


2017

The Role and Experience of Law Students and Law Schools in Clemency Project 2014

J.P. "Sandy" Ogilvy

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <http://scholarship.law.edu/scholar>

 Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

J. P. "Sandy" Ogilvy, *The Role and Experience of Law Students and Law Schools in Clemency Project 2014*, 29 FED. SENT'G REP. 255 (2017).

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

The Role and Experience of Law Students and Law Schools in Clemency Project 2014

The response of lawyers to the call to volunteer with Clemency Project 2014 was phenomenal. More than 3000 individuals from over 800 law firms, law schools, and organizations reviewed more than 36,000 applications from federal prisoners who requested pro bono assistance in filing an application for commutation of sentence with the President. By the end of the Obama administration 2581 petitions were filed or supported by Clemency Project 2014. Of those, 894 applicants were granted commutations by President Obama.¹

This article looks at the response of the law schools and law students to the call for volunteers. The numbers are impressive. More than 30 of the 200 ABA-accredited law schools participated in Clemency Project 2014. Of the 894 applicants granted commutation through Clemency Project 2014 submissions, about 20 percent came from law school-submitted petitions.

When Deputy Attorney General James Cole announced the criteria for the Obama clemency initiative on April 23, 2014, few law schools were regularly engaged in federal clemency work.² Professor Mark Osler at St. Thomas University Law School in Minneapolis had created a Federal Clemency Clinic in 2011, and at Catholic University's Columbus School of Law, we started looking for federal clemency cases in August 2013, four months before Deputy Attorney General Cole first publically mentioned the idea of a clemency initiative in a speech to attorneys attending the Annual Meeting of the New York State Bar Association on January 30, 2014.³ A couple of other law schools occasionally had filed federal commutation applications as part of their post-conviction work, but these schools did not focus on federal clemency cases.

I. The Creation of Clemency Project 2014

Within days of Deputy Attorney General James Cole's call to the bar to provide assistance to those who would be seeking commutation under the administration's clemency initiative, the partner organizations that would create Clemency Project 2014 found each other and coalesced sufficiently to begin meeting with Obama administration officials on February 18, 2014, to help with planning the logistics necessary to get the word out to inmates and to recruit, train, and support the volunteer lawyers who would be needed to provide representation to any inmate who asked for it.

Although the partner organizations, including the National Association of Criminal Defense Lawyers (NACDL), the America Civil Liberties Union, Families Against Mandatory Minimums, the American Bar Association, and the Federal Defenders, did not have any input into the criteria the administration was to establish for the clemency initiative, these organizations, which became the steering committee for Clemency Project 2014, were actively engaged with administration officials in creating the organizational structure to ensure that the Obama initiative worked as well as it did. For example, in early February, Steven Logan, then the IT Manager for NACDL, began designing the database and website that the Project would use to manage the applications and volunteer lawyers.

On April 21, 2014, Attorney General Holder officially announced the administration's clemency initiative; the same day, NACDL emailed its membership seeking volunteer attorneys to provide representation to inmates who would be seeking clemency in response to the initiative. On April 23, Deputy Attorney General James Cole announced the criteria for the administration's clemency initiative. Surveys were provided to all federal inmates by the Bureau of Prisons in early May. Cynthia Roseberry was named Project Manager on June 9, and on July 15 and 16 the Project provided a training webinar for the volunteer attorneys who had registered with the Project. The Project website went live on August 14, 2014.

In late September, Clemency Project 2014 began matching attorney requests from inmates with volunteer attorneys. Almost immediately, on September 30, Professor Mark Osler floated the idea of holding a mini-conference for law schools known to be engaged in federal clemency work. The email went to eight schools and word spread from there.

On December 5, 2014, representatives from 17 law schools and other interested persons convened at Yale Law School to hear from representatives of Clemency Project 2014, the Federal Defenders, and others to learn about the history and process of federal commutations, the mission of Clemency Project 2014, and how to prepare strong applications for commutation. At the close of the meeting, we created a listserv to enable those schools who were preparing applications to communicate among ourselves to share information and assist each other.



J.P. "SANDY" OGILVY

Ordinary Professor of Law, Columbus School of Law, The Catholic University of America

Director, CUA Innocence Project Clinic & Clemency Project

Federal Sentencing Reporter, Vol. 29, No. 5, pp. 255–258, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2017 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, <http://www.ucpress.edu/journals.php?p=reprints>. DOI: <https://doi.org/10.1525/fsr.2017.29.5.255>.

