

UNITED STATES OF AMERICA: KILLING WITHOUT MERCY: CLEMENCY PROCEDURES IN TEXAS

AI INDEX 51/85/99

PUBLIC /
JUNE 1999

DISTR. SC/CC/CO/GR

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UNITED STATES OF AMERICA

Clemency Procedures in Texas: Killing Without Mercy

“It is incredible testimony to me that in 70-plus cases, in an 18-member board, that no person has ever seen an application for clemency important enough to hold a hearing on or to talk with each other about . . . I find that testimony very troubling.”

Judge Sam Sparks, after hearing testimony by members of the Texas Board of Pardons and Paroles on their clemency procedures in death penalty cases.

Introduction

Recent lawsuits and court challenges have exposed glaring deficiencies in the procedures used by the Texas Board of Pardons and Paroles in reviewing clemency petitions by prisoners facing imminent execution. In a jurisdiction that executes more people than any other in the Western world, Texas has turned the final safeguard of executive clemency into nothing more than an empty gesture.

Since resuming executions in 1982, Texas has killed more than 170 prisoners, and for many years, Amnesty International has raised serious concerns over the consistent failure of its clemency procedures to remedy possible wrongful convictions in capital cases or excessive death sentences. Despite compelling grounds for mercy in many cases, in 17 years the Texas Board of Pardons and Paroles has recommended the commutation of a death sentence only once.

Amnesty International has been forced to conclude that the Texas clemency process violates minimum human rights safeguards, by failing to provide any genuine opportunity for death row inmates to seek and obtain the reduction of their sentences.¹ These procedures clearly fail to comply with reasonable concepts of fairness and provide no protection against arbitrary decision-making by the courts.

¹International human rights standards enshrine the right of all prisoners under sentence of death to seek and obtain mercy. For example, Article 6(4) of the International Covenant on Civil and Political Rights states: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”

Under any and all circumstances, Amnesty International regards the death penalty as an intolerable violation of the most fundamental of human rights: the right to life itself and the universal prohibition against cruel or degrading punishment.

Clemency in the USA: A Recent History

Throughout the history of the United States, governors or their appointed representatives have exercised the discretionary power to consider clemency petitions and to issue commutations or pardons. In 1976, the United States Supreme Court approved new legal safeguards intended to ensure the fair and impartial application of the death penalty. The Court was nonetheless careful to emphasize the continuing significance of clemency review. A system of capital punishment without executive clemency “would be totally alien to our notions of justice,” the Supreme Court stated.²

All US jurisdictions that retain the death penalty have instituted some mechanism for clemency. By 15 May 1999, five hundred and forty prisoners had been put to death since executions resumed in 1977, including 173 in Texas. During that same period, state authorities commuted 40 death sentences on humanitarian grounds nationwide.³ Excluding Texas, the national ratio of executive commutations to executions was 10.6 per cent; in Texas it was 0.6 per cent.

²*Gregg v. Georgia*, (1976) footnote 50.

³*Commutations in Capital Cases on Humanitarian Grounds*, Death Penalty Information Center, Washington D.C., April 1999.

Executive clemency review takes into consideration more than just post-trial evidence of innocence. Death sentences have also been reduced to terms of imprisonment due to the prisoner's rehabilitation, the excessiveness of the punishment in relationship to the crime, diminished mental capacity or a juror's recanted sentencing vote.⁴ The absence of meaningful protections against fatal error is even more troubling given the inadequate legal standards that prevail at all levels of the Texas capital justice system.⁵

Texas: a State Without Mercy

Appointed to 6-year terms by the state governor, the 18 members of the Board of Pardons and Paroles (BPP) oversee the granting of sentencing reductions for all applicants within the state's criminal justice system. It has the power in capital cases to issue reprieves, to conduct investigations and interviews and to convene public clemency hearings before making its recommendations.

