UNJUST BARGAINS AND INCOMPLETE SOLUTIONS: APPELLATE WAIVER CONDITIONS IN CAPITAL COMMUTATIONS

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ABSTRACT

Clemency is often a death-sentenced inmate's last hope for relief. Without it, the inmate must either hope for appellate success or, if they have exhausted their appeals, hope that the justice system will eventually and unexpectedly intervene. However, even when clemency is granted, the relief that it provides may come with strings attached.

In some commutations of death sentences to life without parole, these strings have included a requirement that the recipient waive future appeals and legal challenges. In such situations, while the commutation saves the recipient's life, the appellate waiver condition eliminates any hope of further relief. In doing so, the conditions present an incomplete solution that overlooks the doubts and uncertainties that provided the basis for the commutation, prevents these doubts from being further examined, and takes advantage of the recipients' dire situation and lack of leverage. As a result, such conditions cannot be voluntarily accepted, and they do not address the root of the original conviction, further the public policy justifications for appellate waivers, or enhance the functioning of the capital punishment system overall.

For these reasons, this Note argues that such appellate waiver conditions in capital commutations are invalid. Part I provides an overview of executive clemency's role and breadth and examines two competing approaches to clemency: individual mercy and public welfare. Part II describes the scope of the conditional commutation power and sets forth the considerations—acceptance, nexus to public policy, and constitutionality—for evaluating the attached conditions. Part III asserts that appellate waiver conditions in capital commutations are unjust and improper due to the inherent coercion of imminent execution and their contravention of public policy.

INTRODUCTION 366
I. THE SCOPE AND PURPOSE OF EXECUTIVE CLEMENCY 369
A. The Broad Role of Executive Clemency 370
B. The Competing Approaches to Executive Clemency 371

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II. THE SCOPE OF CONDITIONAL COMMUTATIONS 374
A. *Federal and State Examples of Conditional Commutations* . . . 374
B. *The Standard for Evaluating Conditions* 376
C. *Individual Mercy's Role in Evaluating Conditional Commutations* 378
III. THE INVALIDITY OF APPELLATE WAIVER CONDITIONS IN CAPITAL COMMUTATIONS 380
A. *Involuntary Acceptance* 381
B. *Lack of a Nexus to Public Policy* 383
1. Relationship to the Root of the Conviction 383
2. Policy Justifications for Appellate Waivers 386
a. Finality 386
b. Judicial Efficiency 389
c. Bargaining Chip 390
3. Functioning of the Capital Punishment System 391
CONCLUSION 394

INTRODUCTION

Joseph Payne has been in prison for more than four decades and will likely remain there for the rest of his life due to an erroneous death sentence he received while incarcerated.[1] Payne was initially imprisoned for a murder he committed while drunkenly robbing a convenience store.[2] For this crime, he was sentenced to life with the possibility of parole.[3] Since then, Payne, who endured a difficult childhood in foster care and attempted suicide multiple times after the crime,[4] has taken responsibility for his actions, held a prison job, and had no behavioral issues.[5] Yet, despite this evidence of rehabilitation and the original possibility of parole, Payne has remained imprisoned, and will continue to remain imprisoned, due to an unfounded death sentence he received while incarcerated.

Payne received this death sentence in 1986 when he was convicted for the murder by arson of another inmate.[6] This conviction was the result of extremely weak evidence from the prosecution and poor representation by his defense counsel.[7] At his trial, inmate Robert Smith, who was an initial suspect in the murder by arson,

1. *See* John Cloud, *Near Death Experience*, WASH. CITY PAPER (Dec. 6, 1996), https://washingtoncitypaper.com/article/285239/near-death-experience/.

2. *Id.*

3. *Id.*

4. *Id.*

5. Todd C. Peppers, Column, *The Death Penalty Was Abolished but Injustice Lingers*, RICHMOND TIMES-DISPATCH (Mar. 21, 2023), https://richmond.com/zzstyling/view-oped-sig/column-the-death-penalty-was-abolished-but-injustice-lingers/article_607ef634-c663-11ed-a9fd-779ee327a5ea.html.

6. Cloud, *supra* note 1.

7. *See* Petition for Executive Clemency of Joseph Patrick Payne, Sr. at 1–2, 10–11, Payne v. Netherland, No. 95-4016, 1996 WL 467642 (4th Cir. Aug. 19, 1996) [hereinafter Clemency Petition] (unpublished table decision), https://www.capitalclemency.org/file/1_payne_josephsr.pdf; Cloud, *supra* note 1.

was the only eyewitness to testify for the prosecution.[8] While Smith testified that he saw Payne commit the murder,[9] there were severe doubts about his credibility given that he had multiple prior felony convictions, admitted to being involved in the planning of the murder, and received a fifteen-year reduction in his sentence for testifying.[10] He also later recanted his testimony and then recanted his recantation, and following his release from prison, he continued to violate his parole.[11] These doubts about reliability also extended to two of the prosecution's other witnesses who implicated Payne in the conspiracy, as one of them was mentally unstable and the other stated on cross-examination that Payne withdrew from the conspiracy before the murder.[12]

Tragically for Payne, his defense counsel did not take advantage of this weak evidence. While his counsel did call one witness who testified that he saw Smith commit the murder and that Payne was taking a shower at the time of the crime,[13] he failed to call other witnesses that either saw Smith near the crime scene or heard Smith himself confess to the crime.[14]

Nevertheless, the prosecution, aware of their shaky case, offered Payne two plea bargains during the trial: a life sentence and then a thirty-year sentence.[15] However, Payne, who was committed to his innocence, did not accept them, and he was subsequently convicted and sentenced to death.[16] Payne then appealed his conviction to the Virginia Supreme Court, which affirmed the verdict and sentence, and to the Supreme Court of the United States, which denied his petition for a writ of certiorari.[17] Payne also pursued state and federal habeas relief, both of which proved unsuccessful.[18]

Despite his lack of legal success, public opinion shifted in Payne's favor over time.[19] In the years after Payne's conviction, several jurors acknowledged that they had doubts about the verdict they reached, and the victim's mother even pleaded for mercy.[20] Yet, despite these second thoughts and the overall weakness of the record, Virginia Governor George Allen, a staunch conservative, was hesitant to grant clemency.[21] Ultimately, just hours before Payne's scheduled execution, he

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8. Payne v. Netherland, No. 95-4016, 1996 WL 467642, at *1 (4th Cir. Aug. 19, 1996).

9. *Id.*

10. *Id.*; Cloud, *supra* note 1; *see also* Peter Finn & Spencer S. Hsu, *On Execution Day, Allen Grants Clemency*, WASH. POST (Nov. 7, 1996), https://www.washingtonpost.com/archive/politics/1996/11/08/on-execution-day-allen-grants-clemency/dd837c5e-be66-4d9b-ab47-2c0af81c4733/.

11. Cloud, *supra* note 1; Finn & Hsu, *supra* note 10.

12. *Payne*, 1996 WL 467642, at *1.

13. Cloud, *supra* note 1.

14. *Id.*

15. Clemency Petition, *supra* note 7, at 2.

16. *Id.* at 1–2.

17. *Payne*, 1996 WL 467642, at *2.

18. *Id.* at *1–3.

19. Cloud, *supra* note 1 (explaining that Payne's attorney "won the media battle").

20. *Death Sentence Commuted After Jurors' Pleas*, N.Y. TIMES (Nov. 8, 1996), https://www.nytimes.com/1996/11/08/us/death-sentence-commuted-after-jurors-pleas.html; Finn & Hsu, *supra* note 10.

21. Cloud, *supra* note 1.

offered to reduce Payne's sentence to life without parole.[22] However, this came at a cost. Payne agreed never to seek a new trial or begin another court challenge to his conviction.[23] Thus, even though Payne had already exhausted his appeals, this waiver condition extinguished any hope he had of parole or future relief,[24] and ensured that Payne would no longer be able to pursue issues related to his case or avail himself of new legal or factual developments.

This condition on Payne's commutation, while unusual, is not the first of its kind.[25] Similar conditions were imposed on Robert Gattis, who was sentenced to death in 1992 for the murder of his former girlfriend.[26] However, after Gattis had exhausted his appeals, it was revealed that he had experienced severe and sustained sexual and physical abuse throughout his childhood that hindered his development.[27] This horrific revelation ultimately led Delaware Governor Jack Markell to commute Gattis's death sentence to life without the possibility of parole.[28] But again, this commutation came with restrictive strings attached: Gattis was required to "drop all legal challenges to his conviction and sentence."[29]

While these conditional commutations differ in language and purpose, they each serve to bar the recipients from seeking further judicial relief. These conditions

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22. *Death Sentence Commuted After Jurors' Pleas*, *supra* note 20.

23. Cloud, *supra* note 1; Mike Allen, *Virginia Prisoner Receives Rare Mercy on Death Row*, N.Y. TIMES (Nov. 10, 1996), https://www.nytimes.com/1996/11/10/us/virginia-prisoner-receives-rare-mercy-on-death-row.html.

24. *See* Cloud, *supra* note 1 (explaining that Payne struggled with the idea of foregoing future legal challenges).

25. While not discussed in this Note, Julius Jones was the recipient of a similar conditional commutation due to his strong claims for innocence. *See* Application for Executive Clemency, Jones v. State, 128 P.3d 521 (Okla. Crim. App. 2006) (No. D-2002-534), https://htv-prod-media.s3.amazonaws.com/files/2021-10-14-final-julius-darius-jones-application-for-clemency-1634318203.pdf. But rather than bar his ability to further appeal his conviction, he was prohibited from applying and being considered for parole and future acts of clemency. *See* Exec. Order. No. 2021-25, 39 Okla Reg. 247 (Dec. 15, 2021), https://oklahoma.gov/content/dam/ok/en/governor/documents/Julius%20Jones.SNC.Final_November%2018%202021.pdf. Because this condition does not directly concern appellate waivers, it implicates slightly different legal considerations than those addressed in this Note. Specifically, this Note's analogies to appellate waivers in the plea-bargaining context would not be as illustrative given that clemency waivers do not foreclose judicial relief. However, its legality could be challenged based on its potential for restricting the actions of future executives. *See* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1704 (2001). And notably, Jones's attorneys have indicated their desire to further challenge the condition. *See* Discussions with DPIC Podcast, *Julius Jones' Long Road On and Off Oklahoma's Death Row, and What Comes Next in His Case*, DEATH PENALTY INFO. CTR., at 09:52 (Feb. 25, 2022), https://deathpenaltyinfo.org/resources/podcasts/discussions-with-dpic/julius-jones-long-road-on-and-off-oklahomas-death-row-and-what-comes-next-in-his-case.

