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David R. Dow

Jared Tyler

Frances Bourliot

Jennifer Jeans

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IS IT CONSTITUTIONAL TO EXECUTE SOMEONE WHO IS INNOCENT (AND IF IT ISN'T, HOW CAN IT BE STOPPED FOLLOWING *HOUSE V. BELL*)?

David R. Dow,* Jared Tyler,** Frances Bourliot,*** Jennifer Jeans****

We begin with a question that might seem ridiculous: does the Constitution prohibit the execution of someone who is actually innocent? Remarkably, this question remains open. In this article, we discuss how a death row inmate who has strong evidence of actual innocence can gain legal relief in postconviction proceedings on those grounds in the aftermath of the Supreme Court's decision in *House v. Bell*.¹

Much of our analysis is applicable to all criminal cases, not just death penalty cases. In certain respects, however, death penalty cases are unique. Several states provide for special procedural rules in capital cases, and the so-called "death is different" doctrine generates a more robust set of constitutional claims for capital defendants and death-sentenced inmates than for other actors in the criminal justice arena.² Consequently, although much of our analysis may well have broader application, our focus is on capital cases.

The general issue we are addressing concerns a death-sentenced inmate who identifies new evidence that, viewed in the context of all the evidence, suggests that he³ is innocent of the crime (as distinguished from innocent of the sentence).⁴ Necessarily,

* University Distinguished Professor, University of Houston Law Center. I am grateful to the University of Houston Law Foundation for financial support. The argument also benefited from the opportunity to address this issue at the National Innocence Network Conference at the University of Washington School of Law and from conversations and e-mail exchanges with Nina Morrison at the Innocence Project in New York. In addition, the material presented in Appendix A and Appendix B was collected and analyzed in cooperation with the Texas Applesseed Foundation and Texas StandDown.

** Staff Attorney, Texas Defender Service.

*** Research Fellow, Texas Innocence Network.

**** Staff Attorney, Nevada Legal Services.

1. 126 S. Ct. 2064 (2006).

2. See e.g. *Gardner v. Fla.*, 430 U.S. 349 (1977); *Woodson v. N.C.*, 428 U.S. 280 (1976). Justice Scalia has been on a mission to jettison this basic idea. E.g. *Atkins v. Va.*, 536 U.S. 304, 352–53 (2002) (Scalia, J., dissenting).

3. We use the masculine pronoun throughout this article because nearly all death row inmates are men.

4. Because a death penalty trial is actually two trials—the jury determines whether the defendant committed a death-eligible crime at the first trial and, assuming the defendant was found guilty of a death-eligible offense at the first trial, determines whether the defendant should be sentenced to death at the second trial—it is possible for a death row inmate to be guilty of the offense but improperly condemned to death. It is therefore possible, though semantically clumsy, for someone to be "innocent" of a sentence. See e.g. *Sawyer v. Whitley*, 505 U.S. 333 (1992).

this evidence is discovered subsequent to trial and after the period (prescribed by state law) in which new evidence can be presented to the trial court to arrest entry of judgment on the jury's verdict. Conceptually, this evidence can enter the case at four different phases: (1) during the direct appeal proceedings; (2) during the initial state habeas corpus proceedings; (3) during the initial federal habeas corpus proceedings; and (4) during subsequent (or successive) state or federal habeas proceedings.⁵ In this article, we are concerned with the litigation of innocence claims during the final two phases (i.e., the first federal habeas and subsequent habeas proceedings).⁶

Before assessing the current landscape for litigating claims of actual innocence, a word about the historical background may be warranted. Not since *Herrera v. Collins*,⁷ decided more than a decade ago and prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁸ has the Supreme Court addressed whether a stand-alone innocence claim is cognizable in federal habeas corpus proceedings. A stand-alone innocence claim arises when an inmate asserts that he is actually innocent but does not raise any other constitutional violations, such as ineffective assistance of counsel,⁹ the wrongful withholding of evidence,¹⁰ or the like.

Most innocence claims arise in a somewhat different context, as when an inmate invokes his innocence as a basis for forgiving a procedural default. For example, federal habeas law requires that state prisoners present their claims for relief to the state courts prior to seeking relief in federal court; this is known as the "exhaustion" requirement.¹¹ If, however, a prisoner waits too long under state law to file a state habeas petition, then the state court may rule against the inmate on procedural grounds—i.e., without addressing the merits of the issues the inmate wishes to have adjudicated.¹² Such an inmate will therefore not have exhausted his claims in state court and be unable to obtain review in federal court.

However, one exception to the general rule that bars the federal court from addressing the merits of such claims arises when the inmate argues that he is actually innocent of the crime. In this case, the inmate must satisfy the criteria identified in *Schlup v. Delo*¹³ to establish his actual innocence; the standard is to establish by a preponderance of the evidence that, in view of the newly discovered evidence, no reasonable factfinder could have found the inmate guilty beyond a reasonable doubt.¹⁴ The purpose of arguing his innocence in this context is to obtain a merits review in federal court of some *other* constitutional claim. In other words, the claim of innocence

5. Review Appendix A for state-by-state procedures on raising these claims in state habeas proceedings. Review *Herrera v. Collins*, 506 U.S. 390 (1993), and *Herrera v. Collins: A New Innocence Principle?* 11 Harv. Blackletter J. 191 (1994), for raising these claims in federal and successive petitions.

6. In fact, as we discuss below, the issue might also be raised at a fifth stage: clemency proceedings. We do not address clemency at any length in this article.

7. 506 U.S. 390.

8. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

9. *E.g. Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984).

10. *E.g. Brady v. Md.*, 373 U.S. 83 (1963).

11. 28 U.S.C. § 2254(b)(1)(A) (2000).

12. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

13. 513 U.S. 298 (1995).

14. *Id.* at 327.

operates as a “gateway” that permits the federal court to address the merits of one or more issues that it would otherwise be precluded from addressing.

In some cases, however, an inmate does not want the federal court to address other issues. Instead, he simply wants the court to evaluate evidence that established his innocence. In the era of DNA, where we have the ability to be certain about facts that were once subject to substantial doubt, are such stand-alone claims of actual innocence cognizable in federal habeas proceedings? Many observers hoped this question would be answered in *House*, but it was not.

In *Herrera* itself, the Court left open the possibility that “a proper showing of actual innocence” would warrant habeas relief¹⁵ but failed to define “proper showing.” As a result, there has always been deep uncertainty about the soundness of the inference that stand-alone innocence claims are in fact cognizable.¹⁶ Indeed, Justice Scalia implied that where the evidence of innocence is discovered shortly before an execution, the Constitution does not prevent a state from moving forward with the execution.¹⁷ Justice Scalia’s insinuation prompted Justice Blackmun to insist that the Constitution must prohibit the execution of someone who is actually innocent, for such an execution “comes perilously close to simple murder.”¹⁸

Although the *Herrera* Court did not address the question, the majority did assume that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.”¹⁹ The preceding sentence, of course, is highly conditioned. Justice O’Connor’s concurrence, however, was more explicit and went further than the Court’s opinion, noting that a “fundamental legal principle [holds] that executing the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event.”²⁰ Prior to *House*, therefore, it already seemed fair to conclude that Justice O’Connor’s statement in *Herrera*—that the Constitution prohibits the execution of someone who is actually innocent—is the law.²¹

15. 506 U.S. at 404.

16. Review Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 Am. Crim. L. Rev. 121 (2005), for a discussion on the implications of *Herrera v. Collins*.

17. *Herrera*, 506 U.S. at 427–28 (Scalia & Thomas, JJ., concurring).

18. *Id.* at 446 (Blackmun, J., dissenting).

19. *Id.* at 417.

20. *Id.* at 419 (O’Connor & Kennedy, JJ., concurring); see also *Brady*, 373 U.S. at 87–88; *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999); *Jackson v. Calderon*, 211 F.3d 1148, 1164–65 (9th Cir. 2000); *Felker v Turpin*, 83 F.3d 1303, 1312 (11th Cir. 1996); see generally *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that the Due Process Clause “bar[s] certain government actions regardless of the fairness of the procedures used to implement them”).

21. Her opinion was joined by Justice Kennedy. In addition, Justice Blackmun, joined by Justices Stevens and Souter, expressly concluded that executing the innocent is unconstitutional. *Herrera*, 506 U.S. at 430–31 (Blackmun, Stevens & Souter, JJ., dissenting in parts I–IV). Five Justices, therefore, announced that the execution of an innocent inmate would offend the Constitution. Only two Justices—Justice White in a concurring opinion and Justice Blackmun in dissent—addressed the burden of proof that a death row inmate should be required to meet in order to press an actual innocence claim in habeas proceedings. Justice White suggested that a death row inmate presenting a stand-alone innocence claim (an innocence claim unaccompanied by an independent constitutional violation) would have to show that, in view of the newly

Nevertheless, the precise question remained unresolved on the eve of *House*. In *House*, as we will discuss below, the Court confronted facts that strongly suggested—but certainly fell short of proving absolutely—that the inmate on death row was innocent. This, of course, is how most cases of actual innocence can be described: there is strong, but ultimately inconclusive, proof of actual innocence. In *House*, therefore, the Court had an opportunity to remove any remaining confusion relating to whether the Constitution places limits on the power of the states to execute inmates whose cases satisfy this description, but the Court chose not to. As a result, the procedural issues relating to how an actual innocence claim could or must be raised remain somewhat murky.

In this article, we explore how, procedurally, a death row inmate can raise a challenge to his death sentence based on a claim of actual innocence. Our concern is exclusively with the power of federal courts to grant relief. We do not address either state court collateral proceedings or the clemency process.²² In point of fact, these other mechanisms for obtaining relief may provide safeguards against the execution of someone who is actually innocent, a safeguard that would be redundant were these claims also cognizable in federal habeas proceedings. It is not clear, though, why the existence of a federal remedy should hinge on whether some other remedy is available.

In any case, the remainder of this article addresses the litigation of actual innocence claims following *House*. Part I lays out the relevant statutory language, addresses the meaning of “innocence,” and examines the statutory language in view of what “innocence” means. Part II examines the Supreme Court’s recent decision in *House*. Finally, the conclusion identifies three significant questions relating to claims of actual innocence that remain open even in *House*’s aftermath.

I. THE RELEVANT STATUTORY PROVISIONS AND THE MEANING OF “INNOCENCE”

Because the language of the text bears heavily on the answer to the question of how an innocent death row inmate must proceed, we shall set out several relevant provisions of AEDPA before discussing them. Title 28 U.S.C. § 2254 provides, in pertinent part:

- (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

discovered evidence, “no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.” *Id.* at 429 (White, J., concurring) (quoting *Jackson v. Va.*, 443 U.S. 307, 324 (1979)). The standard suggested by Justice White was endorsed by Judge Merritt, who concluded that it is now clear that it is in fact unconstitutional to carry out the execution of someone who is actually innocent. *House v. Bell*, 386 F.3d 668, 688–90 (6th Cir. 2004) (Merritt, J., dissenting).

22. Appendix A contains a state-by-state summary of the cognizability of stand-alone innocence claims in state court proceedings. Appendix B contains a state-by-state summary of the consideration of innocence claims in clemency proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

. . . .

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Title 28 U.S.C. § 2244 provides, in pertinent part:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

. . . .

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

For our present purposes, we should pay careful attention to three provisions of these statutes. First, § 2254(a) authorizes habeas relief only if the prisoner is in custody in violation of federal law. If, therefore, the incarceration or punishment of someone who is actually innocent does not, in and of itself, violate federal law, then habeas does not provide a remedy for such a prisoner. Consequently, a stand-alone innocence claim will be available in an original (i.e., first) federal habeas petition only if executing someone who is innocent violates federal law.

Second, the statute itself acknowledges the significance of actual innocence claims; thus, § 2254(e)(2) authorizes a federal court to hold an evidentiary hearing in

certain circumstances where the inmate has identified new facts²³ and, in view of those facts, no reasonable factfinder could have found the inmate guilty.²⁴ Third, and similarly, § 2244(b)(2) permits a federal court to address the merits of a second or successive habeas petition in certain circumstances, including when there are newly discovered facts²⁵ in view of which no reasonable factfinder could have found the prisoner guilty.²⁶

Overall, therefore, §§ 2254 and 2244 do evince a concern for the problem of innocence. In both statutory provisions, however, the issue of innocence is tethered to the violation of some other constitutional right. For example, § 2244(b)(2)(B)(ii) refers to “constitutional error” as distinct from the issue of actual innocence. The habeas statute consequently signals the importance of innocence without explicitly permitting a federal court to entertain a stand-alone claim of actual innocence.

In addition, AEDPA itself does not say very much about the very meaning of “innocence.” Even if it is plausible, therefore, to conclude that the Constitution forbids the state from executing someone who is actually innocent, it is necessary to be precise as to what “innocent” means. It goes without saying that, in any discussion of actual innocence, the words “innocent” and “innocence” must be understood in a legal sense, rather than a metaphysical one.²⁷ Thus, for example, the references in §§ 2254(e) and 2244(b) refer to what a reasonable factfinder *would have concluded*, as distinguished from *what is true*.

Prior to trial, of course, the defendant is presumed innocent, and the state must therefore prove that the defendant is not innocent, i.e., is guilty. The state’s burden is to establish guilt “beyond a reasonable doubt.” Although the meaning of this phrase is not entirely transparent and the Supreme Court has accepted a variety of jury instructions relating to its meaning, it is generally understood as being a weighty burden.²⁸ Once the state has met this burden by persuading a jury to return a verdict of guilty, the burden is on the defendant, who is now a convicted murderer, to establish innocence.

Proving innocence subsequent to a verdict of guilty, however, is substantially more difficult than proving guilt in the first place—leading to the peculiar irony that it is easier for the state to secure a guilty verdict against someone who is innocent than it is for someone who is innocent to establish his actual innocence following a verdict of guilty. At trial, the state must prove that the defendant is guilty beyond a reasonable doubt. Yet once the state has met that burden, an inmate who wishes to undo the guilty verdict by establishing actual innocence must satisfy a far more rigorous burden.

The federal habeas statute, for example, employs the same standard as Texas law, meaning that a postconviction petitioner who claims actual innocence must prove that

23. 28 U.S.C. § 2254(e)(2)(A)(ii).

24. *Id.* at § 2254(e)(2)(B).

25. 28 U.S.C. § 2244(b)(2)(B)(i) (2000).

26. *Id.* at § 2244(b)(2)(B)(ii).

27. Unfortunately, even the legal definition of innocence embodies intractable metaphysical difficulties. Those difficulties, however, are not our immediate concern, so we shall not linger over them.

28. For a variety of acceptable definitions of the “beyond a reasonable doubt” standard, review David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?* 2000 Utah L. Rev. 483, 507–08.

“no reasonable juror” could have voted to convict.²⁹ The “no reasonable juror” standard is far more onerous than the state’s original burden. Even in the face of DNA exclusions, some jurors disbelieve the evidence or believe that an individual participated in the crime anyway. In one notorious case in Texas, Roy Criner was convicted of rape³⁰ even though DNA found in the victim excluded Criner as the rapist.³¹ The Texas Court of Criminal Appeals nevertheless refused to order a new trial.³² In short, as an empirical matter, it is clear that satisfying the “no reasonable juror” standard is somewhere between exceedingly difficult and entirely impossible. The burden is so onerous that it may well be sensible in some cases, especially death penalty cases, and even more especially death penalty cases involving DNA, to reduce that burden if there is some legitimate reason why the evidence of innocence was not identified previously. Legitimate reasons include incompetent legal assistance, police or prosecutorial misconduct, or even a lack of resources to perform an adequate investigation. At the moment, however, the burden remains daunting.

Even if a stand-alone innocence claim is cognizable in an original federal habeas proceeding, raising such a claim in a second or successive petition will be even more difficult. The statute provides:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.³³

Semantically, it may be possible, if barely, to read § 2244 as permitting an inmate to raise a stand-alone innocence claim in a second or subsequent petition. To begin with, it simply does not make sense to say that a showing of a constitutional error will not warrant habeas relief unless the constitutional error led to an erroneous conviction unless there is something especially problematic about an erroneous conviction. However, if there *is* something especially problematic about an erroneous conviction, then the absence of a constitutional error does not negate that problem. In other words, by recognizing that there is something special about an erroneous conviction, § 2244(b)(2)(B)(ii) implies that an erroneous conviction must itself supply a basis for federal intervention.

Second, the due diligence provision in § 2244(b)(2)(B)(i) would not make sense unless § 2244 anticipated that a stand-alone innocence claim would warrant habeas relief because the facts that underlie any claim other than a claim for actual innocence will

29. See *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (quoting *Schlup*, 513 U.S. at 327); see also Appendix A (collecting state laws).

30. *Criner v. State*, 816 S.W.2d 137, 138 (Tex. App. 9th Dist. 1991).

31. *Id.* at 139.

32. For the views of one of the participating judges, review Frontline, *Interview with Judge Sharon Keller*, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html> (accessed Jan. 31, 2007).

33. 28 U.S.C. § 2244(b)(2), (b)(2)(B).

almost always have been previously discoverable through the exercise of due diligence. In other words, stand-alone claims of actual innocence are precisely the types of claims that will most commonly involve new evidence that was not previously discoverable. Or, put somewhat differently, the prototypical type of new evidence that was not previously discoverable will be new evidence of actual innocence—like an advance in DNA testing technology that reveals innocence or a deathbed confession from the actual perpetrator—rather than evidence of some other constitutional violation. (Of course, it may be possible to recharacterize many cases involving newly discovered evidence of actual innocence as cases where the failure to locate or hand over such evidence to the defense amounted to police or prosecutorial misconduct.³⁴ In some cases, however, the state will truly not be culpable for the belated discovery of exculpatory evidence.)

II. *HOUSE V. BELL*

Prior to *House*, the Supreme Court held that in order to demonstrate actual innocence in a collateral proceeding, an inmate must present “relevant evidence that was either excluded or unavailable at trial” and “show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.”³⁵ *House* did not disturb this requirement, but neither did it provide extensive clarification. As a consequence, at least three significant questions that will recur in death penalty cases with some regularity remain.

A. *The Facts of House*

On July 14, 1985, neighbors discovered the body of Carolyn Muncey, hidden among branches, roughly one hundred yards from her driveway.³⁶ She had a black eye and bruises on her neck and legs, and both hands were bloodstained up to the wrists.³⁷ Her nightgown and panties contained traces of semen.³⁸ The county medical examiner declared the injuries consistent with a “traumatic origin.”³⁹ He concluded that Muncey had been choked and that the cause of death was a severe blow to the left forehead that

34. How an inmate obtains such evidence is a different question. Some courts of appeals have held that an action under 42 U.S.C. § 1983 cannot be used to obtain exculpatory evidence. See e.g. *Harvey v. Horan*, 278 F.3d 370, 374 (4th Cir. 2002); *Kutzner v. Montgomery Co.*, 303 F.3d 339, 340 (5th Cir. 2002). However, no court has gainsaid that an inmate does indeed have a constitutional right of access to exculpatory evidence. See e.g. *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir. 2002) (recognizing a right of access to DNA evidence); *Godschalk v. Montgomery Co. D.A.'s Off.*, 177 F. Supp. 2d 366, 367 (E.D. Pa. 2001) (ordering postconviction DNA testing). And where this right is asserted prior to trial, a line of jurisprudence four decades old supports a defendant's right of access to such material. *Giglio v. U.S.*, 405 U.S. 150, 154–55 (1972); *Brady*, 373 U.S. at 86.

35. *Schlup*, 513 U.S. at 327–28. *Schlup* may well be inconsistent with AEDPA. Whereas *Schlup* essentially adopts a preponderance of the evidence standard, AEDPA, as indicated above, requires clear and convincing evidence. The Ninth Circuit Court of Appeals has noted that AEDPA imposes a more difficult burden of proof than was articulated in *Schlup*. E.g. *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004). The Ninth Circuit also observed that the Supreme Court has not yet addressed whether the standard of *Schlup* has been displaced by AEDPA or whether, on the contrary, the AEDPA standard is impermissible. E.g. *Jaramillo v. Stewart*, 340 F.3d 877, 881 (9th Cir. 2003).

36. *House*, 126 S. Ct. at 2068.

37. *Id.* at 2070.

38. *Id.* at 2072.

39. *Id.* at 2070 (citation omitted).

opened a laceration to the bone and caused a severe right-side hemorrhage.⁴⁰

Paul House was convicted and sentenced to death for the murder of Carolyn Muncey.⁴¹ The State's case against House centered on the semen found on Muncey's nightgown and panties and on bloodstains found on House's jeans.⁴² The State introduced testimony that the source of the semen was a secretor with blood-type A.⁴³ Secretors are those individuals whose blood type can be ascertained from other bodily fluids (like saliva or semen); secretors comprise eighty percent of the population.⁴⁴ House is a secretor, and his blood type was A.⁴⁵ Carolyn Muncey, as well as her husband, William Muncey, was also type A.⁴⁶

Analysts located spots of blood on House's jeans in five locations: the left outside leg, the right bottom cuff, the left thigh, inside the right inside pocket, and on the lower pocket on the outside.⁴⁷ Testimony indicated that each of the five stains was type-A blood; further analysis presumably established that the blood did not belong to House and was consistent with Carolyn Muncey's.⁴⁸ However, fiber analysis showed neither hair nor fiber consistent with the victim's hair or clothing on House's pants.⁴⁹ The State relied heavily on the semen evidence to argue at trial that House had sexually attacked and murdered Muncey.⁵⁰

At the time of Muncey's murder, House was on probation following a sentence of five years to life for the crime of aggravated sexual assault.⁵¹ New to the area, House quickly became a suspect.⁵² When initially questioned, he claimed—falsely—that he had been with his girlfriend, Donna Turner, at the time of the Muncey murder.⁵³ House had scratches on his arms and hands and a bruise on his finger.⁵⁴ He said that the scratches were from Turner's cats and that the bruise was from an injury he had suffered at his construction job.⁵⁵ Turner told police that House had left her trailer the previous evening and had returned later, out of breath, without his shirt and shoes.⁵⁶ He told her, according to Turner, that he had been attacked by people he did not know while out on his walk.⁵⁷

House maintained his innocence from the outset. By the time his case was in

40. *Id.* at 2070–71.

41. *House*, 126 S. Ct. at 2074–75.

42. *Id.* at 2072.

43. *Id.*

44. *Id.*

45. *Id.*

46. *House*, 126 S. Ct. at 2072.

47. *Id.*

48. *Id.* at 2072–73.

49. *Id.* at 2073.

50. *Id.* at 2072.

51. *House*, 126 S. Ct. at 2071.

52. *Id.* at 2070.

53. *Id.* at 2071.

54. *Id.*

55. *Id.*

56. *House*, 126 S. Ct. at 2071.

57. *Id.*

habeas proceedings, new testing had undermined the State's case against him.⁵⁸ The semen on Muncey's clothing, for example, was shown conclusively to belong to Muncey's husband.⁵⁹ (The State had knowledge, moreover, that the Munceys had had sexual relations on the morning of the day Muncey was killed; the jury, however, was not so apprised.⁶⁰) The blood evidence, too, lost any probative value because an entire vial of blood taken during the autopsy disappeared, supporting the theory that the blood was spilled on House's jeans when the jeans and autopsy blood were transported to the laboratory for testing in the same container.⁶¹ This theory gained additional support when the State's Assistant Chief Medical Examiner testified that the blood found on House's jeans was too degraded to have come from the murder but was in fact consistent with the quality of blood found in the autopsy tubes.⁶² (Had the blood splattered onto House's jeans at the time of the murder, the enzymes would not have decayed as they did because the cloth would have acted to prevent that degradation.⁶³ Therefore, the fact that there was degradation caused this expert to conclude that the blood on the jeans came from blood taken from the body during the autopsy or at some other time post-mortem.⁶⁴)

In addition to the disintegration of the case against House, additional evidence surfaced that strongly suggested Mr. Muncey killed his wife. When questioned shortly after the murder, Mr. Muncey stated, falsely, that he had been at a dance at the time of the murder and had left it only briefly to buy beer.⁶⁵ In addition, Carolyn Muncey's brother told authorities that he had witnessed Mr. Muncey, who was drunk at the time, striking his sister and that his sister had told him that she was scared of her husband and wanted to leave him.⁶⁶ House located additional witnesses who testified that Muncey had physically abused his wife.⁶⁷ Two witnesses who had known Muncey for many years testified that Muncey had confessed to them that he had murdered his wife.⁶⁸ (One of these witnesses attempted to testify at House's trial but was turned away by House's counsel.⁶⁹)

B. *The Holding of House*

House's conviction and death sentence were affirmed on direct appeal by the Tennessee Supreme Court.⁷⁰ House filed a pro se state habeas petition.⁷¹ The court appointed counsel to assist House, but House's appointed counsel offered no evidence at

58. *Id.* at 2075.

59. *Id.* at 2078–79.

60. *Id.* at 2072.

61. *House*, 126 S. Ct. at 2080.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 2072, 2084.

66. *House*, 126 S. Ct. at 2083.

67. *Id.*

68. *Id.* at 2084.

69. *Id.*

70. *Id.* at 2075.

71. *House*, 126 S. Ct. at 2075.

the hearing beyond what was in the trial transcript.⁷² The petition was dismissed and, on appeal, the Tennessee Court of Criminal Appeals affirmed.⁷³ The Tennessee Supreme Court and the United States Supreme Court both denied review.⁷⁴ House then filed a second petition in state court, seeking investigative and expert assistance.⁷⁵ The Tennessee Supreme Court held that House's claims were barred by a state statute because they had not been raised in prior postconviction proceedings.⁷⁶ The United States Supreme Court denied certiorari.⁷⁷

House next filed a federal habeas petition, identifying evidence supporting his claim of actual innocence and arguing that he had received ineffective assistance of counsel and that his trial had been rendered unfair by prosecutorial misconduct.⁷⁸ In order for House to obtain review of the merits of these claims in federal court, however, he had to satisfy an exception to the procedural default that the state court had identified.⁷⁹ Citing *Schlup*⁸⁰ and *Sawyer v. Whitley*,⁸¹ House argued that he satisfied the so-called actual innocence gateway, which allows a federal court to consider otherwise defaulted constitutional claims when the inmate can establish that he is actually innocent of the crime.⁸² House showed that the semen did not belong to him, the blood on his jeans was probably transferred from the blood recovered during the autopsy, Muncey's husband was abusive, and Mr. Muncey had in fact confessed to the murder.⁸³ The District Court denied relief, finding that House had not met the standards required in *Schlup* or *Sawyer*.⁸⁴

The Sixth Circuit Court of Appeals granted a certificate of appealability under Title 28 U.S.C. § 2253(c).⁸⁵ Initially, after finding that House had made out a compelling case of actual innocence, the Sixth Circuit certified questions to the Tennessee Supreme Court,⁸⁶ seeking to have that Court indicate whether House had available to him any state law avenue for pursuing his claim of innocence.⁸⁷ The Tennessee Supreme Court declined to answer the certified question.⁸⁸ Thereafter, a divided en banc court, by a vote of eight to seven, denied House relief.⁸⁹ Of the seven dissenters, six believed House had established his actual innocence and would have ordered him released from confinement; the seventh would have remanded to the district

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *House*, 126 S. Ct. at 2075.

77. *Id.*

78. *Id.*

79. *Id.*

80. 513 U.S. 298.

81. 505 U.S. 333.

82. *House*, 126 S. Ct. at 2075.

83. *Id.* at 2078–84.

84. *Id.* at 2075.

85. *Id.*

86. *Id.* at 2075–76.

87. *House*, 126 S. Ct. at 2076.

88. *Id.*

89. *Id.*

court to address the merits of the issue in the first instance.⁹⁰ The Supreme Court granted certiorari.⁹¹

By a vote of five to three, with Justice Alito not participating, the Supreme Court reversed.⁹² House conceded that his constitutional claims were barred by regularly applied state procedural rules, but he insisted that the evidence tending to establish his actual innocence was sufficiently weighty that the federal court should nonetheless address the merits of the constitutional claims.⁹³

Generally, a federal court can address the merits of a constitutional claim that has been forfeited under state law only in limited circumstances—i.e., if the petitioner can demonstrate cause for and prejudice from the default⁹⁴ or where the petitioner can show that a fundamental miscarriage of justice will result from non-review (where such a miscarriage is tantamount to the conviction or execution of someone who is actually innocent).⁹⁵ In the case of these exceptions, however, the petitioner is identifying a constitutional violation, rather than a stand-alone innocence claim. As discussed above, in *Herrera*,⁹⁶ the Court addressed whether a death row inmate can raise a stand-alone innocence claim and, without actually deciding that question, ruled that if such a claim is cognizable, it triggers an extraordinarily high evidentiary threshold.⁹⁷ House did not present a *Herrera*-like claim, however, because he identified independent constitutional violations. Accordingly, under *Schlup*, he could obtain federal merits review of those claims if he could demonstrate that there exists “new reliable evidence . . . that was not presented at trial”⁹⁸ and, in light of the new evidence, “it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.”⁹⁹ The federal court assesses the totality of the evidence to ascertain whether these criteria are satisfied.¹⁰⁰ If they are, the petitioner has passed through the *Schlup* gateway, and the court will address the merits of the constitutional claims.

The Supreme Court concluded that House had in fact satisfied the actual innocence gateway standard of *Schlup*.¹⁰¹ Justice Kennedy’s majority opinion did not go as far as the six judges on the court of appeals who believed that House had already established his actual innocence, but the Supreme Court majority did determine that any reasonable juror would entertain reasonable doubt as to House’s guilt.¹⁰²

90. *Id.*

91. *Id.*

92. *House*, 126 S. Ct. at 2068.

93. *Id.* at 2086.

94. *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

95. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

96. 506 U.S. 390.

97. *Id.* at 417.

98. 513 U.S. at 324.

99. *Id.* at 327.

100. *Id.* at 329.

101. *House*, 126 S. Ct. at 2087.

102. *Id.* at 2086.

III. CONCLUSION: THREE REMAINING QUESTIONS.

Actual innocence is a hot topic, especially in death penalty cases. For example, in *Kansas v. Marsh*,¹⁰³—a case involving a challenge to Kansas’ so-called equipoise instruction rather than an innocence claim—Justices Scalia and Souter, using Professor Sam Gross’ study of exonerations of death-sentenced inmates as a starting point, engaged in a long debate as to how many innocent people have been sent to death row.¹⁰⁴ This ostensible concern over innocence explains the Court’s approach in *House*. In short, the Court held that a habeas court applying the *Schlup* criteria must not limit itself to admissible evidence. As Justice Kennedy summarized:

Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider “all the evidence,” old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under “rules of admissibility that would govern at trial.” Based on this total record, the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” The court’s function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.¹⁰⁵

House thus explicitly holds that a holistic review of the evidence in a federal habeas petition asserting an actual innocence claim requires a court to review and weigh evidence that would not necessarily be admitted at trial.¹⁰⁶ This emphasizes that, regardless of what the jury may or may not have been shown, judges must examine every piece of evidence, weigh it as a whole, and then determine what a reasonable juror would do. Moreover, this analysis does not require a petitioner who has lost in district court to demonstrate on appeal that the lower court’s conclusion was “clearly erroneous” because, even though the court’s analysis is quasi-factual, it is inferring from those facts a legal conclusion. Instead, to pass through the *Schlup* gateway, a petitioner must show only that a reasonable juror would have reasonable doubt sufficient to acquit.

Nevertheless, despite this apparent generosity to inmates asserting claims of actual innocence, the short history of the decision in *House* has revealed three facts worth noting. First, inmates raising so-called *House* claims have, with no published exceptions,¹⁰⁷ foundered on either the first or second hurdle of *Schlup*—that is, they have been deemed not to have identified new, reliable evidence¹⁰⁸ or they have not persuaded a court that, in view of putatively new evidence, no reasonable juror would convict.¹⁰⁹ This fact perhaps reveals that the Court’s view of *House*, and the doctrine

103. 126 S. Ct. 2516 (2006).

104. *Id.* at 2536–38 (Scalia, J., concurring); *id.* at 2545 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

105. *House*, 126 S. Ct. at 2077 (citations omitted).

106. *Id.*

107. Appendix C shows all dispositions of so-called *House* claims as of October 9, 2006.

108. *E.g. Arrington v. Williams*, 2006 WL 2615512 at *5 (10th Cir. Sept. 13, 2006); *Torre Franca v. Schriro*, 2006 WL 1981788 at *11 (D. Ariz. July 13, 2006); *Darity v. McDonough*, 2006 WL 2792891 at *10 (M.D. Fla. Sept. 27, 2006).

109. *E.g. Alongi v. Hendricks*, 2006 WL 2129107 at *12 (D.N.J. July 26, 2006). In *Alongi*, the petitioner also argued that the district court did not consider his *Brady* claim in a holistic manner, but this failure is negated by the court’s determination that the evidence as a whole would not create enough reasonable doubt for

built upon it, is highly dependent on the fact that House's evidence included DNA evidence. How precisely *House* will apply to more common cases involving witness recantation or new non-scientific evidence remains uncertain.

Second, House's federal habeas petition was his first. The State had argued that AEDPA had replaced the *Schlup* standard with the stricter test found in *Sawyer*,¹¹⁰ which permits consideration of successive, defaulted sentencing claims "only if the petitioner 'show[s] by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.'"¹¹¹ The Court reasoned, however, that because House's federal habeas petition was his first, the successor provisions of AEDPA—specifically, the provisions found in Title 28 U.S.C. §§ 2244(b)(2)(B)(ii) and 2254(e)(2)—did not apply because neither provision addresses a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence.¹¹²

Finally, although *House* seems to allow an inmate who has secured new evidence tending to establish actual innocence to pursue the innocence claim in his first federal habeas petition, some inmates who wish to raise an innocence claim will, unlike House himself, not be in possession of the evidence that could establish their innocence. Is there anything they can do?

