

CLEMENCY IN THE STATE OF DELAWARE: HISTORY AND PROPOSALS FOR CHANGE

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In late 2011, the Delaware Board of Pardons (the “Board”) heard a sentence commutation application from a relatively young man who had served approximately five years of a fifty-four year prison sentence.¹ He had been sentenced after being convicted of a crime that classified him as an habitual offender under Delaware law, a classification that carried with it a heavy minimum mandatory sentence.² His most recent offense was holding up a woman at an ATM machine with a pocket knife. His prior crimes had been similar: all had been property crimes, none appeared to involve injuries to the victims. But, several of them had involved weapons that could have caused serious harm if the victims had resisted. A dangerous guy who should serve some serious jail time? Absolutely. A guy who should serve a sentence far longer than many inmates who have taken human life? Not so clear.

The Attorney General’s office provided its opinion on the commutation application, as it does under Delaware statute for all pardon applications.³ The Deputy Attorney General – no light touch on the subject of criminal sentences – told the Board (in more tactful language) that the applicant was an idiot who had insisted on going to trial on an open-and-shut case, turning down a plea offer for a much lighter sentence, and leaving the sentencing judge no choice but to sentence the applicant as an habitual offender once the inevitable conviction occurred. The Deputy Attorney General said: “We don’t think this man should be in prison for fifty-four years.” I said: “You know what my next question is going to be.” He said: “Yes, you want to know how long we think he should be in jail. And the answer is, at least another five years.” The Board recessed,⁴ and when it reconvened I told the applicant that the Board was not recommending a sentence commutation to the Governor, but that he could expect if he maintained good behavior in prison and reapplied in five years, that he would likely get a more favorable reception from those Board members still serving. No guarantees, but a good day for a young man otherwise expecting to spend most of the rest of his life in prison.

Other applicants’ appearances before the Board have not gone as smoothly. In 2010, the Board heard an application from a man who had hit his girlfriend in a convenience store parking lot about eight years prior. He had pled guilty to a misdemeanor offense, which was causing him difficulty with job applications. The Board heard his presentation, in

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1. The Delaware Board of Pardons must approve an application for clemency before the application may be considered by the Governor of Delaware. DEL. CONST. ART. VII, § 1. The Board consists of the Lieutenant Governor (who serves, pursuant to the Board’s rules, as its president), the Chancellor, the Secretary of State, the Treasurer, and the Auditor. DEL. CONST. ART. VII, § 2.

2. DEL. CODE ANN. TIT. 11, § 4214.

3. DEL. CONST. ART. VII, § 3.

4. As noted, the Board of Pardons is expressly excluded from the open meeting requirements of the Freedom of Information Act. DEL. CODE ANN. TIT. 29, § 10004(h).

which he appeared remorseful, responsible, and respectful. The Board then discussed his application in executive session. A majority of the Board members decided to recommend a pardon, but the vote was not unanimous. When the Board reconvened and I told the applicant about the divided nature of the Board's recommendation, his demeanor changed suddenly. He abruptly walked away from the podium toward the exit without saying a word, and angrily stared the Board members down as he was walking out the door. After witnessing this display, the Board decided to postpone its recommendation and have the applicant reappear before the Board. The Board's staff contacted the applicant to let him know of the change in plans. The applicant never returned; the conviction remains on his record to this day.

In this author's opinion, the Board reached the correct conclusion in both of these cases. And, the outcomes were the furthest thing from arbitrary – the Board members thoughtfully considered and discussed both cases. But, decisions that would have a dramatic impact on the lives of convicted criminals were made by a Board that had limited objective information about the applicants, and without the benefit of detailed formal procedures or substantive decision-making standards. Indeed, the Board hears thirty-forty cases each month without the benefit of statutory procedures or formal legal standards to guide it, and without detailed, independently-provided information about many of its applicants.⁵

This article examines whether Delaware can improve its handling of clemency requests. It begins by examining the creation of Delaware's current process, and then outlines the approaches adopted by other states. After discussing the wisdom of adopting practices from other states, the article concludes that (i) decision-makers in the clemency process would benefit in many cases from the input of the judges who originally heard the applicants' cases; (ii) the Board's procedures should be changed to protect victims who are compelled to participate in serial clemency applications filed by persons who harmed them; and (iii) the state should adopt a different process for uncontroversial clemency applications involving some non-violent crimes.

I. THE DELAWARE LEGAL FRAMEWORK

Delaware's legal framework for clemency is, in one way, fairly typical of those found in other states around the country: a Governor, with sweeping clemency authority, is shielded and overseen by an intermediate body that screens clemency applications before they reach his desk. But, Delaware's Board is unusual by national standards. Whereas the national trend is toward creating professional, full-time, non-elected, pardon screening boards, Delaware's Board is comprised primarily of elected officials and their appointees. This membership was chosen in reaction to Delaware's first century.