26. Press Release, Jack Markell, Governor of Delaware, Statement of Governor Jack Markell Regarding the Commutation of Sentence of Robert Gattis (Jan. 17, 2012) [hereinafter Markell Statement], https://news.delaware.gov/2012/01/17/statement-of-governor-jack-markell-regarding-the-commutation-of-sentence-of-robert-gattis/.

27. *Id.*; *see also* Ed Pilkington, *Delaware Pardons Board Show Clemency to Death Row Prisoner*, GUARDIAN (Jan. 15, 2012), https://www.theguardian.com/world/2012/jan/16/delaware-clemency-death-row-prisoner (highlighting that Gattis's petition for clemency was based on his experience being "viciously beaten by his father and stepfather and sexually molested by several family members").

28. Markell Statement, *supra* note 26.

29. *Id.*

thus undermine and contradict the purpose of the commutations in the first place. The commutations are granted due to doubts about the convictions or uncertainties surrounding the necessity of their sentence, but the attached conditions then go on to bar the recipients from pursuing these doubts and uncertainties even further. Conditional commutations like this are therefore incomplete solutions that take advantage of individuals whose only alternative is execution. In doing so, these conditional commutations may prevent state error and misconduct from being uncovered, and they may potentially lock away undeserving and potentially innocent individuals for life with no real avenue for relief.

Due to the incomplete nature and unjust effects of these appellate waiver conditions, this Note argues that such conditions in capital commutations are invalid because they (1) cannot be voluntarily accepted given the looming threat of execution and (2) controvert the public policy justifications of appellate waivers and the public interest in general. Part I lays out the broad nature of executive clemency and examines the role that individual mercy and the public welfare play within this power. Part II then discusses the scope of the conditional commutation power and sets forth the standard for voiding conditions placed on commutations. Finally, Part III asserts that appellate waiver conditions in the capital commutation context should be voided based on the inherent coercion of imminent execution and their contravention of public policy.

I. The Scope and Purpose of Executive Clemency

Executive clemency is a safeguard against punishment imposed by legislatures and courts.[30] It is both an executive check over the judiciary and legislature[31] and a fail-safe for defendants who have been wrongfully convicted or sentenced.[32] In exercising this power, executives generally have broad discretion, including the ability to attach conditions to grants of clemency.[33]

However, within this discretion, executives and courts have taken competing approaches to clemency's purpose, with one approach viewing clemency as an individualized act of mercy towards the recipient,[34] and the other approach prioritizing the public welfare over the individual recipient's interests.[35] These approaches therefore focus on different beneficiaries of clemency and carry different interpretations of the

30. Krent, *supra* note 25, at 1673–74 (explaining that clemency acts as a "safety valve" given Congress's inability to anticipate the circumstances surrounding each crime and the judiciary's potential lack of discretion or compassion).

31. *Id.*

32. Herrera v. Collins, 506 U.S. 390, 415 (1993).

33. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 314–15 (1856) (upholding the conditional commutation power at the federal level); *Ex parte* Houghton, 89 P. 801 (Or. 1907) (upholding the conditional commutation power in Oregon).

34. *See, e.g.*, *Wells*, 59 U.S. at 312 (requiring acceptance of the commutation and its conditions for it to be effective).

35. *See, e.g.*, Biddle v. Perovich, 274 U.S. 480, 486 (1927) (holding that the clemency recipient's acceptance is not required).

recipient's autonomy.[36] This Part examines these distinctions in more depth, but it first describes clemency's function and breadth.

A. The Broad Role of Executive Clemency

As a "fail safe" and check on the constitutional system, clemency generally takes place outside of the legislative and judicial processes.[37] This means that a grant of clemency does not have the same effect as a judicial decision.[38] Rather than determine guilt or alter the verdict, clemency just abridges the execution of the judgment.[39] Thus, clemency only has an enforcement effect and it is not subject to the traditional requirements placed on criminal proceedings, such as due process.[40]

Given clemency's position as a uniquely executive remedy, courts have interpreted the clemency power quite broadly to allow executives to use it effectively.[41] At the federal level, the Supreme Court has repeatedly found the President's clemency power to be expansive.[42] The Court, in *Ex parte Wells*, first established its breadth in the federal system when it explained that the constitutional language[43] regarding clemency is "general" and covers all acts of clemency, including conditional commutations.[44] The Court then reinforced this broad interpretation in *Ex parte Garland* when it prevented Congress from limiting the President's pardon power.[45] In doing so, the Court emphasized that the clemency power extends to every offense aside from impeachment and may be exercised at any time.[46] Later, in *Ex parte Grossman*, the Court explained that, in order to provide an effective check on the judiciary, the grantor of clemency "must have full discretion to exercise it."[47] And more recently, in *Schick v. Reed*, the Court acknowledged that the Constitution meant for this power to be unfettered.[48]

The executive clemency power is also quite broad in most states, even though it is sometimes delegated to pardon or parole boards and subject to more limitations than the President.[49] For example, the South Dakota and North Dakota constitutions

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36. *Compare Wells*, 59 U.S. at 312 (requiring acceptance of the commutation and its conditions for it to be effective), *with Biddle*, 274 U.S. at 486 (holding that the clemency recipient's acceptance is not required).

37. *Herrera*, 506 U.S. at 414–15; *see also* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 284 (1998).

38. *Ohio Adult Parole Auth.*, 523 U.S. at 284.

39. *See* Dennis v. Terris, 927 F.3d 955, 958 (6th Cir. 2019) (citing United States v. Benz, 282 U.S. 304, 311 (1931)).

40. *See Ohio Adult Parole Auth.*, 523 U.S. at 284–85 ("[T]he executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges.").

41. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

42. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 314–15 (1856).

43. *See* U.S. CONST. art. II, § 2, cl. 1 (establishing that the President has the "[p]ower to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

44. *Wells*, 59 U.S. at 314–15.

45. *Ex parte* Garland, 71 U.S. 333, 380 (1866).

46. *Id.*

47. *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

48. Schick v. Reed, 419 U.S. 256, 262–65 (1974).

49. *See* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1661–63 (2008) (surveying the executive clemency power at the state level).

provide their executives with a power as broad as its counterpart in the federal Constitution,[50] and in Ohio, the Governor's clemency power has been interpreted as almost identical to the President's.[51] Similarly, the Supreme Court of Oregon identified that this power, though more limited than at the federal level, is still broad enough to extend to conditional grants of clemency.[52] And significantly, even the United States Supreme Court has recognized this breadth in acknowledging that judicial review of clemency grants is limited.[53] Thus, at both the federal and state level, executive clemency is a broad power that generally encompasses conditional commutations and pardons.[54]

Yet, despite clemency's breadth and uniquely executive nature, courts are not entirely precluded from reviewing grants of it. In fact, "the Supreme Court has a history of reviewing governmental action that, though originating in and belonging primarily to one of the other branches of government, stands to change key provisions in the nation's law."[55] Additionally, the Court has explicitly suggested that the clemency power be invoked sparingly and on an individualized basis[56] and that it be subject to constitutional limitations.[57] Thus, as discussed in depth in Parts II and III, grants of clemency are not immune from judicial review.

B. The Competing Approaches to Executive Clemency

Due to its role as a "fail-safe,"[58] executive clemency is often a death-sentenced inmate's last hope for relief. It has been "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,"[59] and it reflects the reality that the judicial system is "replete with examples of wrongfully convicted

50. N.D. CONST. art. V, § 7 ("The governor may grant reprieves, commutations, and pardons. The governor may delegate this power in a manner provided by law."); S.D. CONST. art. IV, § 3 ("The Governor may, except as to convictions on impeachment, grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures.").

51. *See* Carchedi v. Rhodes, 560 F. Supp. 1010, 1014–15 (S.D. Ohio 1982).

52. *See Ex parte* Houghton 89 P. 801 (Or. 1907).

53. *See* Solesbee v. Balkcom, 339 U.S. 9, 11–12 (1950) ("Seldom, if ever, has this power of executive clemency been subjected to review by the courts.").

54. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 314 (1856); Henry v. Webb, 150 P.2d 693, 694–95 (Wash. 1944); *Carchedi*, 560 F. Supp. at 1013–14; ARIZ. CONST. art. V, § 5 ("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."); CAL. CONST. art. V, § 8 ("[T]he Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment.").

55. Nicole F. Dailo, Note, *"Give Me Dignity by Giving Me Death": Using Balancing to Uphold Death Row Volunteers' Dignity Interests Amidst Executive Clemency*, 23 S. CAL. REV. L. & SOC. JUST. 249, 259 n.43 (2014).

56. *See id.* at 259; *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("[Clemency] is a check entrusted to the executive for special cases.")

57. *See* Schick v. Reed, 419 U.S. 256, 267 (1974) ("[T]he pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself.").

