



The Role of Mercy

**Safeguarding Justice in Texas
Through Clemency Reform**



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About Us

Texas Appleseed

Texas Appleseed is a non-profit, public interest law center that focuses on systemic reform. It was founded in 1996 and is one of 17 Appleseed Centers throughout the United States and Mexico City. Texas Appleseed leverages the skills and resources of lawyers and firms across Texas to address some of the state's most important legal and social issues. Texas Appleseed tackles root causes of problems rather than individual symptoms, and works to create viable solutions at a local level. The work of Texas Appleseed focuses on three major areas: diversity in the legal field, social and economic equity for minority and immigrant communities, and indigent defense reform.

Texas Appleseed played an instrumental role in the 2001 development and passage of the Fair Defense Act, which promotes consistent standards for indigent defense throughout Texas. Texas Appleseed also works to improve the plight of juveniles and defendants with mental illness in the criminal justice system, and to expand access to mainstream financial services to the immigrant community. Through the Diversity Legal Scholars program, sponsored by Texas Appleseed in partnership with Kaplan Educational Centers, more than 150 minority students have received scholarships to take the Kaplan LSAT Preparatory Course.

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Texas Innocence Network

The Texas Innocence Network was organized in 2000 and is based at the University of Houston Law Center. The program focuses exclusively on investigating claims of actual innocence raised by inmates in Texas and elsewhere, and works cooperatively with innocence projects in other states. The Network is active in capital and non-capital cases. David Dow is the founder and director of the Network. He is a professor at the University of Houston Law Center, and has written extensively on legal issues. He served as a law clerk to two judges on the U.S. Fifth Circuit Court of Appeals and as editor of the Yale Law Journal.

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Texas Defender Service is a private, nonprofit organization dedicated to improving the quality of representation provided to those facing the death penalty in Texas. TDS is involved in: direct representation of death-sentenced inmates; consulting, training, case tracking, and policy reform at the post-conviction and at the trial levels; and research projects and public education efforts aimed at exposing inadequacies of the system.

The StandDown Texas Project, organized in 2000, focuses on Texas' application of the death penalty and criminal justice system reform.

Tremendous thanks also are due to Matthew Sharp, who conducted a great deal of research for the report. We would also like to thank Professor Daniel T. Kobil, Margaret Love, Anthony Robinson, and Robert Spangenberg for their valuable contributions. Finally, we thank Janis Monger for getting the report into print.

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A complete copy of this report is provided on the attached CD, along with an Appendix providing more detailed state-by-state data used as a basis for this report. *The Role of Mercy: Safeguarding Justice in Texas Through Clemency Reform* may be downloaded from the websites: www.texasappleseed.net and www.texasinnocencenetwork.org.

CHAPTER 1

Clemency: A Judicial Safeguard

“I have always found that mercy bears richer fruits than strict justice.”

—Abraham Lincoln,
speech in Washington, D.C., 1865

Executive Summary

Clemency plays a critical role in ensuring our system of justice is fair and equitable. This report examines clemency practices in 38 states, including Texas, in order to identify those that best meet an obligation to safeguard the rights of clemency petitioners and victims of crime while preserving the public trust.

Clemency is a broad term for the exercise of executive power to lessen, forgive, or delay the imposition of a punishment meted out by our criminal justice system. Clemency includes pardons, commutations, and reprieves. There are two basic types of pardons in Texas, a full pardon and a pardon based on innocence. A full pardon restores some rights forfeited by law as the result of a criminal conviction, such as the rights to vote, serve on a jury, bear arms, and hold public office, and removes some barriers to employment and licensure, but does not absolve the recipient of guilt. A full pardon based on innocence is a special kind of pardon that does serve to completely exonerate the recipient.¹ In a commutation, the executive changes the punishment, usually to a lesser one, and it is often used to reduce a sentence from

¹ There are also conditional pardons, which release a prisoner but do not affect the sentence. Conditional pardons are most often used to release a prisoner to another country or to immigration officials. Finally, there is a mechanism called “restoration of civil rights,” which allows certain federal offenders to have their Texas civil rights restored.

the death penalty to life imprisonment. A reprieve is temporary relief from a sentence imposed by the judiciary.²

The critical elements of a high-quality clemency review include: an accessible public process that ensures adequate review of the clemency petition, support materials, and input from affected parties; a uniform, well-understood set of criteria used to judge clemency petitions; and safeguards to ensure that the party making clemency recommendations is insulated from political pressure.

In the process of this review, Texas was found to have distinctive procedural rules that place unnecessary obstacles in the paths of those who seek pardon and commutation recommendations from the Board of Pardons and Paroles. In most cases, these obstacles effectively foreclose any consideration for relief. Texas is also the only state among the 38 death penalty states that explicitly mandates by statute that the Board is not required to meet as a body when making clemency determinations. Although the Board is empowered to set hearings on clemency matters, it does not do so, even in cases involving death sentences. Rather, the Board's practice has been to send materials to its members, who make their separate determinations and fax in their votes. Also, unlike other clemency systems across the nation, neither the Texas legislature nor the Board of Pardons and Paroles has adopted any substantive criteria upon which to make decisions in clemency matters. Finally, members of the Texas Board of Pardons and Paroles may be removed by the governor who appointed them for any reason, rather than only for cause, which compromises the independence of the Board.

The conclusions and recommendations in this report were formed after an exhaustive study of the clemency processes in the 38 states with capital punishment. State constitutions, statutory codes, and administrative rules were examined to determine the basic framework for clemency systems in other states. Additionally, unpublished rules and guidelines for procedure before Boards were sought. To supplement our understanding of clemency processes, we solicited comments from governors' offices, state pardon boards, and attorneys regarding the clemency process in their home states. A description of clemency practices state by state appears in the Appendix, attached as a CD-ROM.

Based upon the survey of best clemency practices, this report recommends that:

² For more detailed definitions of clemency types, *see* 37 Tex. Admin. Code § 141.111 (West 2004).

Hearings

- The Texas legislature should require the Board of Pardons and Paroles to meet in public to make clemency determinations and to hold public hearings—either as a full Board or as a panel of the board—on all applications for executive clemency.
- If it is determined not to be feasible to hold hearings on all clemency applications, Board of Pardons and Paroles hearings should at a minimum be required for death-sentenced applicants.

Clemency Guidelines

- The Texas legislature should either mandate that the Board of Pardons and Paroles adopt guidelines and substantive criteria upon which to base its clemency recommendations, or should supply a list of criteria itself.

Trial Official Recommendations

- The legislature should prohibit the Board from requiring the unanimous written recommendation of the trial officials and a certified court order, judgment, and statement of facts before the Board will consider pardons on the grounds of innocence.
- The legislature should likewise prohibit the Board from requiring the recommendation of a majority of the trial officials before the Board will consider granting a commutation of sentence in any case.
- Alternatively, the Board should change its own rules to effect the suggested changes.

Board Independence

- The legislature should provide that the governor may remove any member of the Board of Pardons and Paroles only for cause.

Role of Clemency

The need for the changes recommended here are made all the more critical because the federal courts have placed a burden on state clemency systems to operate as a safeguard for the judicial system. Rec-

ognizing that “[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible,” the Supreme Court of the United States has stated its belief that “[e]xecutive clemency has provided the ‘fail safe’ in our criminal justice system” ensuring that claims of innocence do not go uninvestigated, and that offenders are shown mercy as justice requires.³

This Supreme Court decision, *Herrera v. Collins*, is significant in that it declined to hold that a freestanding claim of actual innocence, absent some other independent constitutional violation, could serve as the basis for federal habeas corpus relief.⁴ Thus, the burden of investigating claims of actual innocence, based on new evidence discovered post-conviction, as well as the burden of deciding when mercy should be granted in the interest of justice, weighs heavily upon the powers and processes of executive clemency. When a sentence of death is at stake, it becomes all the more vital that these processes serve the interests of justice; that mercy is meted out as appropriate; and that claims of actual innocence, which under established judicial policy may be ineligible for federal habeas corpus relief, do not fall on deaf ears.

Supreme Court decisions since *Herrera* have further highlighted the need to ensure that strong procedural and substantive safeguards govern the clemency process in Texas. After the *Herrera* ruling that a claim of actual innocence may only be recognized in a federal court when it is accompanied by some other constitutional claim, five members of the Court in *Ohio Adult Parole Authority v. Woodard* expressed their belief that executive clemency processes were subject to only minimal constitutionally protected safeguards.⁵ In her concurrence, Justice Sandra Day O’Connor noted that judicial intervention in the clemency process might be warranted if a governor simply “flipped a coin” to decide whether or not to grant clemency, or if an inmate was denied access to the clemency process entirely.⁶

The system created by *Herrera* and *Woodard* is one in which the federal judiciary relies very heavily on systems of executive clemency to ensure that innocent people are not wrongly convicted or even put to death, while at the same time it requires very little in the way of procedural or substantive safeguards to ensure that clemency processes function effectively. It is therefore the responsibility of the State of Texas to ensure that the clemency process in this state actually serves to correct miscarriages of justice.

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

4 *Id.* at 400.

5 *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1997).

6 *Id.* at 289.

“It is abundantly clear that the Texas clemency procedure is extremely poor and certainly minimal.”

—Federal District Court

At least one federal court has observed Texas’ system to be lacking. “It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal,” wrote the federal district court in *Faulder v. Texas Board of Pardons & Paroles*.⁷ Meanwhile, the American Bar Association has released guidelines that highlight inadequacies of the clemency system in death penalty cases and the possibility of ensuring redress through the courts. “Recognizing [that courts are becoming more receptive to applying due process protections in clemency matters], ... counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.”⁸

Several indicators further suggest that Texas is not currently fulfilling its responsibility as the “fail safe,” or safeguard, within the criminal justice system. For example, according to the numbers provided in the Texas Board of Pardons and Paroles’ most recent 2003 annual report, each Board member who served the entire fiscal year cast an average of 13,845 votes in parole decisions alone. Each member likewise considered 285 requests for executive clemency. Assuming that Board members work 40 hours per week for 50 weeks out of the year, this amounts to an average of seven cases decided per hour. Put another way, that is a decision every 8.6 minutes.