A. Clemency Prior To 1897

Delaware's Board of Pardons did not exist for more than one hundred years of its existence. In Delaware's original 1776 Constitution, clemency authority was granted to an executive known as the President (also referred to as a Chief Magistrate), who was selected by both houses of the legislature. The President's pardon authority did not apply to prosecutions carried on by the House of Assembly (one of the two branches of the legislative branch). In addition, the Constitution permitted the legislature to assign pardon authority for any types of cases to the House of Assembly rather than the President.⁶

5. As noted, the Delaware statute does provide means for the Board to obtain additional factual information about certain types of applicants, particularly those who have committed more serious crimes, but the additional information is not primarily factual in nature.

6. DEL. CONST. OF 1776, ART. VII.

This bifurcated responsibility for pardons was consolidated in the executive branch in Delaware's 1792 Constitution, when the Governor was granted unrestricted authority to grant pardons and reprieves, except in cases of impeachment.⁷ Similar language appears in the Constitution of 1831, which added a provision requiring the Governor to report to the legislature on his pardon activity. By the time of the state's 1897 Constitutional Convention, the Governor of Delaware had enjoyed unrestricted pardon authority for over one hundred years.

B. Delaware's 1897 Constitution Creates The Board Of Pardons

The delegates to Delaware's 1897 Constitutional Convention arrived with the clear intention to restrict the Governor's pardon authority. In the very first days of the Convention, the Standing Committee on the Governor and Other Executive Offices proposed the creation of a Board of Pardons. The proposal was to bar the Governor from granting a pardon or commutation without the recommendation of three of the following four officials: the Chancellor, Speaker of the Senate, Attorney General, and Secretary of State.⁸ Delegate William Spruance said that a Board was proposed because:

it was extremely desirable that there should be some relief to the Governor, to say the least of it, in regard to the exercise of Executive clemency. There have been times when that power has been used in a manner not the most discreet, and when its exercise was not always entirely above suspicion that it was exercised for improper purposes.⁹

Spruance elaborated that the purpose was twofold: to shield the Governor from direct appeals for clemency from members of the public, and to guard the public from pardons granted by an improperly motivated Governor.¹⁰

The original list of Board members proposed by the Standing Committee was not organic; Spruance confirmed that the language had been copied from the Constitution of Pennsylvania.¹¹ The reason for creating a Board of Pardons made up of existing state officials, rather than appointed members, appears to have been economic rather than philosophical:

[T]he idea which seemed to your committee to be a good one was that there should be an advisory Board which should not be composed of new people who are to be salaried people, and which should require the creation of new places, but that it should be composed of certain officers who shall ex officio act in this capacity.¹²

Delegates to the Convention engaged in a prolonged debate over the specific make-up of the Board. Delegate John Biggs objected to the wholesale adoption of the Pennsylvania model on the grounds that it appeared to be drawn

7. DEL. CONST. OF 1792, ART. III, § 9.

8. 1 DELAWARE CONSTITUTIONAL DEBATES 1897 at 175.

9. *Id.* at 176.

10. *Id.*

11. *Id.* at 176.

12. *Id.*

from a jurisdiction where the Attorney General was not the chief prosecuting officer, as he was in Delaware.¹³ Biggs proposed that another officer – he suggested either the Speaker of the House or the Treasurer – be substituted. His proposal prompted significant debate over whether the Attorney General should be a member. The primary concern appears to have been that the Attorney General would likely have been involved in the prosecution of any crime for which an applicant was seeking clemency.¹⁴ Eventually, the Delegates reached a compromise regarding the Attorney General's involvement; he would not be a member of the Board, but the Constitution would permit the Board to require the Attorney General to provide information to the Board upon request. The Board thereby gained the benefit of the Attorney General's experience without making him a member.¹⁵

One of the proposed alternatives to including the Attorney General on the Board was to include a judge with personal knowledge of the case. This suggestion, made by Delegate Edward Bradford,¹⁶ anticipated one of the challenges today's Board faces routinely: the need to make a consequential decision based upon very limited information – far less than is commonly possessed by a criminal jury or sentencing judge. One of the objections to having a judge on the Board, however, was that it could cause the judge to be lax in his administration of the original case, knowing that he would have a “second chance.”¹⁷

The debate was initially resolved by an amendment offered by Delegate Charles Richards. He proposed that the Board of Pardons consist of the Lieutenant Governor, Secretary of State, and Registers of Wills of each of the three counties, in order to ensure geographic diversity.¹⁸ Delegate Spruance agreed that the proposal was consistent with his larger view of the Board's function:

My notion about this Board of Pardons is this: It is not a body in which we care to have, or in which we need to have lawyers or judges necessarily. They ought to be sensible, sagacious men, who looking over the whole of this case, come to the conclusion that it is wise or unwise to recommend to the Governor the exercise or the withholding of the pardoning power....¹⁹

The Convention approved Richards' proposal for a Board consisting of the Lieutenant Governor, Secretary of State, and the three Registers of Wills.²⁰

Weeks later, however, Delegate J. Wilkins Cooch proposed an amendment to the already-passed Board of Pardons provision, replacing the three Registers of Wills with the Treasurer, Auditor, and Insurance Commissioner.²¹ Part

13. *Id.*

14. *Id.* at 190-91.