58. Herrera v. Collins, 506 U.S. 390, 415 (1993).

59. *Id.* at 412.

persons."[60] In this setting, executives have used clemency to protect individuals from improper sentences and to promote the public welfare.[61] In furthering such objectives, executives and courts have taken two approaches to determining whether clemency is appropriate: (1) an individual mercy approach, which focuses on the recipient, and (2) a public welfare approach, which focuses on the public interest.[62]

The individual mercy approach to clemency concentrates on clemency's effect on the recipient. It views a grant of clemency as an act of mercy that forgives the recipient and protects them from further unnecessary punishment.[63] In line with this focus on the individual, the Supreme Court, in its earlier opinions regarding the clemency power, repeatedly found that the recipient's assent was required.[64] For instance, in *Ex parte Wells*, the Court drew from English common law, which viewed clemency as a merciful act,[65] and held that grants of clemency are not final until the recipient has assented to it.[66] Additionally, in *United States v. Wilson*, the Court reasoned that grants of clemency cannot be forced upon the recipient, as the attached conditions may create more hardship than the original punishment.[67] Thus, as *Wells* and *Wilson* illustrate, the individual mercy approach provides the recipient with discretion and autonomy, as the focus is on the merciful benefit to the recipient.

Notably, many state courts and lower courts have endorsed similar individualized views of clemency's purpose[68] and required the recipient's acceptance for clemency to be valid. For instance, the Supreme Court of Kentucky, in *Fletcher v. Graham*, adopted a similar approach to that in *Wilson* and held that acceptance is especially important "in the case of a conditional pardon, where the pardonee may

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60. *Id.* at 415.

61. *See Grossman*, 267 U.S. at 120 ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."); Biddle v. Perovich, 274 U.S. 480, 486–87 (explaining that the public welfare should determine the outcome of the case, regardless of the clemency recipient's consent).

62. *See* Krent, *supra* note 25, at 1680–81 (laying out two models for understanding the role of conditional clemency: (1) the "Bargaining Model," which views conditional grants of clemency as a bargained-for exchange, and (2) the "Legislative Model," which views conditional grants of clemency as an opportunity for the executive to further policy goals and the public welfare); *see also* Dailo, *supra* note 55, at 258–59 (explaining that two of the primary purposes of clemency are promoting the public welfare and exacting individualized justice).

63. *See Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1856); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833).

64. *See Wells*, 59 U.S. at 312 ("If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon."); *Wilson*, 32 U.S. at 160–61 ("A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered.").

65. *See* Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 AM. U. CRIM. L. BRIEF 2, 3 (2007) ("Under English criminal law, the clemency or pardon power of the king was discretionary, largely unfettered and viewed as an act of mercy.").

66. *Wells*, 59 U.S. at 312–13.

67. *Wilson*, 32 U.S. at 161.

68. *See, e.g.*, Bacon v. Lee, 549 S.E.2d 840, 852 (N.C. 2001); Whitmore v. Gaines, 24 F.3d 1032, 1034 (8th Cir. 1994); Procs. for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation, 417 P.3d 769, 770 (Cal. 2018).

view the conditions of pardon more loathsome than punishment for the actual offense."[69] Additionally, the Supreme Court of North Carolina has emphasized the subjective nature of clemency in holding that grants of clemency are recipient-specific acts of executive grace that cannot bind future executives.[70] Thus, as these decisions demonstrate, the individual mercy approach to clemency at both the federal and state levels grants the recipient and executive discretion in clemency's implementation.

In contrast, the public welfare approach views clemency as a means to promote society's interests in justice and the public welfare.[71] As a result, the public's interests are placed above the recipient's private interests, such as an interest in avoiding certain conditions or an implication of guilt.[72] For example, the Supreme Court, in *Biddle v. Perovich*, described the President's exercise of clemency as "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[73] In that case, President Taft commuted the inmate's death sentence to life imprisonment, but the inmate challenged it on the ground that he did not consent to the new sentence.[74] Despite this lack of consent, the Supreme Court utilized its public welfare interpretation of the clemency power to uphold the unconditional commutation and held that the inmate's consent was not required.[75] In effect, the Court stepped back from the view in *Ex parte Wells* that the recipient's acceptance is pivotal, and it recognized that the interests of the public trump any private misgivings.[76]

Several state courts have also recognized the primacy of this public purpose. For instance, the Supreme Court of Oregon, in *Haugen v. Kitzhaber*, emphasized that the governor's clemency power cannot be a private act given its role in the constitutional scheme as a check on the other branches.[77] Similarly, the Supreme Court of Appeals of Virginia, in *Wilborn v. Sanders*, recognized that clemency is exercised based in part on the notion that society will gain nothing further from the inmate's confinement.[78] Thus, as *Wilborn*, *Haugen*, and *Biddle* illustrate, the public

69. Fletcher v. Graham, 192 S.W.3d 350, 361 (Ky. 2006); *see also* Marino v. INS, 537 F.2d 686, 693 (2d Cir. 1976) (emphasizing that the acceptance requirement serves to protect clemency recipients from "unwanted consequences," such as the pardon's potential implication of guilt); Burdick v. United States, 236 U.S. 79, 90–91 (1915) ("[T]he grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve.").

70. *Bacon*, 549 S.E.2d at 852.

71. *See, e.g.*, Biddle v. Perovich, 274 U.S. 480, 486 (1927); Haugen v. Kitzhaber, 306 P.3d 592, 608 (Or. 2013); *see also* Dailo, *supra* note 55, at 256 (explaining that case law suggests that "a chief executive should exercise the clemency power to primarily, if not entirely, address public, rather than private, concerns").

72. *See, e.g.*, *Biddle,* 274 U.S. at 486; *Haugen*, 306 P.3d at 609.

73. *Biddle*, 274 U.S. at 486.

74. *Id.* at 485.

75. *Id.* at 486–87.

76. *See* Dailo, *supra* note 55, at 256 n.28.

77. *Haugen*, 306 P.3d at 608–09.

78. Wilborn v. Saunders, 195 S.E. 723, 727 (Va. 1938).

welfare purpose of clemency minimizes the role of mercy and reduces clemency's individualized nature.

The tension between these two competing approaches reveals that the recipient's discretion and role in the clemency process may differ depending on the executive's view of clemency and the corresponding judicial interpretations. These differences in the recipient's role, as discussed further in Part II, are particularly problematic in the conditional commutation context given that the attached conditions directly interfere with the recipient's behavior.[79] As such, the individualized mercy approach to clemency is a more suitable lens for evaluating conditional commutations of capital sentences because it is more accommodating of the recipient's autonomy interests.

II. THE SCOPE OF CONDITIONAL COMMUTATIONS

Clemency's breadth allows executives to attach conditions to commutations.[80] This conditional commutation power, like executive clemency in general, is quite broad due to expansive constitutional language[81] and the judiciary's limited ability to intervene.[82] Due to this breadth, executives have imposed a wide array of conditions, some more intrusive than others.

But still, the conditional commutation power is not limitless. This Part details these limits, which hinge on the recipient's voluntary acceptance, the condition's relationship to public policy, and the condition's constitutionality,[83] but first, it provides examples to illustrate the scope of the conditional commutation power.

A. Federal and State Examples of Conditional Commutations

Executives have significant discretion in granting clemency and imposing conditions at both the federal and state levels. At the federal level, the Supreme Court has consistently upheld conditional commutations.[84] For example, in *Ex parte Wells*, President Fillmore pardoned a death-sentenced inmate on the condition that he remain in prison for life, and the Court upheld this condition based on the broad constitutional language concerning the clemency power.[85] More recently, in 1974, the Supreme Court approved of a similar condition in *Schick v. Reed*, reasoning that it would be illogical to allow a person to escape the obligations that they agreed to.[86]

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79. *See* Krent, *supra* note 25, at 1682.

80. *See supra* note 54 and accompanying text.

81. For the United States Constitution's language on clemency and the Supreme Court's interpretations, see *supra* notes 43–44 and accompanying text. For state constitutions' language on clemency, see *supra* note 54.

82. *See, e.g.*, Solesbee v. Balkcom, 339 U.S. 9, 11–12 (1950) (recognizing that judicial review of the clemency power should be limited); Carchedi v. Rhodes, 560 F. Supp. 1010, 1013 (S.D. Ohio 1982) ("A condition of commutation decreed by the [Ohio] governor will ordinarily not be invalidated . . . .").

83. *See, e.g.*, Hoffa v. Saxbe, 378 F. Supp. 1221, 1233–36 (D.D.C. 1974).

84. *E.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307 (1856).

85. *Id.* at 308, 314–15.

86. *See* Schick v. Reed, 419 U.S. 256, 267 (1974).

Lower federal courts have taken similar approaches and upheld other, more invasive, conditional commutations. For instance, in *Ex parte Weathers*, President Coolidge validly commuted a sentence on the conditions that the defendant abstain from possessing alcohol, support his divorced wife and children, work and reside where the Attorney General directs him to, and not associate with persons of evil character.[87] In upholding these conditions, the Florida district court adopted the individual mercy approach to clemency and reasoned that the conditions became binding once the recipient accepted them.[88] Additionally, President Nixon imposed a similarly invasive condition on labor leader Jimmy Hoffa's commutation by requiring Hoffa to abstain from managing any labor organization for a period of at least nine years [89] The district court ultimately upheld the condition because it did not contradict public policy or violate Hoffa's constitutional rights.[90]

State governors have also issued their fair share of invasive conditions. One of the most problematic, yet still permissible, examples of this occurred in Mississippi in 2010.[91] There, Mississippi Governor Haley Barbour granted clemency to two sisters who were convicted of armed robbery.[92] One of the sisters, however, was in poor health and needed a kidney transplant.[93] To save the state the expenses from the surgery, Governor Barbour required, as a condition to their clemency, that the other inmate donate her kidney to her sister after their release.[94] Additionally, Ohio Governor James Rhodes, in 1980, granted a commutation on the intrusive, yet much less distasteful, condition that the defendant not return to the state of Ohio for forty years.[95] This condition was held to be valid because it was not contrary to public policy, did not violate the defendant's constitutional rights, and did not present an impossible task.[96] Thus, as these state and federal cases illustrate, executives have significant latitude when exercising their conditional clemency power, especially when the conditions have a clear relationship to public policy.