Another indicator that the process is not serving its intended safeguarding function is that the Texas Board of Pardons and Paroles does not hold hearings on clemency applications, even in capital cases, nor does it so much as meet, either in private or in public, to vote on clemency applications.⁹ Of the 130 pages that constitute the Board’s 2003 annual report, only two pages discuss the Board’s activity with respect to executive clemency. That year, the Board considered 285 cases for executive clemency, and ultimately recommended that the gover-

7 *Faulder v. Texas Board of Pardons & Paroles*, No. A98 CA 801 SS (W.D. Tex. Filed Dec. 28, 1998), at 16, *aff’d*, 178 F.3d 343 (1999).

8 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 1.1 cmt. C (2003).

9 According to its 2003 annual report, the Board describes its practice in clemency recommendations in this manner:

Before making their recommendations, Board members carefully examine all information gathered during the investigation by their Executive Clemency staff. The Board determines by majority vote whether to recommend to the governor that clemency be granted.

State of Texas Board of Pardons and Paroles 2003 Annual Report, at 16. Texas statutory law allows Board members to perform their duties in clemency matters without meeting as a body. TEX. GOV’T CODE ANN. § 508.047(b) (Vernon 2004).

nor exercise this power in 90 of them.¹⁰ In death penalty cases, the Board considered 17 requests for commutation of sentence, 15 requests for a reprieve, and one request for a conditional pardon in 2003. It did not recommend clemency in any case.

From the reinstatement of capital punishment in 1972 until the end of 2003, the Board has only recommended that the governor grant a commutation of sentence in one death penalty case, that of Henry Lee Lucas in 1998. In 2004, however, the Board recommended two death-sentenced inmates, Robert Smith and Kelsey Patterson, for commutations of sentence and another for a 120-day reprieve. After concessions by the district attorney's office that Mr. Smith was mentally retarded, the Board recommended Mr. Smith for a commutation of sentence from death to life, which was granted by Governor Rick Perry. In May of 2004, the Board recommended Mr. Patterson for a commutation of sentence based upon his mental illness; Governor Perry denied that request, and Mr. Patterson was executed. Then, in November 2004, the Board recommended that Frances Newton be given a 120-day reprieve in order to afford her time for further forensic testing of evidence in her case. Governor Perry granted the reprieve on December 1, 2004. While the Board has made positive recommendations in these cases in 2004, much work remains to be done to improve the clemency rules and process to ensure that future cases are appropriately and consistently considered.

Another indicator that the process may not be working is that governors and Board members in Texas have often justified their decisions based on whether the inmate had access to courts and counsel, or have otherwise deferred to judicial authority rather than operating as an independent fact-finder.¹¹ But this deference is misplaced. One scholar explains, "Clemency's exemption from due process review is traditionally explained by the argument that clemency is an *additional, non-judicial* layer of process, providing a forum to raise issues that were not raised at trial, to catch things that may have been missed by the jury, judge, and appellate courts, and to allow for mercy on grounds that were not cognizable in court. Deference to the courts undermines the

10 In 2003, the governor had 180 petitions including all types of clemency on which to render a decision, and granted 73 of them. Of these, 90 were left over from the prior year, and an additional 90 were those recommended by the Board in 2003. It is not discernible how many of the 90 cases recommended in 2003 were among the 73 granted. State of Texas Board of Pardons and Paroles 2003 Annual Report, at 71.

11 For example, when denying sentence commutation or a reprieve to Kelsey Patterson in May of 2004, the governor justified his decision by finding that Patterson's case had been considered no less than 10 times by the courts and no judicial relief had been granted. Press release on file with author.

nonjudicial purposes of clemency and is a ‘perversion of the governor’s clemency power.’”¹²

Clemency Models

The survey of states revealed four basic models that all states use for organizing clemency, although a few states have mixed systems.

Exclusively Gubernatorial Model

The first model vests the power to grant executive clemency exclusively with the governor. Twenty-two of the 38 examined states (58%) retain this traditional model for granting pardons and commutations of sentences.¹³ These states are Arkansas, California, Colorado, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Dakota, Tennessee, Virginia, Washington, and Wyoming.

Most of these states have created or empowered Boards to assist the governor in the exercise of the clemency power. Some of these states require applications to be passed through the Board for a recommendation, but the granting of clemency is not made to depend upon a favorable Board recommendation. Other states merely provide that the Board may investigate and report to the governor on clemency matters at the governor’s request.

Favorable Recommendation Precondition Model

The second model for organizing systems of clemency is to leave the ultimate granting power in the hands of the governor, but to require a favorable Board recommendation as a precondition to the exercise of that power. Eight of the examined states (21%), including Texas, structure their clemency systems in this manner.¹⁴ The other states are Arizona, Delaware, Florida, Louisiana, Montana, Oklahoma, and Pennsylvania.¹⁵

¹² Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 2002 U.C.L.A. Law Rev. 1825, 1842-43 (footnotes omitted, emphasis added).

¹³ ARK. CONST. of 1868, art. VI, § 18; CAL. CONST. art. V, § 8(a); COLO. CONST. art. IV, § 7; ILL. CONST. art. V, § 12; IND. CONST. art. 5 § 17 and IND. CODE ANN. § 11-9-2-3 (Michie 2003); KAN. CONST. art. I, § 7; KY. CONST. § 77; MD. CONST. art. II, § 20; MISS. CONST. art. V, § 124; MO. CONST. art. IV, § 7; N.H. CONST. pt. II, art. 52; N.J. CONST. art. V, § 2(1); N.M. CONST. art. V, § 6; N.Y. CONST., art. IV, § 4; N.C. CONST. art. III, § 5(6); OHIO CONST. art. III, § 11; OR. CONST. art. V, § 14; S.D. CONST. art. IV, § 3; TENN. CONST. art. III, § 6; VA. CONST. art. V, § 12; WASH. CONST. art. III, sec. 9; WYO. CONST. art. 4, sec. 5.

¹⁴ ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. § 31-402(A) (West Supp. 2004); DEL. CONST. art. VII, sec. 1; FLA. CONST. art. IV, § 8; LA. CONST. art. IV, § 5(E)(1); MONT. CONST. art. VI, § 12; MONT. CODE ANN. § 46-23-104(1) (2004); § 46-23-301(3); OKLA. CONST. art. VI, § 10; PA. CONST. art. IV, § 9(a); TEX. CONST. art. IV, § 11(b).

¹⁵ In Montana, no favorable Board recommendation is required in capital cases.

Specialized Board Model

The third clemency model consists of placing the clemency power entirely or primarily with a specialized Board. Six states (16%) use this model, which divests the governor of his or her traditional clemency power.¹⁶ Alabama and South Carolina employ this model, but have retained in the governor the authority to grant reprieves and commutations of sentences in death penalty cases.¹⁷ The other states using the specialized board model are Connecticut, Georgia, Idaho, and Utah.

Board with Governor Model

In the fourth clemency model, the power to grant pardons and commutations lies with a Board of which the governor is a member. This model of clemency is used in two of the examined states (5%), Nebraska and Nevada.¹⁸

History of Clemency in Texas

Until 1936, the governor of Texas possessed the unfettered power to bestow executive clemency, except in cases of treason and impeachment, and the courts protected any encroachment upon this power by the legislature.¹⁹ Earlier, in 1893, the Texas legislature had created the Board of Pardon Advisors to assist the governor in exercising the clemency power. This Board consisted of two qualified voters of the State of Texas appointed by the governor at will.²⁰ The Board of Pardon Advisors' name was changed to the Board of Pardons and Paroles in 1929.²¹ At that time, a third member was added and terms were set at six years.²²

The governor's clemency authority was finally constrained in 1936 in response to a succession of governorships in which pardons were granted in abundance. From 1915 to 1917, during the governorships of James E. Ferguson and W.P. Hobby, 3,093 full pardons and 678 conditional pardons were granted.²³ Miriam E. Ferguson, during her

16 ALA. CONST. of 1901, amend. 38 (1939); ALA. CODE § 15-22-20(a) (2004); § 15-22-36(a); CONN. GEN. STAT. ANN. § 54-124a(f) (West Supp. 2004); § 18-26(a); GA. CONST. art. IV, § II, ¶ II(a); IDAHO CONST. art. IV, § 7; S.C. CONST. art. IV, § 14; UTAH CONST. art. VII, §12(1), (2)(a).

17 ALA. CONST. of 1901, amend. 38 (1939); S.C. CONST. art. IV, § 14.

18 NEB. CONST. art. IV, § 13; NEV. CONST. art. 5, § 14(1). In Florida, the governor sits on the clemency Board; however, he or she has ultimate authority to either grant or deny clemency relief.

19 *See Ferguson v. Wilcox*, 28 S.W.2d 526 (Tex. 1930); *Ex parte Gore*, 4 S.W.2d 38 (Tex. Crim. App. 1928); *Ex parte Nelson*, 209 S.W. 148 (Tex. Crim. App. 1919).

20 TEX. CONST. art. IV, § 11 (Vernon 1997) (interpretive commentary).

21 *Id.*

22 *Id.*

23 *Id.*

1925-1926 term, granted 384 pardons and 777 conditional pardons.²⁴ In 1936, article IV, section 11 of the Texas Constitution was amended to divest the governor of sole authority in clemency matters.

