Comment

The Executive Summary: Working Within the Framework of the Texas Clemency Procedures

Sarah Hunger*

I. INTRODUCTION

In 1998, Juanita Gonzalez, a member of the Texas Board of Pardons and Paroles ("the Board"), submitted her vote to deny Joseph Stanley Faulder clemency less than two hours after receiving his petition.[1] This incident and a subsequent 1998 hearing on the matter

* J.D. candidate, The University of Texas School of Law, 2011; B.A., The University of Notre Dame. I would like to thank Jim Marcus, Maurie Levin, and Rob Owen for introducing me to these important issues in a very valuable clinic experience and for assisting me with my research on this project. I would also like to express my gratitude for the continued love and support of my family in all of my endeavors.

[1] Testimony of Victor Rodriguez, Transcript of Record at 111, Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS (W.D. Tex. Dec. 28, 1998).

established what many practitioners in Texas had long suspected: the members of the Board often do not review the lengthy clemency petitions in making their recommendation to the governor. More recent investigation into the clemency review procedures of the governor's office reveals a similarly low standard.[2]

Neither the Faulder hearing nor the investigation into the governor's practices, however, changed the clemency procedures employed by either the Board or the governor.[3] According to the court, while "[i]t is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal," the Constitution does not require the Board to implement a higher standard.[4] These events did not prompt change in how advocates file clemency petitions on behalf of their clients.[5] Despite the publicity surrounding the Board's standard and its affirmation by the courts for more than a decade, advocates continue to file lengthy petitions on behalf of their clients, and decision makers continue not to read them in their entirety, if at all.

Although advocates should continue to challenge the constitutionality of the minimal standard of review, it is more immediately essential to alter the format of clemency petitions to effectively communicate information within the current framework of minimal review. As one technique of effective presentation, I propose that each clemency petition include a one-page "Executive Summary" of the material presented in the petition. The inclusion of such a summary will increase the likelihood that the governor and members of the Board will be informed of the central issues in the petition, even if they do not read the petition in its entirety.

II. A DECADE OF STAGNANCY: THE LOW STANDARD OF REVIEW IN TEXAS

Throughout the past decade, the standard of review of clemency petitions in Texas has remained very low. This procedure, upheld by the courts, involves both the governor and the Board. The Board consists of seven members who read clemency petitions and make a recommendation to the governor.[6] The governor then submits a final determination.[7] In capital cases, the governor is not permitted to grant

---

[2] *See* Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July–Aug. 2003, *available at* http://www.theatlantic.com/magazine/archive/2003/07/the-texas-clemency-memos/2755/ (detailing the process as implemented in former Governor Bush's administration); *infra* subpart II(A).

[3] *See infra* subpart II(A).

[4] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 16 (W.D. Tex. Dec. 28, 1998).

[5] *See infra* subpart III(A).

[6] Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. LAW 37, 82 (2009).

[7] *Id.*

clemency without the written recommendation of the Board, but he is able to grant one thirty-day reprieve without a recommendation.[8] Thus, the standard employed by the Board is often more influential than the standard employed by the governor.

A. "Legal Fiction": The Low Standard of Review Employed by the Board and the Governor

Nevertheless, the low standard employed by both actors—the governor and the Board—is clearly evidenced by memos, court opinions, regulations, and interviews. In particular, two sources establish the low standard set forth in the procedure for clemency review by the Board: judicial findings and the regulations governing the Board. In reviewing the standard employed by the Board, many courts have consistently found it to be low. For example, in the pivotal 1998 hearing, federal district Judge Sam Sparks wrote an eighteen-page order critiquing the process governing the review. He remarked upon the Board members freely admitting that they do not consider all of the information submitted with clemency applications.[9] As an example, he noted that some information never made it to the Board members. In fact, four thousand letters were written on behalf of Faulder, but few were forwarded to the members for their consideration.[10] In addition, Judge Sparks commented on the Board's secrecy, noting that there is "absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the governor, can find out why they did this."[11] He then famously concluded, "a flip of the coin would be more merciful than these votes."[12] In Karla Faye Tucker's case, various courts made similar observations. A state district court, for example, echoed these same concerns, finding it particularly distressing that the Board does not meet to discuss the petition and the recommendation.[13]