15. *Id.* at 700.

16. *Id.* at 192-93.

17. Testimony of William Spruance, 1 DELAWARE CONSTITUTIONAL DEBATES 1897 at 204-06.

18. *Id.* at 698.

19. *Id.* at 701.

20. *Id.* at 708.

21. 3 DELAWARE CONSTITUTIONAL DEBATES 1897 at 1975.

of Cooch's concern was that the Registers of Wills would be "overrun" by pardon applicants in their counties.²² Cooch's proposal was voted down by the Convention, but with the subject re-opened, the membership debate began anew.²³

Delegate Woodburn Martin then proposed a Board consisting of the Lieutenant Governor, Chancellor, resident Associate Judge, Secretary of State, and Speaker of the House. Martin's logic was that the Auditor, Treasurer, and Insurance Commissioner were "lower grade" offices that did not belong on the Board of Pardons.²⁴ That motion was also defeated, based in part upon some of the same arguments that had been raised in connection with the debate over including a judge on the Board.²⁵ Finally, the current Board make-up was proposed and approved. The Chancellor was included in order to gain the benefit of a judicial officer without the complication of including someone who had participated in the original criminal case. The other four members were statewide officers (the Treasurer, Auditor, Lieutenant Governor, and Secretary of State) whose positions already existed under the Constitution.²⁶ With a friendly amendment, the Chancellor was placed before the Lieutenant Governor in the relevant paragraph, his position being deemed more important.²⁷ That Constitutional language, including the involvement of the Attorney General in an advisory role, survives to this day as Article VII of the Delaware Constitution:

Section 1. The Governor shall have power to remit fines and forfeitures and to grant reprieves, commutations of sentences and pardons, except in cases of impeachment; but no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State, who shall forthwith notify the Governor thereof.

He or she shall fully set forth in writing the grounds of all reprieves, pardons and remissions, to be entered in the register or his or her official acts and laid before the General Assembly at its next session.

Section 2. The Board of Pardons shall be composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer, and Auditor of Accounts.

Section 3. The said board may require information from the Attorney-General upon any subject relating to the duties of said board.²⁸

C. The Non-Constitutional Legal Framework For Clemency

To the extent that the General Assembly has used its constitutional authority to regulate the Board of Pardons, it has done so primarily to require others to provide information to assist the Board in making its decisions. Aside from

22. *Id.*

23. *Id.* at 1987.

24. *Id.* at 1988.

25. *Id.* at 1991.

26. *Id.*

27. *Id.*

28. DEL. CONST. ART. VII (section headings omitted).

information provided by the Attorney General, there are three other sources of information that may be provided to the Board under the Delaware Code:

- (a) At the request of the Board, the Board of Parole is required by statute to prepare, a report on any person in the custody of the Department of Corrections seeking a pardon or commutation. The report must include the inmate's "record," and the Board of Parole's "opinion as to the state of rehabilitation of such person."²⁹
- (b) If authorized by the Commissioner of Corrections, the Department of Corrections is authorized to make investigations and recommendations to the Board regarding pardon applicants.³⁰
- (c) With respect to certain violent crimes, the Board may not recommend clemency unless it first obtains a psychologist's or psychiatrist's report.³¹ The report must contain "opinions as to the mental and emotional health of the applicant, and opinions as to the probability of the applicant again committing any crime if released."³²

One additional concern addressed by the General Assembly was the Board's need for privacy. Thus, the Delaware Code excludes the Board of Pardons from the state's Freedom of Information Act.³³ The need for the Board to meet privately on occasion, unlike other public bodies, was explicitly recognized by the 1897 Constitutional Convention, which turned down a proposed amendment that would have required Board of Pardons meetings to be "in open session."³⁴ But, exemption from the state's open meeting law does not preclude the Board from opening any of its records or proceedings to the public, except to the extent that those records or proceedings are deemed confidential by other provisions of Delaware statutory or common law. It is the Board's general practice to hear applicants' arguments in public session, to deliberate privately, and then to announce its recommendation to the applicant in public session.³⁵

Finally, the General Assembly adopted detailed provisions for notification of victims and their families, so they may be heard by the Board with respect to clemency applications for which they were victims.³⁶

The Delaware Constitution and Code provide no other procedural guidelines to the Board, nor do they provide any substantive guidance to the Governor or Board of Pardons regarding when to grant or deny clemency requests. The Board has generated a small number of rules on its own, namely, imposing waiting periods of thirty-six months (for a

29. DEL. CODE ANN. TIT. 11, § 4343.

30. DEL. CODE ANN. TIT. 11, § 4361.

31. DEL. CODE ANN. TIT. 11, § 4362.

32. *Id.*

33. DEL. CODE ANN. TIT. 29, § 10004(H).

34. 1 DELAWARE CONSTITUTIONAL DEBATES 1897 at 312.