Yet, there are still several examples of invalid conditions. Two of the primary reasons for such invalidity are (1) unlawful extensions of executive power and (2) a recipient's incapacity. For example, a Delaware court, in *In re McKinney*, found that a condition requiring the recipient to report to a probation officer and comply with the officer's demands was invalid because the condition illegally delegated

87. *Ex parte* Weathers, 33 F.2d 294, 294 (S.D. Fla. 1929).
88. *Id.* at 295.
89. Hoffa v. Saxbe, 378 F. Supp. 1221, 1224 (D.D.C. 1974).
90. *Id.* at 1236–41.
91. *See* Adam M. Gershowitz, *Post-Trial Plea Bargaining in Capital Cases: Using Conditional Clemency to Remove Weak Cases from Death Row*, 73 WASH. & LEE L. REV. 1359, 1379 (2016).
92. *Id.*
93. *Id.*
94. *Id.*
95. Carchedi v. Rhodes, 560 F. Supp. 1010, 1011–12 (S.D. Ohio 1982).
96. *Id.* at 1015–18.

the power to prescribe the clemency's conditions.[97] Additionally, the Court of Criminal Appeals in Texas, in *Ex parte Davenport*, found that a condition may be deemed invalid if the recipient does not have the mental capacity to accept it.[98] In considering a condition that required the clemency recipient to be placed in the care of a mental hospital, the court held that either the pardon was void because the defendant was insane or that it was valid because the defendant was of sound mind to accept.[99] Thus, as depicted in these cases, the conditional commutation power, while broad, is not completely unfettered.

B. The Standard for Evaluating Conditions

Despite clemency's breadth and the variety of conditions imposed in the conditional commutations described above, the conditional commutation power is not limitless. The Supreme Court has endorsed this notion by broadly stating that conditional commutations must be granted within constitutional limits.[100] The Court, however, has not identified specific limits, so lower courts and state courts have largely been responsible for defining the power's boundaries. These courts, in ascertaining the conditional commutation power's limitations, have predominantly focused on (1) the recipient's acceptance of the conditions, (2) the condition's relationship to public policy, and (3) the condition's constitutionality.[101] While some courts, especially state courts, have framed the latter two considerations as immorality, illegality, and impossibility of performance,[102] the overarching concerns are the same: courts are focused on how disruptive the condition is to the recipient and the public, and on whether the condition comports with existing law and policy.

One of the most comprehensive explanations of these limits came from the district court in the Jimmy Hoffa case discussed above. When considering the condition that Hoffa refrain from managing labor organizations, the court acknowledged that the President must have flexibility in devising conditions, but it also emphasized that this flexibility is limited by the framework of the constitutional system and the rights and liberties afforded to individuals.[103] The court then defined these limits using the two concerns discussed above: public policy and illegality.[104]

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97. *In re* McKinney, 138 A. 649, 652 (Del. Super. Ct. 1927); *see also Ex parte* Prout, 86 P. 275, 275–76 (Idaho 1906) (holding invalid a condition that would have required the inmate to serve his unfulfilled sentence time beyond the sentence's original expiration date).

98. *Ex parte* Davenport, 7 S.W.2d 589, 591–92 (Tex. Crim. App. 1927).

99. *Id.*

100. *See* Schick v. Reed, 419 U.S. 256, 267 (1974).

101. *See, e.g.*, Hoffa v. Saxbe, 378 F. Supp. 1221, 1234–35 (D.D.C. 1974).

102. *E.g.*, Wilborn v. Saunders, 195 S.E. 723, 725 (Va. 1938); *see also* People *ex rel.* Brackett v. Kaiser, 205 N.Y.S. 317, 318 (N.Y. App. Div. 1924) ("[C]onditions of any nature may be attached to the exercise of such power, provided only such conditions are not illegal, immoral, or impossible of performance."); *Ex parte* Prout, 86 P. 275, 276 (Idaho 1906) ("[T]he board of pardons may, upon the granting of a pardon, commutation, or parole, attach such conditions as they see fit, so long as they are not immoral, illegal, or impossible of performance.").

103. *See Hoffa*, 378 F. Supp. at 1234–35.

104. *See id.* at 1236.

The court derived the public policy concern from the executive's ability to use clemency to further the public interest.[105] In evaluating the condition at issue, the court explained that it "must relate to the reason for the initial judgment of conviction, because it is the crime and the circumstances surrounding it that give rise to the public's interest in regulating and circumscribing the future behavior of the offender."[106] Given that Hoffa's crime directly related to his participation in union activities and that unions exert significant influence on the economy, the court found that the condition that he not engage in union leadership was consistent with public policy considerations.[107]

Similarly, the illegality concern also swung in the President's favor.[108] In considering the condition's illegality, the court first established that "the condition [must] not unreasonably infringe on the individual commutee's constitutional freedoms."[109] The court then deemed that the condition did not violate Hoffa's First and Fifth Amendment rights because similar regulations had been imposed on parolees without violating the Fifth Amendment, and because the condition was directed at "future conduct" rather than "pure speech."[110]

Following its examination of the condition's relationship to public policy and constitutional freedoms, the district court then considered whether Hoffa had validly accepted the condition.[111] In doing so, it drew from the individual mercy approach to clemency in *Ex parte Wilson* and *Ex parte Wells* and emphasized that inmates cannot be forced to accept a commutation.[112] The district court found the recipient's ability to choose whether to accept was essential, and for the commutation to be valid, the court required that the recipient accept the commutation and all its conditions.[113] In applying these standards to Hoffa's conditional commutation, the court held that there was a valid acceptance because, even though Hoffa did not explicitly accept the condition, he exhibited a clear intent to accept the commutation while aware of the attached condition.[114]

Notably, the district court in *Hoffa* was not alone in identifying the limiting effect of acceptance, public policy, and illegality on the conditional commutation power. For instance, the Fifth Circuit, in *Lupo v. Zerbst*, broadly alluded to these latter two principles when it upheld a condition that required the recipient to be a law-abiding citizen.[115] The court reasoned that the condition was valid because it

105. *Id.*
106. *Id.*
107. *Id.* at 1237–38.
108. *Id.* at 1240.
109. *Id.* at 1236.
110. *Id.* at 1238–39.
111. *Id.* at 1241–43.
112. *Id.*
113. *Id.*
114. *Id.* at 1243.
115. Lupo v. Zerbst, 92 F.2d 362, 363 (5th Cir. 1937).

was not illegal or against public policy.[116] Additionally, the district court, in *Carchedi v. Rhodes*, employed a similar test when it upheld a condition that essentially banished the recipient from returning to Ohio for forty years.[117] The court held that the conditional commutation was valid because the recipient knowingly and voluntarily accepted the condition, and because it was not "illegal, impossible of performance, or contrary to public policy."[118]

State courts have also established limits like those in *Hoffa*, *Lupo*, and *Carchedi* by requiring acceptance[119] and upholding conditions unless they are "immoral, illegal or impossible of performance."[120] For example, just as the court in *Carchedi* required that the acceptance be knowing and voluntary, the Court of Criminal Appeals of Texas, in *Ex parte Davenport*, held that the recipient must have enough mental capacity to accept the conditions.[121] Additionally, in cases in which the conditions were deemed illegal, many state courts have focused on the constitutional scheme and the burden placed on the recipient, such as in *Ex parte Prout* where the court found that a condition that effectively extended the original sentence was invalid because it went beyond the scope of the clemency power.[122] Further, like the public policy consideration in *Hoffa*, many state courts have examined the morality of the condition and the possibility of performance, both of which focus on how the public would judge the condition and how disruptive the condition is to the recipient and others.[123] Thus, despite the different framing in state courts, similar principles to those in *Hoffa* are at play.

Therefore, as these cases contemplate, a condition's validity comes down to (1) whether there was a valid acceptance, (2) how the condition relates to public policy, and (3) whether the condition is constitutional. However, because the competing purposes for executive clemency—individual mercy and public welfare—implicate different interpretations of the recipient's discretion, the first requirement of acceptance warrants more consideration.

C. Individual Mercy's Role in Evaluating Conditional Commutations

Whether acceptance is required ultimately hinges on which approach to clemency the executive and judiciary take. If the executive views clemency as an

116. *Id.* at 364.

117. Carchedi v. Rhodes, 560 F. Supp. 1010, 1014–15 (S.D. Ohio 1982).

118. *Id.* at 1013.

119. *E.g.*, *Ex parte* Prout, 86 P. 275, 277 (Idaho 1906); *Ex parte* Davenport, 7 S.W.2d 589, 591 (Tex. Crim. App. 1927).

120. *E.g.*, Wilborn v. Saunders, 195 S.E. 723, 725 (Va. 1938); *see also* cases cited *supra* note 102.

121. *Davenport*, 7 S.W.2d at 591–92.

122. *See Prout*, 86 P. at 276; *see also In re* McKinney, 138 A. 649, 652 (Del. Super. Ct. 1927) (finding that a condition that delegated the executive's conditional clemency power to a probation officer was invalid because the delegation was unconstitutional); Commonwealth v. Fowler, 8 Va. (4 Call) 35, 36–37 (1785) (holding that a condition that required the recipient to work for three years under the direction and control of the executive branch was illegal).

123. *See* cases cited *supra* note 102.

individualized act of grace, the recipient's autonomy is paramount, and their acceptance is required.[124] In contrast, if the executive takes the public welfare approach, the public interest will trump the recipient's private interests, and the recipient's opinion will be overlooked.[125] Although this public approach may afford the executive more flexibility in pursuing policy objectives, the individual mercy approach is a more effective lens for examining conditional commutations because it is more accommodating of the attached conditions' impacts on the recipient's interests. Given that such conditions are not attached to the original sentence, conditional commutations are much more disruptive because the attached conditions alter the nature and effects of the original punishment.[126]

With that said, for unconditional commutations, the public welfare approach may be more appropriate. In such cases, the President or governor simply lessens the duration of the punishment without requiring anything from the recipient.[127] As a result, the recipient need not do anything to benefit from the executive's act of clemency, and their autonomy interests are not at issue. Therefore, through unconditional commutations, the President can pursue policy goals, such as reducing the costs of incarceration, protecting the interests of a certain class of defendants, or checking legislative or judicial mistakes,[128] without the recipient's consent.