---

[8] *Id.*

[9] Daniel T. Kobil, *Forgiveness & the Law: Executive Clemency and the American System of Justice*, 31 CAP. U. L. REV. 219, 236 (2003) (citing *Faulder*, No. A-98-CA-801-SS at 10 n.5). The information submitted in this clemency petition included a fifteen-page letter from the Secretary of State, Madeleine Albright. Michelle McKee, *Tinkering with the Machinery of Death: Understanding Why the United States' Use of the Death Penalty Violates Customary International Law*, 6 BUFF. HUM. RTS. L. REV. 153, 177 (2000). The letter did not arrive until after fourteen members had submitted their vote. Upon receipt of the letter, only one requested a new voting form. *Faulder*, No. A-98-CA-801-SS at 13.

[10] *Faulder*, No. A-98-CA-801-SS at 10 n.3.

[11] Berlow, *supra* note 2, at 6. *See also* Kobil, *supra* note 9, at 237 ("Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and the autonomy of the system rather than carrying out an efficient, legally sound system.") (citing *Faulder*, No. A-98-CA-801-SS at 10 n.3).

[12] Berlow, *supra* note 2, at 6 (citing *Faulder*, No. A-98-CA-801-SS at 10 n.3).

[13] Allen L. Williamson, note, *Clemency in Texas—A Question of Mercy?*, 6 TEX. WESLEYAN L. REV. 131, 148 (1999).

The concurring judges on the Texas Court of Criminal Appeals similarly declared the Board's closed process to be unwise and a "legal fiction."[14]

In addition to the conclusions reached by the courts, the low standard of review is evidenced by the practices of the Board itself. One indication of this standard is that the Board deliberates in secret, if it chooses to deliberate at all.[15] In fact, the current Board directives establish that Board members shall submit their votes by facsimile or by hand, enabling each member to vote without conducting in-person deliberations.[16] If the Board were to meet, there would be no record of the deliberations because the Board does not conduct open meetings when discussing clemency petitions. Because there are no open meetings, there is no record of the deliberations.[17]

Furthermore, the Board is not bound by any specific criteria in making its recommendation.[18] Both the observations by Judge Sparks and the statements by the current and past Board members illustrate this fact. Judge Sparks noted that in the hearing, most of the Board members testified that they did not "read every word on every line of every piece of paper in the clemency application."[19] In interviews for an article in The New Yorker, one current Board member disclosed that he views his role in reviewing the petition as limited to verifying that everything is in order and ensuring that there are no glaring errors.[20] Another member disclosed that the Board receives many reports during the clemency process, but that they do not have the mechanisms to vet them.[21] This same Board member also stated that the name Willingham, a defendant that filed for clemency during the member's tenure on the Board, did not "ring a bell."[22]

In making the final determination, the governor exercises a similar standard. This is most clearly evidenced by the memos relied upon by former Governor Bush in making this final determination in each case. These memos, written by legal counsel Alberto Gonzales, typically ranged between three and seven pages and included little or nothing regarding the grounds raised in the clemency petition.[23] Based upon this

---

[14] *Ex parte* Tucker, 973 S.W.2d 950, 951 (Tex. Crim. App. 1998) (Overstreet, J., concurring).

[15] Steve Woods, *A System Under Siege: Clemency and the Texas Death Penalty After the Execution of Gary Graham*, 32 TEXAS TECH L. REV. 1145, 1162–63 (2001).

[16] Tex. Bd of Pardons & Paroles, Board Directive 143.300(III)(A) (Sept. 15, 2009) (on file with author). This procedure is known as "death by fax." *See* David Grann, *Trial by Fire*, NEW YORKER, Sept. 7, 2009, 42, 62.