The new amendment elevated the Board of Pardons and Paroles to constitutional status. By constitution, the new Board was to be composed of three members, only one of which was to be appointed by the governor.²⁵ The Chief Justice of the Supreme Court and the presiding Justice of the Court of Criminal Appeals were to each appoint one other member.²⁶ All members required two-thirds approval of the Senate.²⁷ Additionally, the legislature was given the authority to regulate procedure before the Board.²⁸ The most important alteration of the governor's clemency power was that he or she could no longer wield it except upon the recommendation of a majority of the newly reconstituted Board of Pardons and Paroles.²⁹

In 1983, the section was again amended, deleting the constitutional requirements pertaining to the structure of the Board and the mechanisms of appointment, and leaving this instead to the legislature to design by law. Another amendment to the section in 1989 did not affect executive clemency.

²⁴ *Id.*

²⁵ TEX. CONST. art. IV, § 11 (Vernon 1989, amended 1983).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

CHAPTER 2

The Clemency Process in Texas Today

The Constitution of the State of Texas mandates that the legislature establish a Board of Pardons and Paroles.³⁰ It vests in the governor the power to grant reprieves, commutations of punishment, and pardons, but only upon a written and signed recommendation of a majority of the Board.³¹ The governor may, however, grant one reprieve in a capital case, not to exceed 30 days in length, even without the recommendation of the Board.³²

Structure of Texas Board of Pardons and Paroles

The Texas Board of Pardons and Paroles consists of seven members that are appointed by the governor with the advice and consent of the Senate.³³ To be eligible, Board members must be representative of the general public and must have resided in Texas for the previous two years before appointment.³⁴ Additionally, a former employee of the Texas Department of Criminal Justice may not serve on the Board until two years have passed since his or her employment was terminated, and

³⁰ TEX. CONST. art. IV, § 11(a).

³¹ TEX. CONST. art. IV, § 11(b).

³² *Id.*

³³ TEX. GOV'T CODE ANN. § 508.031(a) (Vernon 2004). In 2003, legislation effective January 2004 reduced the Board from 18 members to seven. At the same time, the legislature authorized the Board to hire “parole commissioners” to hear and decide parole matters in three-member panels that must include at least one Board member. The 11 people who were Board members at the time the legislation became effective, but who were not appointed in 2004, were employed as “parole commissioners.” Because three-member panels have always voted on parole decisions, this structural change in the Board has not affected parole considerations. The 18 people making parole decisions now are the same as those who made them before the change. Clemency decisions, however, are voted on by the entire Board and not by panels. Thus, rather than requiring 18 votes, clemency matters are now decided by only seven.

³⁴ TEX. GOV'T CODE ANN. § 508.032(a)-(b) (Vernon 2004).

no more than three Board members may be former employees of the Department at any given time.³⁵ Several provisions also disqualify a person from Board membership based upon conflicts of interest.³⁶

Each Board member must undergo some basic training as to the role of the Board and the laws that govern it.³⁷ One member of the Board is designated by the governor to serve as the Presiding Officer, and this person serves as the administrative head of the Board, delegating authorities and responsibilities, appointing advisory committees, and establishing administrative policies and procedures.³⁸

Board members serve terms of six years, and the terms are staggered so that one-third of them expire every two years.³⁹ Members are full-time employees and draw a salary as provided by the legislature.⁴⁰ The governor may remove one of his or her own appointees at any time and for any reason.⁴¹ However, members appointed by former governors may be removed only for cause. Grounds for removal for cause are: (1) statutory ineligibility for membership; (2) inability to discharge duties for a substantial part of the term because of illness or disability; and (3) failure to attend half of the regularly scheduled Board or panel meetings during a calendar year.⁴²

The Board has the power to issue subpoenas and administer oaths.⁴³ By statute, the Board is not required to meet as a body to perform the members' duties in clemency matters.⁴⁴

Clemency Process

Application Process for a Reprieve from a Death Sentence

A reprieve is defined by the Board as a temporary release from the terms of an imposed sentence.⁴⁵ As discussed above, the governor is authorized to grant one reprieve not to exceed 30 days. However, upon the recommendation of the Board, the governor is always authorized to grant a reprieve (even if he or she has already granted one to the inmate), and for as long as the Board recommends.⁴⁶

³⁵ *Id.* § 508.032(c)-(d).

³⁶ *Id.* § 508.033.

³⁷ *Id.* § 508.0362.

³⁸ *Id.* § 508.035.

³⁹ *Id.* § 508.037(a)-(b).

⁴⁰ *Id.* § 508.039.

⁴¹ *Id.* § 508.037(c).

⁴² *Id.* § 508.034(a).

⁴³ *Id.* § 508.048(b).

⁴⁴ *Id.* § 508.047(b).

⁴⁵ 37 TEX. ADMIN. CODE § 141.111 (West 2004).

⁴⁶ *Id.* § 143.41(c).

Once a death warrant has been issued for an inmate's life, that inmate may apply for a reprieve from the governor. An application written by, or on behalf of, an inmate must contain (1) the name of the inmate and his or her attorneys or other representatives; (2) certified copies of the indictment, judgment, verdict of the jury, and sentence, including a document verifying the scheduled execution date; (3) a brief statement of the offense for which the inmate was sentenced to death; (4) a brief history of all appellate proceedings pertinent to the case including any current proceedings; (5) a brief statement of all legal issues that have been raised during the judicial proceedings; (6) the length of time the inmate requests for a reprieve (must be in increments of 30 days); (7) all grounds upon which the reprieve is requested, as long as the grounds do not ask the Board to decide technical questions of law that are better decided by a court; and (8) a brief statement of the effect that the inmate's crime has had upon the family members of the victim.⁴⁷

An application for a reprieve must be delivered to the Board of Pardons and Paroles no later than 21 days before the scheduled execution date of the inmate.⁴⁸ If an inmate wishes to submit any supplemental materials to his application, that information must be submitted to the Board no later than 15 days before the scheduled execution date.⁴⁹

An inmate may request an interview in his or her application or any supplementary filing.⁵⁰ If requested, the interview is conducted at the prison by a member of the Board designated by the presiding officer.⁵¹ Only the inmate, the designated Board member, and Department of Criminal Justice staff may attend the interview, and the Board may consider statements by the inmate when considering his or her application.⁵²

After the Board has received the application and conducted the interview, it may recommend by majority vote that the governor either grant the inmate a reprieve from execution, or refuse to do so.⁵³ Texas is the only state in which the Board does not have to meet to consider reprieves.⁵⁴ Alternatively, it may schedule a hearing on the request for a reprieve, at which it must allow the attendance of and presentation of information by any trial officials who wish to do so.⁵⁵ It must also

⁴⁷ *Id.* § 143.42.

⁴⁸ *Id.* § 143.43(a).

⁴⁹ *Id.* § 143.43(c).

⁵⁰ *Id.* § 143.43(d).

⁵¹ *Id.* § 143.43(e).

⁵² *Id.*

⁵³ *Id.* § 143.43(f)(1)-(2).

⁵⁴ TEX GOV'T CODE § 508.047(b) (Vernon 2004).

⁵⁵ 37 TEX. ADMIN. CODE § 143.43(f)(3), (g) (West 2004).

notify a representative of the victim's family (who has previously requested to be notified), and allow that family member to attend the hearing or submit written comments pertaining to the case.⁵⁶ Additionally, advocates for and against the death penalty, generally, and members of the general public may submit written information for the Board's consideration at its central office headquarters at any reasonable time.⁵⁷

If a hearing is held, it is open to the public, except those portions of the hearing that discuss confidential matters.⁵⁸ The Board's decision, made at the conclusion of the hearing by majority vote, must be made and announced in an open meeting.⁵⁹ As far as the authors are aware, no hearings have ever been held on reprieves.

If the Board recommends that a reprieve be granted, the governor does not have to act upon that recommendation.

Application Process for Pardons

A full pardon is defined by the Board as an unconditional act of clemency that serves to release the grantee from the conditions of his or her sentence and from any disabilities imposed by law thereby.⁶⁰ A full pardon does not, however, declare a person innocent of the crimes committed nor does it truly absolve an offender of the legal consequences of his or her crime, such as registering as a sex offender.⁶¹ Only a special pardon—a full pardon on the grounds of innocence—declares a person innocent of the crime and provides for complete freedom from legal implications of the conviction.

The Texas Board of Pardons and Paroles will not consider a request for a full pardon from an inmate who is currently in prison, unless "exceptional circumstances" exist.⁶² With respect to pardons on the grounds of innocence, the Board will not consider an application unless it has the unanimous written recommendation of the current trial officials in the county of conviction and affidavits of witnesses upon which the recommendation of innocence is based.⁶³ Additionally, if the basis for the recommendation is evidence that was not previously available, the Board requires a certified order or judgment of a court having jurisdiction ac-

⁵⁶ *Id.* § 143.43(g).

⁵⁷ *Id.* § 143.43(i).

⁵⁸ *Id.* § 143.43(h). According to the rule, a matter is confidential if deemed to be so by statute.

⁵⁹ *Id.* § 143.43(h), (j).

⁶⁰ *Id.* § 141.111(20).

⁶¹ See TEX. CODE CRIM. PROC. art. 62.11(b)(2) (Vernon 2004, Supp. 2004-2005); See also *Taylor v. State*, 612 S.W.2d 566 (Tex. Crim. App. 1981), in which the Court held that a full pardon would not "wipe the slate clean" in terms of probation eligibility.

⁶² 37 TEX. ADMIN. CODE § 143.6 (West 2004).

⁶³ *Id.* § 143.2(1)-(2).

accompanied with a certified copy of the findings of fact.⁶⁴ These requirements are not statutory requirements, but are administrative rules enacted by the Board pursuant to its rulemaking authority.

If the Board recommends that a pardon be granted, the governor is not obligated to act on that recommendation.