Before the end of the Obama administration, two more law school conferences were held, one at the University of Chicago on November 16, 2015, and the other at Columbus School of Law, The Catholic University of America, on April 4, 2016.

II. The Variety of Law School Response

Most of the law schools that participated in Clemency Project 2014 did not have existing federal clemency clinics, and their response to the call for volunteers took a variety of approaches. Some schools, like the University of Richmond, accepted cases into existing clinics; in Richmond's case, its Institute for Actual Innocence.⁴ At the University of Wisconsin, cases were supervised through an expansion of its Federal Appeals Project.⁵ Other schools created short-term, limited-purpose classes or "pop-up" clinics to work the cases from Clemency Project 2014. At Stetson University Law School, 10 students participated in a class jointly taught by a professor and the lead federal public defender for the Middle District of Florida.⁶ The University of Tennessee created a Federal Clemency Mini-Clinic,⁷ and Southern Methodist University Law School created a pop-up clinic supervised by an alumna of the law school.⁸

In some cases, law students worked the clemency cases under the supervision of a law firm attorney for externship credit or simply pro bono. Starting in fall 2014, 15 students of the University of Minnesota drafted 35 clemency petitions under the supervision of Professors JaneAnne Murray and June Carbone. Murray was a member of the Steering Committee of Clemency Project 2014.⁹ At Loyola Law School, Los Angeles, groups of students supervised by faculty, staff, and alumni attorneys helped 29 inmates seeking commutation of sentences.¹⁰

And then there was New York University Law School. In July 2015, NYU created the Clemency Resource Center (CRC) as a new division of its Center on the Administration of Criminal Law. CRC was jointly founded by NYU professor Rachel Barkow and St. Thomas University Law School professor Mark Osler with funding provided by the Open Society Foundation.¹¹

Over its 18-month existence, CRC employed recent graduates of NYU and St. Thomas as fellows to work full-time reviewing applications and preparing clemency petitions for inmates deemed eligible under the Clemency 2014 criteria. In addition to the seven full-time fellows, NYU students, under the supervision of the fellows, participated in about 25 of the petitions CRC filed on behalf of clients. CRC accepted over 200 referrals from Clemency Project 2014, filed about 200 petitions for commutation, and secured 96 grants from the President for their clients.

CRC also conducted initial, pre-referral screening of applications for Clemency Project 2014, reviewing Pre-Sentence Reports (PSR) and the inmate applications to make a recommendation to the Project on whether the applicant likely met the criteria and should be referred to a volunteer attorney. CRC screened nearly 500 PSRs. In addition, two CRC attorneys participated on screening

committees for Clemency Project 2014 reviewing and editing the initial submissions of volunteer attorneys.

III. The Learning Goals of the Law Schools

To prepare for writing this article, I reached out to the faculty member principally responsible for each school's participation with Clemency Project 2014 at the 30-some law schools; 22 schools responded. Among other things, I asked each faculty member to share with me his or her learning goals for the program he or she supervised and to share something of the students' experiences.

The learning goals were consistent among the schools who responded to my inquiries. For the most part, they mirrored the goals that I established for the Clemency Project here at Catholic University.

When I launched the Clemency Project in fall 2013, we had been operating an Innocence Project Clinic for seven years. Because of the nature of re-investigating cases that are often decades old, the cases usually are transferred from team to team over a number of years. The students never have had the opportunity to take a case from initial client contact to resolution. I thought that clemency cases might provide the same rich learning environment as actual innocence claims while allowing me to give students the opportunity to start and finish representation (at least file the application even if no decision was reached) during their year of enrollment in the clinic.

In addition to that modest goal, I saw in the federal clemency cases many teaching and learning opportunities. The students could learn about what it means to have a client for whom they were primarily responsible. Therefore, many of my learning objectives involved introducing the students to client-centered representation, how a lawyer commences the attorney-client relationship, how it is nurtured, and at the end of the representation, how it is properly terminated. I wanted the students to learn and practice good interviewing skills both with clients and with others with whom they would need to speak in the course of preparing the client's application for commutation. I wanted them to learn when and how to counsel a client. In the clemency context, this arises most often when guiding the client through the process of articulating his role in the crime and his reasons for commutation. I wanted them to reflect on the experience of communicating in a genuine and empathetic manner with someone convicted of a serious crime, someone whose background and life experience was likely very different than their own. I wanted them to better understand and begin to develop tools for critiquing a criminal justice system that has resulted in mass incarceration and the imposition of draconian mandatory sentences for non-violent offenses.

