 1996).
  6. *Id.*
  7. *McDonald*, 40 P.3d at 822.

years imprisonment.<sup>8</sup> Since the Board's recommendation was unanimous, the commutation would become effective if the governor failed to act within ninety days after receiving the recommendation.<sup>9</sup> However, the Board received a rejection letter within the ninety days and McDonald's commutation was denied.<sup>10</sup>

McDonald filed a petition for a writ of habeas corpus to have his commutation granted. The petition questioned the validity of the rejection letter, which did not contain the governor's name or signature and therefore, McDonald claimed, did not constitute action by the governor.<sup>11</sup> The contested letter was on plain paper, with no letterhead indicating its source.<sup>12</sup> It had a signature line with the words "Governor or Representative" beneath it, but the signature on the letter was illegible.<sup>13</sup> Neither the governor's name nor signature was anywhere to be found on the document, which also did not contain the seal of the secretary of state.<sup>14</sup> Notwithstanding the unusual nature of the letter, the trial court dismissed McDonald's petition and the court of appeals upheld the dismissal.<sup>15</sup> The court of appeals held that the governor acted according to law and in a timely manner in rejecting the Board's recommendation.<sup>16</sup>

In addition to McDonald's case, the Board unanimously recommended commutations in approximately 200 other cases sent to Governor Fife Symington for review.<sup>17</sup> The governor accepted a mere sixteen of those recommendations.<sup>18</sup> The state attorney general's office estimated that at least 100 inmates had been denied commutation in a similar fashion as McDonald.<sup>19</sup>

The Arizona Supreme Court accepted review of the appeals court decision in McDonald's case to determine whether the Disproportionality Review Act was constitutional and whether commutation was an official act of the governor such that a letter of denial required the governor's signature and attestation of the secretary of state to be valid.<sup>20</sup> The court held the Act was constitutional and that the letter denying the Board's unanimous recommendation of McDonald's sentence was invalid because it was not signed by Governor Symington nor attested by the secretary of state.<sup>21</sup>

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8. *Id.*

9. *Id.*

10. *Id.* at 832.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. McDonald v. Thomas, 12 P.3d 1194, 1201 (Ariz. Ct. App. 2000).

16. *Id.*

17. Howard Fischer, *Ruling Could Free Inmates*, ARIZ. DAILY STAR, Feb. 20, 2002, at A1.

18. *Id.*

19. *Id.*

20. McDonald v. Thomas, 40 P.3d 819, 822 (Ariz. 2002).

21. *Id.* at 830.

## II. CONSTITUTIONALITY OF THE ACT

The Arizona Supreme Court first considered whether the Act interfered with the governor's constitutional clemency power by providing that the Board's unanimous recommendation for clemency would become effective if the governor failed to act.<sup>22</sup> The Arizona Constitution gives the governor the exclusive right to grant clemency "upon such conditions and with such restrictions and limitations as may be provided by law."<sup>23</sup> The state argued that the "automatic" granting of clemency unless the governor acted to reject the Board's recommendation was an unconstitutional transfer of the governor's commutation power to the Board.<sup>24</sup> The court disagreed, holding that the Act's procedural scheme is a mere legislative restriction of the method by which the governor may act.<sup>25</sup> The court found such a restriction expressly permitted by the Arizona Constitution.<sup>26</sup>

The court next considered whether the Act violated Article III of the Arizona Constitution, which establishes the legislative, judicial and executive branches of Arizona government and declares that "no one of such departments shall exercise the powers properly belonging to either of the others."<sup>27</sup> The State argued that restricting the method by which the governor could deny commutation violates this separation of powers.<sup>28</sup> To determine whether a legislative act violates the separation of state government powers, Arizona courts apply the four-factor *Hancock* test.<sup>29</sup> The four factors are: (1) the nature of the power being exercised, (2) the degree of legislative control, (3) the legislative objective, and (4) the practical consequences of the legislation.<sup>30</sup> Applying this test to the Disproportionality Review Act, the court first recognized that the clemency power is an executive power.<sup>31</sup> As to the second factor, the court reasoned that since the governor retains complete control to grant or deny clemency, there is no coercion by the legislature.<sup>32</sup> Similarly, the court found that the legislative objective was to regulate the clemency procedure, a regulation which is expressly allowed by the Arizona Constitution.<sup>33</sup>

Lastly, the court analyzed the practical consequences of the Act's implementation.<sup>34</sup> The State argued that the "automatic" process set a "trap" for an "unwary" governor, and was intended to remove the governor's constitutionally granted clemency power.<sup>35</sup> The court rejected this argument, stating that the Board

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22. *Id.* at 824.

23. ARIZ. CONST. art. V, § 5.

24. *McDonald*, 40 P.3d at 824.

25. *Id.*

26. *Id.*

27. ARIZ. CONST. art. III.

28. *McDonald*, 40 P.3d at 825.

29. *J.W. Hancock Enters., Inc. v. Ariz. State Registrar of Contractors*, 690 P.2d 119 (Ariz. Ct. App. 1984).

30. *Hancock*, 690 P.2d at 124.