It is critical in an instance where a person is wrongly convicted that the clemency system provide the fail safe role envisioned by the U.S. Supreme Court. Clemency is the only way to guarantee justice to a wrongly convicted person. Therefore, the clemency system must not rely on support from the courts, but must operate as an independent process in the event that a person who is innocent needs to use it. Consider the example of Josiah Sutton.

CASE STUDY

Pardon on the Grounds of Innocence

Mr. Sutton was a 16-year-old star high school football player when he was arrested for a rape. He was convicted based on incorrect testimony provided by the now-discredited Houston Police Department crime lab. During an investigation of the lab's mishandling of evidence and faulty analysis of test results, Mr. Sutton's case was reviewed. The DNA from the rape was tested twice and both times the testing proved that Mr. Sutton was not one of the rapists.

As discussed above, the governor cannot grant a pardon without a recommendation from the Board of Pardons and Paroles. When presented with Mr. Sutton's petition for a pardon on the grounds of innocence, the Board claimed that it did not have the necessary paperwork to move forward on the petition, citing Rule 143.2 of its own rules, which states: "On the ground of innocence of the offense for which convicted the Board will only consider applications for recommendation to the governor for a full pardon upon receipt of...a written unanimous recommendation of the current trial officials of the court of conviction..."⁶⁵

Texas is unique in having this requirement.

Although the Board's own rules (Rule 141.51) allow the Board to use discretion in relaxing its rules, and indeed the Board has done so on at least one other occasion, it did not relax them in Mr. Sutton's case.⁶⁶

⁶⁴ *Id.* § 143.2(3).

⁶⁵ *Id.* § 143.2.

⁶⁶ *Id.* § 141.51. The provision, titled "Use and Effect of Rules," states: "In no event shall the rules be construed as a limitation or restriction upon the exercise of any discretion by the Board or by a parole panel."

CASE STUDY

Harris County District Attorney Chuck Rosenthal had written a letter explaining that inaccurate testimony was presented in the Sutton case and that the inaccurate testimony affected the outcome of the case.⁶⁷ The prosecutor stated that he did not oppose Mr. Sutton's release from prison and that he would not seek to re-prosecute Mr. Sutton. District Attorney Rosenthal, however, stopped short of saying Mr. Sutton was innocent and asking for a pardon on the grounds of innocence. Instead he requested a full pardon. As explained above, a full pardon does not restore all rights to a person and is not a declaration of innocence. It also prevents a person from being entitled to collect funds for wrongfully convicted persons under Chapter 103 of the Texas Civil Practice & Remedies Code.⁶⁸ The Board claimed that the letter from the prosecutor was insufficient because it called for a full pardon rather than a pardon for innocence. The judge declined to provide a letter because she was presiding over the habeas action at the time and justifiably felt it would be inappropriate for her to do so.

Eventually, the Board decided to act based on subsequent court rulings, and recommended a pardon on the grounds of innocence, which was granted by the governor. The Board, however, did not act independently of the court or trial officials. Mr. Sutton was released from prison by the judge's order after serving four and one half years, but it took more than a year to secure a pardon on the grounds of innocence from the governor. He lived that year in legal limbo, with a criminal conviction hanging over his head, unable to move forward with his life.

Application Process for a Commutation of a Death Sentence to Life in Prison

A commutation of sentence is defined by Texas statute as "an act of clemency by the governor which serves to modify the conditions of a sentence."⁶⁹

The Texas Board of Pardons and Paroles will consider a recommendation of commutation at the written request of the inmate,⁷⁰ the governor,⁷¹ or a majority of the trial officials of the court of conviction.

⁶⁷ Letter on file with author.

⁶⁸ TEX. CIV. PRAC. & REM. CODE § 103.001(a) (Vernon Supp. 2004-2005).

⁶⁹ *Id.* § 141.111(8).

⁷⁰ *Id.* § 143.57(a).

⁷¹ *Id.* § 143.58.

Any of these is considered sufficient—that is, the imprimatur of the trial officials or governor is not required.

The procedure followed by the Board upon receipt of a valid request is identical to that followed by the Board when considering a request for a reprieve. That procedure was described in a preceding section.

It is important to note that the Texas Board of Pardons and Paroles has the discretion to suspend its internal rules for compelling reasons. In the case of Delma Banks, the Texas Board did not waive its procedural rules and summarily refused to consider a death penalty clemency petition—even though the merits were sufficient to warrant a reprieve by the U.S. Supreme Court 10 minutes before the sentence was to be carried out.

CASE STUDY

The Delma Banks Case

Delma Banks' petition, requesting sentence commutation or a reprieve from execution, detailed facts raising a substantial doubt that he committed the crime for which he was about to be executed. Among the issues raised was the conduct of Bowie County prosecutors, who had allowed key witnesses to lie about critical facts at trial, secreted evidence that would have discredited these witnesses, and argued to the jury that the witnesses were credible. Further, the prosecutors excluded all of the African American prospective jurors from Mr. Banks' trial. Mr. Banks, an African American, was convicted and sentenced to death by an all-white jury for the murder of Richard Whitehead, a white male.

The state's theory of guilt at trial was that in April of 1980, Mr. Banks hitched a ride with the victim, shot him, stole his car, and later met the state's key guilt phase witness, Charles Cook. He testified that Mr. Banks had confessed to him that he had killed someone. However, prosecutors had hidden a transcript of a pretrial rehearsal meeting with Mr. Cook, during which his version of the story changed repeatedly. This transcript reveals that the prosecutors coached Mr. Cook about what to say during his testimony, in contradiction to his trial testimony that he was not coached. During the trial, prosecutors did not correct Mr. Cook's lies—instead, they argued to the jury that Mr. Cook was a credible witness. Without Mr. Cook's testimony, no evidence linked Mr. Banks to the crime. In fact, significant evidence excluded Mr. Banks as a potential suspect.

Mr. Cook recanted his trial testimony in 1999, stating under oath that he testified falsely at trial in response to threats by

CASE STUDY

the State about Mr. Cook's own pending criminal case. Mr. Cook was a twice-convicted felon who, at the time of his testimony, was facing a life sentence for an arson charge in Dallas, Texas. After Mr. Cook's testimony and on same day Mr. Banks was sentenced to death, the prosecutor drove to Dallas and dropped the arson charge pending against Mr. Cook.

Prosecutors similarly suppressed exculpatory evidence that would have revealed that the critical punishment phase witness had motivation to lie.

The case represented such compelling injustices that the Honorable William S. Sessions, former federal prosecutor, federal judge, and director of the FBI, joined by other distinguished former judges and prosecutors, filed an amicus brief in the U.S. Supreme Court supporting Mr. Banks because his claims "call(ed) into question the reliability of the guilty verdict and death sentence in his case..."

The Texas Board of Pardons and Paroles dismissed the clemency petition submitted on behalf of Mr. Banks because it was filed five days late. Current Board rules require that a clemency petition be filed no later than 21 days prior to a scheduled execution, though the petition may be amended until as late as 14 days prior to the execution date. While the Board still had an ample 16 days to consider the troubling facts presented in Mr. Banks' petition, including the claims of prosecutorial misconduct, inadequate representation, and racism, the Board refused to do so.

Because the prosecutors had violated their legal and ethical obligation to disclose some of the exculpatory evidence regarding the key witness and had kept it hidden for more than 19 years, the courts had yet to consider the full extent of the prosecutors' misconduct at the time the clemency petition was filed, and it was unclear whether any court would intervene. Yet the Board of Pardons and Paroles chose to adhere to its self-imposed deadline for the filing of petitions and dismissed Mr. Banks' petition without consideration of his claims. While reasonable time restrictions are an important safeguard against abuse or dilatory tactics, the Board's failure to exercise its discretion to deviate from its internal rules in cases with meritorious claims represents the unacceptable choice of form over substance.

Approximately 10 minutes before Mr. Banks' scheduled execution, the U.S. Supreme Court stepped in and ordered a

stay of execution. After hearing the case, the Court reversed Mr. Banks' death sentence because of the prosecutorial misconduct. It further ordered the federal courts to consider the degree of misconduct at the guilt phase of the trial. The case is presently before the District Court in Texarkana to consider the guilt-phase misconduct issue.

Application Process for Commutation of Sentence in Non-Death Penalty Cases

The Board considers applications for commutation of sentence in non-death penalty cases only when accompanied by the written recommendation of a majority of the trial officials. In their recommendations, the trial officials must state that the penalty now appears excessive and must suggest a definite term that would be more just. Finally, the recommendation must provide reasons based on facts directly related to the case that existed at the time of trial but were unknown to the court and jury. Alternatively, the reasons may be based on a statutory change in penalty for the offense that renders the original penalty excessive. Like the rules governing consideration for pardons based on innocence, these rules are not provided by statute but by administrative regulation.

CHAPTER 3

Comparative Practices

Due process can be defined as the set of procedural rules that should be observed by the government when acting against an individual and that serve to increase the likelihood of arriving at the “correct” result. When the government acts to convict and imprison a person for a crime that he or she allegedly committed, for example, due process consists of those procedural rules that the government should observe and that operate to ensure that the “correct” result—guilty or not guilty—is obtained. The fewer due process rules observed by the government in the course of its action, the greater the likelihood of error in the result.

Meetings and Hearings in Clemency Proceedings

Hearings are a fundamental component of due process. The Supreme Court has long insisted that, when protected interests are at stake, due process requires that a hearing be held.⁷² The formality and procedural requisites of the hearing afforded depend upon the nature of the case.⁷³ Although the Supreme Court has noted—with the exception of death penalty cases—that the nature of the interests at stake in clemency proceedings do not warrant rigorous due process protections as a matter of constitutional right, affording hearings in clemency proceedings is essential if clemency is to fulfill its role as safeguard within the criminal justice system as envisioned by the Supreme Court.⁷⁴ As one law review commentator has noted, “The notion that clemency is a safeguard against the execution of the innocent necessitates clemency proceedings in which evidence is presented and reviewed...”⁷⁵

72 See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

73 *Id.* at 378. See also, *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

74 See *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (concerning non-capital clemency proceedings); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1997) (concerning capital clemency proceedings).