[17] *See* Woods, *supra* note 15, at 1162–63 (2001) (explaining that the Board is not bound by the open meetings requirement and therefore the contents are not submitted as public record and are not subject to public inspection).

[18] *See* McKee, *supra* note 9, at 176 (asserting that the members of the Board do not give reasons for their votes or use any standard in making their decisions); Grann, *supra* note 16, at 62 (noting that the Board is not bound by specific criteria).

[19] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 15 (W.D. Tex. Dec. 28, 1998).

[20] Grann, *supra* note 16, at 62.

[21] *Id.*

[22] *Id.*

[23] Berlow *supra* note 2, at 2. "In his summaries of the cases of Terry Washington, David Stoker, and Billy Gardner, Gonzales did not make [former] Governor Bush aware of concerns about

description of the facts of the crime, the procedural history, and a short description of the defendant's background, former Governor Bush would make a final decision in a thirty-minute meeting, often on the day of the scheduled execution.[24] Gonzales further admitted that it was not uncommon for former Governor Bush to make a final determination without either Gonzalez or Bush having read the petition.[25]

Unlike Governor Bush, Governor Perry refuses to disclose his clemency memos, making it more difficult to pinpoint the exact standard of review that he employs.[26] Recently, however, the Innocence Project obtained all of the records pertaining to an arson report filed as a supplement to the Willingham clemency petition.[27] These documents show that both the Board and the Governor received the report, but neither "has any record of anyone acknowledging it, taking note of its significance, responding to it, or calling any attention to it within the government."[28] This report indicated that the arson evidence relied upon at trial was faulty, and would have been of great significance in reviewing a petition for clemency.

As illustrated by the Board's procedures and the Bush memos, it is clear that these clemency petitions are neither read in their entirety nor considered as carefully as they could be. As a result of this structure, certain petitioners are not only denied relief by rushed and uninformed decision makers, but are also denied a decision that is based upon an understanding of the defendant's best arguments.

B. Review by the Courts Leads to Preservation of the Standard

The low standard of review employed by the Board and the Governor has not gone unnoticed by the courts. Upon each review of this procedure, however, the courts uphold the low standards employed by the Board and the governor, concluding that they meet the minimal due process requirement established by the Supreme Court in Ohio Adult Parole Authority v. Woodard.[29] These holdings are important because they reaffirm the need to work within the framework of minimal review in order to be the most effective advocate possible.

---

ineffective counsel, essential mitigating evidence, and even compelling claims of innocence." *Id.* at 7.

[24] *Id.* at 1.

[25] *Id.* at 2.

[26] James C. McKinley, Jr., *Controversy Builds in Texas over an Execution*, N.Y. TIMES, Oct. 20, 2009, at A14.

[27] Grann, *supra* note 16, at 62.

[28] *Id.*

[29] 523 U.S. 272 (1998).

Under *Woodard*, the Court reaffirmed its position that pardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review.[30] In her concurrence, Justice O'Connor asserted that some minimal procedural safeguards apply to clemency proceedings, but that judicial intervention might only be warranted "in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[31] These examples have been widely cited by lower courts in upholding the standard of minimal procedural safeguards.

The *Faulder* hearing and appeals were no exception. As discussed earlier, the *Faulder* hearing upheld the standards exercised in clemency review in Texas, heavily relying upon the Supreme Court's ruling in Woodard. In his order, Judge Sparks declared the standard "extremely poor and certainly minimal," but concluded that it nonetheless adhered to the "minimal procedural safeguards" required under Woodard.[32] The Fifth Circuit echoed these standards in its review of the Faulder hearing, upholding Judge Sparks' holding because Faulder was not denied access to Texas' clemency procedures nor was his petition determined by a coin flip.[33] Although the process has been declared poor and minimal, the Board and the governor are acting constitutionally under the Woodard regime.