35. On a small number of occasions, the Board has withheld its recommendation and issued it at a later time in writing.

36. DEL. CODE ANN. TIT. 11, § 4361.

first degree murder conviction) and eighteen months (for all other convictions) before a petitioner may refile a clemency petition after a denial,³⁷ and mandating that the Lieutenant Governor serve as the chairman of the Board.³⁸

D. Customary Practices Of The Board Of Pardons

In the absence of specific guidance from the Constitution or Code, members of the Board have developed informal practices that combine custom – the Board’s membership tends to change slowly, as it depends upon the results of staggered elections and judicial appointments – and the individual philosophies of Board members. For example:

- All of the current Board members believe that some period of time should pass between a conviction and an application for clemency. But, opinions regarding the length of time and the flexibility of that presumption vary among the Board members.
- Some current Board members believe the applicant’s practical need for clemency, for example, to pursue specific types of employment, deserves significant weight; other members believe the practical need for a pardon should not be a compelling factor.
- All current Board members attempt to gauge each applicant’s understanding of and remorse for the crime for which clemency is being sought, but the importance of this factor varies significantly among Board members.
- Some current Board members believe that the impact of clemency on an applicant’s immigration status is of significant importance, while others afford this factor no weight.

Again, none of the above is meant to suggest that the Board’s deliberations are anything other than thoughtful and rational. Board members spend a significant amount of time examining each applicant’s file and discussing those cases whose outcome is not immediately evident. What it does mean, however, is that the Board’s decisions are often the result of five individuals employing multiple methods of analysis. In addition, with the exception of the information provided for some applicants when required by statute, the Board commonly has before it only the factual information provided by the applicant and the Attorney General. The Attorney General’s information is generally limited to the applicant’s encounters with law enforcement.

II. CLEMENCY PROCEDURES IN THE OTHER FORTY-NINE STATES

There is a wide diversity of clemency practices in the other forty-nine states.³⁹ Some of the material differences from Delaware practice are discussed below, as a means of outlining possible changes to the manner in which Delaware currently considers clemency applications.

37. Delaware Board of Pardons RULE 7.

38. Delaware Board of Pardons Rule 5.

39. A helpful guide to many states’ pardon practices is found in David R. Dow et al., *Is It Constitutional To Execute Someone Who Is Innocent (And If It Isn’t, How Can It Be Stopped Following House v. Bell)?*, 42 TULSA L. REV. 277 (2006). However, it should be noted that the article is five years old, some state procedures have changed, and the article does not seek to describe the procedures in all states.

A. Transfer Of Authority From The Governor To An Independent Board

Some states have divested the Governor of the power to grant clemency, placing the power instead in the hands of an appointed board. Connecticut has perhaps the broadest such provision. Its Board of Pardons and Parole, whose members are appointed by the Governor and confirmed by both houses of its legislature, has sweeping authority to grant pardons and commutations.⁴⁰ The legislature has imposed a statutory waiting period before convicted criminals may apply for clemency after commission of a crime, but the board may waive the waiting period.⁴¹

Other states have followed this model but have placed more restrictions on their independent boards. Georgia, for example, vests its clemency authority in a Board of Pardons and Parole⁴² appointed by the Governor and confirmed by the State Senate. But, the legislature reserves for itself the right to create (by a supermajority vote) certain classes of crimes whose sentences cannot be commuted absent a finding of actual innocence or medical need.⁴³ Idaho's system is similar: an appointed board makes clemency decisions,⁴⁴ but the legislature has carved out a category of violent offenses for which the board may only make recommendations to the Governor.⁴⁵

B. Primary Authority To The Governor

Other states have stopped short of divesting their Governors of all clemency authority, but have instead made their Governors co-equal members of pardons boards. Florida employs such a hybrid model: clemency authority is vested in a four-member "cabinet" of independently elected officials, one of whom is the Governor.⁴⁶ Nebraska employs a variation of this model: its clemency decisions are made by a three-member board consisting of the Governor, the Attorney General, and the Secretary of State (who is appointed by the Governor).⁴⁷ Nevada has created a system similar to Florida's and Nebraska's, but with a significantly diminished role for the Governor.⁴⁸ The Nevada Constitution grants clemency authority to "[t]he Governor, justices of the Supreme Court, and the Attorney General, or a major part of them, of whom the Governor shall be one."⁴⁹ With seven justices currently sitting on the Nevada Supreme Court, the Governor has only one of nine votes in clemency decisions.

40. *Id.*

41. CONN. GEN. STAT. § 54-130A.

42. GA. CONST. ART. IV, § 2.

43. *Id.* The Georgia Constitution contains similar provisions regarding pardons for certain types of offenses carrying life sentences.