In contrast, because conditional commutations are premised on the recipient giving something up or acting in a certain manner, they impact the recipient's autonomy interests more than unconditional commutations. Whereas the recipient of an unconditional commutation can stand idly by, the recipient of a conditional commutation must actively fulfill their end of the bargain. Thus, no matter what the conditions require, the nature of the punishment, rather than just the length, is being fundamentally changed by the attached conditions.[129] Even though this change in nature may ultimately result in an objective benefit to the recipient, the recipient should make the subjective determination of whether they are willing to comply with the attached conditions given that "the condition[s] may be more objectionable than the punishment inflicted by the judgment."[130]

Admittedly, injecting the recipient's subjective determination into the process could deny the public the benefits related to the conditional grant of clemency. Given that the condition will often be attached to "protect the public from future

124. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1856).

125. Biddle v. Perovich, 274 U.S. 480, 486 (1927).

126. *See* Krent, *supra* note 25, at 1682.

127. *Id.* at 1680.

128. *Id.* at 1682–83 ("[E]arly release can save the government money, check legislative or judicial mistakes, serve a strategic law enforcement role by eliciting cooperation, facilitate international relations, or manifest compassion.").

129. *Id.* at 1682.

130. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833); *see also* Krent, *supra* note 25, at 1682 (explaining that an individualized approach to conditional commutations should govern because it permits recipients to "decide whether fulfilling the condition is less onerous to them than serving their sentence or keeping the fact of conviction on the books").

wrongdoing,"[131] the individual mercy approach may interfere with the purpose of the condition, as it gives the recipient the ultimate power to accept. However, the individualized approach does not eliminate the executive's ability or incentive to attach conditions and tailor them to preserve the public's interests. Instead, it simply helps ensure that the conditions attached are not objectionable or more onerous than the original sentence.[132] Thus, the individual mercy approach still allows the executive to protect the public, while also ensuring that the recipient can protect themselves from undesirable conditions.[133]

Importantly, these same principles regarding a recipient's autonomy interests still apply in the death penalty context, even though any conditional commutation would likely be better than death. Despite the inherent benefits and appeal of escaping execution, the recipients of the conditional commutations may nevertheless have a different assessment of their situation. For instance, they may view the attached conditions as harsher or more dehumanizing than the death sentence itself, or depending on what stage recipients are at in the appellate process, they may have faith that a better offer will come or that the judiciary will eventually rule in their favor. Regardless of their reasoning, taking a capital inmate's ability to accept or decline conditional commutations undermines their autonomy, and arguably their dignity,[134] just as it does a non-capital offender's. And even though the public has an interest in ensuring that only those deserving of the death sentence are executed, there are safeguards in place to ensure that the sentence is carried out according to law and that an inmate who elects execution over other potential avenues for relief is competent.[135] Thus, even in the death penalty context, the individual mercy approach still serves to protect recipients' autonomy interests.

Therefore, in both capital and non-capital settings, the individual mercy approach's requirement of acceptance helps ensure that the recipient is not subject to commutations that are conditioned on unjust, harmful, or undesirable requirements. Because such conditional commutations directly circumscribe recipients' rights and behavior, the conditions effectively alter the nature of the punishment,[136] and recipients may have more reason to object to the commutation. Given this heightened impact on recipients' autonomy, the individual mercy approach to clemency is a more appropriate lens to evaluate conditional commutations through.

III. THE INVALIDITY OF APPELLATE WAIVER CONDITIONS IN CAPITAL COMMUTATIONS

As established in Part II, conditions may be deemed invalid depending on the recipient's acceptance, the nexus between the conditions imposed and public

131. Krent, *supra* note 25, at 1683.

132. *See, e.g.*, *id.* at 1682; *Wilson*, 32 U.S. at 161.

133. *See, e.g.*, *Wilson*, 32 U.S. at 161.

134. *See generally* Dailo, *supra* note 55 (discussing death row inmate's dignity interests when volunteering for execution).

135. *See id.* at 268–73.

136. *See* Krent, *supra* note 25, at 1682.

policy, and the constitutionality of the conditions. In the context of appellate waiver conditions in capital commutations, these first two considerations—acceptance and public policy—cut strongly in favor of invalidity.[137]

First, given the extreme coerciveness of a looming and imminent execution, acceptance of these conditions in the capital context is inherently involuntary. Second, the conditions lack the requisite nexus to public policy given that they do not relate to the root of the conviction,[138] further the policy justifications for appellate waivers in general, or enhance the functioning of the capital punishment system overall. Thus, appellate waivers are inherently invalid in conditional commutations for death-sentenced inmates.

A. Involuntary Acceptance

Under the individual mercy approach, conditional commutation recipients must accept the conditions for the commutation to be valid.[139] To validly accept the attached conditions, the recipient must have the capacity to do so,[140] and they must knowingly and voluntarily express an intent to assent to the commutation.[141] Such capacity and intent are presumed when the recipient accepts the conditional commutation with knowledge of the conditions.[142] In essence, a commutation recipient's expression of acceptance must not be the product of improper pressure that essentially overcomes the recipient's will.[143]

Despite this seemingly high bar for invalidity and the presumptions in favor of acceptance, appellate waiver conditions in the capital commutation context still create improper pressure given that the recipients are facing more than just the possibility of a death sentence. Whereas there may be no such pressure prior to trial or sentencing because execution is typically just a mere possibility at these early stages,[144] the recipients of these conditions in the capital commutation context are

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137. The third requirement of illegality, which largely turns on constitutional considerations, presents a more difficult argument in the context of appellate waiver conditions, as there is no direct constitutional right to appeal. Thus, this Note focuses on the two strongest arguments for invalidating these conditions: the lack of voluntary acceptance and the contravention of public policy.

138. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1236–37 (D.D.C. 1974) (analyzing whether the condition related to the root of the conviction to determine whether the public policy consideration was satisfied).

139. *E.g.*, *id.* at 1243 ("[B]ecause the prisoner might decide that no pardon would be better than a pardon under the circumstances presented, he always has the right to reject the pardon.").

140. *See Ex parte* Davenport, 7 S.W.2d 589, 591 (Tex. Crim. App. 1927).

141. *See* Carchedi v. Rhodes, 560 F. Supp. 1010, 1017 (S.D. Ohio 1982); *Hoffa*, 378 F. Supp. at 1243.

142. *See Hoffa*, 378 F. Supp. at 1243 ("Since the undisputed facts clearly show unequivocal conduct on the part of Hoffa reflecting his clear intent to accept the commutation despite his continuing awareness of the attached condition, he is bound by that condition."); *Davenport*, 7 S.W.2d at 591 ("It follows that the assumption that from the pardon there was vested in the appellant a right carries with it the conclusion that his mental condition was such as enabled him to accept the express conditions upon which the right depended.").

143. *See* United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (explaining when coercion becomes unconstitutional in the context of plea bargains).

144. *But see* Andrew Dean, Comment, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1210–11 (2013) (arguing that appeal waivers in general are contracts of adhesion because of the disparity in bargaining power between the prosecution and recipient).

on a path that will certainly lead to their execution unless there is some outside intervention.

In some cases in the capital commutation context, this pressure is especially apparent, as the timing between acceptance and execution can be disturbingly tight. For example, Joseph Payne,[145] whose capital commutation was conditioned on his waiver of appellate rights, did not receive his conditional commutation offer until just three hours before his execution, after he had already eaten his last meal.[146] For Payne, the possibility of death was not just lurking in the background as it would be in the plea bargaining context; it was a dark reality that crept closer with every passing second. If he were to reject the commutation offer, execution was almost certain given that he, like many other recipients of capital clemency, had already exhausted his appeals.[147] Recipients of these conditional commutations thus face a real threat of real physical harm, as they cannot "shop around"[148] for more favorable conditions or do anything themselves to avoid execution if they reject the commutation.

Whether they have appeals remaining or not, capital recipients of these commutations essentially have a gun to their head because they must choose between facing execution or giving up their hope for eventual relief from a future executive or the judiciary. For recipients who have exhausted their appeals like Payne, these waiver conditions require them to abandon any hope for future legal relief, which is something they may sincerely hope to retain.[149] And for recipients who have appeals remaining, they still face a life-or-death decision,[150] as their denial of the commutation offer would mean they proceed towards execution, hoping that the same system that condemned them to death will eventually rule or intervene in their favor.

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145. *See supra* Introduction (discussing the circumstances surrounding Joseph Payne's conditional commutation).

146. Cloud, *supra* note 1; Allen, *supra* note 23.

147. *See* Cloud, *supra* note 1; *see also* Edmund A. Costikyan, Note, *Bargaining Life Away: Appellate Rights Waivers and the Death Penalty*, 53 COLUM. J.L. & SOC. PROBS. 365, 405–06 (2020). Costikyan argues:

> The coercive power of an offer by the prosecution to take the death penalty off the table in exchange for the waiver of all future appeals on a legally guilty but factually innocent defendant, who has just been shockingly confronted with the failure and injustice of the criminal justice system, need scarcely be explained . . . it is not possible to ensure that a defendant's waiver is being made truly knowingly and voluntarily.

Id.

148. Krent, *supra* note 25, at 1683.

149. *See* Cloud, *supra* note 1 (explaining that Payne struggled with the idea of foregoing future legal challenges).

150. Even in the traditional plea-bargaining context, where a death sentence may not even be on the table or is just a mere possibility, some scholars have argued that the coercive nature of such negotiations invalidates the waivers. *See* Dean, *supra* note 144, at 1210 ("Any reasonable defendant facing multiple counts and lengthy maximum sentences will decide early on that going to trial would be too risky.").