Moreover, neither the Board nor the Texas legislature have enacted the further procedural safeguards recommended by the courts. In his order, Judge Sparks advised the Board to enhance the existing procedural safeguards, even though it was under no constitutional obligation to do so.[34] These suggestions—that the Board members succinctly state the reasoning behind their vote, hold hearings, and distribute the full petition to all members with authority—have yet to be added.[35] The lessons in the decade post-Faulder indicate that neither the Board nor the legislature will change the standard. Given this pattern, it is important for advocates to effectively work within this framework, as even suggestions by a federal judge appear to fall on deaf ears.

---

[30] *Id.* at 276.

[31] *Id.* at 289 (O'Connor, J., concurring).

[32] Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS at 15 (W.D. Tex. Dec. 28, 1998).

[33] Faulder v. Tex. Bd of Pardons & Paroles, 178 F.3d 343, 344 (5th Cir. 1999). The court further asserted, "The Board members reviewed the information they believed material to Faulder's request, and each one independently determined whether clemency ought be recommended. . . . We need not go further in advising the Board what procedures it might choose to adopt in the future, because what they did in this case complied with the constitutional minimum set forth in *Woodard*." *Id.* at 345.

[34] *Faulder*, No. A-98-CA-801-SS at 16.

[35] *Id.* The only change made in this area is the method by which the Board votes. Instead of voting at any time after receiving the petition, the members must vote at 1:00 p.m. two days before the execution. There are no provisions for listing reasoning behind the vote. Clemency for Capital Cases, Board Directive § 143.300 (Sept. 15, 2009) (on file with author).

III. METHOD OF FILING PETITIONS

A. Status Quo: Clemency Petitions and the Laws Governing Them

Before assessing the merits of new strategies for filing clemency petitions, it is important to establish the current form clemency petitions take and understand the laws governing their submission. Under the Texas Administrative Code, a prisoner petitioning for commutation of his death sentence to a lesser penalty must submit a written request setting forth all of the grounds upon which the application is based, along with his full name, the county of conviction, and execution date.[36] A petitioner may file supplemental information, including but not limited to amendments, supplements, addenda, and exhibits.[37] There are no restrictions upon the order or format of the required information or the supplements.[38]

A petition for reprieve of execution must contain in its application specified information, including a brief statement of the offense for which the prisoner has been sentenced to death, the appellate history of the case, the legal issues raised during the judicial process, the requested length of the reprieve, the effect of the prisoner's crime upon the family of the victim, and all grounds upon the basis of which the reprieve is requested.[39] As with petitions for commutation, there is no restriction upon the format or order of this information.[40] The Executive Summary, discussed in subpart III(B), is not precluded by any of these guidelines.

As presently submitted, a typical clemency petition ranges from ten to one hundred fifty pages and includes the elements listed above.[41] Most begin with an introduction detailing the relief requested, the details of the crime, the procedural history, and the basis of relief.[42] The order of these details, however, is not always to the petitioner's advantage. In fact, one petition begins, "Frances Newton is scheduled to be executed on December 1, 2004. She was convicted of murdering her husband and

---

[36] 37 TEX. ADMIN. CODE §143.57(a)(2) (2006) (Tex. Bd. of Pardons & Paroles, Commutation of Death Sentence to Lesser Penalty).

[37] *Id.* at §143.57(c). Petitioners often submit letters, videos, and tapes along with their petition. Testimony of Victor Rodriguez, Transcript of Record at 111, Faulder v. Tex. Bd of Pardons & Paroles, No. A-98-CA-801-SS (W.D. Tex. Dec. 28, 1998).

[38] *Id.*

[39] 37 TEX. ADMIN. CODE § 143.42 (1984) (Tex. Bd of Pardons & Paroles, Reprieve Recommended by Board).

[40] *Id.*

[41] *See* In re Jeffrey Lee Wood, Application for Commutation of Sentence, 2008; In re Toronto Markkey Patterson, Application for Reprieve from Execution and Commutation of Sentence, 2002; In re Frances Newton, Application for Reprieve from Execution, Nov. 9, 2004; In re Napoleon Beazley, 2001.