Apart from the ability to issue a single 30-day reprieve, the governor's independent clemency authority is limited to formally requesting that the pardons board investigate and consider the commutation of a death sentence. The governor may not commute a death sentence without a positive recommendation from the majority of the board.

Clemency applications from death row prisoners are processed by the Executive Clemency Unit, an administrative office of the BPP. Individual board members are sent copies of the application, along with opposing documentation from the prosecution. Each member reviews the material as they see fit and then votes on a standardized form on whether to recommend a reprieve or a commutation of sentence. The received votes are tallied shortly before the scheduled execution.⁶

⁴Recent examples in each respective category include: William Saunders (Virginia, 1998); Guinevere Garcia (Illinois, 1996); Bobbie Shaw (Missouri, 1993) and Bobby Ray Fretwell (Arkansas, 1999).

⁵For more information, see: *The Death Penalty in Texas: Lethal Injustice*, AI Index: AMR 51/10/98, March 1998.

⁶The clemency powers of the BPP and the governor are stated in Article IV of the Texas Constitution; general rules regulating capital clemency review are found under Title 37 of the Texas Administrative Code. However, the actual process used by the BPP in death penalty cases is contained only in its own internal guidelines, which are not subject to public scrutiny.

The BPP has no criteria for assessing the merits of clemency applications; it issues no content guidelines for applicants to follow and its members receive little formal training in clemency review. Board members do not discuss the individual applications among themselves or convene meetings to review the petitions. Although they have the authority to investigate claims, interview applicants and hear witnesses, Board members have repeatedly based their clemency determinations exclusively on unverified submissions. Almost invariably, the Board votes unanimously to deny clemency.⁷ Members are not required to give reasons for their decisions.

In every other state that has adopted clemency procedures similar to those in Texas, pardons boards routinely hold public hearings to consider petitions from prisoners facing execution.⁸ In Texas during the past decade, the BPP has met only once to review, and reject, a clemency petition from a condemned prisoner.⁹ The BPP is required to convene 3-member panels whenever it reviews applications to revoke parole but no such obligation exists when the Board decides in death penalty cases.¹⁰

A history of negligence

Throughout most of its 63-year existence, the Texas BPP has recommended clemency in capital cases only for reasons of expediency: to save the state the inconvenience of re-trying individuals whose death sentences were set aside by the appellate courts. During the 1980s, thirty-six death sentences were commuted because of court rulings invalidating provisions of the Texas death penalty statute.

In 1992 the US Supreme Court reviewed the case of Leonel Herrera, a Texas death row inmate raising a claim of actual innocence based on newly-discovered evidence. Herrera had exhausted his available appeals and no legal avenue was available

⁷With the exception of Bennie Elmore, who abstained from voting in virtually all death penalty cases during his ten years on the BPP between 1989 and 1999.

⁸The other states with comparable procedures are Arizona, Louisiana, Pennsylvania and Oklahoma. In Pennsylvania, for example, death-sentenced inmates are guaranteed a clemency hearing under state law.

⁹In 1991, then-Governor Ann Richards granted a 30-day reprieve to Johnny Garrett, a mentally ill juvenile offender. At the Governor's request, the BPP convened a brief clemency hearing and then refused to recommend commutation.

¹⁰According to information which it provided to a state legislative committee, the BPP convened panels to review 29,000 applications for parole revocation in 1997 alone.

for reviewing the new evidence indicating that his deceased brother Raoul had actually committed the murder he had been convicted for.

The Supreme Court was unmoved by Herrera's dilemma, finding that a late claim of innocence was not of itself grounds for a new appeal. Clemency, according to Chief Justice Rehnquist, "is the historic remedy for preventing miscarriages of justice where judicial review has been exhausted."¹¹

Shortly before Herrera's execution date, a group of prominent Texas attorneys and former judges called on Governor Ann Richards to develop mechanisms so that condemned prisoners alleging miscarriages of justice would receive full and fair clemency hearings. The only response from the governor's office was a promise to "study" the group's recommendations.¹²

Leonel Herrera was executed on 12 May 1993, three months after the Supreme Court ruling. The Texas BPP refused either to recommend clemency or to convene a hearing so that the credibility of the new evidence could be assessed. Herrera's final words were: "I am innocent, innocent, innocent. Something terribly wrong is happening here tonight."