And notably, that same system that sentenced them does not provide a realistic alternative to acceptance because it already has a track record of being very unfavorable towards capital appeals. For instance, in Texas, from 2000 to 2020, only 5.7% of direct appeals in capital cases were successful; only 5.6% of state habeas applications were successful; and only one federal habeas application was successful.[151] Similarly, from 2000 to 2006, capital inmates were successful in around 12% of their federal habeas applications nationwide.[152] Thus, because the appellate odds are heavily against them, even recipients with appeals still available have no realistic alternatives to acceptance, and they would essentially be gambling with their life if they chose not to accept the conditional commutation.[153]

As such, regardless of where the recipient is in the appellate process, execution is a very real and serious threat, and the resulting coercion and desperation almost certainly create improper pressure, as the recipient is the substantially weaker party with much more to lose. Therefore, a capital inmate's acceptance of the attached conditions is inherently involuntary, and the acceptance requirement cannot be satisfied.

B. Lack of a Nexus to Public Policy

Appellate waiver conditions in capital commutations are also invalid due to public policy considerations. First, these conditions do not relate to the root of the convictions, as was required in *Hoffa v. Saxbe*.[154] Second, they undermine the principal justifications for appellate waivers in general. Finally, appellate waivers in capital commutations, even if used deliberately and proactively, would not improve the functioning of the capital punishment system overall.

1. Relationship to the Root of the Conviction

One of the key considerations in evaluating conditional commutations is the condition's nexus to public policy.[155] As part of this public policy consideration, the attached conditions should directly relate to the underlying reasons for the

151. David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000-2020*, 68 UCLA L. REV. DISCOURSE 2, 12 (2020).

152. David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 261, 266–67 (Charles S. Lanier et al. eds., 2009).

153. *See* Dean, *supra* note 144, at 1210–11 (explaining that, in the plea-bargaining context, reasonable defendants would choose waiver over risking a lengthy sentence).

154. Hoffa v. Saxbe, 378 F. Supp. 1221, 1236 (D.D.C. 1974).

155. *See supra* Part II.C.

conviction so that they can prevent similar behavior from occurring in the future.[156] With appellate waivers in capital commutations, however, this direct relationship does not exist, as they do not seek to circumscribe future criminal behavior.

This emphasis on the nexus between the commutation conditions and the initial crime of conviction originated in the Jimmy Hoffa case, *Hoffa v. Saxbe*.[157] There, the district court identified that Hoffa's crimes directly stemmed from his participation in union activities and explained that the public has a strong interest in the integrity of unions given their influence on the nation's economy.[158] As a result, the court held that the condition that he abstain from union management furthered the public welfare due to the public's strong interest in the circumstances surrounding the original conviction.[159]

Appellate waivers in capital commutations, however, are distinguishable from the condition in *Hoffa* because they do little to circumscribe future criminal behavior, and because they may actually undermine the public interest. First, appellate waiver conditions lack a direct relationship to the circumstances surrounding the conviction and do little to prevent similar harms from occurring. Whereas Hoffa's condition was meant to prevent similar crimes from being committed in the future, appellate waiver conditions only prevent further review of the original crime and, therefore, are tenuously connected to the original criminal conduct. Although these conditions in capital commutations, in effect, protect the public by ensuring that the recipient remains imprisoned for life, they also may prevent errors from being corrected and the truth from being uncovered by insulating the conviction and sentence from review.[160] Therefore, there is a risk that appellate waiver conditions may ultimately allow the true perpetrator, who actually engaged in the criminal conduct and poses a continued threat to the public, to walk free.

If the executives imposing these conditions were truly concerned with preventing the defendant from causing similar harm, the conditions would reduce the danger posed by the inmate, rather than focus on judicial resources and efficiency. For example, the conditions could require the defendant to comply with stricter security measures in prison, as this would address the root of most capital convictions: the defendant's dangerous or violent tendencies. While such conditions may not conserve judicial resources or promote efficiency like appellate waivers do, those efficiency goals, while valid, have nothing to do with the root cause of the conviction. In fact, such efficiency goals actually come at the expense of accuracy, as they insulate potential errors and misconduct from further review.[161] Thus,

156. *See Hoffa*, 378 F. Supp. at 1236 ("[I]f conditions are to be attached, they must relate to the reason for the initial judgment of conviction, because it is the crime and the circumstances surrounding it that give rise to the public's interest in regulating and circumscribing the future behavior of the offender.").

157. *Id.*

158. *Id.* at 1237–38.

159. *Id.*

160. *See* Costikyan, *supra* note 147, at 392–95.

161. *Id.*

appellate waiver conditions are not as prospective or protective as the condition in *Hoffa*, which directly related to the commission of the original crime.

Further, appellate waiver conditions may actually undermine the public's interest in accuracy and transparency. Unlike Hoffa's condition, which furthered the public's strong interest in the integrity of unions, appellate waiver conditions may undermine the public's interests in fairness, accuracy, and transparency, as they prevent courts from addressing deficiencies in capital inmates' original sentences.[162] As a result, judicial error, official misconduct, and the true perpetrator may fall through the cracks and go unseen. Thus, appellate waiver conditions may contravene, rather than promote, the public's interests in justice. They therefore lack the direct furtherance of a public interest that was stressed in *Hoffa*.

Outlawing these appellate waiver conditions on capital commutations could theoretically have a chilling effect on clemency and undermine the justice interest because executives may be unwilling to grant capital commutations that leave open the possibility for release. But this argument fails for two reasons: (1) the infrequency of individual clemency and appellate waiver conditions and (2) the limited ability of these conditions to provide political protection.

First, individualized clemency and these waiver conditions are used infrequently. Individualized grants of clemency, as opposed to "mass commutations" by a few governors, only occurred about seventy times between 1976, when the death penalty was reinstated, and 2015.[163] Additionally, in 2024, "no individual death-sentenced person received clemency" in the states,[164] and between 2013 and 2023 the Supreme Court granted only eleven stays of execution.[165] In contrast, more than 1,600 defendants have been executed since 1976, and nearly 250 of those executions have taken place in the last ten years.[166] Thus, clemency itself is quite rare.[167] And even rarer than that are appellate waiver conditions in capital commutations, of which there have only been a couple widely publicized instances.[168] Given this infrequency of clemency and commutations conditioned on appellate waivers, outlawing appellate waiver conditions likely would not create more of a chilling effect than what already exists.

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162. *See id*. at 391–92.

163. Gershowitz, *supra* note 91, at 1369–70.

164. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2024: YEAR END REPORT 3 (Dec. 19, 2024), https://dpic-cdn.org/production/documents/DPI-2024-Year-End-Report.pdf?dm=1735847939.

165. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2023: YEAR END REPORT 25 (Dec. 1, 2023), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf?dm=1701385056.

166. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (Feb. 3, 2025), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.

167. Gershowitz, *supra* note 91, at 1370–71 ("Of the more than 6,000 remaining people who sat on death row [between 1977 and 2015] (many of whom stayed there for many years), only about seventy people received an individualized commutation.").

168. The commutations of Robert Gattis and Joseph Payne are the only examples of capital commutations conditioned on appellate waivers that are widely publicized. *See supra* Introduction; *see also* Discussions with DPIC Podcast, *supra* note 25, at 09:52 (emphasizing the historic and novel nature of a clemency waiver condition on a capital commutation).

Further, this chilling argument also fails because attaching appellate waiver conditions to capital commutations does not offer much political protection to the executive. Because such commutations typically reduce the sentences to life without parole,[169] the possibility for release is already minimal, and attaching appellate waiver conditions would not provide much more political protection. And if a capital commutation recipient later successfully appeals their case and gets released, then their release is proof that the executive was correct to grant clemency and prevent execution. Thus, rather than protect the executive from political criticism, appellate waiver conditions may politically harm the executive by preventing them from being proven right. As a result, outlawing these appellate waiver conditions would not create any chilling effect. As such, unlike the condition in *Hoffa*, which was directly connected to the root of the crime and had a strong public interest, appellate waiver conditions lack a connection to either.

2. Policy Justifications for Appellate Waivers

Appellate waivers in conditional commutations not only lack a nexus to public policy because they are unrelated to the reason for the initial conviction, but also because they undermine the policy justifications for appellate waivers in general. The prevailing justifications for these waivers in the plea bargaining and sentencing contexts are that they (1) preserve the finality of judgments and sentences, (2) improve judicial efficiency, and (3) serve as a bargaining chip for defendants.[170] These justifications, however, are not present in the context of appellate waiver conditions on capital commutations.

a. Finality

Appellate waivers, in both the plea-bargaining and sentencing contexts, are meant to cement the outcome of the case and prevent further review.[171] However, in the capital commutation setting especially, this finality justification is not present and may actually harm the criminal justice system by undermining its accuracy and impeding the development of the law.

The finality effect of appellate waivers, in general, may undermine the "error-correcting function" of the appellate process.[172] Although appellate waiver

169. *See, e.g.*, Schick v. Reed, 419 U.S. 256 (1974) (examining a commutation of a death sentence to life without parole); *Death Sentence Commuted After Jurors' Pleas, supra* note 20 (explaining that the death sentence was commuted to life without parole); Markell Statement, *supra* note 26 (stating that the death sentence was being commuted to life without parole).

170. *See, e.g.*, Spann v. State, 704 N.W.2d 486, 492 (Minn. 2005); United States v. Andis, 333 F.3d 886, 889 (8th Cir. 2003); Costikyan, *supra* note 147, at 399–401; Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 881–82 (2010).

171. *See, e.g.*, United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990) ("The government has added the waiver language to its standard plea precisely because it preserves the finality of judgments and sentences imposed pursuant to valid pleas of guilty.").

172. *See* Costikyan, *supra* note 147, at 400 (quoting Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 363 (2015)).

conditions may bring closure to the state, the victim, and the defendant, this closure comes at the expense of the public's interest in transparency and fairness.[173] By foreclosing further consideration and examination of the conviction and sentence, these appellate waiver conditions preclude the judiciary from uncovering and correcting improper sentences and wrongful convictions, which may thereby cement judicial error, official misconduct, and undiscovered evidence.[174]

This reduced ability to correct errors is especially problematic in the capital commutation context because of (1) the recipient's increased interaction with the justice system[175] and (2) the death penalty's political salience.[176] First, whereas a defendant in the plea-bargaining context typically accepts appeal conditions before trial, a capital recipient of a conditional commutation has already been tried and sentenced.[177] Thus, because the commutation recipients actually went through trial and sentencing, there is greater opportunity for them to have experienced official misconduct or judicial error. As a result, there may be more challengeable issues that arise than at the plea-bargaining stage.