75 Dinsmore, *supra* note 12, at 1836.

Board meetings, which provide the opportunity for deliberation, also are a measure of protection against arbitrary, ill-considered, or even dismissive decisions.

Best Practices

Almost all examined states other than Texas for which there was information require that their Boards at least meet as a body when making clemency determinations. Many states further require that the Board's actions be taken in an open, public meeting. Importantly, in states like Texas where the granting of executive clemency requires favorable Board recommendations or votes, the states are unanimous in requiring meetings.⁷⁶ Several of these states further require that hearings be held on the applications, especially in capital cases. Other than Texas, the states where the Board either has sole responsibility for executive clemency or must at least provide a favorable recommendation before clemency may be granted by the governor are:

- Alabama (except in death penalty cases)
- Arizona
- Connecticut
- Delaware
- Florida
- Georgia
- Idaho
- Louisiana
- Montana (except in death penalty cases)⁷⁷
- Nebraska
- Nevada
- Oklahoma
- Pennsylvania
- South Carolina (except in death penalty cases)
- Utah

⁷⁶ ALA. CODE § 15-22-71 (2004); ARIZ. REV. STAT. ANN. § 31-401 (West 2004, 2002 & Supp. 2004); CONN. GEN. STAT. ANN. § 54-124a (West Supp. 2004); Delaware Board of Pardons Rules, Rule 5, *available at* <http://www.state.de.us/sos/pardrule.shtml>; FLA. ADMIN. CODE ANN. r. 27-10, 11 (2004); GA. CODE ANN. § 42-9-7(1997); IDAHO ADMIN. CODE 50.01.01.450 (2004), 50.01.01.550; LA. REV. STAT. ANN. § 15:572.1 (West Supp. 2005); MONT. CODE ANN. § 2-15-124 (2003); OKLA. STAT. ANN. tit. 57, § 332.2 (West 2004); PA. STAT. ANN. § 81.226 (2004).

⁷⁷ Although Montana's constitution places the power of clemency in the governor's hands, the legislature has bestowed upon the Montana Board of Pardons and Parole the duty to make recommendations on applications. In non-capital cases in which the Board decides against recommending an applicant for clemency, the application is not forwarded to the governor and he or she may not act on it, effectively requiring a favorable recommendation from the Board to obtain clemency relief. MONT. CODE ANN. § 46-23-104(1)-301(3) (2003).

Of these states, Arizona, Florida, Oklahoma, and South Carolina require that their respective Boards not only meet to consider applications but also hold hearings on clemency applications. Still other states, such as Montana and Pennsylvania, require hearings in cases involving the death penalty. Finally, some states require the applicant simply to be screened for eligibility requirements before a hearing becomes mandatory in any case.⁷⁸ Although not mandatory on all applications in most states, hearings are routinely held on at least some clemency applications in all of them.

In Florida and Oklahoma, all cases are docketed for consideration at scheduled meetings wherein persons concerned may appear before the Board. By Oklahoma statutory law, “[a]ll meetings of the Pardon and Parole Board shall comply with [the Oklahoma Open Meeting Act].”⁷⁹ South Carolina, likewise, mandates that its Board of Probation, Parole, and Pardon Services “grant hearings and permit arguments and appearances by counsel or any individual before it...while considering a case for parole, pardon, or any other form of clemency provided for under law.”⁸⁰ Although not explicitly required by statute, the

“The notion that clemency is a safeguard against the execution of the innocent necessitates clemency proceedings in which evidence is presented and reviewed...”

—UCLA Law Review

Arizona Administrative Code provides that “[a]fter an eligible applicant has completed all application requirements, the Board *shall* schedule a hearing and notify the applicant in writing of the date and time of the hearing.”⁸¹

The Pennsylvania Board of Pardons is not required to hold a hearing on every application for clemency, although it is required to vote in a public meeting as to whether a hearing will be held.⁸² In capital cases, however, death-sentenced inmates seeking commutation of their sentences automatically receive a public hearing.⁸³ The Montana Board of Pardons and Parole likewise accords all death-sentenced inmates seeking clemency a public hearing on their applications.⁸⁴

⁷⁸ See, e.g., TENN. COMP. R. & REGS. 1100-1-1-.15(1)(b)(2), (c)(1) (2004); TENN. COMP. R. & REGS. 1100-1-1-.15(1)(a)(1) (2004); UTAH CODE ANN. § 77-27-5.5(7)(b) (2003).

⁷⁹ OKLA. STAT. ANN. tit. 57, § 332.2(G) (West 2004).

⁸⁰ S.C. CODE ANN. § 24-21-50 (Law. Co-op. 2004).

⁸¹ ARIZ. ADMIN. CODE R5-4-201(E) (2004) (emphasis added).

⁸² 37 PA. CODE § 81.226(b) (2004).

⁸³ *Id.* § 81.231(b).

⁸⁴ MONT. ADMIN. R. 20.25.902(3) (2004).

Although their Boards' recommendations are not a prerequisite for clemency relief, the states of Illinois and Indiana also maintain exceptional practices with respect to this element of due process. By statute, the Illinois Prisoner Review Board must, "if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall confidentially advise the Governor by a written report of its recommendations which shall be determined by majority vote."⁸⁵ Before rendering a recommendation to the governor, the Indiana Parole Board by statute must "[c]onduct a hearing where the petitioner and other interested persons are given an opportunity to appear and present information regarding the application."⁸⁶

Additionally, the South Dakota Board of Pardons and Paroles holds hearings on all clemency applications.⁸⁷

The Oklahoma Pardon and Parole Board maintains a regular monthly docket on which persons who have pending clemency applications before the Board are scheduled for a hearing and at which they may personally appear. Notice of who is to be considered for clemency at the monthly meetings is given to all prosecutors in the state 20 days in advance.⁸⁸ Notice of the hearing of particular inmates is similarly given to the victim or victim's family, as well as information regarding the victim's right to testify before the Board at the hearing.⁸⁹

At the hearing, time is set aside for testimony from the prosecutor, the victim's family members, and the inmate or those acting on his behalf.⁹⁰ For security purposes, the Board regulates admittance to the hearings, and generally does not allow the inmate and the victim's family to be admitted at the same time.⁹¹ Victims' family members are able to address the Board for a total of five minutes on a particular case, and no more than two victim's family members per offender are allowed to speak.⁹² Statements made by the victim's family members are not considered confidential, as are most other communications between the victim's family and the Board.⁹³ Prosecutors and law enforcement officials are also allowed to address the Board, but if they speak on behalf of the victim's family they are subject to the same time limitations.⁹⁴ Persons speaking on behalf of an inmate are subject to

⁸⁵ 730 Ill. COMP. STAT. 5/3-3-13(c) (West Supp. 2003).

⁸⁶ IND. CODE § 11-9-2-2(b) (Michie 2003).

⁸⁷ S.D. ADMIN. R. 17:60:05:06 (2004); 17:60:05:08.

⁸⁸ OKLA. STAT. ANN. tit. 57, § 332.2(B), (C) (West 2004).

⁸⁹ *Id.*

⁹⁰ OKLA. ADMIN. CODE § 515:1-7-1(b)-(d) (2004).

⁹¹ *Id.* § 515:1-7-1(a).

⁹² *Id.* § 515:1-7-2(b).

⁹³ *Id.*

⁹⁴ OKLA. ADMIN. CODE § 515:1-7-2(c) (2004).

a two-minute time limitation, and no more than two people may speak on behalf of a single inmate.⁹⁵ The offender may also be eligible to appear, and there are no limitations imposed on the amount of time that he or she may take in addressing the Board.⁹⁶

In death penalty cases, the Oklahoma Board holds greatly expanded hearings. The legal representatives of the applicant and of the state are each given 40 minutes to present a case to the Board, and are allowed to reserve time for rebuttal.⁹⁷ The victim or victim's representative and the applicant are each given 20 minutes to present information to the Board.⁹⁸ The Board may ask questions of each presenter either during the presentations or afterward but, if asked during the presentation, the time taken to ask and answer questions is not counted towards the total time allotted.⁹⁹

CASE STUDY

Expanded Hearings in Oklahoma

Recent experience in Oklahoma underscores the value of having hearings, both to the Board and to parties to clemency petitions. In 1999, the Board decided that in death penalty cases it would drastically increase (in fact, double) the amount of time allowed to parties, family members of victims, and petitioners to present their testimony. The Board was concerned that complex cases could not be fairly decided in the abbreviated hearing time frame, especially when there were issues that had not been addressed by the courts because they were not timely presented there. The expanded hearings have “absolutely” allowed the Board to give more meaningful consideration to petitions and for parties to “properly present their argument[s],” says Susan Bussey, who was Chair of the Board when the new rule was decided and now is executive director of the Oklahoma Merit Protection Commission. “The longer hearings have helped. The Board members get better arguments, more detailed information,” echoes Terry Jenks, the Board’s director. “That is really an important thing when a life is at stake,” he concludes.

Ms. Bussey touts the value of the expanded hearings in augmenting fairness, and explains how important it is to hold hearings in the first place. “I can’t imagine not having

⁹⁵ *Id.* § 515:1-7-2(d).

⁹⁶ *Id.* § 515:1-7-2(e).

⁹⁷ Rules of Procedure for Clemency Hearing, Oklahoma Board of Pardons and Paroles (unpublished) (on file with author).