As the pace of executions accelerated, a series of controversial cases exposed the inadequacy of Texas' minimal approach to clemency review. Juvenile offender Curtis Harris was executed on 1 July 1993, despite evidence of racial bias in the selection of the trial jury and the failure of his court-appointed attorney to present mitigating evidence of his mental disabilities and abusive childhood. Robert Drew was executed on 2 August 1994, even though another prisoner had confessed to the crime, completely exonerating him. Jesse Jacobs was executed on 4 January 1995, although the prosecution conceded after his trial that his sister had committed the murder and that Jacobs may have had no direct involvement. Terry Washington was executed on 7 May 1997, despite the fact that the jury never learned of his mental disabilities, including his profound mental retardation.¹³

¹¹*Herrera v. Collins* (1993).

¹²*Lawyers urge clemency process for death row inmates*, Austin American - Statesman, 7 May 1993, page B3.

¹³Clinical testing and evaluation years after the trial revealed that Washington had the mental capacity of a 7-year-old child, an IQ score as low as 58 (the average score is 100) and a profound concentration defect, all of which would have prevented him from following or participating in the trial proceedings.

None of these cases were compelling enough for the BPP to recommend commutation or to convene a clemency hearing. Far from serving as the fail-safe mechanism envisaged by the US Supreme Court, the Texas BPP had become something akin to a hostile and secretive agency interested only in preserving the illusion of meaningful clemency review.¹⁴

Cases in 1998: the truth emerges

"Our process works because, right now, an inmate can offer anything they want -- give any reason at all -- that they want to in asking us to grant clemency. And they do. But just because we may not grant clemency doesn't mean that our system is bad and doesn't work."

Victor Rodriguez, Chairman of the Texas Board of Pardons and Paroles.¹⁵

Criticism of Texas clemency procedures gained new momentum with the case of Karla Faye Tucker, who was scheduled to be executed in February of 1998. Tucker was sentenced to death for murder in 1983. While on death row, Tucker experienced a religious conversion. She began ministering to the spiritual needs of her fellow-inmates and counselling young people to avoid the drug abuse and criminal acts that she felt had led to her own death sentence.

As Tucker's execution date approached, thousands of requests for clemency poured into Texas, including personal appeals from Pope John Paul II and conservative evangelist Pat Robertson. BPP Chair Victor Rodriguez downplayed the significance of rehabilitation as a determining factor in clemency, stating that board members "see those arguments made in just about everything we do." Rodriguez added: "As to rehabilitation, I think that question was answered a long time ago... It is answered at the time a jury imposes death."¹⁶

¹⁴Talbot D'Alemberte, a former president of the American Bar Association who has represented Texas death row inmates, stated in a 1993 interview that "When you send it [the BPP] something, you sometimes get the feeling that you are throwing your papers into a black hole. . . . Indeed, you may not learn that clemency has been denied until your client has been executed."

¹⁵*Tucker's lawyer attacks clemency system in appeal*, Austin 360 (on-line service of the Austin American-Statesman), 21 January 1998.

¹⁶*Woman's date for execution stirring debate: rehabilitation issue fuels national interest in case*, Dallas Morning News, 12 January 1998, page 1A.

The Board of Pardons voted 16-0 against recommending clemency. One member supported a reprieve and two others abstained from voting. The BPP issued no reasons for its decision.

On 29 January, Tucker's attorneys sued the Texas BPP, alleging that the Board's secretive and minimal clemency process violated the provisions of Texas law regulating the functioning of state boards.¹⁷ The law suit charged that, under the provisions of the Texas Open Meetings Act, the BPP was required to convene a public meeting on seven days' notice before issuing a clemency decision. Furthermore, the Board's failure to issue any explanation for its clemency decisions violated the Texas Constitution, which states that the BPP must "keep record of its actions and the reasons for its actions."¹⁸ The civil suit was dismissed just hours before her scheduled execution.