[42] *See* In re Jeffrey Lee Wood, Application for Commutation of Sentence, 2008.

two small children for the purpose of collecting the proceeds from life insurance policies."[43] If the governor or Board members were to open to the introduction of the petition, the first sentence they would read is a succinct and strong case for execution instead of a concise argument in favor of reprieve. This qualification is important because while the petition as a whole may be persuasive, the question is whether the presentation is effective, given the standard exercised in Texas.

The introduction generally spans several pages and is not presented separately from the remainder of the petition.[44] Lengthier petitions often include a more detailed statement of the facts and procedural history before explaining the grounds for relief. In a minority of petitions, the introduction focuses solely on the grounds for relief, but even these portions span several pages, include substantial detail, and, most importantly, are not separate from the lengthy petition.[45] Therefore, reading these introductions is functionally the same as reading the petition, which the members do not do. If the Board member has no intention of reading the petition, he will not even see the contents of the introduction. Furthermore, in some petitions, merely reading the beginning of the introduction provides a stronger argument for the state than the petitioner.

B. "Executive Summary"

An unsettling pattern has arisen due to the lack of progression in either the standard of review or the method of filing clemency petitions: advocates file lengthy petitions on behalf of their clients that the Board members and the governor do not read. Given that the courts consistently uphold this standard, the burden now rests on advocates to present their clients' information in a way that ensures a more substantial consideration of the material than that which currently exists. Including an Executive Summary in the petition will increase the amount of information considered by the Board and the governor. Doing so will result in not only more effective advocacy, but also a more fair and just process. Advocates may not be able to change the politics of the decision makers, but they can present the material in a way that ensures the decision makers will have knowledge of the pertinent issues. In Texas, this concern is half of the battle.

The use of the Executive Summary is widespread in many other fields, such as business, academia, and other aspects of the legal practice. For example, academic works include abstracts before the introduction.

---

[43] In re Frances Newton, Application for Reprieve from Execution, 2004.

[44] *Id.*

[45] *See* In re Toronto Markkey Patterson, Application for Reprieve from Execution and Commutation of Sentence, 2002. This petition included an introduction comprised of a two-page-long paragraph indistinct from the fifty-nine-page petition.

Similarly, business executives generally do not read full reports—a shorter summary is prepared for them. Executive Summaries are even used within the clemency process. The governor receives a short memo from his legal counsel, and he depends on the memo rather than the petition in reaching his final determination. The only problem from the defense perspective is that the memo is written by someone unfamiliar with the issues rather than the defense team.

The Executive Summary in a clemency petition should be limited to one page and include only the most essential elements of the petitioner's claim, emphasizing the most compelling grounds for relief. Unlike the introductions currently included in the petitions, this summary is separate and distinct from the body of the clemency petition and serves an entirely different purpose: informing the reader of the petitioner's most persuasive grounds for relief.[46] In order to make this supplement conspicuous, it should be printed on a thicker or glossy paper and include stylistic distinctions such as bullet points, varying typefaces, graphics, and distinct subparts. In addition to creating both a visual and a tactile distinction from the body of the clemency petition, this type of summary is meant to immediately draw the attention of the reader in a way that an introduction cannot. The accessibility of this document and the information contained in it are two of its greatest virtues.

The Executive Summary confronts both major obstacles initially facing advocates filing these petitions: the Board's lax attitude in reading the petition and the governor's ignorance of its contents. In advocating effectively to a Board that admits to not reading the petition in full, the most important features of a clemency petition are its accessibility and brevity. As illustrated by their statements, Board members do not read lengthy petitions and often make recommendations within minutes of having received the petition.[47] The addition of an Executive Summary addresses both concerns. If the Board members decide not to read the entire petition, they will be casting their vote with at least having been informed of the most important information regarding the petitioner's claim.[48] The Executive Summary, placed at the beginning of the petition, will inform the Board of the main issues from the perspective of the petitioner. Thus, even if they do not read the details of the claims, the Board members will nonetheless be made aware of the most critical facts in the light most helpful to the petitioner.

If, as in *Faulder*, Board members do not intend to read any part of

---

[46] The introductions generally summarize the entirety of the petition, including the facts of the crime and the procedural posture.