⁹⁸ *Id.*

⁹⁹ *Id.*

CASE STUDY

hearings,” she says. “I don’t know how on earth [a Board] can make a decision on death cases without coming together. To me... the whole idea of a parole board is to be a safeguard in the system. That’s going to require that people have some courage, and when you’re not out there in a public place it’s easy to hide and not do what needs to be done because you’re insulated.”

Practitioners agree that the newer Oklahoma procedure has improved the Board’s receptivity to issues that had not been fully discussed in the short hearings. Moreover, the earlier time frames were inadequate to engage in meaningful advocacy. “There is genuine benefit to being able to stand before [the Board] and explain [your] side,” notes Robert Jackson, an attorney who practices before the Board. In fact, since the change, he says, the Board has recommended clemency in a number of cases. Before that, the Board had rarely voted to recommend a commutation in a death case.

The Oklahoma Board seems to have taken stock of the system and genuinely attempted to increase fairness and due process by expanding the hearing length in death penalty cases.

The State of Florida also holds regular sessions at which it considers clemency applications and affords inmates and interested parties an opportunity to be heard on such requests. The Florida Rules of Executive Clemency provide that the Florida Board of Executive Clemency—which is composed of the governor and three members of the governor’s cabinet—hold regular meetings during the months of March, June, September, and December.¹⁰⁰ Inmates applying for clemency are not required to appear before the Board, but they are encouraged to do so, and the inmate, or anyone speaking on his or her behalf, must notify the Office of Executive Clemency of their intention to appear at least 10 days prior to the scheduled Board meeting.¹⁰¹ Individuals are limited to five minutes in addressing the Board, and all persons making presentations in favor of an applicant are limited to 10 minutes cumulatively.¹⁰² All persons opposing the application are likewise given a maximum of 10 minutes cumulatively.¹⁰³ At the hearing, the inmate’s counsel and the state are each allotted 15 minutes to present their arguments, and representatives of the victim’s family are allowed to speak for a cumulative time of five minutes.¹⁰⁴ If

¹⁰⁰ FLA. ADMIN. CODE ANN. r. 27-11(A) (2004).

¹⁰¹ *Id.* § 27-11(B).

¹⁰² *Id.* § 27-11(C).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the applicant is a death-sentenced inmate, however, the governor may extend the time for presentations before the Board.¹⁰⁵

In Montana, clemency hearings in non-capital cases are discretionary, but hearings are always held in capital cases.¹⁰⁶ Such hearings in Montana are public and recorded.¹⁰⁷ The Board hears “all relevant facts and information of the petitioner, his or her counsel and witnesses, and any opponents to the petition.”¹⁰⁸ The Board must keep a record of the names of all persons appearing before the Board on behalf of the person seeking clemency; the names of all persons appearing before the Board in opposition to the granting of clemency; and the testimony of all persons giving evidence before the Board.¹⁰⁹

Comparison with Texas

The Texas Board of Pardons and Paroles is not required to hear any cases, including those from inmates requesting commutations of and reprieves from their death sentences. Although new legislation, effective in 2004, explicitly makes the Board subject to the Texas Open Meetings Act in the performance of its administrative duties, the Board is specifically allowed by the Open Meetings Act to make clemency decisions by telephone conference.¹¹⁰ Moreover, the Board is specifically authorized by § 508.047(b) of the Texas Government Code to forego even meeting as a body in the performance of its clemency duties, appearing to exempt the Board from the provisions of the Open Meetings Act.¹¹¹

In practice, the Board does not meet or hold public hearings on clemency applications. Rather, the staff of the Board forwards documentation to the members, and this provides the basis for the vote. According to its 2003 annual report, the documentation always includes the petition for clemency and the offender’s criminal history.¹¹² Depending upon the type of clemency requested, the documentation may also include statements from the trial officials; medical records; letters from victims, their families, and the applicant’s family; and descriptions of family hardship or other exceptional situations that might warrant

¹⁰⁵ FLA. ADMIN. CODE ANN. r. 27-15(H) (2004).

¹⁰⁶ MONT. ADMIN. R. 20.25.902(3) (2004).

¹⁰⁷ *Id.* § 20.25.904(3).

¹⁰⁸ *Id.*

¹⁰⁹ MONT. CODE ANN. § 46-23-306 (2003). The Board must also keep a record showing that the return from the printer of the publication of the notice and order of hearing was on file prior to the hearing. *Id.*

¹¹⁰ TEX GOV’T CODE §§ 508.036(d), 551.124 (Vernon 2004).

¹¹¹ *Id.* § 508.047(b) (Vernon 2004). The Board was actually required to meet as a body when making clemency determinations for a brief period until a 1993 amendment to the statute exempted it from meeting entirely. *See* Acts 1990, 71st Leg., 6th C.S., ch. 25, § 19 (repealed 1993); Acts 1993, 73rd Leg., ch. 988, § 10.03.

¹¹² State of Texas Board of Pardons and Paroles 2003 Annual Report, at 24.

clemency.¹¹³ According to the Board's annual reports, the members receive all the documentation to consider before making their decisions.

Texas law authorizes the Board of Pardons and Paroles to decide clemency matters without even meeting as a body. Although some of the 38 death penalty states allowed for meetings and/or deliberations to occur in executive session, none of these states affirmatively condones the practice of refraining from meeting for clemency matters as Texas does.

In 2003, the Texas Board of Pardons and Paroles considered a total of only 285 applications for executive clemency. Additionally, the

The Texas legislature should provide that the Board must meet in public to make clemency determinations and should provide that public hearings must be held...

Board's size was reduced from 18 members to seven members. Requiring the Board to meet periodically in public and hold informal hearings on applications for executive clemency is therefore more feasible than it was before 2003, for two reasons. First, there are fewer people who need to be scheduled and assembled for meetings. Second, with the reduction in the Board size came a reduction in the parole workload of Board members, since the discontinued

Board members were retained as parole hearing officers. These officers are hearing only parole cases now, rather than both parole and clemency, so they have the capacity to dispose of more parole cases and reduce the workload on the actual members. Furthermore, giving one-half hour of hearing time to each of the 285 petitions in 2003 would only amount to about 12 hours of hearings per month.

Certainly there are some challenges to meeting and/or holding hearings to consider clemency petitions, given the state's size and the fact that each Board member handles both clemency and parole cases. But these challenges are not insurmountable, and the current state of affairs of an overburdened Board with inadequate time to meaningfully consider petitions is untenable. As in other areas, Texas need only look to other states for some ideas about how to enhance capacity. In Oklahoma, for example, Board members meet to handle both parole and clemency matters by traveling from region to region. Alternatively, the Board could, as Florida and other states do, set aside several days throughout the course of the year to hear and decide clemency applications as a body.

Dividing functions among members would also alleviate the pressure on the Board of handling both parole and clemency matters across the state. Connecticut could be a model in this respect. Until recently, Connecticut maintained the practice of having separate Boards make parole decisions and clemency decisions. The Connecticut legislature has recently merged the two Boards, but has still maintained a practice of having individual Board members assigned to specific functions, either to hear parole cases or to hear clemency cases.¹¹⁴ Clemency cases are heard by panels composed of those Board members assigned to hear clemency matters.¹¹⁵ If such a separation of functions were enacted in Texas, it would free some Board members from having to hear thousands of parole cases each year, and instead allow them to focus exclusively on the smaller numbers of clemency petitions. Although this would in theory increase the load on the remaining members to handle all the parole cases, the Board could consider adding more parole hearing officers to relieve the burden.

Other possible ways to enhance capacity include screening cases and holding hearings only for the most meritorious ones; installing hearing officers to assist in clemency determinations; use of technological solutions such as videoconferencing; and increasing support staff levels for Board members. While substantial changes probably need to be made to allow for more robust consideration of clemency petitions, these changes are necessary to realize the important goals of fairness and due process in Texas' clemency procedures.

Recommendations

- The Texas legislature should provide that the Texas Board of Pardons and Paroles must meet in public to make clemency determinations and should provide that public hearings must be held—either by the full Board or by a panel of the Board—on all applications for executive clemency.
- The hearing should allow time both for those who support and those who oppose the clemency request to present information and evidence to the Board, and the applicant should be represented by counsel if he or she so desires.
- If it is determined not to be feasible to hold hearings on all clemency applications, hearings should at a minimum be required for death-sentenced applicants.¹¹⁶

¹¹⁴ CONN. GEN. STAT. ANN. § 54-124a(e) (West Supp. 2004).

¹¹⁵ *Id.*

¹¹⁶ The Board considered only 17 in fiscal year 2003. State of Texas Board of Pardons and Paroles 2003 Annual Report, at 71.

Criteria Used in Clemency Determinations

Arbitrariness is a core concern of due process and equal protection as it affects both the fairness of particular proceedings as well as the relative treatment of similarly situated persons and cases.¹¹⁷ The due process clause requires that governments refrain from acting arbitrarily in all that they do, legislatively and executively, including in clemency proceedings.¹¹⁸ The existence and application of substantive criteria to guide decision-making, therefore, is essential to limiting arbitrariness and ensuring that clemency operates as the intended safeguard within the criminal justice system.

Best Practices

Although few states provide by statute an exhaustive list of criteria that their Boards must consider when deciding on clemency applications, some do provide at least some guidance, including establishing the burden that an applicant must meet for certain forms of clemency. Moreover, many Boards themselves have promulgated substantive criteria to be considered during the application process so as to ensure consistency in the clemency process.

In Tennessee, the governor's power to grant clemency is not conditioned on prior Board recommendation. However, in empowering the Tennessee Board of Probation and Parole to investigate and make clemency recommendations to the governor, Tennessee law provides that it do so "based upon its application of guidelines," thereby statutorily requiring the Board to adopt substantive criteria.¹¹⁹ The Tennessee Board has developed the following criteria to guide its clemency recommendations:

- 1 The nature and severity of the crime;
- 2 The applicant's institutional record;
- 3 The applicant's previous criminal record;

¹¹⁷ As the U.S. Supreme Court recently explained in *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998):

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action[.] ...