Second, there is also more room in the capital commutation setting for potentially dangerous political incentives to influence the proceedings. Because officials can utilize the death penalty as a political symbol to illustrate that they are tough on crime, they may be more aggressive in pursuing the death penalty.[178] And while this does not inherently mean that there is a greater likelihood of misconduct or error, experience and data indicate that this concern has teeth. For example, in jurisdictions where trial judges are often subject to partisan elections, there are higher rates of capital exonerations, and the same is true in states and counties that

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173. *See Spann*, 704 N.W.2d at 494–95 ("Allowing a defendant to waive his right to appeal creates a system that . . . permits the results of unfair trials to be preserved, and may encourage prosecutors and courts to hide their errors.").

174. *See* Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 664 (1990) (explaining that appellate waivers permanently isolate police violations and trial court errors from review); Dean, *supra* note 144, at 1221 (asserting that appellate waivers "invite unethical behavior by insulating the actions of defense attorneys, prosecutors, and judges from review").

175. Unlike recipients of plea-bargains or sentencing agreements, recipients of capital commutations have gone through complete trials and sentencing determinations. *See, e.g.*, Schick v. Reed, 419 U.S. 256 (1974) (concerning a defendant who had been convicted and sentenced to death); Payne v. Netherland, No. 95-4016, 1996 WL 467642, at *1–2 (4th Cir. Aug. 19, 1996) (concerning a defendant, Joseph Payne, who had been convicted and sentenced to death).

176. *See Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFO. CTR. (Oct. 18, 1996) [hereinafter *Killing for Votes*], https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/killing-for-votes-the-dangers-of-politicizing-the-death-penalty-processs (explaining the political consequences for judges' and prosecutors' death penalty decisions).

177. *See* cases cited *supra* note 175.

178. *See Killing for Votes*, *supra* note 176 (detailing instances of judges being voted out of office based on rulings against the death penalty, and explaining that death penalty cases offer prosecutors an opportunity to garner votes); Harris v. Alabama, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting) ("Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty.").

more aggressively pursue the death penalty.[179] Therefore, given this increased exposure to the justice system and the political pressures associated with the death penalty, appellate waiver conditions in capital commutations restrict further review of sentences and convictions that are more subject to political whims and more likely to be improper.

Further, beyond the judiciary's diminished ability to correct errors, the finality function of appellate waiver conditions is also problematic because it discourages the development of the law and restricts commuted inmates from availing themselves of new legal developments.[180] Given that a keystone inquiry of the Eighth Amendment is whether the punishment adheres to "evolving standards of decency,"[181] the assurance of finality therefore stifles evolution in an area of the law that calls for it. By foreclosing further judicial consideration, important constitutional issues may go unidentified and unresolved.[182] And even if the recipient's case did not present novel legal issues, an appellate waiver condition still could prevent a commuted inmate from availing themselves of changes in society's standards and the law. Thus, the assurance of finality in appellate waiver conditions prevents commuted inmates from availing themselves of new legal developments and contributing to the development of the law.

Admittedly, despite finality's pitfalls, the finality effect may not be as prominent in the capital commutation context given that clemency is often a last resort.[183] In this setting, the appellate process may have essentially finalized the recipient's case before they even received the appellate waiver condition. But even in such cases, the appellate waiver conditions do not further finality because they are unnecessary. Given the extreme unlikelihood of future appeals, they would merely serve to provide political protection or prevent appeals based on future developments of the law. While the executive may benefit from these effects, appellate waivers in this context, at most, are only indirectly connected to finality. As a

179. *See* JAMES S. LIEBMAN, JEFFREY A. FAGAN, ANDREW GELMAN, VALERIE WEST, ALEXANDER KISS & GARTH DAVIES, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT 350, 354–55 (2002), https://scholarship.law.columbia.edu/faculty_scholarship/3418; *see generally* RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2013), https://dpic-cdn.org/production/documents/pdf/TwoPercentReport.f1564408816.pdf?dm=1683576587 (providing examples of erroneous sentences and prosecutorial misconduct in especially aggressive jurisdictions).

180. *See* Spann v. State, 704 N.W.2d 486, 494–95 (Minn. 2005); Costikyan, *supra* note 147, at 392–93.

181. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

182. *See* Costikyan, *supra* note 147, at 391–93.

183. *E.g.*, Herrera v. Collins, 506 U.S. 390, 412 (1993) (explaining that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted").

result, the appellate waivers extinguish the recipient's hope of future relief without providing much of a finality benefit.[184]

b. Judicial Efficiency

Proponents of appellate waivers also argue that such waivers improve judicial speed and economy.[185] However, this judicial efficiency effect is questionable, as appellate waivers may increase costs related to wrongful convictions, while also failing to reduce appeals.

At a broad level, whether appellate waivers have reduced criminal appeals is debatable.[186] This question about effectiveness is especially evident in comparing the number of appeals in jurisdictions that differ in their use of appellate waivers.[187] For example, in the early 2000s, although 70% of plea agreements in the Fourth Circuit contained appellate waivers, the Fourth Circuit still saw criminal appeals increase by 5.3% annually.[188] In contrast, during that same period, the First Circuit experienced only a 1.89% increase in criminal appeals, while using appellate waivers in just 9% of plea agreements.[189] Additionally, from 2001 to 2010, "five years saw appeals increase by a greater percentage than convictions," meaning that appellate waivers failed to slow new appeals to a rate at or below the rate of new convictions.[190] Thus, although these statistics do not conclusively show that appellate waivers are ineffective, they do contradict the expectation that appellate waivers would reduce, or at least stabilize, the number of appeals each year.[191]

Even if appellate waivers do minimize criminal appeals, they may still undermine judicial efficiency by increasing wrongful conviction costs.[192] Given that

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184. With the death penalty in general, scholars have argued that limits on appeals have little effect on finality due to society's interests in not executing innocent persons. *See* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 510–11 (1996). Bandes writes:

> The refusal to consider new evidence relevant to guilt renders the condemnation unjust . . . . Prisoners who believe they are unjustly incarcerated will not find repose in the finality of their sentences. Nor, one hopes, would executing the innocent reassure society at large that justice and orderly process prevail.

Id.

185. *See, e.g.*, United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990).

186. *Compare* Dean, *supra* note 144, at 1202–09 (concluding that appeal waivers have not reduced criminal appeals), *with* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 228 (2005) (stating that their study and data suggest that appellate waivers have probably reduced the number of appeals).

187. *See* Dean, *supra* note 144, at 1208.

188. *Id.*

189. *Id.*

190. *Id.* at 1208–09.

191. *See id.* at 1208 ("Although the data are insufficient to infer a negative correlation between appeal waivers and the growth of criminal appeals, they demonstrate that appeal waivers have been ineffective in reducing the number of new criminal appeals commenced each year.").

192. *See* Costikyan, *supra* note 147, at 401 (citing Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 564–65, 592, 599).

such waiver conditions may insulate misconduct and error, they may create costs related to incarcerating innocent defendants or correcting improperly long sentences.[193] As a result, states may forego thousands of dollars in savings by failing to correct wrongful sentences.[194] When these savings in wrongful incarceration costs are compared to the costs of appeals, "the average state direct appeal saves around $14,700 in reduced incarceration and costs around $7,900 in total administrative costs."[195] Thus, if appellate waiver conditions are placed on a commutation recipient who has appeals remaining, such conditions may actually cost the state significantly more than the waiver saves.

However, where the recipient has exhausted their appeals, these savings may not be present, as the recipient would have little to no opportunity to reverse their conviction or correct their sentence. But even then, given that the recipient has no appeals remaining, the appellate waiver is unnecessary and, thus, provides no efficiency benefit. At most, the cost-benefit balance is neutral, and therefore, with the costs of trial and sentencing no longer being an issue, it is difficult to see how appellate waivers in the capital commutation context will fully serve this efficiency justification, especially when they do not appear to have a significant impact on the number of appeals.

c. Bargaining Chip

Lastly, proponents of appellate waivers theorize such waivers provide the recipient with a "bargaining chip" that they can leverage during sentencing negotiations.[196] However, even when imposed before conviction, these appellate waiver conditions provide "coercive incentives" that essentially punish defendants if they elect to preserve their right to appeal.[197] When subject to these appellate waivers post-conviction, "defendants' only bargaining tools are rights to appeal."[198] This lack of leverage drastically increases the disparity in bargaining power in favor of the state and forces the defendant to either choose a guaranteed lighter sentence or hope that the appellate system rules in their favor.[199] Therefore, if a recipient still has appeals remaining, waiving those appeals does not provide them with much leverage, as their alternative still carries the substantial risk of execution.

193. *See* Kim, *supra* note 192, at 581–82.

194. *See id.* at 592 ("[C]orrecting a sentence that is improperly long by even a few months can save the state thousands of dollars in wrongful incarceration costs.").

195. *Id.* at 599.

196. Costikyan, *supra* note 147, at 401.

197. Dyer & Judge, *supra* note 174, at 657.

198. *Id.* at 667; *see also* Spann v. State, 704 N.W.2d 486, 493 (Minn. 2005) ("[R]equiring a defendant to waive his right to appeal after conviction in order to receive some benefit offered by the state is particularly coercive because the disparity in bargaining power between the defendant and the state increases significantly after the defendant has been convicted.").

199. *See Spann*, 704 N.W.2d at 494.

Further, this bargaining chip justification also does not apply to capital commutation recipients who have exhausted their appeals. In such cases, not only is execution looming and potentially just days or hours away,[200] but the recipient no longer has appeals to waive. While recipients in such cases may still have an interest in preserving the hope of future legal relief,[201] this interest provides even less leverage than what recipients with appeals remaining have. As a result, such recipients essentially must choose between life, with little opportunity for relief remaining, or death. Therefore, like the previous two justifications of finality and judicial efficiency, this bargaining chip justification is inapplicable to appellate waivers in capital commutations.