Judge J. Michael Luttig has suggested that under such circumstances, where an inmate can identify evidence that could establish his actual innocence, the inmate is entitled to a stay of execution and an order permitting him to test the very evidence that may prove exculpatory.¹¹³ As Judge Luttig wrote:

[W]here the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence.¹¹⁴

Judge Luttig's view makes perfect sense, but it is important to stress that neither the Supreme Court nor any federal court of appeals has adopted this rule. Moreover, Judge Luttig's approach fits more comfortably with first habeas petitions than with

a reasonable juror not to convict. *Id.* at **21–22; *e.g. also Hazelton v. Shannon*, 2006 WL 2302666 at *7 (M.D. Pa. Aug. 8, 2006).

110. *House*, 126 S. Ct. at 2078.

111. *Id.* (quoting *Sawyer*, 505 U.S. at 336) (brackets in original).

112. *Id.*

113. *Harvey v. Horan*, 285 F.3d 298, 318 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc).

[I]t would simply be constitutionally intolerable for the government to withhold from the convicted, *for no reason at all*, the very evidence that it used to deprive him of his liberty, where he persists in his absolute innocence and further tests of the evidence could, given the circumstances of the crime and the evidence marshaled against the defendant at trial, establish to a certainty whether he actually is factually innocent of the crime for which he was convicted.

Id. (internal citation and quotation marks omitted).

114. *Id.* at 317. The principle Judge Luttig has identified is essentially a predicate of the conclusion that the Constitution forbids the execution of the actually innocent. If the inmate is in fact innocent, and his innocence precludes the state from executing him, he has a predicate constitutional right of access to the evidence that will establish his innocence.

second or successive petitions, meaning that this problem is exacerbated by the second problem discussed above.

Nevertheless, it may be reasonable to say that, to the extent that AEDPA is at odds with Judge Luttig's suggestion where second or successive petitions are concerned, § 2244 is unconstitutional. As the Sixth Circuit has reasoned, if § 2244 "prohibit[s] this court and the Supreme Court from reviewing claims of innocence in death penalty habeas cases [then it] raise[s] serious constitutional issues under the due process clause and under Article I, § 9, which prohibits the suspension of the writ of habeas corpus."¹¹⁵ Further, it is possible to read § 2244 broadly enough to permit an inmate who does not possess exculpatory evidence to proceed.¹¹⁶ For example, the Second Circuit Court of Appeals has indicated that the actual innocence gateway of § 2244 is satisfied where the death row inmate presents evidence that "tend[s] to show actual innocence."¹¹⁷ Indeed, in *Schlup*, the Supreme Court indicated that an inmate asserting actual innocence is only required to point to evidence that *would* establish his innocence—rather than existing evidence of actual innocence.¹¹⁸ Construing *Schlup*, the Ninth Circuit Court of Appeals has emphasized that an inmate can satisfy § 2244 even if he "has not affirmatively proved his actual innocence"; rather, the inmate's burden under § 2244 is to identify "sufficient doubt about the validity of his conviction."¹¹⁹

Despite these various dicta, however, all three problems remain unresolved. Thus, an inmate whose evidence is less certain than DNA may find no haven in *House*. A death row inmate who has already filed one federal habeas petition may be outside the scope of *House*. And a death row inmate who believes that there may be exculpatory evidence, but who has neither obtained nor tested it, will also probably lie outside the

115. *Workman v. Bell*, 227 F.3d 331, 337 n. 4 (6th Cir. 2000). Similarly, the Second Circuit has suggested that if a petitioner were to demonstrate that he is actually innocent of the crime for which he was convicted, then application of the AEDPA statute of limitations to bar habeas corpus relief might well constitute a suspension of the writ. *Triestman v. U.S.*, 124 F.3d 361, 378–79 & n. 21 (2d Cir. 1997) (holding that a claim of actual innocence would raise serious due process and Eighth Amendment questions but declining to address alleged Suspension Clause violation).

On the precise question of whether AEDPA's statute of limitations provision constitutes an unconstitutional suspension of the writ in cases where an inmate asserts actual innocence, the circuits are split. In addition to *Triestman*, compare *David v. Hall*, 318 F.3d 343, 347–48 (1st Cir. 2003) (finding no suspension while noting that the rule might be different in a capital case); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (finding no suspension of the writ while noting that, although inmate had claimed actual innocence, he had not shown it) with *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

116. Moreover, if § 2244 would be unconstitutional if it precluded a death row inmate from raising a claim that rests on evidence that is known to exist but the content of which is uncertain, then, under the doctrine of constitutional doubt, § 2244 should be construed to permit what the Constitution requires. *Cf. I.N.S v. St. Cyr*, 533 U.S. 289, 336 (2001) (Rehnquist, C.J. & Scalia, Thomas & O'Connor, JJ., dissenting) (noting that doctrine of constitutional doubt is used to interpret ambiguous statutory provisions in a manner that renders them constitutional).

117. *Torres v. Senkowski*, 316 F.3d 147, 150 (2d Cir. 2003).

118. *Schlup*, 513 U.S. at 324 (noting that a claim of actual innocence requires petitioner to support his allegations of constitutional error with "new reliable evidence" of factual innocence such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" (emphasis added)); see also *Amrine v. Bowersox*, 128 F.3d 1222, 1229 (8th Cir. 1997) (noting that inmate's proffered evidence, "if found reliable," would satisfy actual innocence standard of § 2244 and, therefore, authorize inmate to file subsequent petition).

119. *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997). Such doubt, moreover, can be established by impeachment evidence alone. *Id.* at 478–79.

boundaries of *House*. The Court's decision in *House* will certainly prove significant if House ultimately gains release from Tennessee's death row, but, in view of the questions it leaves unanswered, the decision may ultimately prove significant only to inmates named Paul Gregory House.

APPENDIX A: STATE PROCEDURES FOR RAISING CLAIMS OF ACTUAL INNOCENCE IN
STATE HABEAS PROCEEDINGS*Alabama*

Criminal Rule of Procedure 32.1 allows a defendant convicted of a criminal offense to institute a proceeding based on newly discovered material facts that require the vacation of the sentence or conviction.¹²⁰ The newly discovered facts must:

have been unknown to the petitioner at the time of trial, sentencing, appeal, or post-trial motion;

not have been discoverable through the exercise of reasonable diligence;

be neither merely cumulative nor merely impeaching;

be of such a nature that, had they been known at the time, the result probably would have been different; and

establish that the petitioner is innocent of the crime or should not have received the sentence.¹²¹

Criminal Rule of Procedure 32.2 precludes a court from granting relief on a successive petition unless the petitioner shows that good cause exists for the failure to raise the claim earlier and that failure to entertain the petition would result in a miscarriage of justice.¹²² A petition brought on the ground of newly discovered evidence must be filed within one year from the date when the judgment became final or within six months of the discovery of the material facts, whichever is later.¹²³

Alaska

Alaska's postconviction relief statute authorizes petitions for relief based on material facts "not previously presented and heard . . . that require[] vacation of the conviction or sentence in the interests of justice."¹²⁴ Alaska Statute § 12.72.020(b) waives the statute of limitations for applications based on newly discovered evidence when the petitioner establishes (1) due diligence in presenting the claim; (2) that the evidence was not known within two years after the conviction; (3) that the evidence is not cumulative; (4) that the evidence is not merely impeaching; and (5) that the evidence clearly and convincingly establishes the petitioner's innocence.¹²⁵

A successful application under Alaska Statute § 12.72.010 demonstrates that newly discovered evidence could result in acquittal.¹²⁶ Such evidence "must be realistically evaluated in light of the totality of the evidence to be presented in the event of a retrial,

120. Ala. R. Crim. Proc. 32.1(e).

121. *Id.*

122. *Id.* at 32.2(b).

123. *Id.* at 32.2(c).

124. Alaska Stat. § 12.72.010(4) (Lexis 2004).

125. *Id.* at § 12.72.020(b).

126. *James v. State*, 84 P.3d 404 (Alaska 2004).

including . . . original testimony.”¹²⁷

Arkansas

Arkansas’ habeas statute provides for relief on the basis of new scientific evidence. Arkansas Code Annotated § 16-112-201 allows a person convicted of a crime to petition for relief if the petitioner presents scientific evidence, unavailable at trial, establishing his actual innocence.¹²⁸ A petitioner is also eligible for relief if the new evidence, considered “in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.”¹²⁹

Similarly, Arkansas Code Annotated § 16-112-202 allows a person convicted of a crime to move for fingerprinting, forensic DNA testing, or other tests in order to demonstrate his actual innocence.¹³⁰ A movant seeking fingerprinting or DNA testing must prove, among other things, that identity was an issue at trial and that the evidence has not been materially altered.¹³¹ The circuit court must hold a hearing on the petition if the record in the case fails to show conclusively that no relief is warranted.¹³²

California

California provides relief through its habeas statute as interpreted through case law. In *In re Hall*, the Supreme Court of California articulated a standard of review for claims of actual innocence, holding that the evidence supporting such claims must be “conclusive and ‘point[] unerringly to innocence.’”¹³³ The Court rejected, however, the requirement that “each bit of prosecutorial evidence be specifically refuted,”¹³⁴ holding:

It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecution’s proof, or if a petitioner utterly destroyed the theory on which the [state] relied without rebutting all other possible scenarios which, *if* they had been presented at trial, might have tended to support a verdict of guilt.¹³⁵

Similarly, in *In re Clark*, the California Supreme Court held that, if a petitioner made a showing that he was actually innocent of the crime, it would demonstrate a fundamental miscarriage of justice, thus exempting the petition from the procedural barring of untimely petitions from consideration.¹³⁶

127. *Id.* at 407.

128. Ark. Code Ann. § 16-112-201(a)(1) (Lexis 2006).

129. *Id.* at § 16-112-201(a)(2).

130. *Id.* at § 16-112-202.

131. *Id.* at § 16-112-202(4), (7).

132. *Id.* at § 16-112-205(a).

133. 637 P.2d 690, 698 (Cal. 1981) (quoting *In re Weber*, 523 P.2d 229, 243 (Cal. 1974)).

134. *Id.*

135. *Id.* (emphasis in original).

136. 855 P.2d 729, 760–61 (Cal. 1993).

Colorado

Colorado provides relief through Colorado Revised Statute § 18-1-410 and Criminal Rule of Procedure 35(c). An application may be made under either of these provisions if

there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice.¹³⁷

Similarly, Colorado Revised Statutes §§ 18-1-412 and 18-1-413 authorize incarcerated persons to apply for DNA testing if they can demonstrate by a preponderance of the evidence that favorable results will demonstrate actual innocence.¹³⁸

Connecticut

Connecticut provides relief through case law interpreting the state habeas statute.¹³⁹ In *Summerville v. Warden*, the Supreme Court of Connecticut held a “substantial claim of actual innocence” to be cognizable in a petition for a writ of habeas corpus, even without proof that a constitutional violation affected the trial result.¹⁴⁰ In *Miller v. Commissioner of Correction*, the Court addressed the standard for a claim of actual innocence:

First, taking into account both the evidence produced in the original criminal trial and the evidence produced in the habeas hearing, the petitioner must persuade the habeas court by clear and convincing evidence, as that standard is properly understood and applied in the context of such a claim, that the petitioner is actually innocent of the crime of which he stands convicted. Second, the petitioner must establish that, after considering all of that evidence and the inferences drawn therefrom, as the habeas court did, no reasonable fact finder would find the petitioner guilty.¹⁴¹

In addition, Connecticut requires law enforcement officials to preserve biological evidence so that an incarcerated individual may petition for DNA testing of any available evidence.¹⁴² The relevant provision requires a court to order DNA testing if it finds a reasonable probability that the petitioner would not have been convicted if exculpatory results were available at trial.¹⁴³

Delaware

Criminal Procedure Rule 61 provides for the setting aside of a conviction or a death sentence imposed by a court without jurisdiction or on any ground otherwise

137. Colo. Rev. Stat. § 18-1-410(1)(e) (Lexis 2006); Colo. R. Crim. Proc. 35(c)(2)(V).

138. Colo. Rev. Stat. §§ 18-1-412 to 18-1-413 (Lexis 2006).

139. Conn. Gen. Stat. Ann. § 52-466 (West 2005).

140. *Summerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994).

141. *Miller v. Commr. of Correct*, 700 A.2d 1108, 1130–31 (Conn. 1997).

142. Conn. Gen. Stat. Ann. § 54-102jj (West Supp. 2006).

143. *Id.* at § 54-102kk(b)(1).

available for collateral attack.¹⁴⁴ Criminal Procedure Rule 33 requires a motion for a new trial based on newly discovered evidence to be made within two years of final judgment;¹⁴⁵ however, otherwise applicable procedural bars do not apply if the petition makes a “colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”¹⁴⁶

In order for a new trial to be granted based on the discovery of new evidence under Rules 61 and 33,

[I]t must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial, and could not have been discovered before by the exercise of due diligence; and (3) that it is not merely cumulative or impeaching.¹⁴⁷

In *State v. Condon*, a petitioner for postconviction relief argued that newly discovered evidence demonstrated a “miscarriage of justice,” thus exempting his application from the procedural bars of a motion for a new trial made under Rules 61 and 33.¹⁴⁸ The court declined to address this argument because the petitioner failed to identify new evidence that would warrant the granting of a new trial.¹⁴⁹

Finally, Delaware Code § 4504(a) allows a person convicted of a crime to file a motion requesting DNA testing in order to demonstrate actual innocence.¹⁵⁰ The motion must be filed within three years of the judgment of conviction becoming final.¹⁵¹

District of Columbia

D.C. Code § 22-4135 allows a person convicted of a criminal offense to move for a new trial or to have a sentence vacated on grounds of actual innocence at *any time*.¹⁵² The court shall grant a new trial “[i]f, after considering [the new evidence], the court concludes that it is more likely than not that the movant is actually innocent.”¹⁵³ The court must vacate the conviction if, after considering the new evidence, the court concludes by clear and convincing evidence that the movant is actually innocent of the crime.¹⁵⁴

D.C. Code § 22-4134 requires law enforcement agencies to preserve biological material that resulted in a conviction for five years or as long as any person connected with the case remains in custody, whichever is longer.¹⁵⁵ Similarly, D.C. Code § 22-

144. Del. Super. Ct. Crim. R. 61(a)(1).

145. *Id.* at R. 33.

146. *Id.* at R. 61(i)(5).

147. *State v. Condon*, 2003 WL 1364619 at *4 (Del. Super. Mar. 13, 2003) (quoting *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. 1974)).

148. *Id.*

149. *Id.*

150. Del. Code Ann. tit. 11, § 4504(a) (Lexis 2001).

151. *Id.*

152. D.C. Code Ann. § 22-4135(a)–(b) (Lexis Supp. 2006).

153. *Id.* at § 22-4135(g)(2).

154. *Id.* at § 22-4135(g)(3).

155. *Id.* at § 22-4134(a).

4133 authorizes a person in custody for a crime of violence to apply for DNA testing of biological material in the possession of the state or federal government.¹⁵⁶

Finally, D.C. Code § 23-110(a) allows a prisoner in custody to petition the Superior Court to vacate, set aside, or correct the sentence because

(1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; [or] (4) the sentence is otherwise subject to collateral attack.¹⁵⁷

Florida

Rule 3.850(a) of the Florida Rules of Criminal Procedure incorporates the remedies historically available through the writ of habeas corpus.¹⁵⁸ Rule 3.850(a) also provides relief when the judgment or sentence is otherwise subject to collateral attack.¹⁵⁹ Rule 3.850(b) prohibits the consideration of a motion filed in a non-capital case more than two years after the judgment and sentence became final.¹⁶⁰ Similarly, a court may not consider a petition filed in a capital case more than one year after the judgment and sentence became final¹⁶¹ unless the petitioner alleges, among other things, that “the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence.”¹⁶²

Florida courts have authorized claims of newly discovered evidence of actual innocence made under Rule 3.850.¹⁶³ In reviewing a claim made on the grounds of newly discovered evidence, a trial court is required to “‘consider all newly discovered evidence which would be admissible’ at trial and then evaluate the ‘weight of both the newly discovered evidence and the evidence which was introduced at the trial.’”¹⁶⁴ Florida also allows incarcerated individuals to petition for DNA testing.¹⁶⁵

Georgia

Georgia Code § 5-5-23 provides that a new trial may be granted based on new material evidence that is not merely cumulative or impeaching.¹⁶⁶ Motions under this section must be made within thirty days of the judgment.¹⁶⁷

A motion for a new trial made more than thirty days after entry of judgment is an

156. *Id.* at § 22-4133(a).

157. D.C. Code Ann. § 23-110(a) (Lexis 2001).

158. Rule 3.850(a) provides relief from a judgment or conviction imposed in violation of the Constitution or laws of the United States or the State of Florida, by a court lacking jurisdiction, or in excess of the maximum penalty authorized by law. Fla. R. Crim. Proc. 3.850(a)(1)-(4). A petitioner may also obtain relief from an involuntary plea. *Id.* at 3.850(a)(5).

159. Fla. R. Crim. Proc. 3.850(a)(6).

160. *Id.* at 3.850(b).

161. *Id.*

162. *Id.* at 3.850(b)(1).

163. *E.g. Mills v. State*, 786 So. 2d 547 (Fla. 2001); *Jones v. State*, 709 So. 2d 512 (Fla. 1998).

164. *Jones*, 709 So. 2d at 521 (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)).

165. Fla. Stat. Ann. § 925.11 (West Supp. 2006); Fla. R. Crim. Proc. 3.853.

166. Ga. Code Ann. § 5-5-23 (1995).

167. *Id.* at § 5-5-40(a).

“extraordinary” motion.¹⁶⁸ Generally, a trial court must hold a hearing on a motion for a new trial; an extraordinary motion, however, may be denied without a hearing.¹⁶⁹ In order for a court to grant a motion for a new trial, the movant must establish:

- (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness.¹⁷⁰

Hawaii

Hawaii’s Rule of Penal Procedure 40 encompasses all common law and statutory procedures for postconviction relief.¹⁷¹ A person may seek relief from a conviction under Rule 40 based on newly discovered evidence at any time.¹⁷²

As a general rule, a hearing should be held on a Rule 40 petition . . . where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict; however, a petitioner’s conclusions need not be regarded as true.¹⁷³

Idaho

Idaho’s Uniform Post-Conviction Procedure Act¹⁷⁴ allows a prisoner to petition for relief based on “material facts, not previously presented and heard, that require[] vacation of the conviction or sentence in the interest of justice.”¹⁷⁵ Under Idaho Criminal Rule 57(c), an applicant for postconviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which the application is based.¹⁷⁶

The Idaho Supreme Court enunciated the test for relief in *State v. Drapeau*:¹⁷⁷

A motion [for a new trial] based on newly discovered evidence must disclose (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant.¹⁷⁸

Idaho Code § 19-4902 allows for the filing of a petition for DNA or fingerprint

168. *Dyal v. State*, 172 S.E.2d 326, 327 (Ga. App. 1970).

169. *E.g. Dick v. State*, 287 S.E.2d 11, 13 (Ga. 1982).

170. *Dick*, 287 S.E.2d at 13–14 (citing *Tanner v. State*, 276 S.E.2d 627, 631 (Ga. 1981); *Timberlake v. State*, 271 S.E.2d 792, 795–96 (Ga. 1980); *Bell v. State*, 183 S.E.2d 357, 360–61 (Ga. 1971)).

171. Haw. R. Penal Proc. 40(a) (West 2006).

172. *Id.* at 40(a)(1).

173. *State v. Allen*, 744 P.2d 789, 792 (Haw. App. 1987) (citations omitted).

174. Idaho Code Ann. §§ 19-4901 to 19-4911 (Lexis 2004).

175. *Id.* at § 19-4901(a)(4).

176. Idaho Crim. R. 57(c); *Odom v. State*, 826 P.2d 1337, 1338 (Idaho App. 1992).

177. 551 P.2d 972 (Idaho 1976).

178. *Id.* at 978 (citation omitted).

testing.¹⁷⁹

Illinois

The Illinois Supreme Court held that the conviction of an innocent person violates the Due Process Clause of the Illinois Constitution.¹⁸⁰ Similarly, the Court has recognized the right of postconviction petitioners to assert actual innocence based on newly discovered evidence.¹⁸¹

Illinois courts have required petitioners seeking a new trial under the Post-Conviction Hearing Act¹⁸² on the basis of newly discovered evidence to prove that the evidence was not available at the original trial and that the defendant could not have discovered the evidence earlier through due diligence.¹⁸³ The evidence must also be material, noncumulative, and “of such conclusive character that it would probably change the result on retrial.”¹⁸⁴ Illinois’ postconviction statute, however, considers any claim not made in the original or amended petition to be waived.¹⁸⁵

In *People v. Morgan*, the Illinois Supreme Court noted that, before a successive postconviction petition may be heard on the merits, a petitioner must establish that such consideration is required by fundamental fairness.¹⁸⁶ In order to establish fundamental fairness, a petitioner must show “both cause and prejudice with respect to each claim presented.”¹⁸⁷ The defendant must also show “good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error.”¹⁸⁸ The Court held that prejudice will be found “where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process.”¹⁸⁹

Indiana

The Indiana Rules of Procedure for postconviction remedies provide for postconviction relief based on “material facts, not previously presented and heard, that require[] vacation of the conviction or sentence in the interest of justice.”¹⁹⁰ A proceeding seeking such relief may be authorized *at any time*.¹⁹¹ The Supreme Court of Indiana has held that an individual seeking relief based on newly discovered evidence must establish:

- (1) that the evidence was not available at trial; (2) that it is material and relevant; (3) that it

179. Idaho Code Ann. § 19-4902 (Lexis 2004).

180. *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996).

181. *Id.*

182. 725 Ill. Comp. Stat. Ann. 5/122-1 to 5/122-8 (West 2002).

183. *People v. Morgan*, 817 N.E.2d 524, 527 (Ill. 2004).

184. *Id.* (citing *People v. Barrow*, 749 N.E.2d 892, 913 (Ill. 2001)).

185. 725 Ill. Comp. Stat. Ann. 5/122-3 (West 2002).

186. *Morgan*, 817 N.E.2d at 527.

187. *Id.* (citing *People v. Lee*, 796 N.E.2d 1021, 1023 (Ill. 2003)).

188. *Id.*

189. *Id.* (citing *People v. Tenner*, 794 N.E.2d 238, 246 (Ill. 2002)).

190. Ind. R. Proc. Post-Conviction Rem. § 1(1)(a)(4).

191. *Id.* at § 1(1)(a).

is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.¹⁹²

Indiana Code § 36-38-7-5 allows an inmate to petition for DNA testing or analysis.¹⁹³ Similarly, a new trial is mandatory under Criminal Procedure Rule 16 when a party seeks to address “newly discovered material evidence . . . which, with reasonable diligence, could not have been discovered and produced at trial.”¹⁹⁴ A motion under Rule 16 must be made within thirty days of sentencing.¹⁹⁵

Iowa

Iowa Code § 822.2 allows for postconviction relief for persons claiming the existence of “material facts, not previously presented and heard, that require[] vacation of the conviction or sentence in the interest of justice.”¹⁹⁶ Iowa courts have held that an individual requesting such relief must establish:

(1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial.¹⁹⁷

An application for relief under § 822.3 must be filed within three years from the date the conviction or decision became final or, in the event of an appeal, from the date the writ of precedent was issued.¹⁹⁸ This time limitation is waived, however, for a motion based on facts or law that could not have been raised within the three-year time period.¹⁹⁹

Kansas

Kansas’ habeas corpus statute authorizes a prisoner to petition for relief from a sentence on the ground that it was imposed in violation of the Constitution or laws of the United States or Kansas, the court lacked jurisdiction, the sentence exceeded the maximum authorized by law, or the sentence is otherwise subject to collateral attack.²⁰⁰ A court is not required to entertain successive petitions for similar relief,²⁰¹ nor is it required to consider any petition brought later than one year from the date that the

192. *Wisehart v. State*, 693 N.E.2d 23, 33–34 (Ind. 1998) (citing *Fox v. State*, 568 N.E.2d 1006, 1007 (Ind. 1991)).

193. Ind. Code Ann. § 35-38-7-5 (Lexis Supp. 2006).

194. Ind. R. Crim. Proc. 16(A).

195. *Id.*

196. Iowa Code Ann. § 822.2(4) (West 2003).

197. *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa App. 1997) (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)).

198. Iowa Code Ann. § 822.3 (West 2003).

199. *Id.*

200. Kan. Stat. Ann. § 60-1507(a) (2005).

201. *Id.* at § 60-1507(c).

conviction became final.²⁰² A petition may be exempted from the timeliness requirement, however, in order to prevent manifest injustice.²⁰³ Kansas Statute § 22-3501 provides that a motion for a new trial based on newly discovered evidence may be made within two years after final judgment unless an appeal is pending, in which case the court may grant the motion only upon remand.²⁰⁴ Kansas courts have delineated a two-prong test for determining when new trials are required under § 22-3501: the defendant must show “the evidence could not with reasonable diligence have been produced at trial” and “the evidence must be of such materiality it would likely produce a different result at a new trial.”²⁰⁵

Kansas statutes also authorize individuals in state custody who have been convicted of rape or murder to petition the court for the testing of DNA evidence, subject to various statutory conditions.²⁰⁶

Kentucky

Kentucky Rule of Criminal Procedure 10.02 authorizes a court to grant a new trial for any cause that “prevented the defendant from having a fair trial, or if required in the interest of justice.”²⁰⁷ Rule 10.06(1) requires that a motion for a new trial based on newly discovered evidence must be made within one year of the entry of the judgment or at a later time *if the court for good cause so permits*.²⁰⁸ To move for a new trial based on newly discovered evidence, the “evidence must be of such a decisive nature that it would, with reasonable certainty, change the verdict.”²⁰⁹

Kentucky Rule of Civil Procedure 60.02(b) provides for relief from a judgment on the grounds of newly discovered evidence that could not have been discovered through due diligence in time to move for a new trial under Rule 59.02.²¹⁰ The movant under Rule 60.02 “must affirmatively allege facts which, if true, justify vacating the judgment.”²¹¹ A motion for a new trial must be made within one year from the judgment from which the petitioner is seeking relief.²¹²

Kentucky Rule of Criminal Procedure 11.42 allows a prisoner in custody to move to have his sentence vacated, set aside, or corrected at any time.²¹³ However, in *Foley v. Commonwealth*, the Kentucky Supreme Court held that Rule 11.42 does not apply to newly discovered evidence.²¹⁴

202. *Id.* at § 60-1507(f)(1).

203. *Id.* at § 60-1507(f)(2).

204. Kan. Stat. Ann. § 22-3501(1) (1995).

205. *State v. Neal*, 763 P.2d 621, 625 (Kan. 1988) (citations omitted).

206. Kan. Stat. Ann. § 21-2512 (Supp. 2005).

207. Ky. R. Crim. Proc. 10.02(1).

208. *Id.* at 10.06(1).

209. *Foley v. Cmmw.*, 17 S.W.3d 878, 888 (Ky. 2000) (citations omitted).

210. Ky. R. Civ. Proc. 60.02(b). Rule 60.02 applies to criminal cases. *Gross v. Cmmw.*, 648 S.W.2d 853, 856 (Ky. 1983).

211. *Id.*

212. Ky. R. Civ. Proc. 60.02.

213. Ky. R. Crim. Proc. 11.42(1).

214. 17 S.W.3d at 887.

Louisiana

Louisiana provides for postconviction relief under Article 930.3 of the Louisiana Code of Criminal Procedure if the results of DNA testing prove by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.²¹⁵ Article 926.1 allows a person convicted of a crime to apply for DNA testing.²¹⁶

Article 851 requires the court to grant a new trial based on “[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and . . . probably would have changed the verdict or judgment.”²¹⁷ Article 853 requires a motion for a new trial based on newly discovered evidence to be filed within one year of the date that the trial court imposed the sentence.²¹⁸ Before a motion for new trial on the basis of new evidence may be granted by the court, the petitioner must allege:

- (1) [t]hat notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial;
- (2) [t]he names of the witnesses who will testify and a concise statement of the newly discovered evidence;
- (3) [t]he facts which the witnesses or evidence will establish; and
- (4) [t]hat the witnesses or evidence are not beyond the process of the court or are otherwise available.²¹⁹

In *State v. Reed*, the court of appeals held that the petitioner’s motion for a new trial based on newly discovered evidence was not timely because it was filed more than one year after the verdict.²²⁰ The court also held the one-year time limitation did not deprive the petitioner of his rights under Articles 19 and 22 of the Louisiana Constitution, nor did it deprive him of his federal and state due process rights.²²¹

Maine

Title 15 Maine Revised Statutes §§ 2121 through 2132 describe the exclusive method of reviewing criminal judgments and post-sentencing proceedings and incorporate both common-law and statutory remedies.²²² Section 2128(3) provides that all grounds for relief which are not raised in the first petition are waived unless the state or federal Constitution requires otherwise or the court determines that the ground could not have been raised in an earlier action.²²³ Section § 2128 similarly requires that a petition seeking review of a criminal judgment must be made within one year of the

215. La. Crim. Proc. Code Ann. art. 930.3.

216. *Id.* at art. 926.1.

217. *Id.* at art. 851(3).

218. *Id.* at art. 853.

219. *Id.* at art. 854(1)–(4).

220. 712 So. 2d 572, 582 (La. App. 1st Cir. 1998).

221. *Id.* at 582–83.

222. 15 Me. Rev. Stat. Ann. § 2122 (2003).

223. *Id.* at § 2128(3).

following, whichever is latest:

- A. The date of final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal;
- B. The date on which the constitutional right, state or federal, asserted was initially recognized by the Law Court or the Supreme Court of the United States . . . ; or
- C. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.²²⁴

Criminal Rule of Procedure 33 authorizes a court to grant the petitioner a new trial if required by the “interest of justice.”²²⁵ Any motion for a new trial based on newly discovered evidence must be made before, or within two years after, the judgment is entered.²²⁶ In order to prevail on a motion for a new trial on the ground of newly discovered evidence, a petitioner must show:

- (1) that the evidence is such as will probably change the result if a new trial is granted,
- (2) that it has been discovered since the trial,
- (3) that it could not have been discovered before the trial by the exercise of due diligence,
- (4) that it is material to the issue, and
- (5) that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.²²⁷

Maryland

Maryland Rule 4-331 allows a court to grant a new trial or other appropriate relief based on newly discovered evidence that was not discovered through due diligence in time to move for a new trial.²²⁸ A motion made under this rule must generally be filed one year from the date of the sentence or the date the trial court received a mandate from an appellate court, whichever is later.²²⁹ A motion asserting new evidence showing that the defendant is innocent of a capital crime or a motion based on DNA evidence establishing innocence may be filed at any time.²³⁰

To prevail on a motion for a new trial, a petitioner must show that (1) the new evidence is material to the issues involved and (2) “there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.”²³¹ A claim of newly discovered evidence is not grounds for postconviction relief under Maryland’s Criminal Procedure Code § 7.102.²³²

224. *Id.* at § 2128(5).

225. Me. R. Crim. Proc. 33.

226. *Id.*

227. *State v. Estes*, 418 A.2d 1108, 1114 (Me. 1980) (citations omitted).

228. Md. R. 4-331(c).

229. *Id.* at 4-331(c)(1).

230. *Id.* at 4-331(c)(2)–(3).

231. *Yorke v. State*, 556 A.2d 230, 233–35 (Md. 1989).

232. *Gray v. State*, 857 A.2d 1176, 1183 (Md. Spec. App. 2004).

Massachusetts

Massachusetts Rule of Criminal Procedure 30 allows an individual who is imprisoned pursuant to a criminal conviction to file a motion requesting release or correction of the sentence being served at any time.²³³ Rule 30 also allows the trial judge, upon motion, to grant a new trial “at any time if it appears that justice may not have been done.”²³⁴

A motion made under Rule 30 based on newly discovered evidence “must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.”²³⁵ A petitioner must also show that the evidence was “unknown” to him or his counsel and could not have been discovered through “reasonable pretrial diligence” at the time of trial or of filing any previous motions for a new trial.²³⁶

Michigan

Michigan’s Criminal Procedure Rules 6.501 through 6.509 provide for post-appeal relief from a judgment.²³⁷ Rule 6.508 waives otherwise applicable procedural bars if the court determines “there is a significant possibility that the defendant is innocent of the crime.”²³⁸ In order for a court to grant a new trial based on newly discovered evidence, the petitioner must show

that the evidence itself, not merely its materiality, was newly discovered; that it is not cumulative; that it is such as to render a different result probable on a retrial of the cause; and that the party could not with reasonable diligence have discovered and produced it at the trial.²³⁹

Minnesota

Minnesota Statute § 590.01 allows an individual convicted of a crime to petition for postconviction relief based on scientific evidence, unavailable at trial, establishing his actual innocence.²⁴⁰ In addition, such an individual may file a motion requesting the performance of fingerprint or DNA testing in order to demonstrate his actual innocence.²⁴¹ Finally, an individual convicted of a crime may petition for postconviction relief by claiming that the conviction violated his rights under the state or federal Constitution.²⁴²

In *Martin v. State*, the Minnesota Supreme Court held that “a defendant may base a petition for postconviction relief [under § 590.01(1)] on a claim of newly discovered

233. Mass. R. Crim. Proc. 30(a).

234. *Id.* at 30(b) (emphasis added).

235. *Cmmw. v. Pike*, 726 N.E.2d 940, 945 (Mass. 2000).

236. *Id.* at 945–46.