The clemency matters also allowed me to offer the students an opportunity to work through a sophisticated legal analysis of the relevant federal sentencing laws, the sentencing guidelines, and cases interpreting them, and then to apply those to the facts of their cases to articulate a theory of commutation that could persuade the decision makers.

As readers of this publication know, federal sentencing law is among the most intricate and complex bodies of doctrine, thus it provides a rich pedagogical environment.

The clemency process also provides the student with an opportunity to refine his or her skills of persuasive writing. I wanted to give the students the tools to learn how to craft a compelling narrative of crime, remorse, rehabilitation, and re-entry that could persuade each audience that the commutation application needed to satisfy to obtain the relief sought.

Because of the labyrinthine clemency review process, the students and I had to craft an application that would satisfy each level of review and ultimately get to the President and satisfy him that our client was deserving of commutation. The review process of the Clemency Project 2014 organization was the first step. We had to analyze the criteria established by the DOJ for eligibility for consideration under the Clemency 2014 initiative and draft an executive summary of our findings that would convince a screening committee of two to three lawyers that our client's application satisfied the criteria. If we were successful, our executive summary was passed along to the steering committee for review, where it had to get the unanimous vote of all five members. If successful at this stage, we could prepare the application for commutation and submit it to the Office of the Pardon Attorney (OPA) through Clemency Project 2014. Up to this point the process was transparent; both the screening committee and the steering committee provided written comments as part of their deliberative processes.

Once the application was submitted to OPA, it entered a black box from which no light emitted. At the end of the lengthy process of review, we were notified that the application was granted or denied. Period.

As we drafted our application on behalf of the client, we understood that OPA would be asked to review over 30,000 other applications in the same time frame as ours. Often, the first set of eyes at OPA was a paralegal or legal intern tasked with assuring that the submission satisfied the technical requirements of the agency. If so, it was passed to an attorney in the office to prepare a recommendation to the Pardon Attorney. At the attorney review stage, OPA might reach out to the sentencing judge and the federal prosecutor in the district in which the conviction took place for their comments on the application. Since anything OPA learned from this outreach was not shared with the applicant or his lawyer, our preparation had to anticipate what these sources may say and include a response in the application. The OPA reviewing attorney drafted a memorandum for the Pardon Attorney, who conducted an independent review and made the formal recommendation of OPA to the Office of the Deputy Attorney General (DAG).

At DAG another review was done and a recommendation whether to grant or deny the application was memorialized and forwarded to the Office of White House Counsel, which conducted its own review, ending with a memorandum to the President recommending that he

grant or deny the application. The final audience for the application was the President, who exercised plenary power to grant or deny it.

It is often said that the clemency process is non-adversarial. On the contrary, it is very adversarial, but only one of the adversaries gets to know what the other is thinking. The applicant and his lawyer advocate publicly with the government by submitting a detailed application. In return the applicant gets nothing except an up or down decision.

IV. The Student Experience

Most of the schools responding to my inquiry reported both that the faculty member's learning goals had been met by the case work and that the students enjoyed and learned from their experiences. In a couple of cases, the faculty member was disappointed in the bureaucracy of the Clemency Project 2014 review process. One faculty member complained that none of the cases that happened to be assigned to the school satisfied the criteria, and all were rejected during the Project review process, so the students never had the opportunity to work on an application that could be filed through the Project with OPA.

My students' response to the experience has been uniformly positive. Our first two grants came in cases in which the students who initiated the representation as third-year night students volunteered to continue the representation during their fourth year; after multiple drafts, they completed and filed the applications before graduating. They then learned of their success after they had graduated, passed a bar examination, and were practicing criminal law.

I and most of my correspondents at the other schools who participated in Clemency Project 2014 have been satisfied that the students who had the opportunity to represent clients seeking clemency learned or improved a significant number of essential lawyering skills through their hands-on work with real people where the stakes for the clients were significant. In addition the students ended their participation with a better understanding of some of the causes and effects of mass incarceration and the need for significant criminal justice reforms, especially with respect to mandatory minimum sentences for non-violent crimes.