Tucker also challenged the constitutionality of the state's clemency mechanism in the Texas Court of Criminal Appeals, which ruled 8-1 against her appeal. Although concurring with the majority opinion that Texas clemency procedures were not subject to judicial review, Judge Morris Overstreet filed a separate opinion describing the state's clemency process as "woefully inadequate" and suggesting legislative reforms. "I would say that clemency law in Texas is a legal fiction at best," Judge Overstreet wrote.¹⁹

Karla Faye Tucker was executed on 3 February 1998; the first woman put to death in Texas in more than a century. An opinion poll taken in the aftermath of the execution found an 18-point decline in support for the death penalty; opposition to executions had grown from 7% to 26 per cent.²⁰ Former state Attorney General Jim Mattox called for major reforms to BPP procedures, including the convening of public hearings to review capital clemency applications. "The clemency process is not simply a rubber stamp for what takes place in the court," Mattox stated. "There ought to be some standards developed."²¹

¹⁷*Karla Faye Tucker v. Texas Board of Pardons and Paroles*, filed in the 345th District Court.

¹⁸Article IV, §11(a).

¹⁹*Ex parte Tucker*, (Tex. Crim. App. 1998).

²⁰According to the Scripps Howard News Poll, as reported in the *Houston Chronicle*, 15 March 1998.

²¹*Mattox calls for clemency reforms*, *The Dallas Morning News*, 7 February 1998, page 22A.

On 25 March, the US Supreme Court issued a major decision on the judicial review of clemency procedures, a ruling that would have a significant impact on legal challenges to the Texas BPP. Ohio death row inmate Eugene Woodard had asked the Supreme Court to rule on the constitutionality and procedural safeguards of the state clemency process. In *Woodard v. Ohio Adult Parole Authority*, the Court unanimously dismissed the claim that the Ohio clemency procedure violated an inmate's constitutional rights.

The Supreme Court was deeply divided on the larger question of whether a clemency procedure should be required to conform to the principles of "due process of law."²² Four justices took the traditional legal viewpoint that clemency review was an act of grace, to be dispensed as the executive authorities saw fit and was thus beyond the scope of the courts to regulate. Five justices held that judicial review would be appropriate where it could be shown that the clemency process was completely arbitrary or capricious. Some form of minimum procedural safeguards might therefore apply to state clemency mechanisms. The Court did not clarify what those minimal safeguards might consist of, thereby inviting legal challenges to clemency review procedures in all executing states.

Less than a month after Tucker's execution, the Board of Pardons again found itself embroiled in a law suit challenging its apparent failure to comply with the requirements of state law. Attorneys representing death row inmate Lesley Gosch persuaded a district court judge that the claim had sufficient merit to require the issuing of a temporary restraining order, halting the execution until the issues raised were resolved. In her order of 22 April, Judge Mary Pearl Williams held that the BPP was required to comply with the provisions of the Texas Open Meeting Act and should vote as a body on the clemency application during a public meeting.²³

The BPP appealed the decision to the Texas Court of Criminal Appeals, which lifted the restraining order on 24 April, ruling that the district court had no jurisdiction to issue an order that had the effect of staying the execution. Lesley Gosch was executed that same day.

²² In the broadest sense, "due process of law" refers to the body of mechanisms regulating each stage of legal proceedings to protect the fairness and impartiality of justice. In procedures where basic due process rights apply, all defendants are entitled to an open and fair hearing before a duly-constituted tribunal, a formal notification of the charges against them, the opportunity to present a defence and the pronouncement in public of the tribunal's decision and the reasons for it.

²³*Lesley Lee Gosch v. Texas Board of Pardons and Paroles*, 53rd District Court.