237. Mich. Crim. Proc. R. 6.501–6.509.

238. *Id.* at R. 6.508(D)(3).

239. *People v. Clark*, 110 N.W.2d 638, 640 (Mich. 1961) (citations omitted).

240. Minn. Stat. Ann. § 590.01(1)(2) (West 2000).

241. *Id.* at § 590.01(1a)(a).

242. *Id.* at § 590.01(1)(1).

evidence.”²⁴³ In a postconviction claim of newly discovered evidence, the petitioner must establish:

- (1) that the evidence was not known to him or his counsel at the time of trial,
- (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material (or . . . is not impeaching, cumulative or doubtful), and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner.²⁴⁴

The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner.²⁴⁵ Similarly, a court may deny a petition raising issues that have already been decided by the court.²⁴⁶ In *State v. Knaffla*, the Court held that any matter raised on direct appeal, as well as any claims “known but not raised,” were waived for purposes of postconviction relief.²⁴⁷ However, in *Boitnott v. State*, the Court noted “[d]espite the *Knaffla* bar . . . , we have at times opted to review an appellant’s claims on the merits in the interests of justice.”²⁴⁸

Missouri

In *State ex rel. Amrine v. Roper*, the Missouri Supreme Court allowed an individual facing a death sentence to assert a freestanding claim of actual innocence in a petition for habeas corpus.²⁴⁹ The Court held that it would grant relief to such a petitioner who could demonstrate by clear and convincing evidence that he was actually innocent.²⁵⁰

In *State ex rel. Nixon v. Jaynes*, the Missouri Supreme Court allowed a petitioner to assert actual innocence as a gateway to overcome an otherwise applicable procedural bar.²⁵¹ The Court noted that when a defendant fails to raise a claim in a postconviction proceeding, it generally cannot be raised in a subsequent petition for habeas corpus.²⁵² Adopting the federal standard, the Court required a petitioner asserting innocence in order to waive a procedural bar to prove “that it is more likely than not that no reasonable juror would have convicted him in light of [the] newly discovered evidence.”²⁵³ Missouri Code § 547.360 provides postconviction relief for convictions or sentences that violate the state or federal Constitution, exceed the maximum allowable sentence, or were entered by courts without jurisdiction to do so.²⁵⁴

Missouri Code § 547.035 allows a person in the custody of the state to petition for

243. 295 N.W.2d 76, 78 (Minn. 1980).

244. *Race v. State*, 417 N.W.2d 264, 266 (Minn. 1987).

245. Minn. Stat. Ann. § 590.04(3) (West 2000).

246. *Id.*

247. 243 N.W.2d 737, 741 (Minn. 1976).

248. 631 N.W.2d 362, 369–70 (Minn. 2001).

249. 102 S.W.3d 541 (Mo. 2003).

250. *Id.* at 548.

251. 63 S.W.3d 210, 216 (Mo. 2001).

252. *Id.* at 214.

253. *Id.* at 216 (citing *Schlup*, 513 U.S. at 327).

254. Mo. Rev. Stat. Ann. § 547.360(1) (West 2002).

DNA testing.²⁵⁵ If such testing demonstrates a person's innocence, a motion for release may be filed with the sentencing court.²⁵⁶

Montana

Montana Code § 46-21-102(2) allows claims based on newly discovered evidence if, "viewed in light of the evidence as a whole," it establishes that the petitioner did not engage in the criminal conduct for which he was convicted.²⁵⁷ Such a claim must be made within one year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.²⁵⁸ Montana Code § 46-21-105 requires that a second or subsequent petition demonstrate good cause why its claims were not asserted in the original petition.²⁵⁹

In *State v. Pope*, the defendant's petition was barred by the three-year (now one-year) statute of limitations and because he did not raise his claims on direct appeal.²⁶⁰ The Court concluded that the jurisdictional bar could be overcome by a showing of a "clear miscarriage of justice"—i.e., if Pope was actually innocent of the crime for which he was convicted.²⁶¹ Noting that Pope submitted the newly discovered evidence in order to pass through an "actual innocence" gateway, the Court held that Pope "needed to demonstrate that, in light of the new evidence, a reasonable juror would, more likely than not, find that the State did not prove he was guilty of the crime for which he was convicted."²⁶²

Nebraska

Nebraska's DNA Testing Act provides a procedural framework for individuals seeking relief based on DNA evidence.²⁶³ Under the Act, a petitioner may request and obtain DNA testing if such testing may produce noncumulative, exculpatory evidence relevant to the individual's claim that he was wrongfully convicted or sentenced.²⁶⁴ A court may vacate a judgment on the basis of DNA results when, considered in light of evidence presented at trial, the results exonerate the person and show a "complete lack of evidence to establish an essential element of the crime charged."²⁶⁵

Nebraska Statute § 29-2101 allows for the granting of a new trial based on newly discovered material evidence, not discoverable through reasonable diligence by the time of trial.²⁶⁶ Nebraska Statute § 29-2103 requires that a motion for a new trial based on

255. *Id.* at § 547.035(1).

256. *Id.* at § 547.037(1).

257. Mont. Code Ann. § 46-21-102(2) (2005).

258. *Id.*

259. *Id.* at § 46-21-105(1)(b).

260. 80 P.3d 1232, 1237 (Mont. 2003).

261. *Id.* at 1241.

262. *Id.* at 1242.

263. Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Supp. 2002).

264. *Id.* at § 29-4120(5).

265. *State v. Bronson*, 672 N.W.2d 244, 250-51 (Neb. 2003).

266. Neb. Rev. Stat. § 29-2101(5) (1995).

newly discovered evidence be brought within three years of the date of the original verdict.²⁶⁷ In order for a court to grant a motion for a new trial under §§ 29-4123(3) or 29-2101(5), the evidence must be of such a nature that, had it been offered and admitted at trial, it probably would have produced a substantially different result.²⁶⁸

Nevada

Nevada provides relief from convictions obtained in violation of the Constitution of the United States or the laws or Constitution of Nevada in its habeas corpus statute.²⁶⁹ In part, the habeas statute requires that, unless there is good cause for the delay, a petition must be filed within one year after the entry of the judgment or, if an appeal was taken, one year from the date that the Supreme Court issued its remittitur.²⁷⁰

Similarly, § 34.810 of the habeas statute prevents the court from considering petitions in which the grounds for relief could have been presented in a prior proceeding, as well as successive petitions failing to allege new or different grounds of relief.²⁷¹ Dismissal of the petition may be overcome if the court finds actual prejudice to the petitioner and that good cause exists for not presenting the claim previously or for presenting it again.²⁷²

Nevada Statute § 34.800 allows for the dismissal of a petition if delay in its filing prejudices the state in its response to the petition or in its ability to retry the petitioner.²⁷³ A petitioner may overcome this prejudice to the state by showing his petition is based upon grounds that could not have been known through the exercise of reasonable diligence or, in the case of prejudice to the state in conducting a retrial, if a fundamental miscarriage of justice occurred at trial.²⁷⁴ If a petition is filed after five years, the petitioner must rebut a presumption of prejudice to the state.²⁷⁵

The Nevada Supreme Court has held that in order “[t]o show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from raising his claims earlier.”²⁷⁶ Similarly, “[a]ctual prejudice requires a showing not merely that the errors [complained of] created a possibility of prejudice, but that they worked to [the petitioner’s] actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.”²⁷⁷ Finally, the Nevada Supreme Court noted that it “may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a ‘fundamental miscarriage of justice.’”²⁷⁸ The

267. *Id.* at § 29-2103.

268. *State v. Ferris*, 344 N.W.2d 668, 669 (Neb. 1984).

269. Nev. Rev. Stat. § 34.724 (2005).

270. *Id.* at § 34.726(1).

271. *Id.* at § 34.810(1)(b), (2).

272. *Id.* at § 34.810(3).

273. *Id.* at § 34.800(1).

274. Nev. Rev. Stat. § 34.800(1).

275. *Id.* at § 34.800(1)(b).

276. *Pellegrini v. State*, 34 P.3d 519, 537 (Nev. 2001) (citing *Harris v. Warden*, 964 P.2d 785, 787 (Nev. 1998)).

277. *Id.* (citation and internal quotation marks omitted) (brackets in original).

278. *Id.* (citing *Mazzan v. Warden*, 921 P.2d 920, 922 (Nev. 1996); *Hogan v. Warden*, 860 P.2d 710, 715–16 (Nev. 1993)).

Nevada Supreme Court also recognized that a fundamental miscarriage of justice exists when “the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty.”²⁷⁹ In *Pellegrini v. State*, the Nevada Supreme Court adopted the federal standard found in *Schlup*, explaining that “a petitioner claiming actual innocence must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation.”²⁸⁰

New Hampshire

New Hampshire allows a person in custody to petition the court for DNA testing.²⁸¹ If the results of the testing are favorable to the petitioner, the court must order a hearing and enter any order that serves the interests of justice, including an order vacating and setting aside the judgment, discharging the petitioner, resentencing the petitioner, or granting a new trial.²⁸²

New Hampshire Statute 526:1 provides that “[a] new trial may be granted in any case when through accident, mistake or misfortune justice has not been done and a further hearing would be equitable.”²⁸³ Section 526:4, however, specifies that the petition for a new trial must be filed within three years of the adverse judgment.²⁸⁴ To prevail on a motion for a new trial based upon newly discovered evidence, the petitioner must prove:

- (1) that [he] was not at fault for not discovering the evidence at the former trial; (2) that the evidence is admissible, material to the merits, and not cumulative; and (3) that [the evidence is] of such a character that a different result will probably be reached upon another trial.²⁸⁵

New Jersey

New Jersey Court Rule 3:20-2 allows a motion for new trial based on newly discovered evidence to be made at any time.²⁸⁶ New Jersey Court Rule 3:20-1 allows the trial judge to grant the petitioner a new trial “if required in the interest of justice.”²⁸⁷ Newly discovered evidence warrants a new trial if it is: “(1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury’s verdict if a new trial were granted.”²⁸⁸

New Jersey Court Rule 3:22 contains the state’s postconviction procedures.²⁸⁹

279. *Id.* (citing *Mazzan*, 921 P.2d at 922; *Hogan*, 860 P.2d at 715–16).

280. 34 P.3d at 537 (citing *Schlup*, 513 U.S. at 327).

281. N.H. Rev. Stat. Ann. § 651-D:2(I) (Lexis Supp. 2005).

282. *Id.* at § 651-D:2(VI)(b).

283. *Id.* at § 526:1 (Lexis 2006).

284. *Id.* at § 526:4.

285. *State v. Steed*, 665 A.2d 1072, 1076 (N.H. 1995) (quoting *State v. Abbott*, 503 A.2d 791, 795 (N.H. 1985)) (brackets in original).

286. N.J. Ct. R. 3:20-2.

287. *Id.* at R. 3:20-1.

288. *State v. Carter*, 426 A.2d 501, 508 (N.J. 1981) (citations omitted).

289. N.J. Ct. R. 3:22-1 to 3:22-12.

Rule 3:22-4 bars grounds for relief that were not raised in previous proceedings unless the court finds that such grounds could not reasonably have been raised in a prior proceeding, that enforcing the bar would result in fundamental injustice, or that denying relief would be contrary to the United States or the New Jersey Constitution.²⁹⁰ Rule 3:22-5, on the other hand, considers the prior adjudication of a claim on the merits to be conclusive.²⁹¹ Rule 3:22-12 requires a postconviction petitioner to file a motion within five years from the date of the entry of judgment unless the failure to do so can be excused.²⁹² Rule 3:22-12 also requires a petition filed on behalf of an individual sentenced to death to be brought within thirty days of the denial of certiorari or other final action by the United States Supreme Court on the direct appeal.²⁹³

In *State v. Ways*, the New Jersey Supreme Court held that “[h]owever difficult the process of review, the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent.”²⁹⁴

New Mexico

New Mexico Rule of Criminal Procedure 5-614 allows an individual convicted of a crime to petition for a new trial in the interest of justice.²⁹⁵ A motion for new trial based on the newly discovered evidence under this section must be made within two years of the final judgment.²⁹⁶ Rule of Criminal Procedure 5-801 allows a court to modify a sentence imposed in an illegal manner.²⁹⁷ Motions to reduce an illegally imposed sentence must be filed within ninety days of the sentence’s imposition or the receipt of an appellate court mandate.²⁹⁸

It is unclear whether a petitioner claiming actual innocence would create an exception to the time limitations of Rules 5-614 and 5-801. In *State v. Lucero*, the petitioner sought a new trial, contending that the instruction given to the jury effectively removed the question from the jury’s discretion.²⁹⁹ Holding that the defendant’s failure to comply with the time requirements of Rule 5-614 deprived the trial court of jurisdiction to rule on the motion, the New Mexico Supreme Court failed to decide whether the jurisdictional requirement is absolute or equivocal, noting that the petitioner failed to present any of the “extremely unusual circumstances that would otherwise justify an exception from the time requirements.”³⁰⁰ New Mexico also allows for postconviction relief through its habeas corpus provisions.³⁰¹

290. *Id.* at R. 3:22-4.

291. *Id.* at R. 3:22-5.

292. *Id.* at R. 3:22-12(a).

293. *Id.* at R. 3:22-12(b).

294. 850 A.2d 440, 449-50 (N.J. 2004).

295. N.M. R. Crim. Proc. 5-614(A).

296. *Id.* at 5-614(C).

297. *Id.* at 5-801(A).

298. *Id.* at 5-801(B).

299. 30 P.3d 365, 365 (N.M. 2001).

300. *Id.* at 367.

301. N.M. R. Crim. Proc. 5-802.

New York

New York Criminal Procedure Law § 440.30(1-a) establishes a procedure through which persons convicted of crimes may petition for DNA testing of evidence.³⁰² A petitioner under this section must show that, had such testing been performed prior to the trial and the results made available at trial, there is “a reasonable probability that the verdict would have been more favorable to the defendant.”³⁰³

New York Criminal Procedure Law § 440.10(1) provides that, *at any time after the entry of a judgment*, a court may, upon the petitioner’s motion, vacate a judgment based on new evidence.³⁰⁴ A court may vacate a motion only if the evidence could not have been produced at trial despite the petitioner’s due diligence and there is a probability that, if such evidence had been introduced at trial, the verdict would have been more favorable to the defendant.³⁰⁵ A motion based on new evidence must be made with due diligence after the evidence is discovered.³⁰⁶ Section 440.10(h) allows a court to vacate a judgment that violates the petitioner’s rights under the United States or New York Constitution.³⁰⁷

In *People v. Cole*, a New York supreme court held that “a person who has not committed any crime has a liberty interest in remaining free from punishment” and “the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the Due Process Clause of the State Constitution.”³⁰⁸ The court also held that punishing an innocent person violates the Cruel and Inhuman Treatment Clause of the New York Constitution.³⁰⁹ The court required “a movant making a free-standing claim of innocence [to] establish by clear and convincing evidence . . . that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.”³¹⁰

New York Criminal Procedure Law § 440.10(2) *requires* the court to deny a motion to vacate when the ground or issue was previously determined on the merits during direct appeal, the petitioner unjustifiably failed to appeal or to raise such ground on appeal, or the ground related solely to the sentence and not the conviction.³¹¹ Section 440.10(3) *allows* the court to deny a motion to vacate when the defendant unjustifiably failed to discover such evidence even though it was discoverable through due diligence.³¹² Similarly, the court may deny a motion if the issue was previously determined on the merits in a prior proceeding other than direct appeal or if the issue could have been raised in a previous motion under this section but was not.³¹³ Despite

302. N.Y. Crim. Proc. Law § 440.30(1-a)(a) (McKinney 2005).

303. *Id.*

304. N.Y. Crim. Proc. Law § 440.10(1)(g).

305. *Id.*

306. *Id.*

307. *Id.* at § 440.10(1)(h).

308. 1 Misc. 3d 531, 541–42 (N.Y. Sup. Ct. 2003).

309. *Id.* at 542.

310. *Id.* at 543.

311. N.Y. Crim. Proc. Law § 440.10(2).

312. *Id.* at § 440.10(3)(a).

313. *Id.* at § 440.10(3)(b)–(c).

one of the discretionary bars, § 440.10(3) allows a court to grant a motion if the motion is in the interest of justice, shows good cause, and is otherwise meritorious.³¹⁴

North Carolina

North Carolina General Statute § 15A-1415 allows a defendant to move for postconviction relief at any time based on newly discovered evidence.³¹⁵ Such evidence must have been “unknown or unavailable” to the petitioner at trial, despite his due diligence.³¹⁶ Newly discovered evidence may include recanted testimony that has a “direct and material bearing” upon the petitioner’s guilt or on his eligibility for the death penalty.³¹⁷ A motion based upon such evidence must be filed within a reasonable time after its discovery.³¹⁸ In order to receive a new trial, a petitioner must demonstrate:

(1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.³¹⁹

North Carolina General Statute § 15A-269(a) allows a defendant to request DNA analysis of biological evidence.³²⁰ Such evidence must be untested, material to the defense, and related to the investigation that resulted in the judgment.³²¹ Section 15A-269(b) allows the court to grant the motion for DNA testing if the results may establish a reasonable probability that, had they been available at trial, the verdict would have been more favorable to the defendant.³²²

North Dakota

North Dakota’s Uniform Postconviction Procedure Act³²³ allows an individual to apply for postconviction relief if “[e]vidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice.”³²⁴ Section 29-32.1-12 allows the court to dismiss applications asserting previously adjudicated claims.³²⁵ Under § 29-32.1-03, an application for postconviction relief may be filed at any time.³²⁶

314. *Id.* at § 440.10(3).

315. N.C. Gen. Stat. § 15A-1415(c) (Lexis 2005).

316. *Id.*

317. *Id.*

318. *Id.*

319. *State v. Beaver*, 229 S.E.2d 179, 183 (N.C. 1976) (citation omitted).

320. N.C. Gen. Stat. Ann. § 15A-269(a) (Lexis 2005).

321. *Id.*

322. *Id.* at § 15A-269(b)(2).

323. N.D. Cent. Code §§ 29-32.1-01 to 29-32.1-15 (2006).

324. *Id.* at § 29-32.1-01(1)(e).

325. *Id.* at § 29-32.1-12(1).

326. *Id.* at § 29-32.1-03(2).

North Dakota's Rule of Criminal Procedure 33 also allows a trial court to grant a new trial when required by the interests of justice.³²⁷ A motion for a new trial based on newly discovered evidence must be made within three years after the guilty verdict or finding.³²⁸

Section 29-32.1-01 and Rule 33(a) require the same showing to prevail on a motion for a new trial based on newly discovered evidence:³²⁹

(1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. A motion for new trial based upon newly discovered evidence rests within the discretion of the trial court, and [the North Dakota Supreme Court] will not reverse the court's denial of the motion unless the court has abused its discretion.³³⁰

Ohio

Ohio Code § 2953.21 allows an individual to petition for postconviction relief on the basis of DNA evidence establishing that no reasonable factfinder would have found the petitioner guilty had the evidence been available at trial.³³¹ An inmate may apply for DNA testing pursuant to §§ 2953.71 through 2953.81 of the Ohio Code.³³² Section 2953.21 also allows individuals to petition for relief based on a state or federal constitutional violation at trial.³³³

In *State v. Byrd*, an Ohio Court of Appeals rejected the petitioner's contention that his claim of actual innocence provided substantive grounds for postconviction relief.³³⁴ The *Byrd* court held that "a defendant's claim of 'actual innocence' based on newly discovered evidence . . . does not demonstrate a constitutional violation in the proceedings that actually resulted in the defendant's conviction."³³⁵

Criminal Rule of Procedure 33(A)(6) allows a motion for new trial to be made based on new material evidence that, with due diligence, could not have been produced at trial.³³⁶ Rule 33(B) provides that motions for new trial based on newly discovered evidence must be filed within 120 days from the rendering of a verdict or decision of the court unless the petitioner can clearly and convincingly prove that he was unavoidably prevented from discovering such evidence within the prescribed time limit.³³⁷ To succeed, a motion for new trial must show that the newly discovered evidence: (1)

327. N.D. R. Crim. Proc. 33(a).

328. *Id.* at 33(b)(1).

329. *Breding v State*, 584 N.W.2d 493, 498 (N.D. 1998).

330. *State v Steinbach*, 575 N.W.2d 193, 199 (N.D. 1998) (quoting *State v. VanNatta*, 506 N.W.2d 63, 70 (N.D. 1993)).

331. Ohio Rev. Code Ann. § 2953.21(A)(1)(b) (West Supp. 2006).

332. *Id.*

333. *Id.* at § 2953.21(A)(1)(a).

334. 762 N.E.2d 1043, 1053 (Ohio App. 1st Dist. 2001).

335. *Id.* (footnote omitted).

336. Ohio R. Crim. Proc. 33(A)(6).

337. *Id.* at 33(B).

discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.³³⁸

Oklahoma

Oklahoma's Post-Conviction Procedure Act³³⁹ allows any person convicted of a crime claiming new material facts, not previously presented nor heard, to institute a proceeding seeking relief from his judgment or sentence.³⁴⁰ All grounds for relief must be stated in the original, supplemental, or amended application.³⁴¹ A ground that was finally adjudicated in another proceeding or which could have been but was not raised in a prior proceeding may not be the basis for a subsequent petition unless the court finds the failure to do so was reasonable.³⁴²

Section 1089 deals specifically with postconviction relief in capital cases.³⁴³ Subsection C provides that the only issues cognizable in an application for postconviction relief are errors that affected the outcome at trial or evidence that the petitioner is actually innocent.³⁴⁴ Subsection D.1 requires applications to be filed within ninety days from the date that the appellate brief or reply brief is filed.³⁴⁵ Under subsection D.2, all available grounds that were not included in the application are waived by the petitioner.³⁴⁶ Subsection D.8 prohibits the Oklahoma Court of Criminal Appeals from granting relief to untimely or successive petitions for postconviction relief unless the petition contains claims that could not have been presented previously and

the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable factfinder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.³⁴⁷

In *Slaughter v. State*, the Oklahoma Court of Criminal Appeals held that the Court's "rules and cases do not impede the raising of factual innocence claims *at any stage* of an appeal."³⁴⁸ The Court "fully recognize[d] innocence claims are the Post-Conviction Procedure Act's foundation. But in this case [the Court] continue[d] to find the evidence presented at trial and on appeal does not support or make a clear and convincing showing of factual innocence."³⁴⁹

338. *State v. Lopa*, 117 N.E. 319, 320 (Ohio 1917).

339. Okla. Stat. tit. 22, §§ 1080–1089 (2001 & Supp. 2005).

340. *Id.* at § 1080(d) (2001).

341. *Id.* at § 1086.

342. *Id.*

343. *Id.* at § 1089 (Supp. 2005).

344. Okla. Stat. tit. 22, § 1089(C).

345. *Id.* at § 1089(D)(1).

346. *Id.* at § 1089(D)(2).

347. *Id.* at § 1089(D)(8)(a), (b)(2).

348. 108 P.3d 1053, 1054 (Okla. Crim. App. 2005) (emphasis in original).

349. *Id.*

Oregon

Oregon provides postconviction relief under its Post-Conviction Hearing Act³⁵⁰ for the substantial denial of constitutional rights at trial which render the conviction void.³⁵¹ In *Anderson v. Gladden*, the Oregon Supreme Court held that “[a]s a general rule, *habeas corpus* (or its statutory counterpart in post-conviction proceedings) does not provide relief from a conviction resulting from a mistake of fact, where proof of the jury’s mistake must depend upon the credibility of newly discovered evidence.”³⁵² However, the Court refused to foreclose the possibility that newly discovered evidence might serve as a basis of postconviction relief:

The prospect of a court holding itself powerless to remedy a manifestly erroneous conviction obviously would not adorn the administration of justice. We do not, therefore, say that executive clemency is the only remedy available when newly discovered evidence proves the innocence of a prisoner. That hypothetical state of affairs, however, is not now before us. We leave open the question whether newly discovered evidence can ever give rise to any kind of common-law post-conviction judicial relief.³⁵³

Oregon Rule of Civil Procedure 64 allows an individual to bring a motion for a new trial based on newly discovered evidence within ten days after the entry of the judgment or “such further time as the court may allow.”³⁵⁴ If the motion is not heard within fifty-five days of the judgment, it shall be considered denied.³⁵⁵

Pennsylvania

Pennsylvania Code § 9543 provides relief for convicted persons who prove by a preponderance of the evidence the existence of exculpatory evidence, unavailable at the time of trial, that would have changed the outcome of the trial.³⁵⁶ A convicted individual may petition for DNA testing in order to establish actual innocence pursuant to § 9543.³⁵⁷

Pennsylvania Code § 9545 requires initial and subsequent petitions for postconviction relief to be filed within one year of the date when the judgment became final unless the petitioner proves that the facts upon which the claim is based were “unknown to the petitioner and could not have been ascertained by the exercise of due diligence” before that date.³⁵⁸ Section 9545 also requires that a petition exempted from the one-year requirement be filed within sixty days of the discovery of the evidence.³⁵⁹

In order to obtain relief based on newly discovered exculpatory evidence, a petitioner must establish that “(1) the evidence has been discovered after trial and it

350. Or. Rev. Stat. §§ 138.510–138.680 (2005).

351. *Id.* at § 138.530(1)(a).

352. 383 P.2d 986, 991 (Or. 1963).

353. *Id.*

354. Or. R. Civ. Proc. 64B(4), 64F.

355. *Id.* at 64F.

356. 42 Pa. Consol. Stat. Ann. § 9543(a)(2)(vi) (West 1998).

357. *Id.* at § 9543.1 (West Supp. 2006).

358. *Id.* at § 9545(b)(1)(ii) (West 1998).

359. *Id.* at § 9545(b)(2).

could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not being used solely to impeach credibility; and (4) it would likely compel a different verdict.”³⁶⁰

Rhode Island

Under Rhode Island Code § 10-9.1-1(a)(4), a person may obtain postconviction relief on the basis of “material facts, not previously presented and heard, that require[] vacation of the conviction or sentence in the interest of justice.”³⁶¹ A motion for relief based on newly discovered evidence may be made at any time.³⁶² Section 10.9.1-12 provides for postconviction DNA testing in order to establish actual innocence.³⁶³

In *Ferrell v. Wall*, the Rhode Island Superior Court held that, in order to obtain postconviction relief based on newly discovered evidence, a petitioner must establish that the evidence is:

(1) newly discovered since trial, (2) not discoverable prior to trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, [and] (4) of the type that would probably change the verdict at trial. For the second part of the inquiry, the hearing justice must exercise his or her discretion and determine whether the newly discovered evidence is credible enough to warrant relief.³⁶⁴

South Carolina

South Carolina provides relief through the Uniform Post-Conviction Procedure Act.³⁶⁵ Section 17-27-20 provides that a person convicted of a crime claiming the existence of “material facts, not previously presented and heard, that require[] vacation of the conviction or sentence in the interest of justice” may institute a proceeding for postconviction relief.³⁶⁶

Section 17-27-90 requires all grounds for relief to be raised in the original, supplemental, or amended application for relief.³⁶⁷ Similarly, any ground which could have been raised in a prior proceeding is considered waived unless the court finds there was sufficient reason why the claim was not raised.³⁶⁸ Section 17-27-45 requires applications alleging newly discovered evidence requiring the vacation of a sentence to be filed within one year of the time such facts were actually discovered or should have been discovered through reasonable diligence.³⁶⁹

Similarly, the South Carolina Supreme Court retains authority under the state

360. *Cmmw. v. D'Amato*, 856 A.2d 806, 823 (Pa. 2004).

361. R.I. Gen. Laws § 10-9.1-1(a)(4) (1997).

362. *Id.* at § 10-9.1-3.

363. *Id.* at § 10.9.1-12 (Supp. 2005).

364. 2005 WL 373479 at *3 (R.I. Super. Feb. 2, 2005) (citations omitted) (brackets in original).

365. S.C. Code Ann. §§ 17-27-10 to 17-27-160 (1985).

366. *Id.* at § 17-27-20(a)(4).

367. *Id.* at § 17-27-90.

368. *Id.*

369. *Id.* at § 17-27-45(C).

Constitution to entertain writs of habeas corpus and to “grant relief in those unusual instances where ‘there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice.’”³⁷⁰ In *State v. Spann*, the South Carolina Supreme Court held that, in order to prevail on a motion for new trial, the petitioner must show that the newly discovered evidence

(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to the trial; (4) is material; and (5) is not merely cumulative or impeaching.³⁷¹

South Dakota

In *Boyles v. Weber*, the Supreme Court of South Dakota held that “[n]ewly discovered evidence is generally an insufficient ground for habeas relief when the evidence pertains to guilt rather than a deprivation of constitutional rights or lack of jurisdiction.”³⁷² The Court added that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”³⁷³

Tennessee

The Tennessee Supreme Court has held that, under certain circumstances, procedural bars to postconviction claims may violate due process.³⁷⁴ The Court balanced state and private interests, ultimately determining that a defendant’s interest in presenting evidence of actual innocence, particularly in a capital case, outweighed the government’s interest in finality.³⁷⁵ Tennessee’s Post-Conviction Procedure Act³⁷⁶ allows convicted individuals to assert violations of the state or federal Constitution in relation to their convictions to petition for relief.³⁷⁷

Under § 40-30-102 of the Act, a prisoner may petition for relief based on new scientific evidence which establishes that he is actually innocent.³⁷⁸ Petitions filed on this ground are exempt from the one-year filing requirement.³⁷⁹ Section 40-30-102 contemplates the filing of only one petition for postconviction relief under the Act.³⁸⁰ However, § 40-30-117 allows a petitioner to reopen his petition if the claim is based on

370. *Simpson v. State*, 495 S.E.2d 429, 431 n. 4 (S.C. 1998) (quoting *Butler v. State*, 397 S.E.2d 87, 88 (S.C. 1990)).

371. 513 S.E.2d 98, 99 (S.C. 1999) (citing *State v. Prince*, 447 S.E.2d 177, 184 (S.C. 1993)).

372. 677 N.W.2d 531, 537 (S.D. 2004).

373. *Id.* (quoting *Herrera*, 506 U.S. at 400).

374. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001).

375. *Id.*

376. Tenn. Code Ann. §§ 40-30-101 to 40-30-122 (Lexis 2003).

377. *Id.* at § 40-30-103.

378. *Id.* at § 40-30-102(b)(2).

379. *Id.* at § 40-30-102(a).

380. *Id.* at § 40-30-102(c).

new scientific evidence establishing actual innocence.³⁸¹ An individual may also petition for relief under the writ of error *coram nobis* for newly discovered evidence.³⁸² A convicted individual also may file a petition requesting DNA analysis of evidence in the state's possession.³⁸³

In *State v. Mixon*, the Tennessee Supreme Court held:

a new trial should be granted upon the basis of newly discovered recanted testimony only if: (1) the trial court is reasonably well satisfied that the testimony given by the material witness was false and the new testimony is true; (2) the defendant was reasonably diligent in discovering the new evidence, or was surprised by the false testimony, or was unable to know of the falsity of the testimony until after the trial; and (3) the jury might have reached a different conclusion had the truth been told.³⁸⁴

Texas

In *State ex rel. Holmes v. Court of Appeals*, the Texas Court of Criminal Appeals held that the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment.³⁸⁵ The court announced that petitions for habeas corpus asserting freestanding claims of actual innocence would be cognizable in Texas.³⁸⁶

In *Ex parte Elizondo*, the court held that a non-capital defendant also may assert a freestanding claim of innocence in a petition for habeas corpus.³⁸⁷ The court held that a petitioner seeking relief under habeas corpus on a freestanding claim of innocence "must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."³⁸⁸

Utah

Utah's Post-Conviction Remedies Act³⁸⁹ provides relief for individuals seeking to vacate or modify a conviction or sentence based on newly discovered evidence.³⁹⁰ A petitioner seeking relief under the Act must assert that he was unable to present the evidence in an earlier proceeding, that the evidence is not merely cumulative or impeaching, and that, in light of the evidence presented at trial, the newly discovered evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty.³⁹¹

Petitions based on newly discovered evidence must be made within one year from the date that the conviction became final, that the petitioner became aware of the new evidence, or that the petitioner should have become aware of the evidence through

381. Tenn. Code Ann. § 40-30-117(a)(2) (Lexis 2003).

382. *Id.* at § 40-30-102.

383. *Id.* at § 40-30-303.

384. 983 S.W.2d 661, 673 n. 17 (Tenn. 1999) (citations omitted).

385. 885 S.W.2d 389, 397 (Tex. Crim. App. 1994).

386. *Id.* at 397-98.

387. 947 S.W.2d 202, 205 (Tex. Crim. App. 1996).

388. *Id.* at 209 (emphasis omitted).

389. Utah Code Ann. §§ 78-35a-101 to 78-35a-304 (Lexis 2002).

390. *Id.* at § 78-35a-104(1)(e).