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.

¹¹⁸ Although, as mentioned earlier in the report, the U.S. Supreme Court has not found the interests at stake in non-capital clemency proceedings sufficient to warrant procedural due process protections, all government entities, including clemency boards, *are* subject to the core substantive due process guarantee of freedom from arbitrary government action, or "the exercise of power without any reasonable justification." *Id.* at 845.

¹¹⁹ TENN. CODE ANN. § 40-28-104(a)(10) (2003).

- 4 The views of the trial judge and the district attorney general who prosecuted the case;
- 5 The sentences, ages, and comparative degree of guilt of co-defendants or others involved in the applicant's offense;
- 6 The applicant's circumstances if returned to the community;
- 7 Any mitigating circumstances surrounding the offense;
- 8 The views of the community, victims of the crime or their families, institutional staff, parole officers, or other interested parties; and
- 9 Medical and psychiatric evaluation when applicable.¹²⁰

Montana law requires its Board of Pardons and Parole to "base any recommendation it makes on: (a) all the circumstances surrounding the crime for which the applicant was convicted; and (b) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency."¹²¹ The Montana Board itself has adopted and promulgated additional criteria to guide its recommendations to extend executive clemency to an applicant who:

- 1 Can satisfactorily prove innocence of a crime for which the person is serving or has served time;
- 2 Has demonstrated exemplary performance;
- 3 Submits newly discovered evidence showing complete justification or non-guilt on the part of the person;
- 4 Suffers from terminal illness or from a chronic disability;
- 5 Can satisfactorily prove that further incarceration would be grossly unfair;
- 6 Can satisfactorily prove that a death penalty should be avoided; or
- 7 Can satisfactorily prove extraordinary mitigating or extenuating circumstances exist.¹²²

South Dakota's Board of Pardons and Paroles provides that when deciding upon a clemency application, the Board use the following set of non-exhaustive criteria:

- 1 Substantial evidence indicates that the sentence is excessive or constitutes a miscarriage of justice;

¹²⁰ TENN. COMP. R. & REGS. 1100-1-1-.15(1)(d)(6) (2004).

¹²¹ MONT. CODE ANN. § 46-23-301(2) (2003).

¹²² MONT. ADMIN. R. 20.25.901A(5) (2004).

- 2 The applicant's innocence of the crime for which he was convicted has been proven by clear and convincing evidence;
- 3 The applicant has shown remarkable rehabilitation;
- 4 Substantial evidence indicates that the Board should be in a position at the earliest possible time to deal with the applicant as a parolee under supervision;
- 5 A review of the applicant's personal and family history; his or her attitude, character, capabilities, and habits; the nature and circumstances of the offense; and the effect the inmate's release will have on the victims of his crime and the community indicates that he or she has carried the stigma of the crime for a long enough period to justify its removal;
- 6 The applicant wishes to pursue a professional career from which society can benefit, but a felony conviction prevents it; and
- 7 The applicant's age and medical status is such that it is in the best interest of society that the inmate be released.¹²³

The Indiana Parole Board maintains one set of mandatory and a second set of permissive substantive criteria upon which it may base its clemency decisions. In making its recommendation to the governor, the Board *must* consider:

- 1 The nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime;
- 2 The offender's prior criminal record;
- 3 The offender's conduct and attitude during commitment; and
- 4 The best interests of society.¹²⁴

Additionally, in making its recommendation to the governor, the Indiana Board *may* consider:

- 1 The offender's previous social history;
- 2 The offender's employment during commitment;
- 3 The offender's educational and vocational training both before and during commitment;
- 4 The offender's age at the time of committing the offense and his age and level of maturity at the time of the clemency appearance;
- 5 The offender's medical condition and history;

¹²³ S.D. ADMIN. R. 17:60:05:12 (2004).

¹²⁴ IND. ADMIN. CODE tit. 220 r. 1.1-4-4(d) (2004).

- 6 The offender's psychological and psychiatric condition and history;
- 7 The offender's employment history prior to commitment;
- 8 The relationship between the offender and the victim of the crime;
- 9 The offender's economic condition and history;
- 10 The offender's previous parole or probation experiences;
- 11 The offender's participation in substance abuse programs;
- 12 The attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;
- 13 The attitudes and opinions of the victim of the crime, or of the relatives or friends of the victim;
- 14 The attitudes and opinions of the friends and relatives of the offender;
- 15 Any other matter reflecting upon the likelihood that the offender, if released upon parole, is able to and will fulfill the obligations of a law-abiding citizen; and
- 16 The offender's proposed places of employment and of residence were he to be released on parole.¹²⁵

Comparison with Texas

The Texas Board of Pardons and Paroles has not promulgated any list of criteria that it will consider when making clemency determinations. Neither has the legislature provided a list of factors that the Board must or should consider when deciding clemency matters. As a result, there is no guarantee within the Texas clemency process that decisions by the Board are not arbitrary, another core element of due process.

Recommendations

The states of Indiana, Montana, South Dakota, and Tennessee all serve as models that Texas should embrace with respect to the provision of guidelines for clemency determinations.

¹²⁵ IND. ADMIN. CODE tit. 220 r. 1.1-4-4(e) (2004).

- The Texas legislature should either mandate that the Board adopt guidelines and substantive criteria upon which to base its clemency recommendations, or should supply a list of criteria itself. The list of criteria should include, but not necessarily be limited to:
 - 1 Whether the applicant presently suffers or formerly suffered from psychiatric illness, regardless of the extent to which it may have influenced his involvement in the offense of conviction;
 - 2 The age of the applicant at the time of the offense of conviction;
 - 3 The degree of the applicant's participation in the offense of conviction, and the sentences imposed on other persons convicted of offenses arising out of the same events;
 - 4 Whether the applicant is remorseful for his offense;
 - 5 Any good character evidence offered by the applicant;
 - 6 Whether the applicant had full and fair access to the courts, including whether the applicant received competent and effective representation at every stage of the legal process, including on appeal and in any post-conviction habeas corpus proceedings;
 - 7 Any instance of misconduct in the investigation or prosecution of the case;
 - 8 Any lingering doubt about the applicant's guilt of the capital offense, including doubt about whether he may be guilty only of a lesser included offense, regardless of whether the evidence of innocence is sufficient to merit judicial relief;
 - 9 The applicant's disciplinary record while incarcerated, including specifically whether the applicant has committed acts of violence against other offenders or against persons employed by the Texas Department of Criminal Justice, Correctional Institutions Division;
 - 10 Whether the applicant was mistreated as a child and/or experienced extreme poverty during childhood;
 - 11 Any evidence that the applicant has been rehabilitated;
 - 12 Whether the applicant has performed exceptional acts of public service or heroism;
 - 13 Whether provisions of the Vienna Convention, or any other treaty to which the United States is a party, were violated; and
 - 14 Any other factors the Board deems merit consideration.

Innocence and Trial Official Recommendations

The Texas Board of Pardons and Paroles maintains by far the most stringent requirements of any of the examined states for considering or recommending a person who has been wrongly convicted for a pardon on the basis of innocence. Although not statutorily mandated, the Board maintains a rule stating that before any clemency application for

The Texas Board of Pardons and Paroles is extraordinary for the extent to which it has relinquished its prerogative to independently assess evidence of innocence...

a pardon based on innocence is considered by the Board, it must first have the unanimous written recommendation of the trial officials, which are the district attorney's office that prosecuted the case, the chief of the law enforcement agency that investigated the case, and the judge of the court that presided over the case.¹²⁶ This rule is not found in any other examined state's statutory or administrative regulations governing clemency. Only one other state, Alabama,

requires the recommendation of a trial official before a presently incarcerated inmate can be pardoned on grounds of innocence.¹²⁷ Alabama, however, requires only the recommendation of *either* the judge or prosecuting attorney, not both.

Moreover, Texas is the only state where the Board requires an applicant for a pardon for innocence to provide a certified order or judgment of a court and a certified copy of the findings of facts with respect to the new evidence. The Board of Pardons and Paroles is therefore extraordinary for the extent to which it has relinquished its prerogative to independently assess evidence of innocence, instead choosing to rely on other entities—such as the district attorney's office and the judiciary—and thereby abandoning its role as a “fail safe” within the criminal justice system.

The Texas Board also is alone in requiring the recommendations of a majority of trial officials before even considering a basic application for commutation of sentence in non-capital cases. Although most states require or encourage the input of trial officials as part of the decision-making process, no other examined state requires recommendations before considering commutation requests.

¹²⁶ 37 TEX. ADMIN. CODE § 143.2 (West 2004).

¹²⁷ ALA. CODE § 15-22-36(c) (Supp. 2004).

History of the Rule

Interestingly, the Board was not always so dependent upon other entities and its rules were not always so restrictive. In the Board's 1951 Fourth Annual Report of the Board of Pardons and Paroles of the State of Texas, the Board included a section entitled "Eligibility for Clemency Consideration" in which it described its eligibility requirements. The final paragraph of the section states that "Restrictions on eligibility for consideration shall not apply in unusual cases such as those in which it appears from the evidence, not available at trial, that the inmate was wrongfully convicted."¹²⁸ This provision remained in the Board's guidelines for many years. Oddly, its disappearance from the Board's rules appears to be the result of editorial oversight rather than a deliberate restriction on the Board's authority to consider evidence of innocence presented to it.

At the time of the Fourth Annual Report, the Texas Board of Pardons and Paroles did not grant paroles because, ever since the 1936 constitutional amendment empowering it to do so, the legislature had never appropriated any funding for it.¹²⁹ Thus, its guidelines did not address parole law until it began to actually issue paroles. In the Board's Ninth Annual Report, it began addressing parole. Its guidelines therefore contained a new section entitled "Eligibility for Parole Consideration," which replaced the section entitled "Eligibility for Clemency Consideration."¹³⁰ In this section remained the statement regarding restrictions being inapplicable to unusual cases, such as those involving the wrongful conviction of an innocent person. Although the Board maintained a section describing the different forms of clemency relief and when they may be granted, the section describing general eligibility for clemency never reappeared in its reports.