In a bizarre turn of events, 1998 also produced the first-ever commutation of a contemporary Texas death sentence granted in response to an inmate's petition. On 26 June, Governor George Bush commuted the death sentence of Henry Lee Lucas to life imprisonment, one week after asking the Board of Pardons to review the case due to longstanding questions about his guilt. Lucas gained notoriety for confessing to more than 600 murders, including the crime that resulted in his death sentence. A subsequent investigation by the Texas Attorney General concluded that Lucas was perpetrating a massive hoax on the authorities by falsely confessing to unsolved crimes.

Despite concerns raised by the Attorney General and employment records showing that he was in Florida at the time of the crime, Lucas spent 14 years on death row. Characteristically, Board chairperson Victor Rodriguez insisted that the Board remained convinced of Lucas's guilt as determined by his trial jury. "Nothing we've done affects that finding," he stated.²⁴

The case of Stanley Faulder

Recent litigation in the case of Joseph Stanley Faulder has opened up the Texas clemency process to public scrutiny. Actions in both state and federal courts have shown that clemency review in Texas is a mockery of fairness and public accountability.

Stanley Faulder is a Canadian citizen who has spent more than twenty years on death row, twice convicted for the murder of a woman during a burglary. Troubling questions persist over the adequacy of his 1981 retrial and the reliability of the jury's decision to sentence him to death.²⁵ The BPP has repeatedly refused to approve his application for clemency, disregarding the failure of the courts to address these fundamental flaws and the persuasive evidence of Faulder's positive character.

Faulder was scheduled to be executed on 10 December 1998. The case attracted widespread attention following an unprecedented intervention by US Secretary of State Madeleine Albright. On 27 November, Albright sent a 15-page submission to Governor Bush and to the Texas Board of Pardons and Paroles addressing the failure of the arresting authorities to inform Faulder of his treaty-based right to consular assistance. In her letter to the Board, Albright wrote:

²⁴See *Urgent Action Update: EXTRA 41/98*, AI Index: AMR 51/42/98.

²⁵For case details, see: *Adding Insult to Injury: the case of Joseph Stanley Faulder*, AI Index: AMR 51/86/98, November 1998.

"We are particularly troubled by the facts that Mr. Faulder's legal counsel has been found by the courts to have been deficient in his handling of the sentencing phase of trial [and] that no mitigation evidence was presented to the jury in the sentencing phase... We believe that this is a case in which consular notification issues may provide sufficient grounds for according discretionary clemency relief... I am prepared to have Department officials who are experts in these matters travel to Texas to meet with the Board, if that would be helpful."

Texas officials provided no substantive response to the concerns raised by the Secretary of State. Her offer to brief the BPP on the significance of consular notification and assistance was ignored.²⁶

Two months before his scheduled execution, Faulder was a named plaintiff in a class action law suit filed against the Board of Pardons and Paroles on behalf of all Texas death row inmates. On 30 November, District Judge Paul Davis issued an injunction against the Board of Pardons, ordering it to comply with the Texas Constitution by keeping a record of its deliberations and stating the reasons for its decisions. The order required the Board to convene and conduct open meetings on clemency matters and to post a public notice seven days in advance of its meetings, as required of all boards by state law. A further hearing was set for 14 December, four days after Faulder's execution date.

The BPP refused to comply with the court order, choosing instead to appeal the ruling. After the Texas Court of Criminal Appeals declined to intervene, BPP officials hurriedly scheduled an open meeting for 9 December, in a belated effort to comply with the injunction. However, the Texas Supreme Court lifted the district court's injunction and the BPP meeting was cancelled. The state Supreme Court unilaterally ordered a hearing for 14 December, to determine whether it indeed had the authority to overturn the injunction. Texas courts had thus ordered two separate hearings on the Faulder case, both to be held four days after his scheduled death.