391. *Id.*

reasonable diligence.³⁹² The court may excuse a petitioner's failure to file within the time limitations if the interests of justice so require.³⁹³ A petitioner may not assert a claim raised in a prior proceeding or a claim that could have been raised in a prior proceeding.³⁹⁴ A petitioner sentenced to death may not obtain relief from a court within the thirty days before his execution date unless the relief is based on evidence discovered during that time.³⁹⁵

In *Gardner v. Galetka*, the Utah Supreme Court held that the Post-Conviction Remedies Act was constitutionally infirm because it limited the Court's authority to consider successive petitions.³⁹⁶ The Court's reasoning emphasized that the power to review postconviction petitions belonged to the judicial branch under the state's Constitution.³⁹⁷

Utah Code § 78-35a-301 allows a person convicted of a felony to petition for DNA testing in order to establish his innocence.³⁹⁸

Vermont

Criminal Procedure Rule 33 allows a court to grant a motion for a new trial based on newly discovered evidence if the motion is made within two years after final judgment.³⁹⁹ Vermont's postconviction statute allows a prisoner to petition for relief from a sentence at any time if the sentence violates the federal or state Constitution or laws, the court lacks jurisdiction, the sentence exceeds the maximum authorized by law, or the conviction or sentence is otherwise subject to collateral attack.⁴⁰⁰ Vermont courts however, have refused to address the guilt or innocence of the defendant in postconviction relief proceedings.⁴⁰¹

Virginia

Petitions for postconviction review in Virginia are made pursuant to Virginia's state habeas statute.⁴⁰² Section 8.01-654 requires a petition challenging a criminal conviction to be brought within two years from the date that the judgment became final.⁴⁰³ Section 8.01-654 also prevents the court from granting a writ based on a claim that the petitioner could have raised in an earlier petition.⁴⁰⁴

In *Reedy v. Wright*, a Virginia circuit court held that a claim of actual innocence could serve as a "gateway through which a habeas petitioner must pass to have his

392. *Id.* at § 78-35a-107(1), (2)(a), (2)(e).

393. *Id.* at § 78-35a-107(3).

394. Utah Code Ann. § 78-35a-106(1) (Lexis 2002).

395. *Id.* at § 78-35a-201.

396. 94 P.3d 263, 267 (Utah 2004).

397. *Id.* (citing *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989)).

398. Utah Code Ann. § 78-35a-301 (Lexis 2002).

399. Vt. R. Crim. Proc. 33.

400. Vt. Stat. Ann. tit. 13, § 7131 (1998).

401. *E.g. In re Bentley*, 477 A.2d 980, 982-83 (Vt. 1984); *In re Stewart*, 438 A.2d 1106, 1110 (Vt. 1981).

402. Va. Code Ann. §§ 8.01-654 to 8.01-668 (Lexis 2000).

403. *Id.* at § 8.01-654(A)(2). Section 8.01-654.1 contains restrictions on when death-sentenced petitioners may file postconviction petitions.

404. *Id.* at § 8.01-654(B)(2).

otherwise barred constitutional claim considered on the merits.”⁴⁰⁵ The *Reedy* court applied the federal standard, holding that a petitioner must prove:

that, in light of new evidence, it is more likely than not that no reasonable juror would vote to convict. Like the plaintiff in a run-of-the-mill civil case, *Reedy* must prove his claim only by the greater weight of the evidence—but what he must prove is substantial: that it is probable that, after considering the evidence presented in support of his *habeas* petition, “no reasonable juror would have found [him] guilty beyond a reasonable doubt.”⁴⁰⁶

Washington

Washington allows a court to vacate a conviction based on newly discovered evidence if it is in the interest of justice.⁴⁰⁷ For a court to grant relief, a petitioner must demonstrate that the evidence: “(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.”⁴⁰⁸

Washington Code § 10.73.090 addresses the procedure for collateral attacks to a conviction.⁴⁰⁹ This section governs motions made under Rule 16.4 (newly discovered evidence), as well as petitions for habeas corpus, motions to vacate, motions to withdraw a guilty plea, and motions to arrest judgment.⁴¹⁰ Section 10.73.100 exempts petitions based on newly discovered evidence from the one-year time requirement.⁴¹¹ In order for the exemption to apply, the petitioner must have acted with reasonable diligence in discovering the evidence and filing the petition or motion.⁴¹²

West Virginia

West Virginia statutes allow for relief based on newly discovered evidence in a petition for habeas corpus.⁴¹³ Under § 53-4A-1, the court may only consider unadjudicated claims.⁴¹⁴ In addition, claims which were knowingly and intelligently waived in a prior proceeding may not be advanced in a habeas corpus petition.⁴¹⁵

Under Rule of Criminal Procedure 33, a motion requesting a new trial based on newly discovered evidence is exempt from the otherwise applicable ten-day filing requirement.⁴¹⁶ For a motion for a new trial to be successful under habeas corpus or Rule 33, the newly discovered evidence must (1) have been discovered since the trial through the petitioner’s due diligence; (2) must be new and material; (3) must not be

405. 2002 WL 598434 at *5 (Va. Cir. Ct. Apr. 8, 2002) (quoting *Herrera*, 506 U.S. at 404).

406. *Id.* (quoting *Schlup*, 513 U.S. at 327) (brackets in original).

407. Wash. App. R. 16.4(c)(3).

408. *State v. Williams*, 634 P.2d 868, 873 (Wash. 1981) (citing *State v. Franks*, 445 P.2d 200, 203–04 (Wash. 1968)).

409. Wash. Rev. Code Ann. § 10.73.090 (West 2002).

410. *Id.* at § 10.73.090(2).

411. *Id.* at § 10.73.100(1).

412. *Id.*

413. W. Va. Code Ann. § 53-4A-1(a) (Lexis 2000).

414. *Id.* at § 53-4A-1(a).

415. *Id.* at § 53-4A-1(c).

416. W. Va. R. Crim. Proc. 33.

merely cumulative or impeaching; and (4) must be likely to change the result of the trial.⁴¹⁷

Wisconsin

Wisconsin's postconviction statute provides relief for convictions or sentences imposed in violation of the United States or Wisconsin Constitution.⁴¹⁸ The petitioner must raise all grounds for available relief under this section in his original, supplemental, or amended motion.⁴¹⁹ In *State v. Ware*, a Wisconsin court of appeals held:

Due process may require granting a new trial under § 974.06 on the basis of new evidence. This is because in some situations newly discovered evidence is so compelling that it would violate fundamental fairness not to afford a defendant a new trial at which the new evidence could be considered. Ordinarily, whether to grant a new trial on grounds of newly discovered evidence is a discretionary determination of the trial court. However, whether due process requires a new trial is a constitutional question subject to independent review in this court.⁴²⁰

In order to receive a new trial, the petitioner must show that the newly discovered evidence satisfies the following criteria:

(1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial.⁴²¹

Wyoming

Wyoming Rule of Criminal Procedure 34 allows a petitioner to move for a new trial based on newly discovered evidence within two years of the final judgment.⁴²² Wyoming courts have required that the evidence be discovered after trial, that it is so material that it would probably change the verdict, and that it is not merely cumulative.⁴²³ In addition, the petitioner must have exercised due diligence in discovering the evidence.⁴²⁴

Wyoming's postconviction relief statute allows an incarcerated person to file a motion for relief asserting a denial of his rights under the state or federal Constitution.⁴²⁵ A petitioner seeking relief under the statute must assert questions of "constitutional

417. *State v. Frazier*, 253 S.E.2d 534, 537 (W. Va. 1979) (citing *Halstead v. Horton*, 18 S.E. 953, 955 (W. Va. 1894)).

418. Wis. Stat. Ann. § 974.06(1) (West 1998).

419. *Id.* at § 974.06(4).

420. 1995 WL 302888 at *2 (Wis. App. Dist. II May 17, 1995) (citations omitted).

421. *State v. Bembenek*, 409 N.W.2d 432, 434 (Wis. App. Dist. I 1987) (quoting *State v. Boyce*, 249 N.W.2d 758, 760 (Wis. 1977)).

422. Wyo. R. Crim. Proc. 34(b).

423. *Cutbirth v. State*, 751 P.2d 1257, 1259-60 (Wyo. 1988) (citing *Opie v. State*, 422 P.2d 84, 85 (Wyo. 1967)).

424. *Id.*

425. Wyo. Stat. Ann. §7-14-101(b) (2005).

magnitude which manifest a miscarriage of justice.”⁴²⁶ In *Cutbirth v. State*, the Wyoming Supreme Court acknowledged (in dicta) that a claim of actual innocence may serve as a gateway through which a petitioner may assert an otherwise procedurally barred claim.⁴²⁷

426. *Cutbirth*, 751 P.2d at 1261 (citations omitted).

427. *Id.* at 1262.

APPENDIX B: STATE CLEMENCY PROCEDURES FOR RAISING
CLAIMS OF ACTUAL INNOCENCE*Alabama*

Distribution of Powers

The Alabama Constitution was amended in 1939 to vest authority over clemency procedures in the state legislature.⁴²⁸ The governor retains the authority to grant reprieves and commutations only from the death penalty.⁴²⁹ The legislature has created the Alabama Board of Pardons and Paroles and vested in it the power to grant pardons in non-capital cases.⁴³⁰ The clemency powers granted to the Board by the legislature do not include commutation of sentence.

Structure of Board

The Board has three members appointed by the governor and approved by the Senate.⁴³¹ The appointees must be selected “from a list of five qualified persons nominated by a board consisting of the Chief Justice of the Supreme Court as chairman, the presiding judge of the Court of Criminal Appeals[,] the Lieutenant Governor, the Speaker of the House[,] and the President Pro Tempore of the Senate.”⁴³² The members serve six-year terms and cannot be removed except by impeachment or for incapacitation.⁴³³ Members are compensated and serve on a full-time basis.⁴³⁴ Two members of the Board constitute a quorum.⁴³⁵

The Alabama Board of Pardons and Paroles recently included four “special members” who served a single term that ended in 2006.⁴³⁶ The special members were appointed for the limited purpose of conducting hearings and making determinations concerning clemency, paroles, and revocations.⁴³⁷ During the term of the special members, the Board sat in two panels of three.⁴³⁸ Membership on each panel was designated by the chairperson of the Board, with the chairperson serving as an alternate on either panel.⁴³⁹ Two members of each panel constituted a quorum.⁴⁴⁰

Meetings set for the purpose of conducting hearings and making determinations concerning clemency matters may be set by the chairperson, the Board, or a panel of the

428. Ala. Const. amend. 38, § 124.

429. *Id.*

430. Ala. Code §§ 15-22-20(a), 15-22-36(a) (Lexis 1995).

431. *Id.* at § 15-22-20(a), (b).

432. *Id.* at § 15-22-20(b).

433. *Id.* at § 15-22-20(c), (e).

434. *Id.* at § 15-22-20(g), (h).

435. Ala. Code § 15-22-20(f).

436. *Id.* at § 15-22-20(i).

437. *Id.*

438. *Id.* at § 15-22-20(j).

439. *Id.*

440. Ala. Code § 15-22-20(j).

Board.⁴⁴¹

Process

The Board may grant a pardon to a person who is currently incarcerated only upon the “unanimous affirmative vote of the [B]oard following receipt and filing of clear proof of his . . . innocence of the crime for which he . . . was convicted and the written approval” of the trial judge or district attorney.⁴⁴² Any person who was sentenced to death but subsequently received a commutation of sentence from the governor is ineligible for a pardon unless the Board is satisfied of the person’s innocence of the crime.⁴⁴³ The Board’s vote to grant the pardon must be unanimous, and the governor must concur with the Board’s action and approve the granting of the pardon.⁴⁴⁴

Before a pardon is granted, thirty days’ notice must be given to the Attorney General, the judge and the district attorney who tried the applicant’s case, the chief of police in the city in which the crime occurred if the crime was committed in a city, the sheriff of the county where convicted, and to the same officials of the county where the crime occurred if different from the county of conviction.⁴⁴⁵ When the applicant has been convicted of certain violent offenses, thirty days’ notice must also be given to the victim or the victim’s immediate family.⁴⁴⁶

Applications are considered filed simply by the applicant providing the Board a current telephone number and address, full name, date of birth, and social security number.⁴⁴⁷ This information may be provided in person, by telephone, or by letter.⁴⁴⁸ The Board states that this application process is “intended to facilitate application by individuals who lack formal education.”⁴⁴⁹ The Board investigates thereafter and supplies itself with all further necessary information.⁴⁵⁰

The Board will not consider or decide whether to order or grant clemency except in an open public meeting.⁴⁵¹ Additionally, notice of the hearing must be given to the same persons to whom notice of the application is given.⁴⁵² All of these persons must have been allowed to appear before the Board or give their views in writing.⁴⁵³

Board members review the file individually prior to the hearing, but Board members may not discuss with each other their views on any case before the hearing is

441. *Id.* at § 15-22-23(a).

442. *Id.* at § 15-22-36(c).

443. *Id.* § 15-22-27(a).

444. *Id.*

445. Ala. Code § 15-22-36(d).

446. *Id.* at § 15-22-36(e)(1).

447. Ala. Admin. Code r. 640-X-6-.01 (2006). The applicant may provide more information to the Board, but this information is minimally sufficient. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. Ala. Code § 15-22-23(b)(1); Ala. Admin. Code r. 640-X-4-.01(1); Ala. Bd. of Pardons & Paroles, *Rules, Regulations, and Procedures*, art. 8(1), (6), (10) (available at <http://paroles.state.al.us/ALABPP/Main/Rules.html> (accessed Feb. 4, 2007)).

452. Ala. Code § 15-22-23(b)(2).

453. *Id.* at § 15-22-23(b)(4).

held.⁴⁵⁴ Any member may then order an investigation of anything relevant to the Board's decision.⁴⁵⁵ Information on how to apply to the governor for a commutation of a death sentence or on what process, if any, is given upon application and is not publicly available.

Arizona

Distribution of Powers

The Arizona Constitution gives the governor the power to grant reprieves, commutations, and pardons subject to restrictions and limitations as provided by law.⁴⁵⁶ By statute, the governor may not grant any reprieve, commutation, or pardon except upon the recommendation of the Board of Executive Clemency established by the legislature.⁴⁵⁷

Structure of Board

The Arizona Board of Executive Clemency consists of five members, each of whom is appointed by the governor from a list of three candidates submitted by a selection committee defined by statute.⁴⁵⁸ Board members serve on a full-time basis, are compensated, and are appointed to five-year terms on the basis of their professional and educational qualifications and experience.⁴⁵⁹ No more than two members from the same professional discipline may be members at the same time.⁴⁶⁰ The governor may remove members only for cause.⁴⁶¹ The chairperson is selected by the governor.⁴⁶²

The Board must meet at least once per month.⁴⁶³ Three members constitute a quorum, but the chairperson may designate that two members constitute a quorum.⁴⁶⁴

Process

Notice of an intention to apply for a pardon must be given to the county attorney of the county where the applicant was convicted at least ten days before the Board acts upon the application.⁴⁶⁵ The applicant initiates the process by filling out and submitting an application provided by the Board.⁴⁶⁶ If the applicant is not an inmate, the

454. Ala. Bd. of Pardons & Paroles, *supra* n. 451, at art. 5(3), 8(1).

455. *Id.* at art. 5(4).

456. Ariz. Const. art. V, § 5.

457. Ariz. Rev. Stat. Ann. § 31-402(A) (West Supp. 2005).

458. *Id.* at § 31-401(A) (West 2002). The selection committee is a five-member committee and is itself appointed by the governor, but at least the director of the department of public safety and the director of the state department of corrections must sit on it. *Id.*

459. *Id.* at § 31-401(B), (D).

460. *Id.* at § 31-401(B).

461. Ariz. Rev. Stat. Ann. § 31-401(E).

462. *Id.* at § 31-401(F).

463. *Id.* at § 31-401(H).

464. *Id.* at § 31-401(I).

465. *Id.* at § 31-442(A).

466. Ariz. Admin. Code R5-4-201(B), (C) (2005).

application is submitted directly to the Board.⁴⁶⁷ If the applicant is an inmate, the application is submitted to the Department of Corrections who verifies that the inmate is eligible to apply.⁴⁶⁸ When an application is made for a pardon, the Board is authorized by statute to require the judge of the court of conviction or the county attorney who prosecuted the applicant to provide a statement of facts proved at trial and any other information regarding the propriety of granting or refusing a pardon.⁴⁶⁹

Once an eligible applicant has completed all application requirements, the Board must schedule a hearing at which it votes either to deny the request for a pardon or to recommend a pardon.⁴⁷⁰ If the Board recommends a pardon, members who voted in favor must prepare a letter of recommendation for the governor that includes the reasons for the recommendation.⁴⁷¹ Those who opposed the pardon may send letters of dissent to the governor if they choose to do so.⁴⁷²

The Board's administrative rules only explicitly refer to applications for pardon, and it has not passed any regulations concerning applications for commutations of sentence. However, some statutory provisions exist which apply to commutation procedures. The Board may only recommend to the governor that a sentence be commuted after providing notice to the victim, county attorney, and presiding judge and giving them an opportunity to be heard.⁴⁷³ Before recommending commutation to the governor, the Board must find "by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is a substantial probability that when released the offender will conform" his conduct to the law.⁴⁷⁴

The Board is also authorized to receive petitions from "individuals, organizations or the department [of corrections]" for review and commutation of sentences and pardoning of offenders in extraordinary cases.⁴⁷⁵ If the Board unanimously recommends commutation, its recommendation will automatically become effective if the governor has not acted upon it within ninety days of its submission.⁴⁷⁶

Arkansas

Distribution of Powers

The governor has the sole power to grant reprieves, commutations, and pardons.⁴⁷⁷ The legislature, however, regulates the procedures under which executive clemency may

467. *Id.* at R5-4-201(B).

468. *Id.* at R5-4-201(C).

469. Ariz. Rev. Stat. Ann. § 31-441 (West 2002).

470. Ariz. Admin. Code R5-4-201(E).

471. *Id.* at R5-4-201(F).

472. *Id.*

473. Ariz. Rev. Stat. Ann. § 31-402(C)(2).

474. *Id.*

475. *Id.* at § 31-402(C)(4).

476. *Id.* at § 31-402(D).

477. Ark. Const. art. VI, § 18.

be exercised.⁴⁷⁸ The legislature has also established the Parole Board through which all applications for executive clemency must pass.⁴⁷⁹ The Board's recommendations are not binding on the governor.

Structure of Board

The Parole Board is composed of seven members who are appointed by the governor and confirmed by the Senate.⁴⁸⁰ Six of the members are full-time officials of the state, one of whom is appointed chairperson by the governor.⁴⁸¹ Members serve seven-year staggered terms such that the term of one member expires each year.⁴⁸² Four members of the Board constitute a quorum.⁴⁸³ Removal of Board members may only be for good cause, which includes "[c]onduct constituting a criminal offense involving moral turpitude; . . . [g]ross dereliction of duty; . . . [g]ross abuse of authority; or . . . [t]he unexcused absence of a board or commission member from three (3) successive regular meetings without attending any intermediary called special meetings."⁴⁸⁴ Explicitly, good cause "does not include any vote, decision, opinion, or other regularly performed or otherwise reasonably exercised power of a board or commission member."⁴⁸⁵

Process

All applications for executive clemency must be referred to the Parole Board for investigation.⁴⁸⁶ Prior to considering a request for a pardon or commutation, the Board is obligated to solicit the recommendation of the convicting court, the prosecuting attorney, and the sheriff of the county from which the person was convicted.⁴⁸⁷ However, these recommendations are not binding on the Board.⁴⁸⁸ Additionally, if the applicant was convicted of certain felonies, the Board must notify the victim of the crime or the victim's next-of-kin if he or she has filed a request for notice with the prosecuting attorney.⁴⁸⁹ In that case, the Board also must also solicit the recommendations of the victim, as well as notify him or her of the date, time, and place of the hearing.⁴⁹⁰

The Parole Board's rules provide that an application for executive clemency may be filed for any of the following reasons: "(1) to correct an injustice which may have occurred during the person's trial; (2) life threatening medical condition that does not qualify for Act 290; (3) to reduce an excessive sentence; (4) the person's institutional

478. Ark. Code Ann. § 5-4-607 (Lexis 2006).

479. *Id.* at § 16-93-204(a).

480. *Id.* at § 16-93-201(a)(1).

481. *Id.* at § 16-93-201(a)(2).

482. *Id.* at § 16-93-201(a)(3).

483. Ark. Code Ann. § 16-93-201(d).

484. *Id.* at § 25-16-804(a)(1), (b)(1) (Lexis 2002).

485. *Id.* at § 25-16-804(a)(2).

486. *Id.* at § 16-93-204(a)(3).

487. *Id.* at § 16-93-204(d)(1).

488. Ark. Code Ann. § 16-93-204(d)(4).

489. *Id.* at § 16-93-204(d)(2)(A).

490. *Id.* at § 16-93-204(d)(2)(B), (d)(5).

adjustment has been exemplary, and the ends of justice have been achieved.”⁴⁹¹ Board members then vote to either recommend denial of clemency or schedule a hearing before the Board.⁴⁹² If the Board schedules a hearing, it must notify the victim of the date, time, and place of the hearing.⁴⁹³ The applicant appears before the Board, along with his attorney, if any, and supporters.⁴⁹⁴ In making its decision, the Board considers the statements of the applicant, the applicant’s file, the officer’s report and pre-sentence report, and any documentary evidence presented by interested persons.⁴⁹⁵

A person sentenced to death must apply for executive clemency no later than twenty-one days prior to any execution date.⁴⁹⁶ The application for clemency is investigated by the Board, and either the Board or a designated panel will interview the applicant at least seven days before the execution.⁴⁹⁷

After its decision is made, the Board “submit[s] to the Governor its recommendation, a report of the investigation, and all other information [it] may have regarding the applicant.”⁴⁹⁸ If the governor chooses to grant an application for pardon or commutation, he or she must file notice of that intention with the Secretary of State at least thirty days before granting the application.⁴⁹⁹ Additionally, the governor must “direct the Department of Correction to send notice of his or her intention to the judge, the prosecuting attorney, and the sheriff of the county in which the applicant was convicted, and, if applicable, to the victim or the victim’s next of kin.”⁵⁰⁰ Failure to provide these notices renders the grant void.⁵⁰¹

If the governor does not grant a pardon or commutation within 240 days of the recommendation, the application is deemed denied.⁵⁰² Any pardon or commutation granted after the 240-day period is deemed void.⁵⁰³

California

Distribution of Powers

The California Constitution vests in the governor the power to grant executive clemency subject to application procedures provided by statute.⁵⁰⁴ The governor cannot grant clemency to anyone twice convicted of a felony except on the recommendation of the California Supreme Court, with at least four judges agreeing.⁵⁰⁵ Whenever the

491. Code Ark. R. 158.00.001, XVIII(2) (Weil 2006).

492. *Id.* at XVIII(3).

493. Ark. Code Ann. § 16-91-204(d)(5)(A).

494. Code Ark. R. 158.00.001, XVIII(5).

495. *Id.*

496. *Id.* at XVIII(1).

497. *Id.* at XVIII(6).

498. Ark. Code Ann. § 16-93-204(b).

499. *Id.* at § 16-93-207(a)(1)(A) (Lexis 2006).

500. *Id.* at § 16-93-207(a)(1)(B)(i).

501. *Id.* at § 16-93-207(a)(2).

502. *Id.* at § 16-93-207(b).

503. Ark. Code Ann. § 16-93-207(b).

504. Cal. Const. art. V, § 8(a).

505. *Id.*

governor makes the decision to grant clemency, he or she must furnish the state legislature with a written statement describing the reasons for doing so.⁵⁰⁶

The legislature has authorized the Board of Parole Hearings, when requested by the governor, to investigate, report, and make recommendations on all applications of clemency.⁵⁰⁷ The Board is also authorized to report to the governor the names of persons imprisoned whom it believes ought to have a commutation of sentence or be pardoned on account of good conduct, unusual term of sentence, or any other cause, including evidence of battered woman syndrome.⁵⁰⁸

Structure of Board

The California Board of Parole Hearings is composed of seventeen commissioners who are appointed by the governor with the advice and consent of the State Senate.⁵⁰⁹ Each commissioner serves for a term of three years, and the terms are staggered.⁵¹⁰ Commissioners may be reappointed.⁵¹¹ The selection of commissioners must "reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state."⁵¹² Commissioners are full-time employees and receive an annual salary.⁵¹³ Commissioners may be removed by the governor only for misconduct, incompetence, or neglect of duty and only after a full hearing before the Board of Corrections.⁵¹⁴

The Board may meet and transact business in panels consisting of three persons.⁵¹⁵ To be valid, an action must be approved by majority vote of those present.⁵¹⁶ The Board may employ deputy commissioners to whom it may assign the duty of hearing cases and making decisions.⁵¹⁷ Finally, the Board has the power to employ assistants, take testimony, examine witnesses under oath, administer oaths, and "do any and all things necessary to make a full and complete investigation of and concerning all applications referred to it."⁵¹⁸

Process

Notice of intention to apply for a pardon must be signed by the applicant and served on the district attorney of the county of conviction at least ten days before the governor acts on the application.⁵¹⁹ An affidavit showing proof of service must be given

506. *Id.*

507. Cal. Penal Code Ann. §§ 4812, 5075(a) (West 2000 & West Supp. 2006).

508. *Id.* at § 4801(a) (West Supp. 2006).

509. *Id.* at § 5075(b).

510. *Id.*

511. *Id.*

512. Cal. Penal Code Ann. § 5075(b).

513. *Id.* at § 5076 (West 2000).

514. *Id.* at § 5081.

515. *Id.* at § 5076.1.

516. *Id.*

517. Cal. Penal Code Ann. § 5076.1.

518. *Id.* at § 4812 (West 2000).

519. *Id.* at § 4804.

to the governor.⁵²⁰

Every application for clemency must be accompanied by a full statement of any compensation being paid to any person for assisting the effort.⁵²¹ Failure to do so results in denial of the application.⁵²² Additionally, the person receiving compensation must file a statement with the governor.⁵²³

Application for clemency is made to the governor on forms provided by that office; the governor then transmits the application to the Board.⁵²⁴ Only in the case of a person twice convicted of felony, however, is the governor statutorily obligated to transmit it to the Board of Parole Hearings.⁵²⁵

The governor or Board may require the judge of the court of conviction or the district attorney who prosecuted the case to provide a summarized statement of the facts proved at trial, as well as any other facts bearing on the propriety of granting or refusing the application.⁵²⁶ Upon request, the judge and district attorney must also provide their recommendations on the application and the associated reasons.⁵²⁷

Before meeting en banc to consider the application, the Board assigns a deputy commissioner to complete a background investigation and submit a written report.⁵²⁸ In all cases referred to it by the governor, the full Board (rather than a panel) considers the application and decides upon the recommendation.⁵²⁹ When conducting its review, the Board is required to examine the inmate's application, the record of judicial proceedings in the case, and all other documents submitted with the application.⁵³⁰ The Board's recommendation, along with all associated documents, is then transmitted to the governor.⁵³¹

If the applicant has not been convicted of more than one felony, the governor may grant or deny the clemency request after he or she receives the Board's recommendation.⁵³² However, in cases in which the applicant has been convicted of two or more felonies, the California Supreme Court must also approve the grant of clemency.⁵³³

The California Supreme Court treats clemency applications as a court proceeding. When applications come before the court from the governor, they are given a file number.⁵³⁴ The fact that the application has been filed is public, but, because the documents that the governor transmits may have confidential information within them,

520. *Id.*

521. *Id.* at § 4807.2.

522. Cal. Penal Code Ann. § 4807.2.

523. *Id.* at § 4807.3 (West 2000).

524. Personal communication from representative of the governor's office to authors.

525. Cal. Penal Code Ann. § 4802 (West 2000).

526. *Id.* at § 4803.

527. *Id.*

528. Cal. Code Regs. tit. 15, § 2818 (2006).

529. *Id.*

530. Cal. Penal Code Ann. § 4812.

531. *Id.* at § 4813 (West 2000) (applying to twice-convicted felons).

532. Cal. Const. art. V, § 8(a).

533. *Id.*

534. Cal. Sup. Ct., *Internal Operating Practices & Procedures*, XIV(A) (Aug. 25, 2004).

the files themselves are not made available to the public.⁵³⁵ The Court appoints an attorney for the applicant if he is indigent, and the attorney is compensated for the representation.⁵³⁶

The Court denies applications unless granting clemency is recommended by at least four Justices.⁵³⁷ If clemency is granted, the Chief Justice informs the governor by letter of the Court's recommendation, and the clerk transmits the record to the governor's office.⁵³⁸

The governor is not bound by any recommendations from the Board or the California Supreme Court. Therefore, he or she may deny an application even if recommended by both the Board and the Supreme Court. The only limit on the governor's clemency power is that the recommendation of the Supreme Court (but not the Board) *is* required before he or she may grant clemency to a person with more than one felony conviction.

Importantly, the California Habeas Corpus Resource Center, created by the California legislature to represent death-sentenced inmates in postconviction appeals, is also authorized to assist such inmates in the preparation of clemency petitions.⁵³⁹

Colorado

Distribution of Powers

The governor has the constitutional power to grant reprieves, commutations, and pardons after conviction.⁵⁴⁰ The legislature is given the authority to regulate the manner of applying for pardons.⁵⁴¹ In every instance in which the governor exercises the clemency power, he or she must send to the legislature at its next session a transcript of the petition, all proceedings, and the reasons for the action taken.⁵⁴² Colorado statutory law "fully authorizes" the governor to commute a death sentence to imprisonment for life or for a term of not less than twenty years at hard labor.⁵⁴³

Structure of Board

The Colorado Executive Clemency Advisory Board is a non-statutory agency created by the governor that is subject to no law or administrative guidelines dictating how it must conduct itself.⁵⁴⁴ It consists of seven unpaid volunteer members appointed by the governor, and the governor consults it when making decisions concerning executive clemency.⁵⁴⁵

535. *Id.*

536. *Id.* at XV(A), (D).

537. *Id.* at XIV(A).

538. Cal. Penal Code Ann. § 4852 (West 2000); Cal. Sup. Ct., *supra* n. 534, at XIV(A).

539. Cal. Govt. Code Ann. § 68661(a) (West Supp. 2006).

540. Colo. Const. art. IV, § 7.

541. *Id.*

542. *Id.*

543. Colo. Rev. Stat. § 16-17-101 (Lexis 2006).

544. Personal communication from representative of the governor's office to authors.

545. *Id.*

Process

An application for a pardon or commutation of sentence must be “accompanied by a certificate of the respective superintendent of the correctional facility, showing the conduct of an applicant during his confinement . . . together with such evidences of former good character as the applicant may be able to produce.”⁵⁴⁶ Before the governor approves the application, it must first be submitted to the district attorney of the district of conviction, to the judge who sentenced the applicant, and to the attorney who actually prosecuted the applicant, if available, who each have ten days from the receipt of the application to comment.⁵⁴⁷ “Good character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys, if any, and any other material concerning the merits of the application” are to be given “such weight” as the governor thinks proper in the particular case, as is evidence that the applicant has reformed.⁵⁴⁸ The governor has sole discretion in evaluating any comments and in soliciting whatever other comments he or she deems appropriate.⁵⁴⁹

The governor’s office also maintains its own set of eligibility criteria for the exercise of the commutation power. First, the inmate must have served at least ten years or one-third of his sentence, whichever is less.⁵⁵⁰ Nor can the inmate be within fifteen months of parole eligibility.⁵⁵¹ Second, the inmate must not have committed any major violations of the Colorado Code of Penal Discipline within the two years prior to applying, and all inmates who are housed in administrative segregation are ineligible.⁵⁵² Third, if the inmate was on probation at the time that the crime being proposed for clemency was committed, the inmate is ineligible for a commutation.⁵⁵³ Fourth, all inmates with pending criminal charges are ineligible to apply.⁵⁵⁴ Finally, the inmate must have no pending appeals and must have exhausted all other judicial remedies.⁵⁵⁵ The governor or the Director of the Department of Corrections may waive any of these requirements in the event that the inmate has “catastrophic” medical or health problems or in exceptionally unique situations (such as “heroism,” extreme disparity between the crime the offender committed and the sentence received, or the inmate has been rehabilitated).⁵⁵⁶

An inmate may obtain an application for executive clemency through the inmate’s case manager or by contacting the governor’s office directly.⁵⁵⁷ All applicants for

546. *Id.* at § 16-17-102 (Lexis 2006).

547. *Id.*

548. *Id.*

549. *Id.*

550. Crim. J. Policy Found., *Clemency: Colorado*, http://www.cjpf.org/clemency/Colorado_print.html (last updated Jan. 17, 2007).

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

555. Crim. J. Policy Found., *supra* n. 550.

556. *Id.*

557. *Id.*

executive clemency must also complete the Executive Clemency Advisory Board's Application Eligibility Criteria for Commutation of Sentence and Character Certificate.⁵⁵⁸ Several other documents must be submitted with an inmate's application for executive clemency. These include (1) a personal letter to the governor stating the specific reasons for which clemency is sought; (2) the inmate's most recent Performance Review Summary;⁵⁵⁹ (3) the inmate's Admission Data Summary and Diagnostic Summary;⁵⁶⁰ (4) all psychological/psychiatric evaluations made of the inmate while he has been incarcerated; (5) reports of all disciplinary actions taken against the inmate, including any investigative reports if applicable; (6) the inmate's most recent time computation; (7) the inmate's FBI record of arrest; (8) all of the inmate's detainers/notifications requests and other pertinent law enforcement communications; (9) the inmate's pre-sentence report or offense report; (10) if serious medical or mental health problems exist, a report containing the diagnosis, prognosis, and recommendations; and (11) any additional documents that the inmate feels will help the governor make his or her final decision.⁵⁶¹

Applications are routinely sent to the Colorado Executive Clemency Advisory Board for evaluation and recommendation.⁵⁶² The governor, however, has sole authority to grant or deny clemency in any case.⁵⁶³

Connecticut

Distribution of Powers

The power to grant reprieves rests with the governor in all cases except impeachment, but that power lasts only until the end of the General Assembly's next session.⁵⁶⁴ The legislature has created the Board of Pardons and Paroles, which is authorized to grant pardons and commutations, conditioned or absolute, including commutations of death sentences.⁵⁶⁵ Until 2004, Connecticut separated clemency and parole functions, placing responsibility for executive clemency in the Board of Pardons.⁵⁶⁶

558. *Id.*

559. The Performance Review Summary is an annual report compiled for each inmate detailing his or her progress in the areas of work and training, group living (e.g., cooperation, personal hygiene), participation in counseling, and progress towards the goals set for the inmate by the correctional diagnostic program. Colo. Rev. Stat. § 17-22.5-302(1) (Lexis 2006). If an inmate's Performance Review Summary is more than ninety days old, a new summary must be compiled by the Department of Corrections before an inmate may apply for clemency. Crim. J. Policy Found., *supra* n. 550.