31. *McDonald*, 40 P.3d at 825.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

acts in a business-like manner with proper methods for transmitting, receiving and recording official communications.<sup>36</sup> So there was no “trap” involved.<sup>37</sup> In addition, the requirement that the Board first recommend clemency prevents the governor from abusing his power, while still allowing the governor to retain full veto power over the Board’s recommendation.<sup>38</sup> Therefore, the Act did not violate the separation of powers clause by requiring the governor to act in order to deny a unanimous commutation recommendation by the Board.<sup>39</sup> The procedural requirement was a legitimate restriction on the exercise of the governor’s clemency power.<sup>40</sup>

### III. PRESUMPTION OF REGULARITY

The court next considered the state’s argument that the letter should be presumed valid because of a presumption of validity that attaches to official acts of the governor.<sup>41</sup> The court of appeals had agreed with the State in applying a presumption of regularity and stated that “no evidence in the record shows that the governor did not [act in a correct and legal manner] in this case.”<sup>42</sup> The Arizona Supreme Court disagreed, stating that the presumption of regularity did not apply in the instant case because the question was not whether the governor acted properly, but whether the governor acted at all.<sup>43</sup> “The presumption should be that the official did not act absent something in the file showing that the official did, in fact, consider the matter and act accordingly.”<sup>44</sup> Here, there was no file and no official record, and therefore the letter did not meet the burden of showing that the governor did indeed act.<sup>45</sup>

### IV. OFFICIAL ACTS

The court next considered whether the governor’s actions under the clemency power are official acts requiring attestation by the secretary of state.<sup>46</sup> Arizona law requires that “all official acts of the governor, except approval of laws, shall be attested by the secretary of state.”<sup>47</sup> The State argued that the use of clemency power is not an official act.<sup>48</sup> The court of appeals agreed, finding that “the use of the clemency power is not an official act that must be signed by the governor and attested by the secretary of state.”<sup>49</sup> The Arizona Supreme Court rejected this argument, formulating a new rule to define when a governor commits

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36. *Id.*  
37. *Id.*  
38. *Id.*  
39. *Id.*  
40. *Id.*  
41. *Id.* at 826.  
42. *McDonald*, 12 P.3d at 1199.  
43. *Id.*  
44. *Id.* (quoting *Verdugo v. Indus. Comm’n*, 492 P.2d 705, 709 (Ariz. 1972)).  
45. *Id.*  
46. *Id.*  
47. ARIZ. REV. STAT. § 41-101(B) (West 2004).  
48. *McDonald*, 40 P.3d at 827.  
49. *Id.*

an “official act” under certain Arizona statutes.<sup>50</sup> “[A]n act required by law to be taken by the governor and that falls within the governor’s exclusive power qualifies as an official act for purposes of A.R.S. §§ 41-101(B), 41-102(A)(1), and 41-121(2).”<sup>51</sup> Since granting and denying clemency is an exclusive power of the governor, it is an official act and therefore requires attestation by the secretary of state.<sup>52</sup>

The court also held that since only the governor may exercise the executive power of clemency, the governor’s name must appear on the document representing the act.<sup>53</sup> The governor may authorize a staff member to sign or may use an electronic or other signature device.<sup>54</sup> The document denying or granting clemency must be attested by the secretary of state in order to authenticate the governor’s decision.<sup>55</sup> Since the governor’s letter in McDonald’s case was not signed by either the governor or his representative, and was not attested by the secretary of state, it was not a valid denial of the Board’s unanimous clemency recommendation.<sup>56</sup> And, since the ninety day time limit for the governor to deny the recommendation had already passed, the Board’s recommendation remained valid.<sup>57</sup> Kevin Lewis McDonald, sentenced to life in prison without the possibility of parole for 25 years, was now a free man again.<sup>58</sup>

## V. CONCLUSION

The Arizona Supreme Court concluded that the Disproportionality Review Act was indeed constitutional, allowing the legislature significant control over how clemency applications are evaluated and processed, so long as the governor has the final power to grant or deny clemency.<sup>59</sup> The court held that the governor’s exercise of the clemency power, as an “official act” of the governor, must follow a prescribed process.<sup>60</sup> The final declaration, if it requires action by the governor, must be signed by the governor and must contain the seal of the secretary of state to be valid.<sup>61</sup> The governor need not personally sign every document constituting an official act.<sup>62</sup> The court’s decision leaves room for “electronic devices” or even the signature of a representative of the governor to serve as a valid signature.<sup>63</sup>

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50. *Id.* at 828.

51. *Id.*

52. *Id.*

53. *Id.* at 829.

54. *Id.*

55. *Id.*

56. *Id.* at 830.

57. *Id.*

58. *Id.*

59. *Id.* at 824.

60. *Id.* The court held that all official acts of the governor, including judicial and executive appointments, must follow this process. *Id.*

61. *Id.* at 829.

62. *Id.*

63. *Id.*

Since this formal process to deny the Board recommendation was not followed in McDonald's clemency petition, the court declared that the governor's denial of McDonald's commutation was invalid. McDonald was released after serving eleven years of a life sentence.<sup>64</sup> The decision has also led to commutations for nearly 200 other inmates whose Board-recommended commutations were invalidly rejected by the governor.<sup>65</sup>

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64. *Id.* at 830. The clemency board recommended a reduced sentence of eight and one-half years, but McDonald remained incarcerated while his case was on appeal. *Id.*

65. Ariz. State Univ. Coll. of Law, *Faculty Profile of Robert Bartels*, at [http://www.law.asu.edu/Apps/Faculty/Faculty.aspx?Individual\\_ID=41](http://www.law.asu.edu/Apps/Faculty/Faculty.aspx?Individual_ID=41) (last visited Feb. 8, 2004). Prof. Bartels was co-counsel for the defendant in *McDonald v. Thomas*. *Id.*