[47] It is impossible to determine how long the individual board members spend considering the petition's contents. It is still possible, though, as indicated above, for the member to make his or her decision immediately upon receipt of the petition despite not casting his vote until two days before the scheduled execution.

[48] This Comment does not intend to address the motivations of those reading clemency petitions. It merely acknowledges that these motivations could exist and asserts the Executive Summary's relevance in either case.

the petition, the stylistic and tactile differences in the Executive Summary will catch their attention, resulting in a brief glance of the issues at the very least. While this modification may not cause the Board members to change their recommendation in every circumstance, they will at least think twice about their vote and recognize the important issues at stake in the petition.

The Executive Summary also addresses the concerns raised by the governor's low standard of review. Because the governor only reads that which his legal counsel summarizes, the key part of this process is the legal counsel's review of the petition.[49] As evidenced by the Gonzales memos, the grounds for the petition and other important factors are often not presented to the governor for his consideration.[50] The Executive Summary has potential to resolve this problem in two ways. First, if the reason that the petitioner's arguments do not appear in the clemency memos is that the legal counsel does not read the entire petition, the accessibility of this information may lead to its inclusion in the clemency memos. The legal counsel has many responsibilities, and even if he has the best intentions in accurately representing the information, he may not be able to fully absorb and read a hundred-page petition. A summary written by an advocate will be a much stronger rendition of the argument than that which a third party can generate.

Second, the Executive Summary could replace the clemency memo as the information that the legal counsel presents to the governor. Because current clemency petitions do not include an Executive Summary, the legal counsel must write his own, including information he thinks is important. If an advocate submits an Executive Summary, it might be the summary presented to the governor rather than one written by his legal counsel. In either scenario, the governor will have available the most important grounds raised in the clemency petition in making the final determination. As demonstrated in the Karla Faye Tucker case, the decision to deny clemency becomes considerably more difficult for the governor when confronted with an individual's grounds for clemency.[51]

Proponents of preserving the current form of clemency petitions may argue that including such a summary will only ensure that the Board and the governor will never read a clemency petition in its entirety. While this concern is significant, it is abundantly clear that these individuals do not read the clemency petitions in their entirety as a matter of practice. Instead of expecting the Board members or the governor to change their method of review without being required by the courts, a

---

[49] *See supra* subpart II(A).

[50] *See supra* subpart II(A).

[51] The only exception to the standard employed by former Governor Bush is in the case of a highly publicized clemency petition, such as that of Karla Faye Tucker. In this case, former Governor Bush reportedly did not sleep the night before the execution and reflected much longer than thirty minutes on the merits of her petition. In fact, he noted that it was one of the hardest decisions of his life. Berlow, *supra* note 2, at 6.

more effective strategy is to accept this standard and design the petition to appeal to those making the recommendation. Until the courts overturn this standard, the decision makers will continue to exercise it; ignoring this fact only renders the petition less effective.

IV. CONCLUSION

Clemency is a unique feature of the American justice system that allows prisoners to request relief based upon mercy or unfair adjudication in the legal system. In order for the clemency process to work effectively, however, the individuals making this determination must be aware of the grounds upon which the petitioner asserts his worthiness of mercy or the unfair adjudication of his claims. In a system such as Texas that reviews petitions with such a low standard, this basic requirement is the first, and often the most difficult, obstacle in the clemency review process.

Unfortunately, this standard has not improved in the past decade, and it is unlikely to do so in the near future. Thus, the burden currently lies on the advocates to assert these grounds in a manner that forces the Board and the governor to take notice of the critical issues in each petition. Inclusion of an Executive Summary will effectively communicate the crucial information to the decision makers and enable them to understand the main issues from the petitioner's perspective, all without requiring a change in their standard of review. Until it is possible to change the law or the politics in Texas, the best approach in advocating for a petitioner is to add a clear and concise Executive Summary to the full-length petition, thereby ensuring each decision maker's awareness of the essential elements of the petition.