560. The Admission Data Summary is a summary of the inmate's background compiled by the Department of Corrections when the inmate first enters prison. The Diagnostic Summary is a report compiled when the inmate enters prison concerning his mental state. Personal communication from representative of the governor's office to authors.

561. Crim. J. Policy Found., *supra* n. 550.

562. *Id.*

563. *Id.*

564. Conn. Const. art. IV, § 13.

565. Conn. Gen. Stat. Ann. § 54-124a(f) (West Supp. 2006).

566. *Id.* at § 54-124(e).

Structure of Board

The Board is situated within the Department of Correction for administrative purposes only.⁵⁶⁷ The governor appoints the Board's thirteen members with the consent of either house of the legislature.⁵⁶⁸ The governor is obligated to appoint members so that the Board may "reflect the racial diversity of the state."⁵⁶⁹ From the Board's members, the governor appoints a chairperson, who is compensated and serves full time.⁵⁷⁰ Other members are paid per diem for each day spent in the performance of their duties.⁵⁷¹ Board members serve coterminous with the governor or until a successor is chosen.⁵⁷²

Five members of the Board are assigned exclusively to hear pardon applications.⁵⁷³ Seven are assigned exclusively to parole hearings, while the chairperson may serve both on parole and pardons panels.⁵⁷⁴ With the exception of the chairperson, once a member is assigned to pardon hearings, he or she may not be subsequently assigned to parole hearings, and vice versa.⁵⁷⁵ Each pardons panel is composed of three members.⁵⁷⁶ For hearings on commutations of death sentences, one member of the panel must be the chairperson.⁵⁷⁷ The Board must hold a pardons hearing at least once every three months.⁵⁷⁸

Process

The legislature has passed some procedural rules that the Board is obligated to follow, but the new Board itself has not yet promulgated any regulations regarding how clemency petitions are processed.

Generally, when considering whether to grant a commutation or pardon, the Board must permit any victim of the crime to appear before it and make a statement for the record.⁵⁷⁹ Rather than appearing before the Board, the victim may submit a written statement, which the Board must make part of the record at the session.⁵⁸⁰ Additionally, the Board may institute inquiries as to the previous history or character of any prisoner, and each prosecuting officer, judge, police officer, or other person must, when requested, provide to the Board whatever information he or she possesses with reference to the "habits, disposition, career and associates of any prisoner."⁵⁸¹

567. *Id.* at § 54-124a(a).

568. *Id.*

569. *Id.*

570. Conn. Gen. Stat. Ann. § 54-124a(a), (c).

571. *Id.* at § 54-124a(c).

572. *Id.* at § 54-124a(b).

573. *Id.* at § 54-124a(e).

574. *Id.*

575. Conn. Gen. Stat. Ann. § 54-124a(e).

576. *Id.*

577. *Id.*

578. *Id.* at § 54-124a(k).

579. *Id.* at § 18-27a(b) (West Supp. 2006).

580. Conn. Gen. Stat. Ann. § 18-27a(b).

581. *Id.* at § 18-30 (West Supp. 2006).

Delaware

Distribution of Powers

The governor has the power to grant reprieves, commutations of sentence, and pardons.⁵⁸² He or she may only exercise this power, however, upon the recommendation of a majority of the Delaware Board of Pardons.⁵⁸³ There is an exception for reprieves of less than six months' duration, which do not require recommendations from the Board.⁵⁸⁴

Structure of Board

The composition of the Delaware Board of Pardons is set by the Delaware Constitution. Its members are the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer, and Auditor of Accounts.⁵⁸⁵ The Board has the power to issue subpoenas requiring the attendance of witnesses and the production of such documents necessary for its investigations.⁵⁸⁶

Process

When a convicted person applies for a pardon, the Board must notify the Superior Court and the Attorney General, who in turn notify each person who was a victim or witness of the offense for which the person was convicted.⁵⁸⁷ The time, date, and place of the Board's hearing must be included in the notice to victims and witnesses.⁵⁸⁸ Both victims and witnesses may either testify before the Board or submit a written statement.⁵⁸⁹

Before the Board may consider an application for pardon or commutation of sentence from a person convicted of certain felonies, a psychiatrist and a psychologist must have examined the applicant within the year preceding consideration of the application.⁵⁹⁰ The psychiatrist and psychologist who examine the applicant submit to the Board their opinions as to the mental and emotional health of the applicant and their opinions as to the probability of the applicant again committing any crime if released.⁵⁹¹

The applicant must give written notice of his application for a reprieve, pardon, or

582. Del. Const. art. VII, § 1.

583. *Id.*

584. *Id.*

585. *Id.* at art. VII, § 2.

586. Del. Code Ann. tit. 11, § 4361(a) (Lexis 2001).

587. *Id.* at § 4361(d).

588. *Id.*

589. *Id.*

590. *Id.* at § 4362(b). Those crimes are an act causing death; sexual offenses; kidnapping and related offenses; arson and related offenses; burglary in the first degree; burglary in the second degree; robbery; offenses relating to children and incompetents; cruelty to animals; abusing a corpse; unlawful use of an incendiary device, bomb or other explosive device; abuse of children; distribution of a controlled substance to a person under eighteen; or for an attempt as provided by statute to commit any of these crimes. Del. Code Ann. tit. 11, § 4362(a).

591. *Id.* at § 4362(c).

commutation to (1) the sentencing judge; (2) the Attorney General; (3) the chief of police having jurisdiction of the place where the crime occurred; and (4) the Superintendent of the Delaware State Police.⁵⁹² Board hearings are open to the public; however, the Board may consider matters and arrive at decisions in executive sessions.⁵⁹³ At hearings, the Board hears those individuals and receives that material “it considers desirable to discharge its functions to hold a full hearing.”⁵⁹⁴ The Board also considers the trial transcript, affidavits, and letters from the judge and jury who tried the case, the prosecuting attorney, responsible persons in the community where the crime was committed, and persons who were present at the trial.⁵⁹⁵

No application is considered if there are any judicial proceedings pending concerning the matter.⁵⁹⁶ Exceptions are made for cases involving capital punishment or for other urgent reasons.⁵⁹⁷ Additionally, a majority of the Board may waive any of its administrative rules when good cause is shown for adopting other procedures for any particular application.⁵⁹⁸

Florida

Distribution of Powers

The Florida Constitution vests the power of executive clemency in the governor.⁵⁹⁹ On his or her own and by executive order, the governor may grant reprieves, but these may not extend for more than sixty days.⁶⁰⁰ In order to grant full or conditional pardons and commute sentences, the governor must have the approval of three of his or her cabinet members.⁶⁰¹

Structure of Board

The Office of Executive Clemency was established by the governor’s office in 1975 to process clemency applications.⁶⁰² The Board relies on the Florida Parole Commission to investigate applications and to report to it the circumstances, criminal records, and social, physical, mental, and psychiatric conditions and histories of applicants.⁶⁰³ All records developed by any state entity pursuant to an investigation into an application for executive clemency are classified and may only be released with the

592. Board of Pardons R. 2(d) (available at <http://www.state.de.us/sos/pardrule.shtml> (amend. Jan. 22, 2004)).

593. *Id.* at R. 5(a).

594. *Id.* at R. 6(a).

595. *Id.* at R. 6(b).

596. *Id.* at R. 7(a).

597. Board of Pardons R. 7(a).

598. *Id.* at R. 10.

599. Fla. Const. art IV, § 8(a).

600. *Id.*

601. *Id.*

602. See Fla. Admin. Code Ann. tit. 27, app. (2006); *Rules of Executive Clemency*, <http://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004> (Dec. 9, 2004).

603. Fla. Stat. Ann. § 947.13(d)–(e) (West Supp. 2006).

governor's approval.⁶⁰⁴

Process

Eligibility for executive clemency depends upon the type of clemency requested. For example, a person may not apply for a pardon unless he has completed all sentences imposed and all conditions of supervision expired at least ten years ago.⁶⁰⁵ The applicant must not have any outstanding detainers, outstanding victim restitution, or pecuniary penalties totaling more than \$1,000 resulting from any criminal conviction or traffic infraction.⁶⁰⁶ For a commutation, a waiver of eligibility must be obtained.⁶⁰⁷ Any Board member may place a case he or she deems to have exceptional merit on an upcoming agenda for consideration.⁶⁰⁸

An Application for Executive Clemency can be obtained from the Coordinator of the Office of Executive Clemency or by downloading it from the Office's website.⁶⁰⁹ The completed application is filed with the Coordinator along with certified copies of the indictment, judgment, and sentence for each felony conviction.⁶¹⁰ The inmate may also include other documents that are relevant to the application, including character references and letters of support.⁶¹¹ When the Coordinator receives the application, he or she must make reasonable attempts to notify the victim (or the victim's family members), the prosecuting attorney, the Office of the Statewide Prosecutor, and the Office of the Attorney General, Bureau of Advocacy and Grants.⁶¹²

When an inmate has been sentenced to death, an application for executive clemency may only be filed within one year of the date that his last appeal is rejected by the Florida Supreme Court or by the United States Supreme Court, whichever is later.⁶¹³ The Florida Parole Commission receives completed application for investigation.⁶¹⁴

Once an investigation is complete, the Coordinator places the case on the agenda for consideration by the Clemency Board.⁶¹⁵ The Board holds meetings during the months of March, June, September, and December, but the governor may call a special meeting at any time for any reason.⁶¹⁶ Inmates applying for clemency are not required

604. *Id.* at § 14.28 (West 2003).

605. *Rules of Executive Clemency, supra* n. 602, at § 5(I)(A). Although the eligibility requirements for a pardon suggest that only people who have completed their sentences may apply, the rules' definition of a full pardon contemplates those who are still serving a sentence, as part of the relief included in the pardon "unconditionally releases a person from punishment." *Id.* at § 4(I)(A). An inmate may seek to waive eligibility requirements if at least two years have elapsed since his conviction or at any time if he demonstrates extraordinary merit. *Id.* at § 8(I)(A). A waiver may only be granted by the governor with the approval of at least one Board member. *Id.*

606. *Id.* at § 5(I)(A).

607. *Rules of Executive Clemency, supra* n. 602, at § 5(I)(B).

608. *Id.* at § 17(A).

609. *Id.* at § 6(I)(A).

610. *Id.* at § 6(I)(B).

611. *Id.*

612. *Rules of Executive Clemency, supra* n. 602, at § 6(II).

613. Fla. Stat. Ann. § 940.03 (West 2006).

614. *Rules of Executive Clemency, supra* n. 602, at § 7.

615. *Id.* at § 10(A).

616. *Id.* at § 11(A).

to appear before the Board, but they are encouraged to do so; the inmate, or anyone speaking on his behalf, must notify the Office of Executive Clemency of the intention to appear at least ten days before the scheduled Board meeting.⁶¹⁷ No person is allowed more than five minutes to present his case, and the total cumulative time allowed for all presentations in favor of an applicant is ten minutes.⁶¹⁸ Likewise, presentations opposing the application are limited to a total of ten minutes.⁶¹⁹ At the hearing, the inmate's counsel and the state are each allotted ten minutes to present their arguments, and representatives of the victim's family are allowed to speak for a cumulative time of five minutes.⁶²⁰ After the Board hearing, the governor may decide to grant clemency with the approval of at least two members of the Board.⁶²¹ A person who has been denied clemency may not reapply for a period of two years.⁶²²

Special rules apply to commutation applications in death penalty cases. There are no eligibility requirements for consideration of an application for commutation of a death sentence to a life sentence.⁶²³ In all cases where an applicant is facing the death penalty, the Parole Commission can conduct a "thorough and detailed investigation into all factors relative to the issue of clemency" in order to provide the Board with a final report.⁶²⁴ The Rules of Executive Clemency suggest that the investigation should consist of a series of interviews with the inmate (who is allowed to have counsel present), the trial attorneys, the trial judge, and the inmate's family members.⁶²⁵ However, the Commission may investigate further if the members feel it is appropriate.⁶²⁶

The investigation begins at the time designated by the governor or, if the governor does not designate a time, when the applicant's opportunities for postconviction relief have effectively been exhausted.⁶²⁷ The Commission employs a Capital Punishment Research Specialist who tracks the legal progress of death penalty cases.⁶²⁸ If the Commission conducts an investigation, it must notify the Attorney General's Office, which, in turn, notifies the victim or victim's family and requests written comments.⁶²⁹

Once the Commission has completed its investigation, those commissioners who personally interviewed the inmate produce a final report that is submitted to the members

617. *Id.* at § 11(B).

618. *Id.* at § 11(C).

619. *Rules of Executive Clemency, supra* n. 602, at § 11(C).

620. *Id.*

621. *Id.* at § 4.

622. *Id.* at § 14.

623. *Id.* at § 15.

624. *Rules of Executive Clemency, supra* n. 602, at § 15(B).

625. *Id.* at § 15(B).

626. *Id.*

627. *Id.* at § 15(C). Specifically, investigation begins immediately after the applicant's federal petition for writ of habeas corpus has been denied by the United States Eleventh Circuit Court of Appeals if all appeals have been timely filed. *Id.* The investigation commences immediately upon any failure to timely file the initial motion for postconviction review in state court or any related appeal and likewise upon any failure to timely file an initial petition for writ of habeas corpus in federal court or any related appeal. *Rules of Executive Clemency, supra* n. 602, at § 15(C).

628. *Id.*

629. *Id.* at § 15(B).

of the Clemency Board.⁶³⁰ The report must include statements made by the inmate during the investigation, a detailed summary from each of the commissioners who interviewed the inmate, and all information gathered during the investigation.⁶³¹ The report is submitted to the Board within 120 days of the commencement of the investigation, unless the governor extends the time period.⁶³²

Like non-death penalty cases, once an investigation is complete, the Coordinator places the case on the agenda for the next scheduled meeting.⁶³³ In death penalty cases, however, any member of the Board may, after receiving the report of the Parole Commission, request a specially called meeting.⁶³⁴ At the hearing in a death penalty case, the inmate's counsel and the state are each allotted fifteen minutes to present their arguments, and representatives of the victim's family are allowed to speak for a cumulative time of five minutes.⁶³⁵ The governor may extend these time limits at his or her discretion.⁶³⁶

Georgia

Distribution of Powers

The Georgia Constitution creates a State Board of Pardons and Paroles and vests it with the power of executive clemency subject to certain limitations.⁶³⁷ One such limitation is that once the Board has commuted an inmate's sentence from death to life in prison, no authority exists to pardon or parole the individual until he has served at least twenty-five years in prison.⁶³⁸ A second limitation is that where the legislature has provided for mandatory minimum sentences for certain violent offenses, no authority exists to pardon or commute the sentences of an individual during the mandatory portion of the sentence.⁶³⁹

Additionally, the legislature is constitutionally empowered to create sentences of life without parole for persons convicted of murder and for persons who have previously been convicted of certain violent offenses.⁶⁴⁰ When such a sentence is imposed, the

630. *Id.* at § 15(D).

631. *Id.*

632. *Rules of Executive Clemency, supra* n. 602, at § 15(D).

633. *Id.* at § 15(E).

634. *Id.*

635. *Id.* at § 15(H).

636. *Id.*

637. Ga. Const. art. IV, § II, ¶ II(a).

638. *Id.* at art. IV, § II, ¶ II(b)(1).

639. *Id.* at art. IV, § II, ¶ II(b)(2). The offenses for which such mandatory minimum sentencing laws can be passed are armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery. *Id.* Mandatory minimum sentencing laws may only be passed by a two-thirds majority in each branch of the General Assembly. *Id.* The Georgia legislature has taken advantage of this provision. Ga. Code Ann. § 17-10-6.1 (2004).

640. Ga. Const. art. IV, § II, ¶ II(b)(3). The legislature may provide for a sentence of life without parole upon any conviction for murder or upon the second conviction for any of the following offenses: murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery. *Id.* A sentence of life without parole may only be enacted by a two-thirds majority in each branch of the General Assembly. *Id.* The Georgia legislature has passed such a law imposing sentences of life without parole for the commission of serious violent felonies. Ga. Code Ann. § 17-10-7(b)(2) (2004).

Board has no authority to pardon or commute the sentence of the individual so sentenced.⁶⁴¹ The Georgia Constitution also reserves to the legislature the power to prohibit the Board from granting a pardon or to prescribe the terms of a pardon granted to any person who is incarcerated a second time for an offense for which the person could have been sentenced to life imprisonment as well as to any person who has received consecutive life sentences as a result of offenses occurring during the same series of acts.⁶⁴²

In cases where an inmate has been sentenced to death, the chairperson of the Board has the power to halt an execution for the amount of time that it takes for the Board to consider the inmate's application for executive clemency.⁶⁴³ The Georgia Constitution also provides that, if an inmate can prove his innocence, the Board may grant the inmate a full pardon regardless of any limitations placed on the Board by other provisions of the constitution.⁶⁴⁴

Structure of the Board

The Board of Pardons and Paroles consists of five members who are appointed by the governor and confirmed by the Senate to serve a seven-year term.⁶⁴⁵ The members of the Board select one of their own to serve as chairperson of the Board for the following year.⁶⁴⁶ The Board's members serve full time at a salary set by the governor.⁶⁴⁷ Members of the Board may be removed for cause or for incapacitation.⁶⁴⁸

Process

In Georgia, "[a] pardon is a declaration of record that a person is relieved from the legal consequences of a particular conviction. It restores civil and political rights and removes all legal disabilities resulting from the conviction."⁶⁴⁹ Any person who proves innocence of the crime for which he was convicted may be granted a pardon; when new evidence is available to prove a person's complete justification or lack of guilt, that evidence may be the basis for the pardon.⁶⁵⁰ A written application can be submitted to the Board at any time after conviction.⁶⁵¹ In all cases other than those involving the innocence of the convicted person, a pardon will only be granted to one who has

641. Ga. Code Ann. § 17-10-7(b)(2).

642. Ga. Const. art. IV, § II, ¶ II(c). The Georgia legislature has used this power as well. For example, any person who is convicted of murder and sentenced to life imprisonment and who has been previously incarcerated under a life sentence must serve at least twenty-five years before the Board may grant him a pardon. Ga. Code Ann. § 42-9-39(b) (1997).

643. Ga. Const. art. IV, § II, ¶ II(d).

644. *Id.* at art. IV, § II, ¶ II(e).

645. *Id.* at art. IV, § II, ¶ I.

646. Ga. Code Ann. § 42-9-6(a) (1997).

647. *Id.* at § 42-9-5 (Supp. 2006).

648. *Id.* at §§ 42-9-12, 42-9-14 (1997). A "removal committee" composed of the governor, the lieutenant governor, and one other appointee of the governor other than the attorney general can pass regulations regarding the procedures to be observed in removing members of the Board for cause and in determining what conduct by a Board member constitutes cause for removal. *Id.* at § 42-9-14(a)-(c).

649. Ga. Comp. R. & Regs r. 475-3-.10(3) (1985).

650. *Id.* at r. 475-3-.10(3)(a).

651. *Id.*

completed his full sentence obligation, including serving any probated sentence and paying any fine, and who has since gone five years without any criminal involvement.⁶⁵²

An application for a commutation of a death sentence to life in prison may be made to the Board in writing, and the only content requirement is that the application state the reasons for which a commutation is requested.⁶⁵³ Once the Board receives the application, it decides whether or not to consider the inmate for a commutation and must make a decision after the inmate has exhausted all of his appeals through the courts or within seventy-two hours of the inmate's scheduled execution date regardless of any pending appeals.⁶⁵⁴ Before the inmate's last appeal, the Board will obtain information concerning the offense for which the inmate was convicted, as well as the inmate's criminal history.⁶⁵⁵ If the Board does not have sufficient time to consider an inmate's application, it may suspend the inmate's execution for a period not to exceed ninety days in order to allow time for a proper review.⁶⁵⁶ Hearings are not mandatory.⁶⁵⁷

In non-death penalty cases, the Board will consider a request for a commutation "only when substantial evidence is submitted to the Board in writing that the sentence is either excessive, illegal, unconstitutional or void; that the ends of justice would be best served thereby[;] and that such action would be in the best interests of society and the inmate."⁶⁵⁸

By statute, when considering "any case within its power," the Board must consider at least the following information: (1) a report by the superintendent of the correctional institution in which the person has been confined outlining the conduct of the person while incarcerated; (2) the results of any physical and mental examinations that may have been conducted; (3) the apparent response made to efforts to improve the person's social attitude; (4) the person's work record while confined, including the nature of that work and a recommendation for appropriate work at which the person can succeed if released; and (5) the person's educational level, based on standard reading tests, and educational programs attended.⁶⁵⁹ The Board may also conduct other investigations it deems necessary to be fully informed about the person.⁶⁶⁰

When considering a final decision to grant executive clemency, the Board must give twenty days' advance notice to the victim and provide an opportunity for the victim to file a written objection.⁶⁶¹ The Board will be relieved of the duty to notify the victim if the victim has not previously expressed an objection to release and has neither requested notification nor provided current contact information.⁶⁶²

Decisions are made by a majority vote of the Board.⁶⁶³ Georgia statutory law

652. *Id.* at r. 475-3-.10(3)(b).

653. *Id.* at r. 475-3-.10(2)(b).

654. Ga. Comp. R. & Regs. R. 475-3-.10(2)(b).

655. *Id.*

656. Ga. Code Ann. § 42-9-20 (1997); Ga. Comp. R. & Regs. R. 475-3-.10(2)(b).

657. Ga. Comp. R. & Regs. r. 475-3-.10(2)(b).

658. *Id.* at r. 475-3-.10(2)(c).

659. Ga. Code Ann. § 42-9-43(a) (1997).

660. *Id.*

661. *Id.* at § 17-17-13 (2004).

662. *Id.*

663. *Id.* at §§ 42-9-20, 42-9-42(a) (1997).

stresses that, notwithstanding any contrary laws, the Board may pardon anyone whose innocence is determined after conviction.⁶⁶⁴

Idaho

Distribution of Powers

The Idaho Constitution creates a board of pardons named by statute as the Idaho Commission of Pardons and Parole.⁶⁶⁵ This Commission is vested with the authority to grant commutations and pardons in all cases to the extent provided by statute.⁶⁶⁶ The legislature retains the power to prescribe the sessions of the Commission, the application process, and procedural regulations of the Commission.⁶⁶⁷ The governor has the power to grant reprieves in all cases, but the reprieves granted cannot extend beyond the next session of the Commission, during which the Commission is to make a determination with respect to the reprieve or grant of a pardon or commutation.⁶⁶⁸ By statute, the Commission's actions on pardons and commutations "with respect to sentences for murder, voluntary manslaughter, rape, kidnapping, lewd and lascivious conduct with a minor child, and manufacture or delivery of controlled substances" constitute only recommendations that must be submitted to the governor for approval.⁶⁶⁹

Structure of Board

The Commission is composed of five compensated, part-time members who are appointed by the governor with the advice and consent of the Idaho Senate and serve at the governor's pleasure.⁶⁷⁰ Not more than three members may be from the same political party.⁶⁷¹ The Commission has an executive director, who is also appointed by the governor and is a full-time employee.⁶⁷² The executive director is the Commission's official representative and is responsible for the day-to-day management and administration of Commission business as well as scheduling hearing sessions at times that are convenient to the members.⁶⁷³

Process

A request for commutation is initiated by submitting a petition, which cannot exceed four pages in length, to the Commission in the form provided by it and signed by the inmate.⁶⁷⁴ It must contain the reason the commutation is requested and the

664. Ga. Code Ann. § 42-9-39(d).

665. Idaho Const. art. IV, § 7.

666. *Id.*

667. *Id.*

668. *Id.*

669. Idaho Code Ann. § 20-240 (Lexis 2004).

670. *Id.* at § 20-210.

671. *Id.*

672. *Id.*

673. *Id.*

674. Idaho Admin. Code r. 50.01.01.450.01(a), (j) (2006).

modification of the sentence that is sought.⁶⁷⁵ Generally, petitions are scheduled for consideration at one of the Commission's quarterly sessions; however, the Commission may choose to consider them at any time.⁶⁷⁶ Scheduling of hearings is completely at the discretion of the Commission.⁶⁷⁷ If a hearing is scheduled, notice is published in a newspaper in Boise, Idaho, once a week for the four weeks immediately before the hearing.⁶⁷⁸ A copy of the notice is also mailed to the prosecuting attorney of the county of conviction.⁶⁷⁹ Deliberation on the petition is conducted in executive session.⁶⁸⁰

In death penalty cases, the Commission maintains an individual file of each person under such sentence.⁶⁸¹ At any time, the Commission may review the file or interview the inmate without activating the commutation process,⁶⁸² which can only be done by the inmate or his counsel.⁶⁸³ The Commission may elect to receive and consider a petition for commutation of death sentence at any time.⁶⁸⁴

An application for pardon will not be considered until either three or five years have elapsed since the inmate has been discharged for custody, depending on the nature of the offense.⁶⁸⁵ To initiate the process, an application obtained from the Commission is completed and returned.⁶⁸⁶ The applicant can attach letters of recommendation or other supporting documents.⁶⁸⁷ When an application is received, the Commission requests an investigation to be conducted by correctional field personnel in the area in which the person resides.⁶⁸⁸ The report of the investigation includes a criminal record check of the applicant, the applicant's employment history since completing his sentence, his status as a good citizen, a summary of an interview with the applicant, and any additional information deemed appropriate.⁶⁸⁹ The Commission then reviews the report in executive session, determining whether or not a hearing will be granted on the application.⁶⁹⁰ If a hearing is granted, the same notice is given as in an application for commutation.⁶⁹¹

For commutation and pardon hearings, the subject is encouraged by the Commission to attend.⁶⁹² The Commission allows the participation of attorneys, families of the subject, victims, and others who have a direct relationship to the hearing

675. *Id.* at r. 50.01.01.450.01(c).

676. *Id.* at r. 50.01.01.450.01(e).

677. *Id.* at r. 50.01.01.450.02.

678. *Id.* at r. 50.01.01.450.02(a).

679. Idaho Admin. Code r. 50.01.01.450.02(b).

680. *Id.* at r. 50.01.01.450.01(g).

681. *Id.* at r. 50.01.01.450.05(a).

682. *Id.* at r. 50.01.01.450.05(b).

683. *Id.* at r. 50.01.01.450.05(c).

684. Idaho Admin. Code r. 50.01.01.450.05(d).

685. *Id.* at r. 50.01.01.550.01.

686. *Id.* at 50.01.01.550.02(a).

687. *Id.* at 50.01.01.550.02(a)(ii).

688. *Id.* at r. 50.01.01.550.02(b).

689. Idaho Admin. Code r. 50.01.01.550.02(b).

690. *Id.* at r. 50.01.01.550.03.

691. *Id.* at r. 50.01.01.550.04.

692. *Id.* at r. 50.01.01.200.05(c)-(d).

or subject.⁶⁹³ Persons who wish to participate must notify the Commission five days in advance of the scheduled hearing.⁶⁹⁴ All written documents to be considered by the Commission must be submitted seven days in advance of the hearing.⁶⁹⁵ Verbal testimony of witnesses, victims, and attorneys may be limited by the number of persons allowed to testify and by the available time.⁶⁹⁶ Decisions are made by a majority vote of the Commission.⁶⁹⁷

Illinois

Distribution of Powers

The Illinois Constitution grants the governor the power to grant reprieves, commutations, and pardons for all offenses as he or she deems proper.⁶⁹⁸ The application process may be regulated by law.⁶⁹⁹

Structure of Board

The Illinois legislature has created the Prisoner Review Board to make recommendations to the governor in the exercise of his or her clemency power.⁷⁰⁰ It consists of fifteen persons appointed by the governor with the advice and consent of the Senate.⁷⁰¹ To be qualified to serve, members must have “at least [five] years of actual experience in the fields of penology, corrections work, law enforcement, sociology, law, education, social work, medicine, psychology, other behavioral sciences, or a combination thereof.”⁷⁰² At least six of the members are required to have at least three years’ experience in juvenile matters, and there must be enough political diversity so that no more than eight members are of the same political party.⁷⁰³

Board positions are full-time, compensated positions, and Board members are prohibited from holding any other paid positions or engaging in other businesses or vocations.⁷⁰⁴ Members are appointed for six-year terms, but the governor may remove them “for incompetence, neglect of duty, malfeasance or inability to serve.”⁷⁰⁵ All requests for pardon, reprieve, or commutation must be heard by at least one Board member, but decisions on those requests require three Board members.⁷⁰⁶ Based on

693. *Id.* at r. 50.01.01.200.06.

694. Idaho Admin. Code r. 50.01.01.200.06(a).

695. *Id.* at r. 50.01.01.200.06(b).

696. *Id.* at r. 50.01.01.200.06(d).

697. *Id.* at r. 50.01.01.200.08(a).

698. Ill. Const. art. V, § 12.

699. *Id.*

700. 730 Ill. Comp. Stat. Ann. 5/3-3-1(a) (West Supp. 2006).

701. *Id.* at 5/3-3-1(b).

702. *Id.*

703. *Id.*

704. *Id.*

705. 730 Ill. Comp. Stat. Ann. 5/3-3-1(c).

706. *Id.* at 5/3-3-2(a)(6).

those decisions, the Board makes confidential recommendations to the governor.⁷⁰⁷

Process

Petitions seeking pardon, commutation, or reprieve must be in writing, signed by the applicant or his representative, addressed to the governor, and filed with the Prisoner Review Board.⁷⁰⁸ The petition must include a summary of the case, the reasons for seeking executive clemency, and other relevant information the Board may require.⁷⁰⁹ The Board is required to provide notice of the application to the court of conviction and the state's attorney in the county of conviction.⁷¹⁰

Upon request, the Board must hear each application.⁷¹¹ Applicants may be represented by counsel.⁷¹² After the hearing, the Board makes its recommendations to the governor in a confidential written report.⁷¹³ The Board must meet to consider petitions at least four times per year.⁷¹⁴ Recommendations are determined by majority vote⁷¹⁵ and are not binding on the governor.⁷¹⁶

The docket for each Board meeting lists all outstanding petitions filed at least thirty days before the date of the meeting.⁷¹⁷ Anyone, including counsel, who wants to support or oppose docketed petitions must register in person at the Board's meeting.⁷¹⁸ Those registered will be heard by the Board or its designated panel at the scheduled public hearing.⁷¹⁹ The Board also considers "petitions on the docket on which there are no appearances and may elect to hear petitioners who are in confinement."⁷²⁰

If the governor has denied a petition, the Board cannot accept a repeat petition from the same person for a full year from the date of the governor's denial.⁷²¹ The Board's chairperson may waive the one-year waiting period if the petitioner provides significant new information that was unavailable to him when the earlier petition was filed; such new information must be provided in writing.⁷²² The waiting period may also be waived if the petitioner can show that a "change in circumstances of a compelling humanitarian nature has arisen since the denial of the prior petition."⁷²³

707. *Id.*

708. *Id.* at 5/3-3-13(a) (West 1997).

709. *Id.*

710. 730 Ill. Comp. Stat. Ann. 5/3-3-13(b).

711. *Id.* at 5/3-3-13(c).

712. *Id.*

713. *Id.*

714. *Id.*

715. 730 Ill. Comp. Stat. Ann. 5/3-3-13(c).

716. *Id.* at 5/3-3-13(e); Ill. Admin. Code tit. 20, pt. 1610.180(h) (2006).

717. Ill. Admin. Code tit. 20, pt. 1610.180(e).

718. *Id.*

719. *Id.* at pt. 1610.180(f).

720. *Id.*

721. 730 Ill. Comp. Stat. Ann. 5/3-3-13(a-5).

722. *Id.*

723. *Id.*

Indiana

Distribution of Powers

The governor, subject to legislative regulations, is authorized by the Constitution to grant reprieves, commutations, and pardons for all offenses except in cases of treason or impeachment.⁷²⁴ The Constitution also authorizes the legislature to create a board or “council” whose advice and consent must be given before the governor may grant pardons.⁷²⁵ The legislature has given the Indiana Parole Board the power to hear clemency applications and make recommendations to the governor.⁷²⁶ It has not, however, exercised its constitutional prerogative to limit the governor’s authority to issue pardons only upon a favorable recommendation of the Board.⁷²⁷

Structure of Board

The Indiana Parole Board consists of five members who are appointed by the governor for four-year terms.⁷²⁸ No more than three members may have the same party affiliation.⁷²⁹ Members may be reappointed and may be removed for cause but only after having the opportunity to be heard by the governor.⁷³⁰ At a minimum, Board members must have either a bachelor’s degree from an accredited school or at least ten years’ experience in law enforcement.⁷³¹ Members are full-time, salaried state employees.⁷³²

Process

The Indiana Parole Board has fashioned rules delimiting when inmates are eligible to apply for clemency. Inmates may apply only after they have served a specified portion of their sentence.⁷³³ Additionally, the inmate must not have had any major disciplinary violations and no more than one minor disciplinary violation within the preceding year.⁷³⁴ Inmates declared ineligible to apply for clemency have no right to meet with the Board.⁷³⁵ They do, however, have the right to appeal an ineligibility determination by the Board.⁷³⁶ If appealed, the inmate meets with a member of the Board, who explains the reasons for the determination.⁷³⁷ The Board member may

724. Ind. Const. art. 5, § 17.

725. *Id.*

726. Ind. Code Ann. § 11-9-1-2(a)(3) (Lexis 2003).

727. *Id.* at § 11-9-2-3.