V. What's Next for the Law School Participants?

At the risk of understatement, it seems unlikely that the Trump administration will continue the clemency initiative begun by President Obama, nor be particularly welcoming to applications for commutation of sentences. The exiting clinics that modified their intake to take on some federal clemency cases have returned to providing the representation they provided before the Clemency 2014 initiative. Those that do federal post-conviction work will continue to keep the clemency application as a tool in their tool box, but few new applications for commutation will be filed by the schools in the coming years. Some applications may be filed on behalf of clients whose initial applications were denied

and who, under OPA guidelines, are eligible to file a new application a year after the denial. One school told me that it plans to file applications for clients who were turned down by Clemency Project 2014 late in the review process.

With the end of the federal clemency initiative, a couple of the schools who had participated in Clemency Project 2014 have pivoted to state clemency cases. My school is one of those. This year we have begun representation of three Maryland inmates serving life sentences. Two of the clients were convicted of homicide as juveniles and are technically eligible for parole, although only two individuals serving a parole-eligible life sentence in Maryland has been granted non-medical parole since 1995. We will be assisting our clients with their parole applications.

The third client was sentenced to 180 years in prison for two armed robberies committed on the same day in which no one was physically injured. We will assist him in preparing and filing an application for commutation seeking to reduce his term to make him parole-eligible. Under Maryland law, he is not eligible for parole until he has served half of his sentence (90 years).¹² If he had been sentenced to life with parole, he would have been parole eligible after 15 years.¹³

VI. Conclusion

Those of us at law schools who participated in Clemency Project 2014 continue to reflect on and evaluate our experiences. I think we can be justifiably proud of our quick and effective response to the call for lawyers to represent clemency applicants. But we also must continue to reflect on the limits of our participation both in terms of the number of clients ultimately served and in terms of the limits of this type of advocacy on the broader issues of reform of the criminal justice system. We should, and I think will, look for new opportunities for the law schools to join together with organizations like those involved in Clemency Project 2014 to respond quickly with representation where the need arises and to collaborate on longer-term strategies for reform.

Appendix. List of Law Schools Known to Have Participated in Clemency Project 2014

Yeshiva University Benjamin N. Cardozo School of Law
University of Chicago Law School
University of Cincinnati College of Law
Columbia Law School
Columbus School of Law, The Catholic University of America
University of Denver Sturm College of Law

University of the District of Columbia David A. Clarke School of Law
Drake University Law School
Fordham University School of Law
George Washington University Law School
Harvard Law School
Howard University School of Law
Indiana University Robert H. McKinney School of Law
Marquette University Law School
Loyola Law School, Los Angeles
University of Minnesota Law School
New York Law School
New York University School of Law
University of Richmond School of Law
Roger Williams University School of Law
SMU Dedman School of Law
University of St. Thomas, Minnesota, School of Law
Stetson University College of Law
University of Southern California Gould School of Law
Stanford Law School
University of Tennessee College of Law
University of California, Irvine School of Law
UCLA School of Law
West Virginia University College of Law
University of Wisconsin Law School
Yale Law School

Notes

- ¹ Press release, NACDL and the Foundation for Criminal Justice Applaud Clemency Project 2014; Historic Pro Bono Effort by Nation's Bar (Jan. 19, 2017), https://www.nacdl.org/clemency_Jan19_NACDL_FCJ/.
- ² Press Release, Deputy Attorney General James M. Cole, Announcing New Clemency Initiative, Details Broad New Criteria for Applicants (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.
- ³ Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting (Jan. 30, 2014), <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.
- ⁴ Response to email survey (on file with the author).
- ⁵ Response to email survey (on file with the author); see also Adam Stevenson, *Clinical Clemency: Scaling Clemency Mountain with Student Guides*, 12 U. St. Thomas L.J. 483 (2016).
- ⁶ Response to email survey (on file with the author).
- ⁷ Response to email survey (on file with the author).
- ⁸ Response to email survey (on file with the author).
- ⁹ Response to email survey (on file with the author).
- ¹⁰ Response to email survey (on file with the author).
- ¹¹ Response to email survey (on file with the author).
- ¹² Md. Code Ann., Corr. Servs. § 7-301(b)(1)(i) (West 2017).
- ¹³ Md. Code Ann., Corr. Servs. § 7-301(d)(1) (West 2017).