44. IDAHO CONST. ART. IV, § 7.

45. IDAHO CODE ANN. § 20-240.

46. FLA. STAT. § 940.01.

47. NEB. CONST. ART. IV, § 13.

48. NEV. CONST. ART. VI, § 3.

49. NEV. CONST. ART. V, § 14.

A small number of states permit their Governors to grant or deny pardons without any involvement by an intermediate body. But, it does not appear that the Governors with this legal right often choose to exercise it. In the State of Colorado, for example, the Governor is permitted to make pardon decisions unilaterally.⁵⁰ The only restriction imposed by statute is that the views of corrections officials, prosecutors, and judges must be solicited by the Governor prior to granting a pardon.⁵¹ However, it appears that the Governor of Colorado traditionally appoints an Executive Clemency Board, fashioned by Executive Order, which serves many of the same functions as a Board of Pardons (albeit with no outside oversight of its membership). Similarly, the Governor of New Jersey is permitted to grant or deny pardons without the involvement of an outside body, but the state constitution also allows him to create an outside body to advise him in this area.⁵² In addition, the Governor may, but need not, refer pardon applications to the Board of Parole.⁵³ New York's system is similar to New Jersey's: the Governor may, but need not, refer pardon applications to the state's Board of Parole for assistance.⁵⁴

C. Professionalization Of Pardons Boards

Delaware is one of the only states in America that has a pardons board whose members serve by virtue of their positions rather than being selected. Among those states that have pardons boards whose members are selected, an increasing number have put measures in place to ensure the professional background or knowledge of those members.

Most state pardons boards created by law must have their appointees approved by one or both houses of the state's legislature. And, a number of states have in place additional restrictions on membership. Some states, such as Alabama,⁵⁵ require by statute that board members be screened by a separate group before they can be nominated by the Governor. Others, such as Illinois, require potential board members to meet statutory qualifications. Illinois' Prisoner Review Board, which makes clemency recommendations to the Governor, consists of fifteen full-time members, who must have at least five years of experience in penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, other behavioral sciences, or a combination thereof. Illinois' board also requires partisan balance and that some members have expertise in juvenile justice.⁵⁶ Maryland and Kentucky have similar systems: Maryland's board is appointed by its chief corrections official with the consent of the Governor and Senate.⁵⁷ Kentucky's board members are drawn from a list provided to the Governor from a list provided to him by a state corrections commission, appointed by

50. COLO. CONST. ART. IV, § 7.

51. COLO. REV. STAT. § 16-17-102.

52. N.J. CONST. ART. V, § 2; *see also* N.J. STAT. ANN. § 2A: 167-4.

53. N.J. STAT. ANN. 2A: § 167-7.

54. N.Y. CONST. ART. IV, § 4. The identification of the Board of Parole as the entity to which pardon applications may be referred is found at N.Y. EXECUTIVE LAW § 259-C (MCKINNEY).

55. ALA. CODE § 15-22-20. The Alabama legislature also passed a law in 2003 that added board members for an interim period from 2003 through 2006. 2003 ALA. ACTS 415.

56. 730 ILL. COMP. STAT. § 5/3-3-1.

57. MD. CODE ANN., CORR. SERVS. § 7-202.

the Governor and confirmed by the State Senate.⁵⁸ Both Maryland and Kentucky, like Illinois, require board members to have a background in criminology-related professional fields.

Pennsylvania, the state that provided the model for Delaware's Board of Pardons in 1897, has evolved to a hybrid board composition. Two of its five members are state officials, as they were in 1897. But, the remaining three members are appointed by the Governor and confirmed by the State Senate. One must be a crime victim, one a corrections expert, and one a doctor.⁵⁹

D. Substantive Standards For Clemency

A small number of states have tried to impose substantive standards for the granting of clemency, at least with respect to more serious crimes. Those standards tend to take the form of restrictions on the ability of pardons boards to recommend, or Governors to grant, clemency with respect to serious violent offenses. Arizona, for example, prohibits its Board of Executive Clemency from recommending commutation of a sentence for a felony committed after 1994 unless it finds by clear and convincing evidence that the sentence was clearly excessive and that there is a substantial likelihood that the offender will not reoffend.⁶⁰ The Georgia Constitution allows its legislature, by a two-thirds vote, to label certain types of violent felonies as being out of the purview of the Board of Pardons and Parole, thereby barring the Board from reducing sentences.⁶¹ Montana's Board of Pardons has also set forth in its rules a set of substantive standards for recommending clemency, although those standards have catch-all exclusions that effectively allow the Board to bypass its own standards.⁶²

E. Providing Factual Information To Decision-Makers

Some states have taken additional steps to enhance the information available to the persons making clemency decisions and recommendations. Most significantly, California and Connecticut require the judges who originally sentenced an individual seeking clemency to opine on the individual's clemency petition.⁶³