On 9 December the BPP voted 17-0 against a clemency recommendation. Within hours of the decision, defence attorneys were in Federal court contending that the Board's review of Faulder's clemency petition failed to meet the minimal safeguards required by the Supreme Court's decision in *Woodard*. Faulder was promptly granted a stay of execution, after lawyers for the state were unable to provide the judge with any

²⁶ Faulder is one of 20 foreign nationals awaiting execution in Texas, none of whom were informed after arrest of their guaranteed right to communicate with their consular representatives. For additional information on this topic, see: *USA: Violation of the Rights of Foreign Nationals Under Sentence of Death*, AI Index: AMR 51/01/98.

information about the actual deliberations of the Board of Pardons. "It is unclear how the Board can document that its procedures are not arbitrary if it does not document its procedures at all," Judge Sam Sparks ruled. An hour later Sparks issued a stay on identical grounds to Danny Lee Barber, who was scheduled for execution in Texas that same evening.

The legal battle over the fate of both men continued overnight. In response to appeals filed by the state, two panels of the US Fifth Circuit Court of Appeals reached opposite conclusions: one panel upheld Danny Barber's stay, while the other dismissed the stay granted to Stanley Faulder. Just minutes before Faulder was to enter the lethal injection chamber, the US Supreme Court granted him an indefinite stay of execution on unrelated grounds.

Faulder v Texas Board of Pardons and Paroles: the truth is revealed

On 21 December, Judge Sparks convened a two-day hearing to examine the procedures used by the Board of Pardons to review the clemency petitions filed by Stanley Faulder and Danny Barber. During the opening statements, Sparks noted that all other executing states provided for some form of meeting when determining clemency.

Brett Hornsby from the Executive Clemency Unit testified that virtually none of the letters from the public on death penalty cases are forwarded to Board members. In total, some 4,000 letters were received on the Faulder case, all but eight of which supported clemency. Among the letters that staff members did not forward to the Board were appeals from members of the Faulder family, the President of the American Bar Association and the Executive Director of the Texas Council of Churches (representing some 10,000 congregations).

Hornsby also confirmed that his office conducts no investigation to verify the accuracy of information contained in the clemency packages that it circulates to Board members. That material routinely includes unverified submissions from prosecutors and law enforcement officers opposing the clemency application.

BPP chairperson Victor Rodriguez testified that Board members do not meet to discuss clemency petitions and that individual members do not provide reasons for their votes. He verified that the BPP has the authority to investigate matters before it, to interview inmates and to convene hearings, but stated that the Board "did not see fit" to exercise those powers in the Faulder case.

Counsel for Danny Barber pointed out that the Board reviews approximately 400 non-capital clemency cases each year, along with 59,000 parole decisions and 29,000

parole revocation hearings. "I get more than 300 decisions a day that this Board has to make. And are you telling us that you have in your opinion the time to give due consideration and due process to each of those capital clemency applications?" he asked. "Yes," Rodriguez replied.

The court heard testimony from eleven other members of the Board of Pardons. Each stated that they had reviewed the contents of the two clemency files and had devoted sufficient time to carry out a full assessment. However, evidence presented to the court established that in at least one instance this review was far from extensive. Board member Juanita Gonzalez received Barber's petition, a file some four inches thick, on the morning of 4 December and had recorded her vote against clemency by 10:45 on that same morning.

Although only a few weeks had passed since their review of the two files, Board members had little or no memory of the case particulars. None could recall the details of the Secretary of State's submission; fourteen members had already voted to deny Faulder's clemency petition before Albright's letter arrived.

None of the testifying BPP members could clearly define what he or she would look for in a petition that might merit clemency. Several members reviewed clemency petitions only to confirm that the prisoners had been duly convicted of terrible crimes and had received appellate review (foregone conclusions in most capital cases). Few of the members could recall until prompted that their clemency authority also extended to investigating claims and convening hearings. It was revealed that the Board's voting forms contain no provision for those options or any area for members to indicate reasons for their decisions.