3. Functioning of the Capital Punishment System

The efficiency justifications for appellate waiver conditions may be somewhat illusory, especially in the capital commutation context.[202] Even though they present the illusion of preventing future resources from being tied up in costly capital appeals, the reality is that they are rarely used in capital commutations,[203] and when they are used, they typically come after the appeals process,[204] at which point the recipients are essentially giving up their hope for future legal challenges, rather than actual appeals.

In theory, these waivers could improve efficiency in the capital punishment system if they are used more deliberately and earlier in the process.[205] As Professor Adam Gershowitz wrote, by locating cases where the prosecution involved known "problematic actor[s]," by tracking Supreme Court changes to death penalty jurisprudence, and by identifying cases that produced divided panels on direct appeal, governors could use appellate waiver conditions to remove these "weak" cases, which are likely to be reversed anyway, from the appeals process.[206] Not only are these cases more likely to be of the type that governors would consider commuting, but they are also the cases that would lead to the most legal challenges and generate the highest litigation costs.[207] Therefore, by proactively commuting these

200. *See supra* Part III.A (explaining that the timing of conditional commutation offers can be disturbingly tight).

201. *See id.* (describing the reasons why recipients with no appeals remaining may have an interest in avoiding appellate waivers).

202. *See* Dean, *supra* note 144, at 1208 (explaining that data "demonstrate that appeal waivers have been ineffective in reducing the number of new criminal appeals commenced each year").

203. The commutations of Robert Gattis and Joseph Payne, see *supra* Introduction, are the only examples of capital commutations conditioned on appellate waivers that are widely publicized.

204. *See Death Sentence Commuted After Jurors' Pleas*, *supra* note 20 (noting that Payne had exhausted his final appeal at the Supreme Court); Markell Statement, *supra* note 26, (stating that the death sentence was being commuted to life without parole).

205. *See* Gershowitz, *supra* note 91, at 1363–64, 1386–90.

206. *Id.* at 1386–90.

207. *See id.* at 1387–89.

weaker capital sentences, and by attaching appellate waiver conditions, governors could streamline the capital punishment system and the clemency process.[208]

However, while this approach to clemency could lead to fewer executions and conserve judicial resources, it presents two key issues in that it would (1) provide an incomplete solution to cases and issues that require individualized consideration and (2) overlook the most vulnerable capital inmates in need of clemency.

First, this approach would shield from judicial review the cases that need it the most. Because this approach centers on the "weakest" death sentences,[209] it is inherently targeting the convictions and sentences that have the most meritorious appeals. In doing so, it prevents the inmates with the best chance at appellate success from pursuing that relief and achieving that vindication, and in turn, it also prevents problematic actors and actions from coming to light.[210] For instance, in identifying weak capital cases based on the involvement of known problematic actors,[211] this approach would simply push those cases out of the judicial system without deeply evaluating the conduct involved and seeking to correct the wrongs done. The problematic actors and conduct would just become the next capital defendant's problem.[212]

Similarly, by using divided appellate panels as a proxy for weak cases,[213] this approach would remove cases from judicial review that would likely have the largest impact on death penalty jurisprudence as a whole.[214] If appellate judges disagree about the law or the application of the law, that case may affect more than just the inmate involved and would likely warrant further consideration. While this further consideration would require more time and resources, proper appellate review would provide the commutation recipients with a forum to vindicate their rights and bring to light the wrongs that they and other inmates may have experienced. Therefore, this post-trial plea-bargaining approach presents an incomplete solution in that it shields the recipients from execution but not from their sentences' underlying deficiencies. It seeks to apply a blanket approach to cases that require individualized consideration.

Second, this approach would likely not be applied evenhandedly, and as a result, it may not benefit the capital inmates that need it most. In general, executions and

208. *Id.* at 1394.

209. *Id.* at 1364.

210. *See, e.g.*, Spann v. State, 704 N.W.2d 486, 494–95 (Minn. 2005); Costikyan, *supra* note 147, at 394, 402; Dean, *supra* note 144, at 1221–22.

211. Gershowitz, *supra* note 91, at 1388.

212. *See, e.g.*, Dean, *supra* note 144, at 1221 (explaining that appellate waivers "insulat[e] the actions of defense attorneys, prosecutors, and judges from review"); *Spann*, 704 N.W.2d at 494–95 ("Allowing a defendant to waive his right to appeal creates a system that . . . permits the results of unfair trials to be preserved.").

213. *See* Gershowitz, *supra* note 91, at 1387.

214. *See* Costikyan, *supra* note 147, at 392–95 ("[A]n appellate rights waiver would have 'insulated from review the underlying convictions in some of the more notable criminal decisions in the Supreme Court's recent history.'" (quoting United States v. Vanderwerff, No. 12-CR-00069, 2012 WL 2514933, at *5 (D. Colo. June 28, 2012), *rev'd*, 788 F.3d 1266 (10th Cir. 2015)).

death sentences have historically been concentrated in a small number of states and jurisdictions, with Oklahoma and Texas performing about forty-five percent of all executions since 1976, and with the "five most prolific executing counties" accounting for "more than one-fifth of all executions in the U.S. in the last fifty years."[215] In line with this trend, Oklahoma, beginning in 2022, scheduled twenty-five executions over the course of twenty-nine months.[216] This aggressive ramp-up in executions made Oklahoma an outlier, even among the other high-sentencing states, as "[o]nly three states have ever executed 25 or more people in a two-year span."[217] In taking such unprecedented action, Oklahoma proposed to execute nearly sixty percent of its death row over a two-year span, and in some cases, Oklahoma sought to execute inmates before their appeals regarding the state's execution procedures were heard.[218]

Oklahoma's recent aggressiveness, while abnormal, is not unheard of. For instance, like Oklahoma's ramp-up, the Trump Administration carried out thirteen executions in its final six months, despite a prior seventeen-year hiatus in the federal system.[219] Similarly, in 2022, Alabama attempted to carry out executions via methods, such as nitrogen hypoxia, that the prisoners had not agreed to, even though the prisoners were legally entitled to make such a designation.[220] As this neglection of inmates' rights in Alabama and the ramp ups in Oklahoma and the federal system indicate, some executives and regimes are much more motivated to implement and carry out death sentences.

This increased aggression among a handful of jurisdictions, while not inherently problematic, likely prevents this proactive approach to clemency from being applied evenly across jurisdictions. For the proactive approach to achieve its goals of efficiently disposing of costly capital appeals, the executive must be willing to grant clemency. Not only is this decision to grant clemency constrained by local politics and political consequences,[221] but it is also limited by the executive's political agenda and moral beliefs. Thus, even though clemency may prove to be appropriate for an inmate or improve efficiency, the determinative factor in whether clemency is granted is typically the executive's will. Given that some executives,

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215. *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2022) [hereinafter *2022 Death Penalty Report*], https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report; *see also State Execution Rates (Through 2023)*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/state-execution-rates (last visited June 15, 2024) (providing an overview of each state's execution rate).

216. *2022 Death Penalty Report*, *supra* note 215.

217. *Id.*

218. *Id.*

219. Michael Tarm, *Fuller Picture Emerges of the 13 Federal Executions at the End of Trump's Presidency*, ASSOCIATED PRESS (Oct. 3, 2023), https://apnews.com/article/trump-executions-biden-death-penalty-brandon-bernard-c1b26807c5c40b337d14485c3d6df2de.

220. *2022 Death Penalty Report*, *supra* note 215.

221. *See Killing for Votes*, *supra* note 176 (explaining how the politics surrounding the death penalty affect executives' willingness to grant clemency).

and even jurisdictions in general, tend to be more aggressive in pursuing death,[222] a proactive approach may not fit within their agenda.

And notably, the capital inmates in these higher-sentencing jurisdictions may be in greater need of relief, compared to inmates in less aggressive areas. As discussed earlier,[223] capital-error rates are higher in jurisdictions that are more aggressive in pursuing the death penalty.[224] As such, judicial review is likely more important to capital inmates in higher-sentencing jurisdictions, as they may be at a greater risk of having an erroneous sentence.

Thus, given that higher-sentencing jurisdictions are probably less likely to proactively grant clemency and that the inmates in those same jurisdictions may be in more need of relief, the proactive approach may not benefit the most vulnerable inmates. And even if the proactive approach did extend to the most vulnerable inmates, it would prioritize the efficient disposition of their case over their sentence's underlying deficiencies and, therefore, provide an incomplete solution to a problem that requires individualized consideration.

CONCLUSION

For Joseph Payne and Robert Gattis, conditional commutations saved their lives. However, their relief came at an unnecessary cost. Had Payne's commutation not been subject to the conditions that he not seek a new trial or challenge his conviction, he could be eligible for parole now. And had Gattis's commutation not been subject to even more robust appellate waiver conditions, he could have further presented his mitigating circumstances to achieve a more lenient sentence. But for now, and for the foreseeable future, each of these individuals are imprisoned for life without the possibility of parole. These outcomes are the result of an incomplete solution and unjust bargain that undermines the purposes of appellate waivers and executive clemency. Although commutations conditioned on appellate waivers provide executives with a politically expedient solution and assure recipients that they will not be executed, they come at the costs of undermining the recipient's autonomy; covering up new evidence, prosecutorial misconduct, judicial error, and unfair trials; increasing the potential for wrongful convictions; and impeding the development of the law. These conditions thus masquerade sentences' underlying deficiencies at the expense of capital recipients threatened with death, and at the favor of politically motivated executives.

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222. *See id*. (providing examples of state governors who were especially aggressive in seeking executions); Tarm, *supra* note 219 (describing President Trump's ramp up of executions at the end of his presidency); *2022 Death Penalty Report*, *supra* note 215 (detailing Oklahoma's recent aggressiveness in conducting executions).

223. *See supra* Part III.B.2.

224. *See* LIEBMAN ET AL., *supra* note 179, at 350.