F. Protecting Victims

Finally, most states have taken steps to ensure that the clemency process imposes a minimal burden upon the victims of crime. Virtually every state has provisions in its constitution, code, or rules that provides for notice to the victims of crimes for which clemency is being sought, and an opportunity to be heard on those applications. In addition, a number of states (including Delaware) have statutes or rules regarding mandatory periods of time that must elapse before unsuccessful clemency applicants can reapply. Those waiting periods are designed partly to allow pardon authorities to

58. KY. REV. STAT. ANN. § 439.320.

59. PA. CONST. ART. IX, § 4.

60. ARIZ. REV. STAT. ANN. § 31-402.

61. GA. CONST. ART. IV, § 2.

62. Montana Board of Pardons and Parole Rule 20.25.901A.

63. CAL. PENAL § 4803; CONN. GEN. STAT. § 54-130c.

operate efficiently, but they also reduce the number of times that crime victims must relive their traumas by formally opposing their assailants' clemency applications.

III. LESSONS LEARNED AND STEPS FORWARD

The foregoing overview of clemency practices in other states illustrates the types of improvements that Delaware should consider making to its own clemency process. But, considering changes to the current system requires more than selecting from a menu of options. Decisions about any changes to Delaware's clemency process should be guided by at least three considerations: the rights of clemency applicants, the overall goals of the clemency process, and the efficiency of the clemency process (including the minimization of its impact on victims of crime).

A. What Rights Do Clemency Applicants Have?

Thanks to some unequivocal language from the United States Supreme Court, it is fairly clear that clemency applicants have no federal constitutional or statutory rights absent extreme circumstances. No clemency applicant has presented facts to the Supreme Court that has resulted in the Court finding any constitutional rights that attach to clemency applications. In fact, the Court has repeatedly admonished lower courts that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever appropriate subjects for judicial review."⁶⁴ Some lower courts, based upon language from a concurring opinion written by Justice O'Connor warning against explicitly discriminatory clemency decisions, have warned that there are some factual scenarios where due process rights might affect the state's discretion with respect to clemency applications – but the examples given seem far-fetched.⁶⁵

Delaware courts have not often had to address legal issues arising from Delaware's clemency framework, and to the extent that they have, they have not found any constitutional protections beyond those expressly provided for in the law.⁶⁶ It is worth noting, however, that at least one Delaware court has compelled the state to permit inmates access to the tools necessary to fulfill the procedural prerequisites for a clemency application. In 2006, the Delaware Superior Court ordered the Department of Correction to grant an inmate's request for a fingerprint analysis, because such an analysis was required by the Board of Pardons' internal rules to permit the Board to obtain the criminal background information required for consideration of any clemency request.⁶⁷ Although the court did not cite a specific constitutional or statutory

64. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 276 (1998) (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)). See also *District Attorney for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67-68 (2009). The Second Circuit Court of Appeals' analysis of the current state of the law following *Osborne* was that "a prisoner has no liberty interest with respect to any procedures available to vindicate an interest in state clemency, because clemency is inherently discretionary and subject to the whim, or grace, of the decisionmaker..." *McKithen v. Brown*, 626 F.3d 143, 149 (2d Cir. 2010).

65. See, e.g., No. 110-CV-12169, *Berryman v. Sampson*, 2011 WL 6450775 (E.D. Mich. Sept. 8, 2011) (noting that "minimal" due process protections attach to commutation proceedings and citing concurring opinion of Justice O'Connor from *Woodard*).

66. "Furthermore, it is settled that because the Constitution imposes no standards constraining the Board of Pardons or the Governor concerning the grant of clemency, there is no constitutional right or entitlement sufficient to invoke the Due Process Clause. Additionally, since Section 4362 is equally inapplicable to all other capital defendants similarly situated, there is no valid Equal Protection claim." *State v. Sullivan*, 740 A.2d 506, 507-08 (Del. Super. 1999).

67. *State v. Hamil*, I.D. No. 9510006777, 2006 WL 3545377 (Del. Super. Nov. 13, 2006) (Witham, J.) (compelling Delaware Department of Correction to conduct fingerprint analysis of defendant seeking clemency because fingerprint analysis is required by Board of Pardons for consideration of clemency petition).

basis for its decision, it is logical to infer that the court believed the inmate had a due process right to obtain access to a clemency process.

In this author's view, no changes to Delaware's clemency system are needed to remedy any loss or violation of applicants' rights. The next consideration is whether changes to Delaware's clemency process are needed to further a particular state policy regarding when clemency is appropriate.