One issue in particular eluded the BPP in its review of Faulder's clemency application. During the sentencing phase of the trial, the jury heard from Dr. James Grigson, a Dallas psychiatrist notorious for providing paid testimony for the prosecution in more than 170 Texas death penalty trials. Without conducting any clinical examination of Faulder, Grigson stated that the defendant was an untreatable sociopath "of the severest kind" who would certainly kill again, even if imprisoned. Grigson's testimony was crucial: under Texas law, jurors must unanimously decide that the defendant represents a continuing danger to society before they can impose a death sentence.

Faulder's clemency petition contained compelling material never presented to the jury, including medical evidence and character testimony that thoroughly refuted Grigson's diagnosis and predictions. The petition contained documents that cast a shadow over Grigson's claim of total accuracy in predicting defendants' future behaviour. A letter

from a prominent Texas psychiatrist challenging the validity of Grigson's diagnosis was never forwarded to the Board.²⁷

On 28 December, Judge Sparks issued his decision. "The Board has voted to recommend clemency only once in the past 76 petitions," he wrote. "It is elemental that a flip of the coin would be more merciful than these votes." He concluded:

"It is abundantly clear that the Texas clemency procedure is extremely poor and certainly minimal... Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system. The Board would not have to sacrifice its conservative ideology to carry out its duties in a more fair and accurate fashion. Giving reasons for its decisions and/or holding hearings to allow petitioners and other interested parties to present evidence would not threaten the employment of the Huntsville executioner. Instead, it would ensure the legality of the system and provide greater protection against arbitrary or improper outcomes.

But of course, the Court's duty is not to legislate and mandate wise policies--it is to apply the law as stated by the Constitution as interpreted by the Supreme Court. Regardless of whether the Texas clemency procedure that denied clemency to Faulder and Barber was desirable, the Court concludes the procedure did provide *these* petitioners with the "minimal procedural safeguards" suggested by the five Justices in *Woodard*."

Danny Lee Barber was executed on 11 February, 1999. Stanley Faulder is currently appealing Judge Sparks' ruling. He is scheduled for execution on 17 June 1999.

Current developments: the illusion of meaningful reforms

Following a two-day hearing in state court, the class action law suit against the Board of Pardons was dismissed on 8 January 1999. Judge F. Scott McCown ruled that the BPP was not required by law to convene open hearings or to give reasons for denying a clemency petition, since a denial did not constitute "action" by the Board. However, the judge noted:

²⁷A 1988 study by the Dallas District Attorney's Office revealed that Grigson's predictions of "future dangerousness" in Dallas County capital cases were 100% incorrect. In 1995, James Grigson was expelled from the American and Texas psychiatric associations for unethical behaviour, resulting from his grossly misleading and unscientific testimony in death penalty trials.

“What is troubling to the court is that the Board of Pardons and Paroles never seems to consider any petition for clemency, but merely polls its members. Every other state board and commission must meet to take any action, however insignificant, yet the Board of Pardons and Paroles decides a plea for mercy from death without ever meeting...While convinced of the wisdom of requiring the Board to draw together, the court is hesitant to say that the constitution requires such a meeting.”

Responding to the various court challenges, Victor Rodriguez announced that the BPP policy committee would convene a series of public meetings to review and discuss changes to the clemency process. The first public meeting lasted only fifteen minutes, resulting in a restriction of the filing deadline for submitting clemency applications. Petitions must now be filed 21 days prior to an execution date rather than five days in advance.²⁸

Throughout the year-long controversy over BPP procedures, Governor George Bush repeatedly stressed that the only two issues he considered appropriate for purposes of clemency were the inmates' guilt or innocence and whether access to the courts had been provided. The credibility of that position was severely undermined by his response to the case of Troy Farris.

Farris was sentenced to death for the 1983 murder of a Tarrant County deputy sheriff. On appeal, he challenged the selection of the trial jury, citing a well-established legal precedent which had guided the Texas courts for a decade. The appeal was dismissed.