728. *Id.* at § 11-9-1-1(a).

729. *Id.*

730. *Id.*

731. Ind. Code Ann. § 11-9-1-1(b).

732. *Id.*

733. 220 Ind. Admin. Code 1.1-4-1(a)–(e) (2006).

734. *Id.* at 1.1-4-1(i).

735. *Id.* at 1.1-4-1(j).

736. *Id.* at 1.1-4-1(k).

737. *Id.*

request that the Board reconsider.⁷³⁸

Those requesting commutations of death sentences may not apply until an execution date has been set.⁷³⁹ If that date is subsequently stayed, the Board ceases all investigation and consideration of the petition, and the inmate must reapply when the next execution date is set.⁷⁴⁰

To initiate the clemency process, an application to the governor for clemency is filed with the Parole Board.⁷⁴¹ The application must be in writing and signed by the applicant or his representative.⁷⁴² Additional information may be required if the Board believes it is pertinent to the process of considering the application.⁷⁴³

Before making a recommendation to the governor, the Board must: (1) notify the sentencing court, the victim or the victim's next of kin, and the prosecuting attorney; (2) conduct an investigation, collecting records, reports, and any other relevant information; and (3) hold a hearing that provides the applicant and any other interested parties with the opportunity to present information to the Board.⁷⁴⁴

The Parole Board may delegate its inquiry, investigation, hearing, and review functions to one or more members.⁷⁴⁵ Members acting on behalf of the Board may exercise any or all of the Board's powers but cannot make a final decision.⁷⁴⁶ After completing the delegated function, those members acting on the Board's behalf must file a complete procedural record, along with the findings, conclusions, and recommended decision.⁷⁴⁷ The Board will base its final decision upon this information.⁷⁴⁸

Prior to making a recommendation to the governor to grant a commutation, the Board must investigate the attitudes and opinions of three groups: the community where the crime occurred; the victim or the victim's relatives and friends; and the friends and relatives of the offender.⁷⁴⁹ The Board must also obtain a report regarding the petitioner's medical, psychological, and psychiatric condition and history.⁷⁵⁰ The Board *must* consider several factors when making its recommendation to the governor:

- (1) the nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime;
- (2) the offender's prior criminal record;
- (3) the offender's conduct and attitude during commitment; and

738. 220 Ind. Admin. Code 1.1-4-1(k).

739. *Id.* at 1.1-4-1(d).

740. *Id.*

741. Ind. Code Ann. § 11-9-2-1 (Lexis 2003).

742. *Id.*

743. *Id.*

744. *Id.* at § 11-9-2-2(b).

745. *Id.* at § 11-9-1-3(a).

746. Ind. Code Ann. § 11-9-1-3(b).

747. *Id.*

748. *Id.*

749. 220 Ind. Admin. Code 1.1-4-4(b) (2006).

750. *Id.* at 1.1-4-4(c).

(4) the best interests of society.⁷⁵¹

The Board *may* also consider:

- (1) the offender's previous social history;
- (2) the offender's employment during commitment;
- (3) the offender's educational and vocational training both before and during commitment;
- (4) the offender's age at the time of committing the offense and his age and level of maturity at the time of the clemency appearance;
- (5) the offender's medical condition and history;
- (6) the offender's psychological and psychiatric condition and history;
- (7) the offender's employment history prior to commitment;
- (8) the relationship between the offender and the victim of the crime;
- (9) the offender's economic condition and history;
- (10) the offender's previous parole or probation experiences;
- (11) the offender's participation in substance abuse programs;
- (12) the attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;
- (13) the attitudes and opinions of the victim of the crime, or of the relatives or friends of the victim;
- (14) the attitudes and opinions of the friends and relatives of the offender;
- (15) any other matter reflecting upon the likelihood that the offender, if released upon parole, is able to and will fulfill the obligations of a law-abiding citizen; [and]
- (16) the offender's proposed places of employment and of residence were he to be released on parole.⁷⁵²

Kansas

Distribution of Powers

The Kansas Constitution vests the "pardoning power" in the governor, subject to regulations and restrictions prescribed by the legislature.⁷⁵³ The Kansas Parole Board is authorized by statute to adopt rules determining the procedures used for applications for pardon and commutation.⁷⁵⁴ All applications for clemency must be referred to the

751. *Id.* at 1.1-4-4(d).

752. *Id.* at 1.1-4-4(e).

753. Kan. Const. art. I, § 7.

754. Kan. Stat. Ann. § 22-3701(2) (Supp. 2005).

Board, which must examine each one and submit a report to the governor.⁷⁵⁵ The governor may not grant or deny any application until he or she has received the report of the Board unless more than 120 days have elapsed since the application was referred to the Board.⁷⁵⁶ The governor is not bound by the Board's recommendation.⁷⁵⁷ Additionally, clemency may not be granted unless the statutory notice provisions have been fulfilled.⁷⁵⁸

The governor's latitude is limited in death penalty cases. The governor may postpone the execution of a death sentence for a limited time.⁷⁵⁹ At the expiration of the time granted for postponement, however, the sentence of the court must be carried out.⁷⁶⁰ The governor also has the power to commute a death sentence as long as it is not commuted to imprisonment for less than ten years.⁷⁶¹

Structure of Board

The Kansas Parole Board is comprised of three members who are appointed by the governor and confirmed by the Senate.⁷⁶² No more than two members may be from the same political party.⁷⁶³ Members are appointed to four-year terms but continue to serve until their successors are confirmed.⁷⁶⁴ Board positions are full-time⁷⁶⁵ and salaried.⁷⁶⁶ The governor designates both the chairperson and vice-chairperson.⁷⁶⁷

"The governor may not remove any member of the [Board] except for disability, inefficiency, neglect of duty or malfeasance in office," and members may be removed only after receiving both written notice of the charges and a public hearing.⁷⁶⁸ If a member is removed, a statement of all charges and findings, along with a record of the proceedings, must be filed by the governor in the Office of the Secretary of State.⁷⁶⁹

The Board is empowered "to issue subpoenas requiring the attendance of any witnesses and the production of any records, books, papers and documents that it considers necessary for the investigation of the issues before it."⁷⁷⁰ Any Board member may sign subpoenas and administer oaths.⁷⁷¹ Additionally, one or more members of the Board may be authorized to conduct hearings on the Board's behalf.⁷⁷²

755. *Id.* at § 22-3701(4).

756. *Id.*

757. Personal communication from representative of the governor's office to authors.

758. Kan. Stat. Ann. § 22-3701(4).

759. *Id.* at § 22-3704 (1995).

760. *Id.*

761. *Id.* at § 22-3705(a).

762. *Id.* at § 22-3707(a) (Supp. 2005).

763. Kan. Stat. Ann. § 22-3707(a).

764. *Id.*

765. *Id.*

766. *Id.* at § 22-3708.

767. *Id.* at § 22-3709.

768. Kan. Stat. Ann. § 22-3707(b).

769. *Id.*

770. *Id.* at § 22-3720 (1995).

771. *Id.*

772. *Id.* at § 22-3713(a) (Supp. 2005).

Process

All applications for pardon or commutation of sentence must be referred to the Board.⁷⁷³ An inmate initiates his request for clemency by making a request to the facility representative.⁷⁷⁴ The applicant then writes a statement of the reasons for his request on forms furnished by the Board and provides all information required by the forms.⁷⁷⁵ The completed application may be returned to the facility representative or sent directly to the Board.⁷⁷⁶

At least thirty days before a pardon or commutation may be granted, notice of the application must be provided to the prosecuting attorney and judge of the court of conviction; for certain offenses, notice must also be provided to the victim of the offense or the victim's family.⁷⁷⁷ Additionally, notice must be published in the official newspaper of the county of conviction.⁷⁷⁸ If the applicant is indigent, the state will pay the publication costs once per twelve-month period.⁷⁷⁹

The Board's review must include an examination of records and reports, as well as a personal interview with the applicant if requested by the Board, and after the application is received and notice has been provided, the Board reviews the file to determine whether it warrants a personal interview with the inmate.⁷⁸⁰ Within 120 days after the application was referred to the Board, the Board must submit a report, including any information the Board has about the applicant, to the governor.⁷⁸¹ In turn, the governor may not grant or deny any application until he or she "has received the report of the [B]oard or until 120 days after the referral to the [B]oard, whichever time is the shorter."⁷⁸²

Kentucky

Distribution of Powers

The governor of Kentucky has the "power to remit fines and forfeitures, commute sentences, [and] grant reprieves and pardons, except in cases of impeachment."⁷⁸³ A statement of the governor's reasons for the decision must be filed with the application, and both are open to public inspection.⁷⁸⁴ The governor may ask the Kentucky Parole Board to investigate and prepare a report in any case of executive clemency, but its recommendations are not binding on the governor.⁷⁸⁵

773. Kan. Stat. Ann. § 22-3701(4).

774. Kan. Admin. Regs. r. 45-900-1(a) (2006).

775. *Id.* at r. 45-900-1(b).

776. *Id.*

777. Kan. Stat. Ann. § 22-3701(3).

778. *Id.*

779. *Id.*

780. Kan. Admin. Regs. r. 45-900-1(c).

781. Kan. Stat. Ann. § 22-3701(4).

782. *Id.*

783. Ky. Const. § 77.

784. *Id.*

785. Ky. Rev. Stat. Ann. § 439.450 (Lexis 1999).

Structure of Board

The Kentucky Parole Board is composed of seven full-time members and two part-time members appointed by the governor and confirmed by the Senate.⁷⁸⁶ The two part-time members must be from different political parties, and no more than five of the nine members may be from the same political party.⁷⁸⁷ Part-time members' authority, however, is limited by statute.⁷⁸⁸ Each new appointment must be drawn from a list of three names given to the governor by the Commission on Correction and Community Service, and each person appointed must have at least five years' experience in the fields of penology, correction work, law enforcement, sociology, law, education, social work, medicine, or some combination of these.⁷⁸⁹ Alternatively, an appointee with five years of previous experience serving on the Board is considered to be qualified.⁷⁹⁰ The governor chooses one full-time member to be chairperson.⁷⁹¹

Full-time Board members must devote all of their time to the Board and are salaried employees, with the chairperson being compensated slightly more.⁷⁹² Terms are four years.⁷⁹³ The chairperson determines the Board's organization, but by statute a quorum for clemency matters requires four members.⁷⁹⁴

"The [g]overnor may not remove any member of the [B]oard except for disability, inefficiency, neglect of duty, or malfeasance in office."⁷⁹⁵ Before removal, the governor must provide the member with a written copy of the charges and an opportunity to be heard.⁷⁹⁶ If the member is removed, a statement of all charges and findings, along with a record of the proceedings, must be filed by the governor in the Office of the Secretary of State.⁷⁹⁷ The executive director of the Parole Board is responsible for administration and the review, drafting, and promulgation of rules and regulations for the Board.⁷⁹⁸

Process

There does not appear to be any formal procedure for applying for executive clemency. The governor's office does have a form titled "Application for Pardon," which an inmate may fill out and submit to the governor's office.⁷⁹⁹ In practice, the Parole Board does not appear to play a role in the executive clemency process. Rather, its statutory duty is to conduct investigations at the request of the governor.⁸⁰⁰

786. *Id.* at § 439.320(1) (Lexis Supp. 2005).

787. *Id.*

788. *Id.* at § 439.320(7).

789. *Id.* at § 439.320(1).

790. Ky. Rev. Stat. Ann. § 439.320(1).

791. *Id.* at § 439.320(2).

792. *Id.* at § 439.320(3).

793. *Id.*

794. *Id.* at § 439.320(4).

795. Ky. Rev. Stat. Ann. § 439.320(5).

796. *Id.*

797. *Id.*

798. *Id.* at § 439.320(8).

799. This form must be requested directly from the governor's office.

800. Ky. Rev. Stat. Ann. § 439.450.

Louisiana

Distribution of Powers

The Louisiana Constitution vests the power of executive clemency in the governor, but in order to commute a sentence or grant a pardon the governor must first have a favorable recommendation from the Louisiana Board of Pardons.⁸⁰¹

Structure of the Board

The Louisiana Board of Pardons has the duty to review and take action on applications for pardons pending before it and meets on regularly scheduled dates and at other times designated by the Board's chairperson.⁸⁰² The Board has the additional power to create rules and regulations and to employ a staff, including "professional personnel with training or past experience in criminology or related fields such as sociology, psychology, or psychiatry."⁸⁰³ The Board also has the authority to sanction applicants for "disorderly, threatening, or insolent behavior, or use of insulting, abusive, or obscene language."⁸⁰⁴ Such a sanction may include immediate termination of proceedings and denial of relief.⁸⁰⁵

By constitution, the Board consists of five members appointed by the governor and confirmed by the Senate for terms that run concurrently with the term of the appointing governor.⁸⁰⁶ By statute, at least one member of the Board may be chosen by the governor from a list of three names provided by Victims and Citizens Against Crime, Inc.⁸⁰⁷ The governor chooses a chairperson from among the Board members.⁸⁰⁸ The Board members choose their own vice-chairperson.⁸⁰⁹ Four Board members constitute a quorum, and all actions of the Board require the favorable vote of at least four members.⁸¹⁰ Each Board member must devote his or her full time to the duties of the Board and is "prohibited from holding any elective, appointive, or public employment; or from engaging in any private business or employment which is in conflict with his [or her] duties" on the Board.⁸¹¹ All Board members are paid an annual salary of \$36,000

801. La. Const. art. IV, § 5(E)(1).

However, a first offender convicted of a non-violent crime, or convicted of aggravated battery, second degree battery, aggravated assault, mingling harmful substances, aggravated criminal damage to property, purse snatching, extortion, or illegal use of weapons or dangerous instrumentalities never previously convicted of a felony shall be pardoned automatically upon completion of his sentence, without a recommendation of the Board of Pardons and without action by the governor.

Id.

802. La. Stat. Ann. § 15:572.1(C) (2005).

803. *Id.* at § 15:572.3(1)-(2).

804. *Id.* at § 15:572.3(4).

805. *Id.*

806. La. Const. art. IV, § 5(E)(2).

807. La. Stat. Ann. § 15:572.1(A).

808. *Id.*

809. *Id.* at § 15:572.1(D).

810. *Id.* at § 15:572.1(E).

811. *Id.* at § 15:572.1(F).

except for the chairperson, who receives \$42,000.⁸¹²

Process

A person who is sentenced to life is ineligible to apply for executive clemency until he has served fifteen years from the date of the imposition of sentence.⁸¹³ This rule does not apply, however, when the Board determines that new, material evidence exists that would probably have changed the verdict so long as that evidence was not discovered before or during the trial despite reasonable diligence by the applicant.⁸¹⁴

For an application to be considered by the Board, it must be received by the fifteenth day of the month before the Board's next hearing, and applications from an inmate sentenced to death must be submitted within one year of the denial of the inmate's direct appeal.⁸¹⁵ Completed applications may be given a hearing by the Board.⁸¹⁶ Until notified that a hearing has been granted, applicants may not submit documents or information other than what is required by the application.⁸¹⁷ An exception applies to inmates with a life sentence who have documentation proving innocence.⁸¹⁸

The Board has discretion to refuse to hear an application for any reason.⁸¹⁹ A non-exhaustive list of reasons the Board may decide to refuse to hear an application for clemency includes:

- (a) the serious nature of the offense;
- (b) insufficient time served on the sentence;
- (c) insufficient time has passed since release;
- (d) the proximity of parole or good-time date;
- (e) institutional disciplinary reports;
- (f) probation or parole was unsatisfactory or violated;
- (g) past criminal record; or

812. La. Stat. Ann. § 15:572.2 (2005).

813. *Id.* at § 15:572.4(D); La. Admin. Code tit. 22, § 101(E) (2006).

814. La. Stat. Ann. § 15:572.4(D); La. Admin. Code tit. 22, § 101(E).

815. La. Admin. Code tit. 22, § 101(B), (D).

816. *Id.* at § 101(A). A complete application must be submitted on the form provided by the Board and contain the following: the name of the applicant, the applicant's prison number, date of birth, race, sex, education level, age at the time of the offense, present age, offender class, facility where the inmate is incarcerated, the parish where the inmate was convicted, the offenses for which the inmate was convicted of, the parish where the offenses were committed, the date of the inmate's sentence, the length of the inmate's sentence, the amount of time served, a description of any prior parole or probation, a list of any previous clemency hearings that the inmate has had, the reasons that the inmate is requesting clemency, the particular type of clemency sought, and a statement of the facts surrounding the offense. *Id.* at § 103(A) (2006). Additionally, inmates must attach their institutional disciplinary reports, *id.*, and, if the inmate is sentenced to death, proof that the inmate's direct appeal was denied. *Id.* at § 103(B).

817. La. Admin. Code tit. 22, § 103(C).

818. *Id.*

819. *Id.* at § 105(A.1).

(h) any other factor determined by the Board.⁸²⁰

If the inmate is favorably recommended by any of the Louisiana Risk Review Panels, the inmate will automatically receive a hearing without any further consideration by the Board.⁸²¹

Contact with members of the Board is limited to appearing or testifying at a public hearing or writing letters addressed to the Board of Pardons.⁸²² All letters in favor of granting clemency are open to public inspection except letters written by or on behalf of the victim; letters opposing clemency generally are not subject to public inspection.⁸²³ However, any letter written by an elected or appointed public official is open to public inspection.⁸²⁴

Before a hearing may be set, the applicant must have published notice of the application for clemency on “three separate days within a thirty-day period of time . . . in any newspaper recognized . . . as the official journal of the governing authority of the parish where the offense occurred.”⁸²⁵ Proof of this notice must be given to the Board within ninety days of when the applicant is notified that a hearing has been granted.⁸²⁶ At this time, the applicant may also submit additional letters and documents in support of his application.⁸²⁷

At least thirty days before the scheduled hearing date, the Board must notify (1) the prosecutor and sheriff of the parish where the offense was committed; (2) the applicant; (3) the victim; (4) the victim’s next of kin (unless the Board has received a written request that notification is not wanted); (5) the Crime Victims Services Bureau of the Department of Public Safety and Corrections; and (6) any other interested parties who have previously requested to be notified.⁸²⁸ All of these parties must be given the opportunity to appear at the inmate’s hearing,⁸²⁹ and some may be allowed to appear by telephone.⁸³⁰ At the hearing, only three people, including the applicant, are allowed to speak in favor of clemency, and only three persons, including the victim or the victim’s family members, are allowed to speak in opposition, but there is no limit on how many written statements may be submitted.⁸³¹ If the inmate fails to attend the hearing and fails to inform the Board in advance of his inability to attend, the inmate’s application is automatically denied.⁸³²

The Board will notify the inmate if it makes the decision to deny the application⁸³³

820. *Id.*

821. *Id.* at § 105(E).

822. La. Stat. Ann. § 15:573.1(A) (2005); La. Admin. Code tit. 22, § 107(A) (2006).

823. La. Stat. Ann. § 15:573.1(B), (E); La. Admin. Code tit. 22, § 107(D).

824. La. Stat. Ann. § 15:573.1(E); La. Admin. Code tit. 22, § 107(E).

825. La. Stat. Ann. § 15:572.4(C).

826. La. Admin. Code tit. 22, § 109(A) (2006).

827. *Id.* at § 109(B).

828. *Id.* at § 111(B). Most of these notices are required by statute; however, Louisiana statutory law does not require that notice be provided to the Crime Victims Services Bureau. La. Stat. Ann. § 15:572.4(B)(1).

829. La. Stat. Ann. § 15:572.4(B)(2)–(3); La. Admin. Code tit. 22, § 111(C).

830. La. Stat. Ann. § 15:573.2 (2005); La. Admin. Code tit. 22, § 111(C).

831. La. Admin Code tit. 22, § 111(D).

832. *Id.* at § 111(F).

833. *Id.* at § 113(A).

or if the governor rejects the inmate's application after a favorable recommendation by the Board.⁸³⁴ The governor will notify the inmate if he or she decides to grant clemency.⁸³⁵

Maryland

Distribution of Power

The Constitution of Maryland vests the power of executive clemency in the governor but provides that, before granting a pardon, the governor must first give notice in one or more newspapers of the earliest day that he or she will make a decision.⁸³⁶ Additionally, the governor must submit the applicant's petition and the reasons for his or her decision to the legislature.⁸³⁷ The Maryland legislature has authorized the Maryland Parole Commission to "review and make recommendations to the [g]overnor" on executive clemency when its assistance is requested.⁸³⁸ The Commission's recommendations are not binding on the governor.⁸³⁹

Structure of Commission

The Commission consists of ten members appointed to six-year terms by the Maryland Secretary of Public Safety and Correctional Services subject to the approval of both the governor and the Senate.⁸⁴⁰ To qualify for a seat on the Commission, an individual must "be appointed without regard to political affiliation," be a Maryland resident, and "have training and experience in law, sociology, psychology, psychiatry, education, social work, or criminology."⁸⁴¹ The Secretary, with the governor's approval, may designate a member of the Commission to serve as chairperson.⁸⁴² Also with the governor's approval, the Secretary may remove a member of the Commission based on disability, neglect of duty, or misconduct while in office.⁸⁴³ The Secretary must first serve the Commissioner with written notice of the charges and hold a public hearing.⁸⁴⁴ The Commissioners serve full time, may not have any other employment that conflicts with their duties,⁸⁴⁵ and are compensated by an amount determined by the legislature.⁸⁴⁶

834. *Id.* at § 115(A).

835. *Id.* at § 117(A).

836. Md. Const. art. II, § 20.

837. *Id.*

838. Md. Correctional Servs. Code Ann. § 7-206(3)(ii) (Supp. 2006).

839. Personal communication from representative of the governor's office to authors.

840. Md. Correctional Servs. Code Ann. § 7-202(a), (d)(i) (Supp. 2006).

841. *Id.* at § 7-202(b).

842. *Id.* at § 7-202(g).

843. *Id.* at § 7-202(e)(1).

844. *Id.* at § 7-202(e)(2).

845. Md. Correctional Servs. Code Ann. § 7-202(c).

846. *Id.* at § 7-203 (Lexis 1999).

Process

Any inmate may ask the Commission to recommend commutation to the governor when his legal remedies are exhausted and the circumstances of his case are unusual.⁸⁴⁷ The request is then heard at a parole hearing, where the Commission has discretion to deny the request or submit it to the governor with a recommendation.⁸⁴⁸ A sentence can be commuted to a specific time period or to time served, resulting in the inmate's release.⁸⁴⁹ Once the inmate's sentence is commuted, the Commission has discretion to release him on parole.⁸⁵⁰ If the governor denies the clemency request, the applicant may resubmit it "after a reasonable time."⁸⁵¹ The Commission will recommend commuting a life sentence "where the case warrants special consideration or where the facts and circumstances of the crime justify special consideration, or both."⁸⁵²

Either a petition or a letter to the Parole Commission can initiate a request for a pardon.⁸⁵³ A favorable pardon recommendation is more likely if the applicant can provide proof that he has successfully completed parole or probation, if applicable, and has adjusted to the community for a period of time extending beyond the latest expiration date of his sentence.⁸⁵⁴ Before making a recommendation to the governor, the Commission must have the Division of Parole and Probation investigate the individual and submit a report to the Commission and governor.⁸⁵⁵ In cases where pardon is denied, the applicant may resubmit an application after a reasonable time.⁸⁵⁶

The governor's legal counsel also reviews applications for executive clemency and makes a recommendation to the governor.⁸⁵⁷ The legal counsel uses the following criteria when making clemency determinations: (1) the nature and circumstances of the relevant offense; (2) the effect that a pardon or commutation would have on the victim, community, and public safety; (3) the inmate's criminal history; and (4) the reason that clemency is requested.⁸⁵⁸

Mississippi

Distribution of Powers

The Mississippi Constitution vests the power of executive clemency in the governor; before a pardon may be granted in a felony case, the petitioner must post his application in a newspaper in the county where his offense was committed for a period of

847. Code Md. Regs. 12.08.01.15(A) (2006).

848. *Id.*

849. *Id.*

850. *Id.*

851. *Id.*

852. Code Md. Regs. 12.08.01.15(B).

853. *Id.* at 12.08.01.16(C) (2006).

854. *Id.*

855. *Id.* at 12.08.01.16(B).

856. *Id.*

857. *Governor Ehrlich Clarifies Executive Clemency Process*, http://www.gov.state.md.us/pressreleases/2003/082903_clemency.html (Aug. 29, 2003).

858. *Id.*

thirty days.⁸⁵⁹ The Mississippi legislature has given the State Parole Board the “exclusive responsibility for investigating clemency recommendations upon request of the [g]overnor.”⁸⁶⁰

Structure of Board

The governor, with the advice and consent of the Senate and without consideration of political affiliation, appoints five members to the Board who serve terms “at the will and pleasure of the [g]overnor.”⁸⁶¹ The governor also has the power to appoint the chairperson.⁸⁶² To be eligible to be a Board member, a person must have either a bachelor’s degree or a high school diploma and four years of work experience.⁸⁶³ Board members are full-time employees and are compensated for their services with an amount determined by the legislature.⁸⁶⁴ Members of the Board are immune from civil liability for acts made in good faith and in the execution of the Board’s legitimate authority.⁸⁶⁵

Process

Very little is codified concerning applications for executive clemency, but an examination of the clemency application provides some information as to what is required.⁸⁶⁶ The inmate must first obtain an application from the governor’s legal division and send the completed application to the governor.⁸⁶⁷ Separate letters stating the unusual circumstances that the inmate believes warrant clemency and letters of recommendation from former employers, pastors, church members, elected officials, judges, prosecutors, family members, and others must accompany the application.⁸⁶⁸ If the governor believes that further investigation into an inmate’s case is necessary in order to make a decision concerning clemency, he or she may refer the application to the State Parole Board for investigation and recommendation.⁸⁶⁹ The Board’s recommendations are not binding upon the governor.⁸⁷⁰

Missouri

Distribution of Powers

By the Missouri Constitution, the governor has the sole authority to grant

859. Miss. Const. art. V, § 124.

860. Miss. Code Ann. § 47-7-5(3) (Lexis Supp. 2006).

861. *Id.* at § 47-7-5(1), (2).

862. *Id.* at § 47-7-5(1).

863. *Id.* at § 47-7-5(2).

864. *Id.*

865. Miss. Code Ann. § 47-7-5(4).

866. *E.g.* Office of the Governor, *Application for Clemency*, <http://www.cjpf.org/clemency/MississippiApp.pdf> (last modified June 16, 2005). An official form must be requested from the governor’s office.

867. *Id.*

868. *Id.*

869. Personal communication from representative of the governor’s office to authors.

870. *Id.*

postconviction reprieves, commutations, and pardons except in the case of treason or impeachment.⁸⁷¹ The legislature may determine the manner of applying for clemency.⁸⁷² It has created the Missouri Board of Probation and Parole, and all applications are referred to the Board for investigation and recommendation to the governor.⁸⁷³

Structure of Board

The Board is composed of seven members who are appointed by the governor subject to the advice and consent of the Senate.⁸⁷⁴ To be qualified, members must be “persons of recognized integrity and honor, known to possess education and ability in decision making through career experience Not more than four members . . . shall be of the same political party.”⁸⁷⁵ Members are appointed for six-year terms and may be reappointed.⁸⁷⁶ They are full-time, compensated employees.⁸⁷⁷ The governor designates the chairperson.⁸⁷⁸

Process

The Missouri Board of Probation and Parole has not issued any rules or regulations with respect to executive clemency procedures. By statute, however, any meeting, record of proceedings, or vote involving pardons may be closed to the public.⁸⁷⁹

Montana

Distribution of Powers

The Montana Constitution vests the executive clemency power solely in the governor, subject to procedures provided by the legislature.⁸⁸⁰ However, by statute, the legislature has created a Board of Pardons and Parole that “is responsible for executive clemency”⁸⁸¹ such that, if the Board recommends that clemency be denied in a non-capital case, “the application may not be forwarded to the governor and the governor may not take action on the case.”⁸⁸² The Board’s recommendation is not binding for applications that are forwarded to the governor.⁸⁸³ The governor may grant respite without any recommendation from the Board.⁸⁸⁴ In capital cases, this may have the

871. Mo. Const. art. IV, § 7.

872. *Id.*

873. Mo. Rev. Stat. Ann. § 217.800(2) (West 2004).

874. *Id.* at § 217.665(1).

875. *Id.* at § 217.665(2).

876. *Id.* at § 217.665(3).

877. *Id.* at § 217.665(6)–(7).

878. Mo. Rev. Stat. Ann. § 217.665(5).

879. *Id.* at § 217.670(5).

880. Mont. Const. art. VI, § 12.

881. Mont. Code Ann. § 46-23-104(1) (2005).

882. *Id.* at § 46-23-301(3).

883. *Id.*

884. *Id.* at § 46-23-315.

effect of postponing the execution; however, if clemency is not granted before the respite expires, the death warrant is again in effect and the execution must take place on the date the respite expires.⁸⁸⁵

Structure of Board

The Montana Board of Pardons and Parole has three members and four auxiliary members.⁸⁸⁶ Members must undergo training imparting “knowledge of American Indian culture and problems” and possess academic training qualifying them for professional practice in criminology, education, psychiatry, psychology, law, social work, sociology, guidance and counseling, or a related field.⁸⁸⁷

All members serve staggered four-year terms and are appointed by the governor with the confirmation of the Senate.⁸⁸⁸ The governor designates the chairperson and may remove a member only for cause.⁸⁸⁹ A majority of the Board constitutes a quorum, and a majority vote is required for any decision.⁸⁹⁰ Members are compensated by legislative appropriation.⁸⁹¹

Process

A person convicted of a crime is not required to exhaust judicial or administrative remedies before applying for executive clemency; however, an application involving a death sentence may not be filed while the automatic review before the Montana Supreme Court is pending.⁸⁹² All applications for clemency must be made to the Board.⁸⁹³ In death penalty cases, a clemency application must be filed no later than ten days after an execution date is set.⁸⁹⁴ Applications may only be filed by the person convicted of the crime, that person’s attorney, or a court-appointed next friend, guardian, or conservator acting on the person’s behalf.⁸⁹⁵ The application must state the type of executive clemency requested, the particulars of the crime, the date the crime was committed, the court of conviction, the applicant’s social condition, and the reasons for the clemency request.⁸⁹⁶

When an application is made, the Board investigates and makes a recommendation

885. *Id.*

886. Mont. Code Ann. § 2-15-2302(2) (2005). Auxiliary Board members are obligated to attend those meetings that regular Board members are unable to attend and, when doing so, possess all the powers of a regular member. *Id.* at § 2-15-2302(3).

887. *Id.* at § 2-15-2302(2).

888. *Id.* at §§ 2-15-2302(4), 2-15-2302(7), 2-15-124(3).

889. *Id.* at §§ 2-15-2302(7), 2-15-124(5), 2-15-124(6).

890. Mont. Code Ann. §§ 2-15-2302(7), 2-15-124(8).

891. *Id.* at § 2-15-2302(7).

892. *Id.* at § 46-23-301(2).

893. *Id.*

894. *Id.*

895. Mont. Code Ann. § 46-23-301(2). The Board of Pardons and Parole, however, has adopted a contrary rule. The Board must receive applications in death penalty cases no later than thirty days before the execution date, but the Board reserves the power to waive this rule for good cause. Admin. R. Mont. 20.25.901(4) (2006).

896. *Id.* at 20.25.901(3).

to the governor.⁸⁹⁷ The Board's recommendation is based on (1) all the circumstances surrounding the crime and (2) the individual circumstances relating to the applicant's social condition before the crime was committed, when the crime was committed, and when the application for clemency was made.⁸⁹⁸ The Board must also consider: (1) the nature of the crime; (2) the comments of the judge, the prosecuting attorney, the community, the victims, and the victims' families; and (3) whether the petitioner's release would endanger the public.⁸⁹⁹ Board rules state that concern for public safety outweighs even the "most substantial showing of exceptional or compelling circumstances."⁹⁰⁰

According to Board regulations, executive clemency may be recommended for an individual who (1) can satisfactorily prove innocence of a crime for which the person is serving or has served time; (2) has demonstrated exemplary performance; (3) submits newly discovered evidence showing complete justification or non-guilt; (4) suffers from terminal illness or a chronic disability; (5) can satisfactorily prove that further incarceration would be grossly unfair; (6) can satisfactorily prove that the death penalty should be avoided; or (7) can satisfactorily prove the existence of extraordinary mitigating or extenuating circumstances.⁹⁰¹

The Board reserves the right to investigate any case when "substantial evidence showing innocence or complete justification on the part of the person convicted" is offered.⁹⁰² At least thirty days are usually required for an investigation.⁹⁰³ After all investigative material has been received and filed with the executive director, the Board meets to consider the application and determine whether to hold a hearing.⁹⁰⁴ If the Board decides to have a hearing, it must issue an order to set the hearing date and give notice to all concerned parties.⁹⁰⁵ In addition, the Board must publish a copy of its order in a newspaper of general circulation in the county where the offense occurred at least once a week for two weeks before the hearing date.⁹⁰⁶ The Board must also transmit a copy of the order to the applicant and to the district judge, county attorney, and sheriff of the county where the crime was committed.⁹⁰⁷ Hearings are required in capital cases.⁹⁰⁸

At a public and recorded hearing, the Board will hear all relevant facts and information from the petitioner, his counsel and witnesses, and any opponents to the petition.⁹⁰⁹ The Board must keep a record of the names of all persons who appeared on the petitioner's behalf, the names of all persons who appeared to oppose clemency, and

897. Personal communication from representative of the governor's office to authors.

898. Admin. R. Mont. 20.25.901(3).

899. *Id.* at 20.25.901A(6).