B. What Is The Purpose Of Clemency?

Over the last several decades, there has been occasional academic debate over the issue of whether the federal or state governments should grant clemency based upon a specific "theory" of clemency. Much of the discussion has been driven by Professor Kathleen Dean Moore's thorough 1989 book *Pardons: Justice, Mercy, and the Public Interest*.⁶⁸ Professor Moore advocates for a "retributivist" approach to clemency, which would allow for pardons only when they are justified under an exclusive list of reasons, namely, that the applicant is actually innocent of the crime (which would include insanity and lack of competency); that the applicant's crimes are excused (*i.e.*, *unsuccessful attempts, crimes where full reparations have been made, and strict liability crimes where the defendant did not know he was committing a crime*); that the crimes are justified (*i.e.*, *crimes that are legitimate acts of conscience*); or that the sentence is simply too long. Other academics have made contrary arguments. For example, some argue that the clemency process, at least in the case of capital punishment, exists primarily as a fail-safe against defects in the judicial process.⁶⁹ Others argue that redemption is an independently sufficient basis for clemency, including the commutation of a prison sentence.⁷⁰

These theories are all interesting fodder for debate, and perhaps the clemency process would be fairer if the awarding or withholding of clemency could be placed in a unified philosophical framework. Indeed, some members of the Delaware Board of Pardons have conscientiously tried to develop their own personal frameworks for analyzing applications. But these theories and frameworks inevitably give way to facts. This should be no surprise. The willingness of criminal juries, sworn to uphold complex and detailed jury instructions, to bypass those instructions when their sense of justice so demands is well documented.⁷¹ There is no reason to expect clemency boards, unrestricted by rules, to act differently. They, too, do so with the legitimate and noble goal of assuring that justice is done.

In 2010, the Delaware Board of Pardons heard an application from a young woman who had recently graduated as one of the top-performing students at a Delaware university. She was destined for a graduate program at an out-of-state university, where she would be one of the first African-American women to enter the program in its history. Her personality and life story were compelling. She was the first person in her family to have completed college. She had never been in trouble in her life until she and a group of her friends shoplifted some relatively small items from a department store less than a year prior to her Board of Pardons hearing – something that she said she was incredibly ashamed of. Having

68. KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989).

69. Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993).

70. Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHICAGO-KENT L.R. 1501 (2000).

71. Andrew Leipold, *Rethinking Jury Nullification*, 82 VA. LAW. REV. 253 (1996) (detailed discussion of academic literature regarding prevalence of and justification for jury nullification).

the criminal offense on her record would jeopardize her participation in the graduate program to which she had already been admitted.

There was nothing about her pardon application that fit into any overarching theory of clemency. The offense had just occurred; she had received a minimal sanction; and there was no suggestion that she had been subjected to the slightest unfairness throughout the process. But the Board recommended a pardon, simply because it did not want this young woman's extraordinary trajectory to come crashing down because of a single moment of stupidity – even if that moment had occurred just months prior.

The shoplifting charge was a misdemeanor, but this fact-specific approach to applications affects the Board's consideration of its most serious matters. Earlier this year, in connection with a death penalty commutation application, the Board issued a written recommendation that reflected a variety of different philosophical approaches to the application. The Board recommended that the applicant's death sentence be commuted to a sentence of life without parole, if the applicant voluntarily forfeited his right to further legal appeals of his conviction and forfeited forever his right to apply for a further reduction of his sentence. The Board's written recommendation, issued on behalf of four of the Board's five members, indicated that one of the four members was against the death penalty in all circumstances where a prisoner had been incapacitated and posed no future harm to society. But, it also indicated that the four Board members recommending clemency based their recommendations on a variety of fact-based concerns that included the physical, emotional, and sexual abuse the inmate had suffered as a child, his complaints of involuntary violent impulses to medical professionals a year prior to the murder, the fact that the inmate's death sentence had been imposed based upon a jury recommendation that was not unanimous, and a concern about sentencing disparities in other murder cases that had similar facts.

In the end, decisions regarding clemency are intensively fact-specific, and decision-makers will base their decisions on those facts to the extent that the legal framework allows. Thus, the only truly effective legal rules will be those that absolutely preclude clemency under certain specific circumstances. The Delaware General Assembly could certainly consider such legislation. It could, for example, impose a Georgia-style rule declaring certain crimes or penalties to be exempt from the clemency process. But, if it considers such an approach, the legislature should also consider the fact that Delaware's Board of Pardons is already uniquely answerable to the public – a majority of the Board must face election by the voters every four years. Although the Board's deliberations are not open, it is highly unlikely that a candidate for office would refuse to disclose his vote on a particular clemency application if asked.

Thus, it appears that no major renovations to Delaware's clemency process are required for the purpose of imposing a stricter substantive framework on the granting of clemency. There are, however, improvements that can be made to Delaware's process, to make it more efficient, to ensure that decision-makers base their decisions on the best information reasonably possible, and to protect the rights of victims.