The new section of the Board's annual report describing parole eligibility retained the clause regarding waiving of restrictions on eligibility in light of evidence of wrongful conviction for the next two years.¹³¹ In the Board's 12th Annual Report, it rewrote the "Eligibility for Parole Consideration," dividing it into subsections. The clause providing for the waiver of all eligibility restrictions in cases of wrongful

¹²⁸ Fourth Annual Report of the Board of Pardons and Paroles of the State of Texas (September 1, 1950 through August 31, 1951), at 11.

¹²⁹ The Fourth Annual Report states that "[s]ince the Legislature has never appropriated the funds necessary for the operation of the Adult Probation and Parole Law in its entirety, the Board does not grant Paroles. Instead, the Board only recommends various forms of executive clemency which the Governor may grant or refuse." *Id.* at 7.

¹³⁰ Ninth Annual Report of the Board of Pardons and Paroles of the State of Texas (September 1, 1955 through August 31, 1956), at 11.

¹³¹ See Tenth Annual Report of the Board of Pardons and Paroles of the State of Texas (September 1, 1956 through August 31, 1957), at 11; Eleventh Annual Report of the Board of Pardons and Paroles of the State of Texas (September 1, 1957 through August 31, 1958), at 11.

conviction was removed in this report, almost certainly due to the editor's realization that the clause did not make sense in a section dealing with parole eligibility requirements. Because there was no section dealing with general entitlement to clemency, the clause was entirely omitted in this and all subsequent reports.

Recommendations

- The legislature should prohibit the Board from requiring the unanimous written recommendation of the trial officials and a certified court order, judgment, and statement of facts before it will consider pardons on the grounds of innocence.
- The legislature should likewise prohibit the Board from requiring the recommendation of a majority of the trial officials before it will consider granting a commutation of sentence in any case.
- Alternatively, the Board should change its own rules to effect the suggested changes.

Board Independence

Given the increase in the number of incarcerated persons throughout the United States, most states have established specialized Boards to process clemency applications. Several of these states—including Texas—have endowed these Boards through constitutional amendments with some authority over the actual issuance of clemency relief itself, indicating an intent to establish some independence from core executive control over clemency matters. Thus, for those states like Texas wherein the governor's clemency power has been curtailed and has been channeled either partially or entirely through a specialized Board, the independence of those Boards from direct executive control is an important indicator of their ability to function as safeguards. One important measure of executive control is the ability of governors to remove members of the Boards.

Best Practices

Of the 15 other examined states for which clemency depends upon the review of a specialized Board—those states which have conditioned the governor's exercise of clemency power on the favorable recommendation of a clemency Board and those states which have placed primary clemency authority in a clemency Board—only Texas and

Idaho maintain a provision allowing the governor to remove an appointee to the Board for any reason.¹³² The governor's ability to remove members of the clemency Board for any reason runs counter to the original rationale for establishing and maintaining a specialized clemency Board: to independently and objectively assess the merits of cases before it without political influence.

The State of Georgia has implemented a clemency system whereby the Georgia Board of Pardons and Paroles has complete authority over the issuance of clemency relief. The governor's role in the clemency process is limited to the appointment of Board members, who serve seven-year terms and are approved by the Georgia Senate.¹³³ Once appointed, members may be removed only for cause or for incapacitation.¹³⁴ The Georgia Board's independence from executive control is typified by its treatment of cases in which inmates claim innocence.

Independence ... from direct executive control is an important indicator of (a Board's) ability to function as a safeguard.

Board rules provide that, notwithstanding other limitations on pardon eligibility, a pardon may be granted to a person who proves his innocence of the crime for which he was convicted. An inmate may submit to the Board newly discovered evidence "proving the person's complete justification or non-guilt."¹³⁵ Such evidence, which may be submitted in writing any time after conviction, is evaluated by the Board to determine whether a pardon should issue.¹³⁶

Montana is another state that has channeled clemency authority through its Board. Unlike Georgia, Montana's governor retains ultimate clemency authority, but may only grant clemency in non-capital cases on the affirmative recommendation of the Montana Board of Pardons and Parole. The governor is responsible for appointing members to the Board and for designating its chairperson but, once appointed, members may be removed only for cause. Like Georgia, the Montana

132 The 15 other states are Alabama, Arizona, Connecticut, Delaware, Florida, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and Utah.

133 GA. CONST. art. IV, § II, ¶ I.

134 GA. CODE ANN. § 42-9-12-14 (2004, 1997). A "removal committee" composed of the governor, the lieutenant governor, and one other appointee of the governor other than the attorney general, constitute the removal committee and can pass regulations regarding the procedures to be observed in removing members of the Board for cause and determinations as to what conduct by a Board member constitutes cause for removal.

135 GA. COMP. R. & REGS. r. 475-3-.10(3)(a) (2004).

136 *Id.*

Board takes it upon itself to evaluate evidence submitted to it offered to prove the innocence of an inmate who claims to have been wrongfully convicted.¹³⁷

The Montana Board's administrative rules even state that, although those who plead guilty or are found guilty by juries are "deemed guilty," the Board reserves the right to initiate an investigation into any case where there is offered "substantial evidence showing innocence or complete justification on the part of the person convicted."¹³⁸

South Dakota's governor is not required to have an affirmative recommendation from its clemency Board prior to granting clemency. The South Dakota Board of Pardons and Paroles, which makes non-binding recommendations to the governor, is nonetheless afforded sufficient independence from control by those who appoint the members and sufficient independence to evaluate cases that come before it. South Dakota's Board consists of nine members, and only three are appointed by the governor.¹³⁹ The attorney general and the Supreme Court each appoint three members as well.¹⁴⁰ The South Dakota Board's regulations provide that it will consider evidence of innocence submitted to it by an applicant, and will make a favorable recommendation if the applicant can prove his or her innocence by clear and convincing evidence.¹⁴¹

Comparison with Texas

Texas is in a minority of the 38 examined states in that it does not guarantee Board members insulation from removal except if there is cause. In Texas, a governor "may remove a member of the Board, other than a member appointed by another governor, at any time and for any reason."¹⁴² As a result, the Board cannot maintain the necessary independence from executive control to serve effectively as an objective and specialized decision-making body. In short, it is open to political influence.

Texas law has not always been so. Because the very reason the Board was created was to place an objective and independent body between the governor and clemency grants, the 1936 constitutional amendment to the Texas Constitution required that one member of the Board be appointed by the governor, one member by the Chief Justice of the Supreme Court, and one member by the presiding Justice of the Court of Criminal Appeals. Thus, originally, the governor only had appoint-

¹³⁷ 20.25.901A(5) (2004).

¹³⁸ MONT. ADMIN. R. 20.25.901A(7) (2004).

¹³⁹ S.D. CODIFIED LAWS § 24-13-1 (Michie Supp. 2003).

¹⁴⁰ *Id.*

¹⁴¹ S.D. ADMIN. R. 17:60:05:12 (2004).

¹⁴² TEX. GOV'T CODE § 508.037(c) (Vernon 2004).

ment power over one-third of the Board as it existed at that time. Subsequent changes handing regulatory power over to the legislature resulted in the governor gaining sole appointment power. Yet, even then, Board members once appointed could not easily be removed.

The Texas legislature first addressed removal in 1989. It provided at that time that the governor could remove a member of the Board at any time and for any reason, *but only subject to the approval of a majority of each house of the Legislative Criminal Justice Board.*¹⁴³ Only in 1990 did the Texas legislature allow the governor to remove on his own authority any Board member.¹⁴⁴

Recommendations

- The legislature should provide that the governor may remove any member of the Texas Board of Pardons and Paroles only for cause.

¹⁴³ See Acts 1989, 71st Leg., ch. 785, § 5.01, Sec. 3 (repealed in part 1990).

¹⁴⁴ Acts 1990, 71st Leg., 6th C.S., ch. 25, § 19, Sec. 3.

CHAPTER 4

Conclusion

In addition to intervening where a petitioner is deserving of mercy or where fairness demands it, executive clemency serves an important “safeguard” function in our modern justice system. In our current system, innocent persons can be left with no recourse but the clemency system, and the courts recognize that clemency is expected to step in when such a situation occurs. Texas has an obligation to offer petitioners a system that can serve that protective function and that is accountable. Particularly where a life interest is at stake, procedures should be open and thorough, adhering to the principles of due process.

This examination of best practices in the 38 death penalty states has been undertaken to identify ways in which Texas’ clemency system can be fine-tuned to ensure that justice is truly served. The four areas in which changes are recommended are Board meeting and hearing practices, where Texas stands out by failing to provide minimal process for even death-sentenced applicants; criteria used to make critical clemency determinations, which are lacking in Texas; access to the system for those who are innocent; and the independence of the Board.

The changes suggested in this report would demonstrate the state’s commitment to securing the faith of the citizens of Texas in the clemency system. These changes also would promote the full, fair, and consistent examination of clemency petitions.

A complete copy of this report is provided on the attached CD, along with an Appendix providing more detailed state-by-state data used as a basis for this report. *The Role of Mercy: Safeguarding Justice in Texas Through Clemency Reform* may be downloaded from the websites: www.texasappleseed.net and www.texasinnocencenetwork.org.

Clemency plays a critical role in ensuring our system of justice is fair and equitable, but several indicators suggest that Texas' clemency practices are failing to safeguard justice in Texas. This examination of states' best practices was undertaken to identify ways to improve Texas' clemency system to ensure justice is truly served.

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