900. *Id.*

901. *Id.* at 20.25.901A(5).

902. *Id.* at 20.25.901A(7).

903. Admin. R. Mont. 20.25.902(1) (2006).

904. *Id.*

905. Mont. Code Ann. § 46-23-302 (2005).

906. *Id.* at §§ 46-23-302, 46-23-303.

907. *Id.* at § 46-23-303.

908. Admin. R. Mont. 20.25.902(3).

909. *Id.* at 20.25.904(1) (2006).

the testimony of all persons who gave evidence.⁹¹⁰

In every non-capital case in which the Board recommends that clemency be granted, the Board must send a written decision, along with supporting documentation, to the governor.⁹¹¹ In all capital cases, the Board must transmit its decision to the governor within thirty days of the hearing.⁹¹² The governor must review the record of the hearing and the Board's recommendation before granting or denying clemency.⁹¹³ The governor's decision to grant or deny clemency is not appealable.⁹¹⁴ Unless the Board otherwise orders or circumstances change significantly, a person may not reapply for executive clemency for thirty-six months.⁹¹⁵

The governor must report each case in which executive clemency is granted, as well as the reasons for his or her decision and any objections by Board members, to the legislature.⁹¹⁶

Nebraska

Distribution of Powers

The Nebraska Constitution delegates the "power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases . . . except treason and cases of impeachment" to a board comprised of the governor, attorney general, and secretary of state.⁹¹⁷ By statute, this board is named the Board of Pardons.⁹¹⁸ The Board of Parole, created by the legislature, may advise the Board of Pardons on the merits of any application, but its advice is not binding.⁹¹⁹

Structure of Board

As stated above, the members of the Board of Pardons are the governor, attorney general, and secretary of state.⁹²⁰ The governor is chairperson of the Board.⁹²¹ The Board can issue subpoenas, compel the attendance of witnesses and the production of documents, administer oaths, and take the testimony of persons under oath.⁹²² All actions of the Board are by majority vote.⁹²³ The Board may call upon the Board of Parole to conduct investigations and to submit written reports and recommendations.⁹²⁴

910. Mont. Code Ann. § 46-23-306(1)-(3) (2005). The Board must also keep records showing that the affidavit and return of publication from the printer was on file before the hearing. *Id.* at § 46-23-306(4).

911. *Id.* at § 46-23-307.

912. *Id.*

913. *Id.* at § 46-23-301(3).

914. Mont. Code Ann. § 46-23-301(3).

915. Admin. R. Mont. 20.25.901(3).

916. Mont. Code Ann. § 46-23-316 (2005).

917. Neb. Const. art. IV, § 13.

918. Neb. Rev. Stat. § 83-1,126 (1999).

919. Neb. Const. art. IV, § 13.

920. Neb. Rev. Stat. § 83-1,126.

921. *Id.*

922. *Id.* at § 83-1,128.

923. *Id.* at § 83-1,130(3).

924. *Id.* at § 83-1,127(4); Neb. Bd. of Pardons, *Policy and Procedure Guidelines, Rule 003.02*, <http://>

Process

A person seeking clemency must request an application from the Board of Pardons' secretary.⁹²⁵ The completed application must be returned to the secretary, identifying the specific relief requested and including any other information required by the Board.⁹²⁶

The Board will consider applications at its next regularly scheduled meeting.⁹²⁷ An informal hearing may be held, and, if so, a record of the proceedings will be made.⁹²⁸ In general, the Board will not grant an application for pardon or commutation without a hearing.⁹²⁹

If the Board grants a hearing to a person seeking clemency for a crime against a person, the Board will attempt to contact the victim or victim's family and offer them an opportunity to present information at the hearing.⁹³⁰ The Board may hear sworn or unsworn testimony and may receive written statements, as well as any other information the Board deems useful.⁹³¹ The Board has discretion over how information is presented at the hearing; ordinarily the applicant or his representative will present first, followed by those who oppose the application.⁹³² If the applicant has not yet completed his sentence, the Board will ask the county attorney from the county where the crime was committed to attend the hearing and present information concerning the nature and severity of the crime, as well as any reasons why clemency should be denied.⁹³³ If the county attorney declines to attend, the Nebraska Attorney General's Office will present the information.⁹³⁴ After the hearing, the Board will consider the application and may conduct further investigation, as needed.⁹³⁵ The Board will then vote to grant or deny clemency.⁹³⁶

There are special procedures for clemency applications in death penalty cases. By statute, whenever a death-sentenced inmate files an application, the sentence may not be carried out until the Board rules on the application.⁹³⁷ If the Board denies relief, it may set the time and date of execution and refuse to accept another application from the inmate.⁹³⁸

According to the Board's procedural guidelines, the Board's staff prepares a file concerning the prisoner and begins to gather documentation, just as if an application for

www.pardons.state.ne.us/app_guidelines.html (accessed Feb. 4, 2007).

925. Neb. Rev. Stat. § 83-1,129(1) (1999).

926. *Id.*

927. *Id.* at § 83-1,129(3).

928. *Id.*

929. Neb. Bd. of Pardons, *supra* n. 924, at Rule 004.02.

930. *Id.* at Rule 004.03(A).

931. *Id.* at Rule 004.03(C).

932. *Id.*

933. *Id.*

934. Neb. Bd. of Pardons, *supra* n. 924, at Rule 004.03(C). The Board may change this requirement through majority vote. *Id.*

935. Neb. Rev. Stat. § 83-1,130(1).

936. *Id.*

937. *Id.* at § 83-1,132.

938. *Id.*

clemency had been filed, as soon as the Board is notified that an execution date has been set.⁹³⁹ In addition, the Secretary of the Board immediately issues a stay of execution.⁹⁴⁰ The stay remains in effect until the Board makes a decision on the application.⁹⁴¹

The Board meets within five days of the filing of the application to determine whether a hearing should be held.⁹⁴² A hearing must be held within thirty days after the application is filed.⁹⁴³ At the hearing, a representative of the death-sentenced inmate will be given three hours to present information and argument to the Board.⁹⁴⁴ The presentation may include a sworn statement from the inmate made by videotape, audiotape, or affidavit.⁹⁴⁵ A portion of the allotted time may be reserved for rebuttal.⁹⁴⁶ The State also receives three hours for presentation and argument to the Board, including time allotted to representatives of the victims who wish to present information.⁹⁴⁷ Any other interested persons may submit written comments or information to the Board on or before the hearing date.⁹⁴⁸

If the clemency application is denied, the stay is lifted.⁹⁴⁹ If the original execution date has elapsed, the Board issues a warrant to the warden establishing a new date.⁹⁵⁰ In each case, the Board votes to determine whether it will accept additional applications from the death-sentenced inmate.⁹⁵¹

Nevada

Distribution of Powers

The Nevada Constitution authorizes “[t]he governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one,” to grant remittance of fines and forfeitures, commute punishments, and grant pardons in all cases, except treason and impeachment, subject to legislative regulation of the application process.⁹⁵² However, a sentence of death or life imprisonment with no parole cannot be commuted to a sentence allowing parole.⁹⁵³

Structure of Board

As required by the Nevada Constitution, the legislature has created the State Board of Pardons Commissioners, which consists of the governor, the justices of the Supreme

939. Neb. Bd. of Pardons, *supra* n. 924, at Rule 004.05.

940. *Id.*

941. *Id.*

942. *Id.*

943. *Id.*

944. Neb. Bd. of Pardons, *supra* n. 924, at Rule 004.05.

945. *Id.*

946. *Id.*

947. *Id.*

948. *Id.*

949. Neb. Bd. of Pardons, *supra* n. 924, at Rule 004.05.

950. *Id.*

951. *Id.*

952. Nev. Const. art. 5, § 14(1).

953. *Id.* at art. 5, § 14(2).

Court, and the attorney general.⁹⁵⁴ Board members who have served as a district judge or as a justice of the Supreme Court for at least four years are entitled to compensation equal to two percent of their annual salary as a judge per year of service.⁹⁵⁵ Board members have the authority to administer oaths and affirmations.⁹⁵⁶

Process

Any person seeking executive clemency in Nevada must submit an application to the Board.⁹⁵⁷ The notice must include the following information:

- (a) [t]he court in which the judgment was rendered; (b) [t]he amount of the fine or forfeiture, or the kind or character of punishment; (c) [t]he name of the person in whose favor the application is to be made; (d) [t]he particular grounds upon which the application will be based; and (e) [a]ny other information deemed relevant by the Secretary.⁹⁵⁸

At least thirty days before the Board meets to consider the application, the Board must notify the district attorney and district judge in the county of conviction.⁹⁵⁹ The notice must solicit their recommendations and invite them to testify at the hearing.⁹⁶⁰ Notice is not required, however, for an application to commute a death sentence.⁹⁶¹

All district attorneys receiving notice of an application for clemency must send the Board a written statement of the facts surrounding the commission of the offense and any other information affecting the merits of the application.⁹⁶² The district attorney must also forward a copy of the notice to the victim if the victim has requested such notice.⁹⁶³

The Board meets semiannually, but any member of the board or the executive secretary may call a special meeting with the governor's consent.⁹⁶⁴ Clemency applications must be submitted at least sixty days before the semiannual meeting and must state whether or not a hearing is requested.⁹⁶⁵ In general, the Board will not consider an application unless the director of the Department of Corrections has recommended the application to the Secretary of the Board.⁹⁶⁶ The Secretary then has the authority to place an application on the agenda, granting the applicant a hearing before the Board.⁹⁶⁷ The Board retains authority, however, to review an application that lacks a recommendation from the director of the Department of Corrections or the

954. Nev. Rev. Stat. § 213.010(1) (2005).

955. *Id.* at § 213.015(1).

956. *Id.* at § 213.050(1).

957. *Id.* at § 213.020(1).

958. *Id.*

959. Nev. Rev. Stat. § 213.020(3)–(4). The thirty-day requirement may be waived for good cause. *Id.* at § 213.020(4).

960. Nev. Admin. Code § 213.060 (2006).

961. Nev. Rev. Stat. § 213.030(2) (2005).

962. *Id.* at § 213.040(1).

963. *Id.* at § 213.040(2). The district attorney must treat the victim's personal information, including address, as confidential. *Id.*

964. *Id.* at § 213.010(2); Nev. Admin. Code § 213.020(1), (3) (2006).

965. Nev. Admin. Code §§ 213.040(1), 213.050(7) (2006). The governor may waive the sixty-day period for special hearings of the board. *Id.* at § 213.040(2).

966. *Id.* at § 213.090(1).

967. *Id.* at § 213.090(2).

approval of the Secretary.⁹⁶⁸

Upon request, the Board must give written notice at least fifteen days before a meeting to the victims of the crimes committed by each person who is applying for clemency; each victim may submit a written response to the Board at any time before the meeting.⁹⁶⁹ Hearings before the Board are informal.⁹⁷⁰ The Board may, however, require that testimony be given under oath, require the applicant's presence at the hearing, and accept affidavits and depositions for consideration.⁹⁷¹

When a death sentence is commuted, the Board must sign a written statement containing: (1) the name of the person receiving clemency; (2) the time and place where conviction occurred; (3) the punishment substituted for the death penalty; and (4) the location where the substitute punishment will take place.⁹⁷² In all cases in which clemency is granted, the Board must provide written notice to the victim at his or her request.⁹⁷³

New Hampshire

Distribution of Powers

The New Hampshire Constitution vests the "power of pardoning" in the governor, with the advice of the Executive Council.⁹⁷⁴ The governor may, with the advice of the Council, pardon a death-sentenced inmate on the condition that he will remain imprisoned for life or any term of years expressed in the pardon.⁹⁷⁵ Similarly, the governor and Council may respite the execution of a death sentence while legal proceedings are pending or if more time is needed to investigate and consider the application.⁹⁷⁶

Structure of Board

The Executive Council is not a typical pardons board. It is rather a constitutionally created core of the New Hampshire executive branch that advises the governor.⁹⁷⁷ The Council consists of five people who serve two-year terms.⁹⁷⁸ The governor has the authority to convene the Council at his or her discretion and, with them, to direct "the

968. *Id.* at § 213.090(3).

969. Nev. Rev. Stat. § 213.010(3).

970. Nev. Admin. Code § 213.190 (2006).

971. *Id.* at § 213.200.

972. Nev. Rev. Stat. § 213.080(1) (2005).

973. *Id.* at § 213.095.

974. N.H. Const. pt. II, art. 52.

975. N.H. Rev. Stat. Ann. § 4:23 (Lexis 2001). The New Hampshire legislature refers to the commutation of the death sentence as a pardon. It would thus appear that the phrase "pardoning power" in the New Hampshire Constitution encompasses all typical forms of executive clemency, and hence the governor's commutation power is actually constitutionally based rather than statutorily based.

976. *Id.* at § 4:24. A temporary respite may also be granted if it appears to the governor and Council that the death-sentenced inmate has become insane or is pregnant. *Id.*

977. N.H. Const. pt. II, art. 60.

978. *Id.*

affairs of the state, according to the laws of the land.”⁹⁷⁹

Process

Very little statutory or regulatory guidance is provided for the clemency application process. Pardon forms are available through the Office of the Attorney General.⁹⁸⁰ Written notice of the clemency application must be given to the state’s counsel and to those identified by the governor.⁹⁸¹ In addition, the prosecuting attorney may be required to provide a statement of the case and any other relevant facts.⁹⁸² The governor may summon witnesses to appear before him or her and the Council, to testify at hearings, and to produce documents.⁹⁸³

New Jersey

Distribution of Powers

The governor may “grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures.”⁹⁸⁴ The New Jersey Constitution allows the legislature to create a commission or other body to advise the governor in clemency-related matters.⁹⁸⁵ The governor may, upon a prisoner’s application, commute the sentence under whatever terms he or she may direct.⁹⁸⁶ The governor must report each grant of clemency to the legislature; the report must include the name of the convicted person, the person’s crime, the sentence imposed, its date, and the date of the clemency grant, as well as the governor’s reasons for granting clemency.⁹⁸⁷

Structure of Board

The New Jersey State Parole Board consists of a chairperson and eight associate members.⁹⁸⁸ Each member is appointed by the governor with the advice and consent of the Senate and must have training or experience in law, sociology, criminal justice, juvenile justice, or related fields.⁹⁸⁹ All terms are for six years.⁹⁹⁰ The governor may remove any Board member from office for cause.⁹⁹¹ Members are full-time employees who are compensated in accordance with state law.⁹⁹² All policies and determinations

979. N.H. Const. pt. II, art. 62.

980. Personal communication from representative of the governor’s office to authors.

981. N.H. Rev. Stat. Ann. § 4:21 (Lexis 2001).

982. *Id.*

983. *Id.* at § 4:28.

984. N.J. Const. art. V, § 2(1).

985. *Id.*

986. N.J. Stat. Ann. § 2A:167-4 (West 1985).

987. *Id.* at § 2A:167-3.1 (West Supp. 2006).

988. N.J. Stat. Ann. § 30:4-123.47(a) (West 1997).

989. *Id.*

990. *Id.*

991. N.J. Stat. Ann. § 30:4-123.47(b).

992. *Id.* at § 30:4-123.47(c).

are made by majority vote.⁹⁹³

Process

Applications for commutation of sentences, other than death sentences, must be made on forms prescribed by the governor.⁹⁹⁴ The governor may refer the application to the Board for an investigation.⁹⁹⁵ Upon referral, the Board must thoroughly investigate and issue a written report and recommendation to the governor; however, the Board's recommendation is not binding on the governor.⁹⁹⁶ The Board has not published or promulgated regulations concerning the executive clemency application process.

New Mexico

Distribution of Powers

The governor has the power to grant reprieves and pardons, subject to legislative requirements.⁹⁹⁷ By statute, the New Mexico Parole Board is authorized to investigate clemency applications and report to the governor upon his or her request.⁹⁹⁸

Structure of Board

The Parole Board consists of fifteen members appointed by the governor with the consent of the Senate.⁹⁹⁹ Members serve staggered, six-year terms.¹⁰⁰⁰ The governor may remove a member for any reason and is responsible for designating the chairperson.¹⁰⁰¹ Members of the Board must be "qualified by such academic training or professional experience as is deemed necessary to render them fit," and no member can be an official or employee of any other government entity.¹⁰⁰² Members are not salaried but receive a per diem and mileage to cover expenses.¹⁰⁰³

The Board has the power to conduct "investigations, examinations, interviews, hearings and other proceedings" in order to perform its duties.¹⁰⁰⁴ The Board may also summon witnesses, documents, or tangible things and administer oaths.¹⁰⁰⁵

Process

State statutes do not specify any procedures for clemency applications.

993. *Id.* at § 30:4-123.48(a) (West Supp. 2006).

994. N.J. Stat. Ann. § 2A:167-6 (West 1985).

995. *Id.* at § 2A:167-7.

996. *Id.*

997. N.M. Const. art. V, § 6.

998. N.M. Stat. Ann. § 31-21-17 (Lexis 2000).

999. *Id.* at § 31-21-24(A) (Lexis Supp. 2006).

1000. *Id.* at § 31-21-24(B).

1001. N.M. Const. art. V, § 5; N.M. Stat. Ann. § 31-21-24(C), (F).

1002. N.M. Stat. Ann. § 31-21-24(D).

1003. *Id.* at § 31-21-24(E).

1004. N.M. Stat. Ann. § 31-21-25(B)(2) (Lexis Supp. 2006).

1005. *Id.* at § 31-21-25(B)(3).

New York

Distribution of Powers

The governor has the power to grant reprieves, commutations, and pardons for all offenses except treason and cases of impeachment, subject to legislative regulations concerning the application process.¹⁰⁰⁶ The governor must report annually to the legislature each case of clemency granted, including the name of each convict, his crime, the sentence and its date, and the date clemency was granted.¹⁰⁰⁷ In addition, the governor may issue a subpoena to compel the attendance of persons—either before the governor or an appointed hearing examiner—and to compel the production of documents.¹⁰⁰⁸ The governor or the appointed examiner may also administer oaths.¹⁰⁰⁹

Structure of Board

Upon the governor's request, the New York Parole Board must investigate and report "the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of inmates under consideration" for clemency.¹⁰¹⁰ The Executive Clemency Bureau within the Division of Parole screens candidates to determine if they meet the eligibility requirements, gathers information concerning clemency applications, and corresponds with applicants.¹⁰¹¹

Process

Pardons are considered in the following circumstances when no other adequate administrative or legal remedy is available: (1) to set aside a conviction when there is "overwhelming and convincing proof of innocence not available at the time of conviction"; (2) to relieve a disability resulting from the conviction; or (3) to prevent deportation or permit reentry into the United States.¹⁰¹²

Commutation reduces the minimum period of imprisonment, enabling the inmate to apply for parole earlier than the original sentence would permit.¹⁰¹³ The Board of Parole determines when prisoners are eligible for parole; as a matter of policy, the governor does not consider these prisoners eligible for clemency.¹⁰¹⁴ Commutation is available only if (1) the term or minimum period of imprisonment exceeds one year; (2) the person has served at least one-half of the minimum period of imprisonment; (3) the person will not become eligible for parole within one year from the date of application; and (4) the person is not eligible for parole at the Board's discretion.¹⁰¹⁵ Commutation

1006. N.Y. Const. art. IV, § 4.

1007. *Id.*

1008. N.Y. Correct. Law §§ 261, 262 (McKinney 2003).

1009. *Id.* at § 263.

1010. N.Y. Exec. Law § 259-c(8) (McKinney 2005).

1011. *New York State Parole Handbook* § 9(4), <http://parole.state.ny.us/Handbook.pdf> (rev., Feb. 2005).

1012. *Id.* at § 9(2).

1013. *Id.* at § 9(3).

1014. *Id.*

1015. *Id.*

is also available in “extraordinary circumstances.”¹⁰¹⁶

North Carolina

Distribution of Powers

The North Carolina Constitution grants the governor the sole power to grant reprieves, commutations, and pardons—except in cases of impeachment—subject to legislative regulation of the application process.¹⁰¹⁷ In any case in which the Constitution authorizes the governor to grant a pardon, he or she may grant it subject to “proper or necessary” conditions, restrictions, and limitations.¹⁰¹⁸ The governor has the power to determine whether a violation of a conditional pardon has occurred, and, if so, the duty to order the person confined for the remainder of the sentence.¹⁰¹⁹ The North Carolina legislature has created the Post-Release Supervision and Parole Commission, which assists the governor at his or her request in exercising executive clemency authority.¹⁰²⁰

Structure of Commission

The Post-Release Supervision and Parole Commission consists of one full-time and two part-time members appointed to four-year terms by the governor from persons “whose recognized ability, training, experience, and character qualify them for service on the Commission.”¹⁰²¹ The governor has the power to designate the chairperson and to remove any member from office for misfeasance, malfeasance, or nonfeasance.¹⁰²² All matters are decided by majority vote of the full Commission.¹⁰²³ Members of the Commission receive the salary fixed by the General Assembly, as well as necessary travel and subsistence expenses.¹⁰²⁴

Process

Pardon

There are three types of pardons in North Carolina. A pardon of forgiveness is granted to those requesting forgiveness of their crimes.¹⁰²⁵ It does not expunge or erase a criminal record nor does it restore their right to own or possess a firearm.¹⁰²⁶ An

1016. *New York State Parole Handbook*, *supra* n. 1011, at § 9(4).

1017. N.C. Const. art. III, § 5(6).

1018. N.C. Gen. Stat. § 147-23 (Lexis 2005).

1019. *Id.* at § 147-24.

1020. *Id.* at § 143B-266(a).

1021. *Id.* at § 143B-267.

1022. *Id.*

1023. N.C. Gen. Stat. § 143B-267.

1024. *Id.*

1025. Off. Exec. Clemency, *Glossary of Terms*, <http://www.doc.state.nc.us/clemency/glossary.htm> (accessed Mar. 8, 2007).

1026. *Id.*

unconditional pardon may be granted where it would assist the person to seek employment; it also restores the recipient's right to own and possess a firearm.¹⁰²⁷ A pardon of innocence declares an individual innocent of the crime after it has been determined by a court that the individual is not guilty.¹⁰²⁸ It allows the recipient to pursue expungement of his criminal record.¹⁰²⁹ The pardon in and of itself does not expunge or erase a criminal record; expungement is handled by the judiciary.¹⁰³⁰

The North Carolina legislature has mandated that every application for pardon must be in writing, signed by the party seeking clemency or his representative, and sent to the governor.¹⁰³¹ The application must contain the grounds upon which the pardon is sought and include a certified copy of the indictment, the verdict, and judgment in the case.¹⁰³²

Once an application is complete, an investigation—coordinated by the Office of Executive Clemency within the governor's office—is conducted, after which the case is presented to the governor for decision.¹⁰³³ By statute, the Office of Executive Clemency must notify the victim when it is considering granting a pardon.¹⁰³⁴ The victim has a constitutional right to this notice, as well as the right to present a written statement for consideration by the Office before a pardon is granted.¹⁰³⁵

A person must wait to apply for a pardon until at least five years have passed since he was released from state supervision (including probation and parole).¹⁰³⁶ The governor, however, has discretion to reduce the waiting period if the applicant can demonstrate a "specific need."¹⁰³⁷ A three-year waiting period exists from the date of denial of one application until another application may be made.¹⁰³⁸ The governor also has discretion to reduce the waiting period when new or additional information becomes available.¹⁰³⁹

Commutation

A commutation serves to commute the sentence of a presently incarcerated person or to reduce a sentence by a specified amount of time, to reduce it to time served, or to

1027. *Id.*

1028. *Id.*

1029. *Id.*

1030. Off. Exec. Clemency, *supra* n. 1025.

1031. N.C. Gen. Stat. § 147-21 (Lexis 2005).

1032. *Id.*

1033. The Governor's Clemency Office processes all requests for and inquiries about Executive Clemency, oversees and coordinates investigations, prepares reports and drafts Executive Clemency Orders for the Governor. Off. Exec. Clemency, *supra* n. 1025.

1034. N.C. Gen. Stat. § 15A-838 (Lexis 2005).

1035. N.C. Const. art. I, § 37(1)(f)–(g); N.C. Gen. Stat. § 15A-838. Although no time frame is given, the governor's office will give the victim twenty to thirty days from the date the notification is received to present his or her views on the clemency application. Personal communication from representative of the governor's office to authors.

1036. Off. Exec. Clemency, *supra* n. 1025.

1037. Personal communication from representative of the governor's office to authors.

1038. *Id.*

1039. *Id.*

make it parole eligible.¹⁰⁴⁰ The application for a commutation is the same as for a pardon except that the governor must be informed of the current legal status of the person's case.¹⁰⁴¹ Victims of crimes have the right to be notified that commutation is being considered, to be heard,¹⁰⁴² and, if a commutation is granted, to receive notice within twenty days of the decision.¹⁰⁴³ Also to be notified in the event of commutation are the victim's spouse, children, and parents; any other members of the victim's family who request in writing to be notified; and the Chairs of the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee.¹⁰⁴⁴

Ohio

Distribution of Powers

The Ohio Constitution vests the power of executive clemency in the governor, subject to legislative regulation of the application process.¹⁰⁴⁵ The governor must report to the legislature during every regular session each case of clemency that he or she has granted; the report must include the inmate's name, crime, sentence, date of sentence, date of clemency, and the reasons for the decision.¹⁰⁴⁶ The legislature has created the Adult Parole Authority, which administers the clemency regulations passed by the legislature.¹⁰⁴⁷

Structure of Board

The Authority is part of the Parole and Community Services Division of the Department of Rehabilitation and Correction.¹⁰⁴⁸ The Authority is appointed by the Director of the Department and consists of a Chief (Chairperson), one or more of the Superintendents of the Field Services Section of the Department, and the chairperson of the Parole Board.¹⁰⁴⁹ To be appointed Chief of the Authority, a person must be educated or experienced in the fields of correctional work, law, or social work.¹⁰⁵⁰

Process

All applications for executive clemency must be made to the Ohio Adult Parole Authority for their investigation and recommendations.¹⁰⁵¹ To initiate the application process for executive clemency, the inmate or his legal representative must request an

1040. Off. Exec. Clemency, *supra* n. 1025.

1041. Personal communication from representative of the governor's office to authors.

1042. N.C. Gen. Stat. § 15A-838.

1043. N.C. Gen. Stat. § 147-16(b)(1) (Lexis 2005).

1044. *Id.* at § 147-16(2)-(4).

1045. Ohio Const. art. III, § 11.

1046. *Id.*

1047. Ohio Rev. Code Ann. § 5149.02 (West Supp. 2006).

1048. *Id.*

1049. *Id.*

1050. *Id.*

1051. *Id.* at § 2967.07 (West 1997).

application form from the Authority.¹⁰⁵² The completed application must be returned to the Authority, which will subsequently investigate the inmate's case and make recommendations to the governor concerning whether or not clemency should be granted.¹⁰⁵³

During the investigation, the Authority must comply with several notification requirements.¹⁰⁵⁴ At least three weeks before making a recommendation, the Authority must notify the judge of the court where the inmate was indicted, the prosecutor, and, upon request, the victim or the victim's representative.¹⁰⁵⁵ The notice must inform the victim that he or she has the right to submit written statements to the Authority concerning the effects of the crime and recommendations concerning whether or not clemency should be granted.¹⁰⁵⁶ The Authority must consider the victim statements before making its final recommendation.¹⁰⁵⁷ In cases involving the death penalty, the governor may modify the notice requirements if there is not enough time in which to comply with them.¹⁰⁵⁸

The Authority may require the prosecutor and the judge to submit a brief statement of the facts from the trial, as well as a recommendation for or against granting clemency.¹⁰⁵⁹ The governor may grant a reprieve to a person under a sentence of death without complying with the mandatory notification requirements and may even do so in the absence of an application from the inmate.¹⁰⁶⁰

Once the Board has conducted its investigation, it must forward its recommendations, along with a brief summary of the case and the record of its investigation, to the governor for a final decision.¹⁰⁶¹ If the inmate has applied for a pardon or commutation, the governor has several options.¹⁰⁶² He or she may grant the inmate a full pardon or a full commutation or attach such conditions as he or she sees fit.¹⁰⁶³ The inmate must agree to those conditions and sign the warrant granting clemency; at least one witness must attest to the warrant.¹⁰⁶⁴

If an inmate is pardoned and released from prison, the Authority must notify the prosecutor at least two weeks before the release date.¹⁰⁶⁵ The notice must contain: (1) the inmate's name; (2) the inmate's release date; (3) the offense for which the inmate was convicted; (4) the inmate's conviction date; (5) the sentence imposed on the inmate;

1052. Ohio Parole Bd., *Application for Executive Clemency Instructions and Guidelines*, <http://www.cjpf.org/clemency/OhioApp2.pdf> (last modified June 16, 2005). This site provides a sample clemency form. To obtain an official form, the inmate must directly contact the Adult Parole Authority of the Ohio Parole Board.

1053. Ohio Rev. Code Ann. § 2967.07.

1054. *Id.* at § 2967.12 (West Supp. 2006).

1055. *Id.* at § 2967.12(A)–(B).

1056. *Id.* at § 2967.12(B).

1057. *Id.*

1058. Ohio Rev. Code Ann. § 2967.12(D).

1059. *Id.* at § 2967.03 (West 1997).

1060. *Id.* at § 2967.08.

1061. *Id.* at § 2967.07.

1062. *Id.* at § 2967.04.

1063. Ohio Rev. Code Ann. § 2967.04(A).

1064. *Id.*

1065. *Id.* at § 2967.121(A) (West Supp. 2006).

(6) the length of time that the inmate will be under supervision (if applicable); (7) contact information for the inmate's supervising officer; and (8) the address where the inmate will reside once released.¹⁰⁶⁶

Oklahoma

Distribution of Powers

The Oklahoma Constitution vests the power of executive clemency in the governor but mandates that he or she may not grant clemency unless a majority of the members of the Oklahoma Pardon and Parole Board recommend it.¹⁰⁶⁷ The governor may, however, grant reprieves, which may not extend beyond sixty days without the consent of the Board.¹⁰⁶⁸ The constitution also allows the legislature to impose restrictions and regulations upon the governor's executive clemency power.¹⁰⁶⁹

Structure of Board

The Oklahoma Pardon and Parole Board consists of five members, three of which are appointed by the governor.¹⁰⁷⁰ One member is appointed by the Chief Justice of the Oklahoma Supreme Court, and one is appointed by the Presiding Judge of the Oklahoma Criminal Court of Appeals.¹⁰⁷¹ The terms of the members expire at the same time that the governor's term expires, and members are removable only for cause.¹⁰⁷² The Board, which is authorized to hire professional investigators, must impartially investigate all applications for clemency and recommend applicants that it deems worthy of clemency to the governor.¹⁰⁷³ New members of the Board receive twelve hours of training, and all members must complete an additional six hours of training for each year that they serve on the Board.¹⁰⁷⁴ The members select their own chairperson.¹⁰⁷⁵ By law, Board meetings must be open to the public.¹⁰⁷⁶

Process

The chairperson determines when the Pardon and Parole Board will meet to evaluate clemency applications.¹⁰⁷⁷ The Board must provide all prosecutors in the state with a list of the clemency applications to be considered at the next board meeting at least twenty days in advance.¹⁰⁷⁸ Similarly, the Board must notify members of the

1066. *Id.* at § 2967.121(B).

1067. Okla. Const. art. VI, § 10.

1068. *Id.*

1069. *Id.*

1070. *Id.*

1071. *Id.*

1072. Okla. Const. art. VI, § 10.

1073. *Id.*; Okla. Stat. tit. 57, § 332.1 (2001).

1074. Okla. Stat. tit. 57, § 332.1A (2001).

1075. *Id.* at tit. 57, § 332.4(A).

1076. *Id.* at tit. 57, § 332.2(G).

1077. *Id.* at tit. 57, § 332.2(A).

1078. *Id.* at tit. 57, § 332.2(B).

victim's families and inform them of their right to testify at the hearing.¹⁰⁷⁹

At the hearing, time must be set aside for testimony from the prosecutor, the victim's family members, and the inmate or those acting on his behalf.¹⁰⁸⁰ For security purposes, the Board regulates admittance to the hearings, generally not allowing the inmate and the victim's family to be present at the same time.¹⁰⁸¹ The victim's family members receive five minutes to address the Board at the hearing, and no more than two victim's family members per offender may appear.¹⁰⁸² Unlike most communications between the Board and family members, statements made at the hearing are not confidential.¹⁰⁸³ Prosecutors and law enforcement officials are also allowed to address the Board but are subject to the same limitations if they speak on the victim's behalf.¹⁰⁸⁴ Persons speaking on the inmate's behalf receive two minutes to address the Board, and no more than two people appear on behalf of a single inmate.¹⁰⁸⁵ The offender may also be eligible to appear, and there are no limitations imposed on the amount of time that he may take in addressing the Board.¹⁰⁸⁶

Within twenty days of the hearing, the Board must send written notification of its recommendation to the victim's family members.¹⁰⁸⁷ Anyone can inquire about the Board's decision sooner than that by telephoning the Board's office.¹⁰⁸⁸ After twenty days, the recommendations of the Board may also be viewed on the Board's website, which is the Board's chosen method of notification.¹⁰⁸⁹ However, the Board must still notify the members of the victim's family.¹⁰⁹⁰

If the Board does not approve an inmate's application for clemency, the application is deemed denied.¹⁰⁹¹ If the Board approves an inmate's application, it must forward its recommendation, along with the application itself, to the governor within thirty days.¹⁰⁹² The governor then has ninety days to grant or deny clemency, and the application is deemed denied if no action is taken in that time.¹⁰⁹³ If the governor grants clemency, the Board must provide written notification to (1) the sheriff of the county where the inmate was sentenced; (2) the prosecutor of the county where the inmate was sentenced; (3) the chief law enforcement officer of any city or town in the county where the inmate was sentenced, upon request; and (4) any victim who previously requested to be notified, provided the Board does not disclose the address of the inmate's new place

1079. Okla. Stat. Ann. tit. 57, § 332.2(C).

1080. Okla. Admin. Code § 515:1-7-1(b)-(d) (Supp. 2005).

1081. *Id.* at § 515:1-7-1(a).