C. Improving the Accuracy and Efficiency of Delaware's Clemency Process

One deficiency in Delaware's clemency process is the shortage of objective information available to the Board of Pardons when making its recommendations. As noted above, clemency applications for inmates and for certain categories of violent crimes require reports from third parties that provide the Board with additional information and perspective. But, the majority of the Board's applications do not fit into categories that invoke third party reports. And even when they do, the third party reports are of mixed value and inevitably reflect the biases of the institutions that create them. The reports provided to the Board by the Department of Correction often reflect an interest in divesting the Department of responsibility for the inmate. The reports from mental health experts are based upon minimal contact with the petitioner

and usually avoid reaching any conclusions about the applicant's potential danger to the public.⁷² Reports from the Board of Parole are generally based on no information other than that available to the Board of Pardons and, thus, simply reflect the conclusions of a separate group of individuals.

Other than these third party reports, the Board has in its possession only materials submitted by the applicant, the applicant's criminal record (both arrests and convictions), and whatever additional information is provided by the Attorney General's office. Information from the Attorney General's office is often extremely helpful. The real-time information from police reports and prosecutors about the events underlying the applicants' convictions can serve to support or undermine an applicant's version of events.

This author believes that improving the quality of information available to the Board is a worthy goal. After surveying the practices of other states, the information that would appear to be most useful would be the perspective of the judge who originally sentenced the individual seeking clemency. This information will not be available or helpful in every instance—many of the Board's clemency applications are for low-level offenses that sentencing judges are unlikely to recall. But, in cases involving more serious crimes, it is more likely that the judges will have played a role in sentencing and may have an objective, detailed recollection of the applicant. This information could be invaluable to the Board of Pardons when it later considers granting clemency for those same offenses. One helpful reform to Delaware's clemency process would be for original sentencing judges to be invited to provide their perspective on the clemency applications of persons whom they sentenced.

A second change to the existing clemency process would serve two goals outlined above: ensuring that clemency decisions are based upon the maximum information reasonably possible, and streamlining the clemency process. Each year, the Board hears scores of cases involving relatively minor, non-violent crimes. Most of these crimes involve low-level theft (typically shoplifting) and minor drug possession offenses. Most of the applicants seeking pardons for these crimes do so because the convictions are preventing the applicant from obtaining employment, professional licensure, or security clearances. Most of the applications meeting this description are not opposed by the Attorney General, and many of the Board's recommendations with respect to these cases are unanimous. These applications are also the least likely to be accompanied by helpful information about the applicant in the paper file as they meet none of the statutory requirements for third-party reports. Nevertheless, applicants in this category must await the Governor's approval in order to receive pardons, delaying resolution of their applications, creating a substantial amount of work for the Governor and his staff, and forcing the Governor to make clemency decisions with very little factual information.

Clemency authority historically rests with Delaware's Governor, and in the case of either difficult decisions or serious crimes, there is no reason to disturb that tradition. But in cases involving low-level, non-violent offenses where the Board unanimously supports clemency, there is good reason for Delaware to emulate some of the states that have afforded their pardons boards direct authority to grant clemency. Applications for clemency involving less serious, non-violent crimes that receive the unanimous support of the Board of Pardons should be granted as a matter of law. The Governor's time and attention should be reserved for clemency applications that involve serious crimes or that present difficult issues for the Board. In the latter case, the Board should be permitted to request that the Governor make the decision.

Finally, the Delaware Board of Pardons would be well served if it followed the lead of other states and set stricter limits on the ability of persons convicted of violent crimes to apply repeatedly for clemency and subject their victims to multiple clemency hearings. Although the Board already enforces waiting periods for violent criminals to reapply for

72. I have not seen one mental health evaluation in my three years on the Board of Pardons that recommended denying clemency for an applicant. That may simply reflect a decision by applicants who receive such mental health reports to postpone their applications.

clemency after an application is denied, there are some cases where the existing waiting periods are clearly inadequate. A common scenario involves an inmate convicted of extremely violent crimes and serving a long sentence, affording multiple opportunities to seek clemency. In such cases, the Board is unlikely to recommend clemency due to the nature of the crimes and the propriety of the sentence; there is little purpose to be served by forcing victims of violent crime to appear as often as every eighteen months to face their assailants. This is an area where universal rules are difficult to create – there may be cases involving violent crimes where good reasons exist to have the applicant reapply after eighteen or thirty-six months. But the Board should have the discretion to protect crime victims from being re-victimized by their assailants through the clemency process by determining the appropriate waiting period in each case. When denying a clemency application opposed by a victim, the Board of Pardons should impose a binding interval of time that must expire before the applicant may again apply for clemency. This interval may be the existing default period of eighteen or thirty-six months, or it may be longer, but it should be a conscious decision of the Board, made with an eye toward protecting victims from applicants' unreasonable use of the clemency process.

IV. CONCLUSION

In general, Delaware's unique clemency process works well and results in thoughtful, just outcomes from a Board of Pardons that has an unusually high level of public accountability. However, the state could take steps to help the Board make better-informed decisions, to streamline the clemency process for uncontroversial, non-violent offenses, and to protect crime victims from overuse of the clemency system.