Three years later, the Texas Court of Criminal Appeals conceded that his appeal had been "wrongly decided" and was "expressly overruled".²⁹ The Court restored the original precedent struck down by their earlier decision in Farris's case and subsequently reversed a number of capital convictions on this basis. In a bizarre ruling, the Court later refused to apply their own decision to the case that had created it, dismissing Farris' final appeal of this very same issue on a procedural technicality.

Shortly before the scheduled execution, an investigative article in the Fort Worth *Star-Telegram* exposed serious inconsistencies and irregularities in the investigation and trial of Troy Farris. As a subsequent editorial stated:

²⁸*In quick session, clemency revisions begin*, Austin American- Statesman, February 6, 1999.

²⁹*Riley v. State*, (1993).

“Because his case involved an obviously bungled investigation, destroyed and/or tampered evidence and, at the least, misstatements by a law enforcement official, Farris should be a free man today... Now, after 13 years on Death Row for a crime he says he did not commit (and which the state did not prove he committed), Farris is just days away from being put to death by lethal injection. There were too many errors made in this case, and too many questions still remain. Justice screams for this execution to be stopped.”³⁰

But the execution was not stopped. Troy Farris was executed on 13 January, after the US Supreme Court refused to intervene. Unusually, five members of the Board of Pardons voted either for a reprieve or the commutation of his sentence. Two BPP members even attached notes to their votes, explaining that they were voting for clemency because of serious doubts about Farris' guilt. Governor Bush refused to grant a 30-day reprieve to permit further investigation of the case.

There is mounting evidence that the behaviour of the Board of Pardons is undermining public confidence in the administration of justice. Although general support for the death penalty remains high, nearly half of Texans polled would oppose an execution where there is evidence that the inmate has “shown signs of turning his or her life around”.³¹

Former Attorney General Dan Morales (the state official responsible for prosecuting death penalty appeals) has also expressed misgivings over the adequacy of clemency review. “There's no question in certain cases that the process does not appear to be an absolutely fair and equitable system,” Morales said as he was leaving office.³²

Conclusion: no justice without mercy

“The litigation has exposed to the citizens of Texas the inner workings of the Board of Pardons and Parole in the review of clemency petitions in death-penalty cases. It belongs to the citizens to express their judgement through their assembled representatives in the 76th Legislature as to whether this system adequately ensures that Texas is able to determine when mercy should be given.”

³⁰Execution of Farris Would be Big Mistake, Fort Worth Star-Telegram, 11 January 1999.

³¹According to the *Texas Poll*, published in the Fort Worth Star-Telegram, 14 January 1999.

³²Quoted in *Death Row Dilemma*, Austin Chronicle, 25 January 1999.

District Judge F. Scott McCown³³

Over the past two decades, Texas has executed nearly two hundred prisoners. It is inconceivable that a functioning clemency process would have found only one case worthy of mercy and none that merited thorough investigation. Senior officials, newspapers across the state and even the courts have all raised profound concerns over the disgraceful lack of fairness in Texas clemency proceedings.³⁴

Three bills have been introduced during the current session of the Texas Legislature, each calling for amendments to state law that would provide for an open and accountable clemency process in death penalty cases.³⁵ At present, all three bills are stalled in committee hearings, preventing their consideration by the full Legislature.

Amnesty International remains appalled at the absence of any meaningful clemency mechanism in Texas and urges the Texas Legislature to institute immediate and fundamental reforms. In a state that relies solely on the jury's prediction of "future dangerousness" to sanction a death sentence, it is shocking that no fair process exists for confirming the validity of that prediction prior to the execution.

³³*Final Judgement, Cause No. 98-11442*, 98th Judicial District, 8 January 1999.

³⁴During a recent legislative hearing into a proposed bill requiring open meetings on clemency, Victor Rodriguez suggested that the BPP be re-named, so that it would no longer be considered to be a "board" under the Open Meetings Act.

³⁵House Bill No. 397, for example, would require the BPP to hold a public hearing on all capital clemency applications. Companion legislation would stipulate a list of criteria to guide the Board in reviewing clemency petitions.