1082. *Id.* at § 515:1-7-2(b).

1083. *Id.*

1084. *Id.* at § 515:1-7-2(c).

1085. Okla. Admin. Code § 515:1-7-2(d).

1086. *Id.* at § 515:1-7-2(e).

1087. Okla. Stat. Ann. tit. 57, § 332.2(D).

1088. Okla. Admin. Code § 515:1-5-2(a) (Supp. 2005).

1089. *Id.* at § 515:1-5-2(b).

1090. *Id.* at § 515:1-5-2(d).

1091. Okla. Stat. tit. 57, § 332.19 (2001).

1092. *Id.*

1093. *Id.*

of residence.¹⁰⁹⁴

Anyone submitting information to the Board may assert or substantiate a claim of confidentiality; in the absence of such a claim, the information will be publicly available.¹⁰⁹⁵ However, the following information is always considered confidential: (1) victim protest letters; (2) correspondence from persons exercising their rights under the Oklahoma Constitution; (3) an inmate's criminal history not resulting in convictions; (4) juvenile records; (5) medical records; (6) references to Department of Corrections internal investigations; (7) pre-sentence investigations; and (8) any "other information deemed confidential by the [Board's] Executive Director or General Counsel pursuant to Oklahoma law."¹⁰⁹⁶ Publicly available information can be reproduced at the Board's office.¹⁰⁹⁷

One of the interesting features of the clemency process in Oklahoma is that the Board sets aside time for public input during its monthly business meeting.¹⁰⁹⁸ Anyone can place an item on the agenda by contacting the Board's office at least seven days before the meeting and having the item approved by the chairperson at least three days in advance.¹⁰⁹⁹ Additionally, the chairperson may recognize anyone to speak at the hearing.¹¹⁰⁰

Oregon

Distribution of Powers

The governor of Oregon has the power to grant reprieves, commutations, and pardons for all offenses except treason, subject to legislative regulations.¹¹⁰¹ Similarly, the governor has the power to remit fines and forfeitures, as regulated by the legislature.¹¹⁰² He or she must report to the legislature at its next meeting each case of clemency granted and the reasons for the grant.¹¹⁰³

Structure of Board

The Oregon legislature has created the State Board of Parole and Post-Prison Supervision, but the Board's only clemency-related responsibility is supplying records to the governor.¹¹⁰⁴

1094. *Id.* at § 360(B).

1095. Okla. Admin. Code § 515:1-3-2(d) (Supp. 2005).

1096. *Id.*

1097. *Id.* at § 515:1-3-2(a).

1098. *Id.* at § 515:1-7-2(a).

1099. *Id.* at § 515:1-7-2(a)(2).

1100. Okla. Admin. Code § 515:1-7-2(a)(1).

1101. Or. Const. art. V, § 14; Or. Rev. Stat. § 144.649 (2005).

1102. Or. Const. art. V, § 14.

1103. *Id.*

1104. Or. Rev. Stat. § 144.650(3) (2005).

Process

When an application for clemency is made to the governor, a copy of the signed application must be served on: (1) the district attorney of the county of conviction; (2) the district attorney of the county in which the applicant is incarcerated; (3) the State Board of Parole and Post-Prison Supervision; and (4) the Director of the Department of Corrections.¹¹⁰⁵ Proof of service by affidavit must be presented to the governor.¹¹⁰⁶ All recipients of the above-described notice must provide any requested information, records relating to the case, and any other relevant information to the governor.¹¹⁰⁷ Relevant information that must be provided includes: (1) statements by the crime victim or the crime victim's immediate family; (2) a statement by the district attorney of the county of conviction; and (3) photos of the victim and the autopsy report, if applicable.¹¹⁰⁸

Following receipt by the governor of a clemency application, he or she is prohibited from granting the application for at least thirty days.¹¹⁰⁹ If the governor has not granted clemency in 180 days, the application is deemed denied, and the inmate must reapply.¹¹¹⁰

Pennsylvania

Distribution of Powers

In all criminal cases except impeachment, the governor has the power to remit fines and forfeitures and to grant reprieves, commutations, and pardons.¹¹¹¹ The governor may exercise his or her power to grant pardons and commutations, however, only on the written recommendation of the majority of the Board of Pardons.¹¹¹² Additionally, if the case involves a death sentence or life imprisonment, the governor may not act except on the *unanimous* recommendation of the Board of Pardons and only after a full hearing in open session after public notice.¹¹¹³

Structure of Board

The Board of Pardons is composed of the lieutenant governor, who is chairperson, the attorney general, and three members appointed by the governor with the consent of the Senate.¹¹¹⁴ The three members appointed by the governor must be residents of the state.¹¹¹⁵ Additionally, one must be a crime victim, one a corrections expert, and the

1105. *Id.* at § 144.650(1).

1106. *Id.* at § 144.650(2).

1107. *Id.* at § 144.650(3).

1108. *Id.*

1109. Or. Rev. Stat. § 144.650(4).

1110. *Id.*

1111. Pa. Const. art. IV, § 9(a).

1112. *Id.*

1113. *Id.*

1114. Pa. Const. art. IV, § 9(b).

1115. *Id.*

third a doctor of medicine, psychiatrist, or psychologist.¹¹¹⁶ Terms are for six years.¹¹¹⁷ Three members constitute a quorum.¹¹¹⁸ The Board's records of its actions are open for public inspection at all times.¹¹¹⁹

Process

Applications for clemency are made on forms prescribed by the Board.¹¹²⁰ A fee is required to obtain the form although the Board may waive the fee if the applicant provides evidence of indigency.¹¹²¹ An individual must file the original application along with ten copies with the Secretary of the Board.¹¹²² If a person is not confined at the time of application, he must also furnish five passport-type photos.¹¹²³ With the exception of capital cases, an applicant for executive clemency must pay a filing fee, which may be waived upon proof of indigency.¹¹²⁴ In death penalty cases, the application must be filed with the Board within ten days of the governor's issuance of a death warrant specifying the execution date.¹¹²⁵

A copy of each application received is sent to the court, the district attorney of the county of sentencing, and the correctional institution in which the applicant is confined for the purpose of soliciting comments on the application's merits.¹¹²⁶ Judges and district attorneys have a statutory duty to provide information upon request of the Board.¹¹²⁷ An additional copy is sent to the Board of Probation and Parole for investigation.¹¹²⁸

When the reports of the Board of Probation and Parole and the opinions of the trial officials have been received, the Board will review the case and vote in public as to whether a hearing will be granted.¹¹²⁹ For prisoners serving life sentences or sentences for crimes of violence, a majority of the Board is required to vote in favor of the hearing.¹¹³⁰ In all other non-capital cases, only two votes are required for the applicant to obtain a hearing.¹¹³¹ In capital cases, death-sentenced inmates seeking commutation of their sentence automatically receive a public hearing.¹¹³²

1116. *Id.*

1117. 71 Pa. Consol. Stat. Ann. § 113 (West Supp. 2006).

1118. *Id.*

1119. *Id.*

1120. Pa. Code tit. 37, § 81.221 (2006).

1121. *Id.*

1122. *Id.* at § 81.222(a). The application is available for public inspection. *Id.* at § 81.227.

1123. *Id.* at § 81.222(b).

1124. Pa. Code tit. 37, § 81.225 (2006).

1125. 71 Pa. Consol. Stat. Ann. § 299(c) (West Supp. 2006); Pa. Code tit. 37, § 81.231(b) (2006).

1126. Pa. Code tit. 37, § 81.226(a) (2006).

1127. 71 Pa. Consol. Stat. Ann. § 299a (West 1990).

1128. Pa. Code tit. 37, § 81.226(a).

1129. *Id.* at § 81.226(b).

1130. *Id.* at § 81.231(a). "Crimes of violence" include murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, aggravated assault, robbery, kidnapping; an attempt to commit any of the previous offenses; or an offense committed while in visible possession of a firearm. 71 Pa. Consol. Stat. Ann. § 299(h); Pa. Code tit. 37, § 81.202 (2006).

1131. Pa. Code tit. 37, § 81.231(a).

1132. *Id.* at § 81.231(b).

If a public hearing is denied, the application is deemed denied at that time.¹¹³³ If a public hearing is granted, the Board makes a reasonable effort to notify victims who are registered with the Board's Office of Victim Advocate, as well as "those whose whereabouts are otherwise known."¹¹³⁴ Victims are notified that they are entitled to offer "prior comment" regarding an application that has been granted a hearing, which may be submitted in writing or presented orally.¹¹³⁵ Written communications from the victim with the Board are confidential.¹¹³⁶

If a hearing is granted to a person sentenced to death or life or who was convicted of murder, voluntary manslaughter, or an attempt to commit murder or voluntary manslaughter, each member of the Board will interview the applicant before the public hearing.¹¹³⁷ If a Board member fails to interview the applicant, that member is prohibited from voting on the application.¹¹³⁸ The interview may be conducted either individually or as a group.¹¹³⁹ Although the interview is private, it must be recorded, and "subsequent use" of the interview is left to the Board's discretion.¹¹⁴⁰ The applicant's attorney may attend the interview.¹¹⁴¹

Hearings of the Board are public and audiotaped for preservation purposes.¹¹⁴² A confined applicant is prohibited from attending the public hearing, but he may designate a person to appear on his behalf.¹¹⁴³ If the applicant is not confined at the time of the hearing, he must appear unless excused by the Board.¹¹⁴⁴ Applicants may be represented by privately retained counsel or by any person designated by them.¹¹⁴⁵ Additionally, confined applicants may request representation from the Department of Corrections.¹¹⁴⁶ The attorney for the Commonwealth of Pennsylvania may attend the hearing and offer his or her recommendation.¹¹⁴⁷

In non-capital cases, fifteen minutes are allowed for the entire presentation in support of an application.¹¹⁴⁸ The same amount of time is allotted for the opposition.¹¹⁴⁹ In capital cases, however, a maximum of thirty minutes is allowed for each side.¹¹⁵⁰ The Board may also request or subpoena a witness to appear at the

1133. *Id.* at § 81.226(b).

1134. *Id.* at § 81.226(c). Aside from this personal notice, the Board must also publish a general notice at least one week before the hearing in a newspaper of general circulation in the county where the offenses were committed. *Id.* at § 81.233.

1135. 71 Pa. Consol. Stat. Ann. § 299(d); Pa. Code tit. 37, § 81.226(d).

1136. Pa. Code tit. 37, § 81.226(d).

1137. 71 Pa. Consol. Stat. Ann. § 299(e); Pa. Code tit. 37, § 81.232(a) (2006).

1138. Pa. Code tit. 37, § 81.232(b).

1139. *Id.* at § 81.232(c).

1140. *Id.*

1141. *Id.*

1142. *Id.* at § 81.263.

1143. Pa. Code tit. 37, § 81.281 (2006).

1144. *Id.*

1145. *Id.* at § 81.282.

1146. *Id.*

1147. *Id.* at § 81.283.

1148. Pa. Code tit. 37, § 81.292(a) (2006).

1149. *Id.*

1150. *Id.* at § 81.292(b).

hearing.¹¹⁵¹

The application must be approved by the Board at a public hearing by a majority vote.¹¹⁵² An application for commutation of a death or life imprisonment sentence must be approved by the Board at a public hearing by a unanimous vote.¹¹⁵³ If a recommendation for commutation is granted to a person sentenced to death or life or who was convicted of murder, voluntary manslaughter, or an attempt to commit murder or voluntary manslaughter, the recommendation to the governor must include a requirement that the individual serve at least one year in a “prerelease center” before he is released on parole.¹¹⁵⁴ Recommendations for commutations are always conditional because the person must not commit any probation or parole violations or any new criminal offenses.¹¹⁵⁵ Recommendations for pardons may be made conditional in the same manner.¹¹⁵⁶

Finally, an applicant may ask the Board to reconsider any decision.¹¹⁵⁷ The applicant must show a change of circumstances or “other compelling reasons” to warrant reconsideration.¹¹⁵⁸ The request is taken up at the next public hearing upon a public motion by any Board member.¹¹⁵⁹ A majority vote is required to grant reconsideration.¹¹⁶⁰

South Carolina

Distribution of Powers

South Carolina divides clemency power between the governor and the Probation, Parole, and Pardon Services Board. By the South Carolina Constitution, the governor has the sole power to grant reprieves and to commute a death sentence to a sentence of life in prison.¹¹⁶¹ The granting of all other clemency, however, is left to the legislature.¹¹⁶² By statute, the legislature has given the power to grant clemency in all other cases solely to the Probation, Parole, and Pardon Services Board.¹¹⁶³ The Board also considers all petitions for reprieves and commutations of death sentences referred to it by the governor for recommendation.¹¹⁶⁴ In those cases, its recommendation is not binding on the governor, but, if the governor does not follow the recommendation, he or she must provide reasons for not doing so.¹¹⁶⁵ The governor is not obligated to refer

1151. *Id.* at § 81.293.

1152. *Id.* at § 81.301(a).

1153. Pa. Code tit. 37, § 81.301(a).

1154. 71 Pa. Consol. Stat. Ann. § 299(f); Pa. Code tit. 37, § 81.301(b).

1155. Pa. Code tit. 37, § 81.301(c), (e).

1156. *Id.* at § 81.301(d).

1157. *Id.* at § 81.271(a).

1158. *Id.*

1159. *Id.* at § 81.271(b).

1160. Pa. Code tit. 37, § 81.271(b).

1161. S.C. Const. art. IV, § 14.

1162. *Id.*

1163. S.C. Code Ann. § 24-21-920 (1989).

1164. *Id.* at § 24-21-910 (Supp. 2005).

1165. *Id.*

cases that fall within his or her clemency authority to the Board for recommendation.¹¹⁶⁶

Structure of Board

The Board of Probation, Parole, and Pardon Services has seven members, appointed by the governor with the consent of the Senate, who each serve a six-year term.¹¹⁶⁷ Six of the seven members are appointed from each of the congressional districts, with one member appointed at large.¹¹⁶⁸ The Board selects its own chairperson each year.¹¹⁶⁹ Members are not salaried but receive per diem and expenses.¹¹⁷⁰ Board members are subject to removal by the governor for “malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity.”¹¹⁷¹

Process

In South Carolina, a pardon means that the “individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral.”¹¹⁷² By statute, each pardon application must be accompanied by an application fee, which is applied towards the “pardon process.”¹¹⁷³ In addition, the offender must have paid in full any restitution ordered by the court to be eligible for a pardon.¹¹⁷⁴

The legislature has established criteria that, when satisfied, require the Board to consider the application for pardon. The Board must consider a request for pardon when the applicant has either completed probation, been discharged from confinement without parole, or has successfully completed parole or at least five years of parole.¹¹⁷⁵ Those who are incarcerated at the time of application are eligible only when evidence of “extraordinary circumstances” is produced.¹¹⁷⁶ Additionally, “[t]he victim of a crime or a member of a convicted person’s family living within [South Carolina] may petition for a pardon for a person who has completed supervision or has been discharged from a sentence.”¹¹⁷⁷

To obtain a pardon from the Board, the applicant must write to the Department of Probation, Parole and Pardon Services for an application.¹¹⁷⁸ The application has three components: (1) written letters of reference; (2) information from the applicant; and (3) the application fee.¹¹⁷⁹ After the individual submits the application, it is investigated by

1166. *Id.*

1167. *Id.* at § 24-21-10(B)–(C).

1168. S.C. Code Ann. § 24-21-10(B).

1169. *Id.*

1170. *Id.* at § 24-21-12.

1171. *Id.* at § 24-21-11; *id.* at § 1-3-240(C) (2005).

1172. S.C. Code Ann. § 24-21-940 (1989).

1173. *Id.* at § 24-21-960(A) (Supp. 2005).

1174. *Id.* at § 17-25-322(E) (2003).

1175. *Id.* at § 24-21-950(A)(1)–(3) (Supp. 2005).

1176. *Id.* at § 24-21-950(A)(4).

1177. S.C. Code Ann. § 24-21-950(A)(5).

1178. Dept. of Probation, Parole & Pardon Servs., *Applying for a Pardon: Frequently Asked Questions*, http://www.dppps.sc.gov/pardon_faq.html (accessed Feb. 4, 2007).

1179. *Id.*

agents of the Department in the county where the offense was committed.¹¹⁸⁰ When the investigation is completed, the case is turned over to the Board for a hearing.¹¹⁸¹

The Board must hold hearings during which it is statutorily obligated to permit arguments and appearances by counsel or any individual before it.¹¹⁸² However, an applicant has no right of confrontation.¹¹⁸³ The chairperson may direct that hearings be conducted by three-member panels, and a unanimous decision of such a panel constitutes a decision by the Board.¹¹⁸⁴ A panel that is not unanimous does not constitute an act of the Board, and the matter is referred to the entire Board for determination.¹¹⁸⁵ The vote of the majority of the Board usually constitutes the Board's decision.¹¹⁸⁶ However, an order of pardon must be signed by two-thirds of the members of the Board.¹¹⁸⁷ No written law, regulations, or guidelines exist with respect to commutations of sentences.

South Dakota

Distribution of Powers

The South Dakota Constitution gives the governor the power to grant pardons, commutations, and reprieves, except in cases of treason and impeachment, and to suspend and remit fines and forfeitures.¹¹⁸⁸ The governor may, however, by executive order delegate to the Board of Pardons and Paroles the authority to hear applications for clemency and to make recommendations.¹¹⁸⁹ The governor is never, however, bound to follow the Board's recommendations.¹¹⁹⁰

Structure of Board

The Board of Pardons and Paroles consists of nine members.¹¹⁹¹ The governor, the attorney general, and the Supreme Court appoint three members each.¹¹⁹² For each set of three, at least one appointee must be an attorney, for a minimum of three attorneys on the Board.¹¹⁹³ Each member of the Board must be a resident of South Dakota and is appointed only with the advice and consent of the Senate.¹¹⁹⁴ Members serve four-year terms and are eligible for reappointment.¹¹⁹⁵ The chairperson is selected by the

1180. *Id.*

1181. *Id.*

1182. S.C. Code Ann. § 24-21-50 (Supp. 2005).

1183. *Id.*

1184. *Id.* at § 24-21-30(A).

1185. *Id.*

1186. *Id.*

1187. S.C. Code Ann. § 24-21-930.

1188. S.D. Const. art. IV, § 3.

1189. S.D. Codified Laws § 24-14-1 (2004).

1190. *Id.* at § 24-14-5.

1191. *Id.* at § 24-13-1.

1192. *Id.*

1193. *Id.*

1194. S.D. Codified Laws § 24-13-1.

1195. *Id.* at § 24-13-2.

Board.¹¹⁹⁶ A majority of the Board is required for a quorum.¹¹⁹⁷

The Board is administered under the direction and supervision of the Department of Corrections but retains “the quasi-judicial, quasi-legislative, advisory, and other non-administrative functions otherwise vested in it” and exercises those functions independently of the Department of Corrections.¹¹⁹⁸ Board members are compensated pursuant to statute for attending meetings and for their expenses.¹¹⁹⁹

Process

An individual must serve notice on the state’s attorney who prosecuted the individual or his or her successor at least thirty days before filing an application for clemency with the Board.¹²⁰⁰ Additionally, the applicant must publish notice once a week for three consecutive weeks in one of the official newspapers of the county where the offense was committed.¹²⁰¹ The notice must include the person’s name, the offense, the date of conviction, and the term of imprisonment.¹²⁰² An affidavit of publication must accompany the application.¹²⁰³

Applications for clemency are on a form provided by the Board of Pardons and Paroles.¹²⁰⁴ It must be accompanied by a written statement, signed by the applicant, setting forth a “reasonable and realistic recommendation the [B]oard might make to the [g]overnor.”¹²⁰⁵ The statement may include any pleas supporting the application.¹²⁰⁶ The application, notices, and any supporting papers must be filed at least thirty days before the Board’s regular meeting at which the hearing on the application is to be held.¹²⁰⁷

After the application is received, the Board gives notice to the prosecuting attorney, the trial judge, and the sheriff of the county where the offense occurred.¹²⁰⁸ Additionally, upon scheduling a clemency hearing, the Board must notify the victim.¹²⁰⁹ The executive director of the Board is responsible for filing a copy of the applicant’s prison record with his clemency application.¹²¹⁰

A hearing is held on all applications.¹²¹¹ Verbal arguments and petitions before the Board in support of or opposing any application for clemency are considered, and

1196. *Id.* at § 24-13-4.

1197. *Id.* at § 24-13-4.1.

1198. *Id.* at § 24-13-3.

1199. S.D. Codified Laws § 24-13-5 (2004).

1200. Admin. R. S.D. 17:60:05:03 (2006).

1201. S.D. Codified Laws § 24-14-4 (Supp. 2006).

1202. *Id.*

1203. *Id.*

1204. S.D. Dept. of Corrects., *Forms: Executive Clemency Pardon Application*, <http://www.state.sd.us/corrections/forms.htm> (accessed Feb. 4, 2007).

1205. Admin. R. S.D. 17:60:05:01 (2006).

1206. *Id.*

1207. *Id.* at 17:60:05:08.

1208. *Id.* at 17:60:05:06.

1209. S.D. Codified Laws § 24-14-4.1 (2004).

1210. Admin. R. S.D. 17:60:05:07 (2006).

1211. *Id.* at 17:60:05:06, 17:60:05:08.

written statements that may have a bearing on the case are accepted.¹²¹² When considering an application, the Board has established a set of non-exhaustive criteria, including:

- (1) Substantial evidence indicates that the sentence is excessive or constitutes a miscarriage of justice;
- (2) The applicant's innocence of the crime for which he was convicted . . . has been proven by clear and convincing evidence;
- (3) The applicant has shown remarkable rehabilitation;
- (4) Substantial evidence indicates that the [B]oard should be in a position at the earliest possible time to deal with the applicant as a parolee under supervision;
- (5) Review of the applicant's personal and family history; his attitude, character, capabilities, and habits; the nature and circumstances of the offense or offenses; and the effect the inmate's release will have on the victims of his crime and the community indicates that [the] applicant has carried the stigma of the crime for a long enough period to justify its removal;
- (6) The applicant wishes to pursue a professional career from which society can benefit, but a felony conviction prevents it; and
- (7) The applicant's age and medical status is such that it is in the best interest of society that the inmate be released.¹²¹³

A favorable recommendation of clemency must be made by a majority of the Board.¹²¹⁴ When the Board recommends clemency, a record is made of the findings, which must include the reasons for the recommendation.¹²¹⁵ The record is furnished to the governor, along with the Board's recommendation.¹²¹⁶ If the application is denied, the Board will not reconsider or rehear the matter.¹²¹⁷

Tennessee

Distribution of Powers

Tennessee vests the power of executive clemency in the governor.¹²¹⁸ The governor has the power to grant reprieves and pardons after conviction, except in cases of impeachment.¹²¹⁹ The legislature has given the Tennessee Board of Probation and Parole the duty, upon the governor's request, to consider and to make nonbinding recommendations concerning all requests for pardons, reprieves, or commutations.¹²²⁰

1212. S.D. Codified Laws § 24-14-6 (2004); Admin. R. S.D. 17:60:01:06 (2006).

1213. Admin. R. S.D. 17:60:05:12 (2006).

1214. S.D. Codified Laws § 24-13-4.6 (2004).

1215. *Id.* at § 24-14-7; Admin. R. S.D. 17:60:05:09 (2006).

1216. Admin. R. S.D. 17:60:05:09.

1217. *Id.* at 17:60:05:10.

1218. Tenn. Const. art. III, § 6.

1219. *Id.*

1220. Tenn. Code Ann. § 40-28-104(a)(10) (Lexis 2003).

Structure of Board

The Tennessee Board of Probation and Parole is composed of seven members who are appointed by the governor and who are autonomous.¹²²¹ All members serve six-year terms and are eligible for reappointment.¹²²² In considering persons for appointment, the governor is to give “preference to candidates with training, education or experience in the criminal justice system, law, medicine, education, social work or the behavioral sciences.”¹²²³ No member of the Board may hold any other salaried public office or engage in any other paid business or profession.¹²²⁴ The governor appoints one member of the Board to serve as its chairperson for a term of two years.¹²²⁵ All votes of the Board are by public ballot or public roll call.¹²²⁶ A majority of the Board constitutes a quorum.¹²²⁷

The governor or the attorney general and reporter may remove a Board member for knowing or willful misconduct in office, knowing or willful neglect, failure to perform any duty, or the conviction of any felony offense.¹²²⁸ Removal is conducted according to formal and general procedures provided by law.¹²²⁹

The Board may make favorable or unfavorable recommendations, based upon its application of guidelines and criteria adopted by the governor.¹²³⁰ The Board also has the “authority upon request of the governor to issue warrants authorizing the arrest and return to their former places of incarceration of persons who are reasonably believed to have violated the conditions of their grants of executive clemency.”¹²³¹ Also charged to the Board is the duty, when requested by the governor, to collect records, make investigations, and report to the governor the “facts, circumstances, criminal records, and the social, physical, mental, and psychiatric conditions and histories of prisoners under consideration” for clemency.¹²³² Board members have the authority to administer oaths and to issue subpoenas to compel the attendance of witnesses and the production of documents.¹²³³

Process

Upon receiving a request for executive clemency, the Board sends the inmate an executive clemency application with a cover letter explaining the application procedure.¹²³⁴ The person requesting clemency must apply directly to the Board.¹²³⁵

1221. *Id.* at § 40-28-103(a).

1222. *Id.* at § 40-28-103(b).

1223. *Id.* at § 40-28-103(c).

1224. *Id.*

1225. Tenn. Code Ann. § 40-28-103(e).

1226. *Id.* at § 40-28-105(b).

1227. *Id.* at § 40-28-105(d)(1).

1228. *Id.* at § 40-28-105(f).

1229. *Id.*

1230. Tenn. Code Ann. § 40-28-104(a)(10).

1231. *Id.* at § 40-28-104(a)(13).

1232. *Id.* at § 40-28-106(c).

1233. *Id.* at § 40-28-106(a)(1)–(2).

1234. Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(a)(1) (2006).

An application for pardon must include enough evidence to enable the Board to determine whether the applicant is eligible to be considered for a pardon under the governor's guidelines.¹²³⁶ After reviewing the application and supporting information, the Board decides whether the application should be scheduled for a hearing.¹²³⁷ If the applicant is deemed ineligible for consideration, he will be notified by the Board.¹²³⁸

For commutation requests, the Board reviews the application and any supporting information to determine whether the applicant is eligible for consideration and should be scheduled for a hearing.¹²³⁹ If the application does not meet the governor's criteria, the Board notifies the inmate that he is ineligible for consideration.¹²⁴⁰

After the Board receives the application, the individual is notified as to whether he will receive a hearing and, if so, the date, time, and place of the hearing.¹²⁴¹ Hearings are held promptly following the notice to the applicant, unless they are delayed at the applicant's request or pending receipt by the Board of essential information.¹²⁴² The notice to the applicant explains that he is entitled to appear at the hearing and to present witnesses and other evidence in his favor.¹²⁴³ The notice also includes a description of the type of evidence considered by the Board.¹²⁴⁴ Notice of the hearing is also sent to the appropriate judge and district attorney general.¹²⁴⁵ The notice to the judge and district attorney solicits their comments and recommendations concerning clemency for the applicant.¹²⁴⁶

For consideration at the hearing, the Board's staff may compile the following information on the applicant:

- (i) a reclassification/ parole summary completed by the institutional staff, if the applicant is an inmate;
- (ii) information about the facts and circumstances surrounding the offense and conviction. Such information shall be obtained through investigation conducted by a parole officer or other individual designated by the Board;
- (iii) a psychiatric/psychological evaluation if the applicant is an individual convicted of a sexual offense or sex related crime;
- (iv) information about medical, mental and/or family problems or needs obtained through investigation by a parole officer or other individual designated by the Board, if appropriate; [and]
- (v) the application, original request, and supporting evidence, and any correspondence in

1235. *Id.* at 1100-1-1-.15(1)(a)(2).

1236. *Id.* at 1100-1-1-.15(1)(b)(1).

1237. *Id.* at 1100-1-1-.15(1)(b)(2).

1238. *Id.* at 1100-1-1-.15(1)(b)(3).

1239. Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(c)(1).

1240. *Id.* at 1100-1-1-.15(1)(c)(2).

1241. *Id.* at 1100-1-1-.15(1)(d)(1).

1242. *Id.*

1243. *Id.*

1244. Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(d)(1).

1245. Tenn. Code Ann. § 40-28-126(b) (Lexis 2003); Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(d)(2).

1246. Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(d)(2).

the Board's file concerning the application.¹²⁴⁷

Additional information is obtained if the applicant is requesting a pardon, including: (1) information from FBI and local records checks; (2) information regarding recent social history and reputation in the community; and (3) information verifying the reasons for the pardon request.¹²⁴⁸ The Board's staff obtains this information to ensure that clemency hearings are not completely *ex parte*; however, the burden remains on the applicant to establish that he is entitled to clemency.¹²⁴⁹

At a clemency hearing, the Board considers the following factors:

- (i) the nature of the crime and its severity;
- (ii) the applicant's institutional record;
- (iii) the applicant's previous criminal record, if any;
- (iv) the views of the appropriate trial judge and the district attorney general who prosecuted the case;
- (v) the sentences, ages and comparative degree of guilt of co-defendants or others involved in the applicant's offense;
- (vi) the applicant's circumstances if returned to the community;
- (vii) any mitigating circumstances surrounding the offense;
- (viii) the views of the community, victims of the crime or their families, institutional staff, parole officers or other interested parties; and
- (ix) medical and/or psychiatric evaluation when applicable.¹²⁵⁰

At the end of the hearing, the Board may either inform the applicant of its recommendation or take the case under advisement.¹²⁵¹ When the decision has been made, the chairperson designates one member of the Board to prepare a report for the governor.¹²⁵² This report must include: (1) a statement of the reasons for the recommendation; (2) the complete file; (3) the views of the various Board members, if the recommendation is not unanimous; and (4) whether the recommendation is positive or negative, as well as any suggested terms and conditions.¹²⁵³

After the Board's clemency recommendation, it must forward to the appropriate standing committees of the legislature a written list of the names of all persons receiving favorable and unfavorable recommendations for executive clemency along with the reasons for the recommendations.¹²⁵⁴

In reviewing the Board's recommendation, the governor seriously considers

1247. *Id.* at 1100-1-1-.15(1)(d)(3).

1248. *Id.* at 1100-1-1-.15(1)(d)(4).

1249. *Id.* at 1100-1-1-.15(1)(d)(5).

1250. *Id.* at 1100-1-1-.15(1)(d)(6).

1251. Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(d)(7).

1252. *Id.* at 1100-1-1-.15(1)(d)(8).

1253. *Id.*

1254. Tenn. Code Ann. § 40-28-107(b) (Lexis 2003); Tenn. Comp. R. & Regs. 1100-1-1-.15(1)(f).

commutation requests if the applicant has “demonstrated[] by clear and convincing evidence that [he] has made exceptional strides in self-development and self-improvement, and would be a law abiding citizen.”¹²⁵⁵ Additionally, the applicant must satisfy one of the following conditions:

A. Petitioner is suffering from a life-threatening illness or has a severe chronic disability, said illness or disability is supported by appropriate medical documentation and the relief requested would mitigate said illness or disability; or

B. Petitioner’s parent, spouse or child has a life-threatening illness, said illness is supported by appropriate medical documentation, and the petitioner is the only person able to assist in the care of such person; or

C. Petitioner has been rehabilitated, is no longer a threat to society, has demonstrated, to the extent his age and health permit, a desire and an ability to maintain gainful employment, and fairness supports the petitioner’s application.¹²⁵⁶

Tennessee also has a unique form of clemency called “exoneration.” After considering any newly discovered evidence in a particular case, the governor may grant exoneration to any person whom he or she finds did not commit the crime for which the person was convicted.¹²⁵⁷ However, a person may not apply for or receive exoneration until all possible state judicial remedies have been exhausted.¹²⁵⁸ As a matter of law, exoneration unconditionally and automatically expunges all records of the person’s arrest, indictment, and conviction and restores all rights of citizenship.¹²⁵⁹

Texas

Distribution of Powers

The Texas Constitution mandates that the legislature establish a Board of Pardons and Paroles.¹²⁶⁰ It vests in the governor the power to grant reprieves, commutations, and pardons only upon a written recommendation signed by a majority of the Board.¹²⁶¹ The governor may, however, grant one reprieve in a capital case for a maximum of thirty days.¹²⁶²

Structure of Board

The Texas Board of Pardons and Paroles consists of seven members that are appointed by the governor with the advice and consent of the Senate.¹²⁶³ To be eligible,

1255. Tenn. Bd. of Probation & Parole, *Application for Commutation*, <http://cjpgf.org/clemency/TennesseeApp.pdf> (last modified July 18, 2005).

1256. *Id.*

1257. Tenn. Code Ann. § 40-27-109(a) (Lexis 2003).

1258. *Id.*

1259. *Id.* at § 40-27-109(b).

1260. Tex. Const. art. IV, § 11(a).

1261. *Id.* at art. IV, § 11(b).

1262. *Id.*

1263. Tex. Govt. Code Ann. § 508.031(a) (2004). In 2003, legislation effective January 2004 reduced the Board from eighteen members to seven. At the same time, the legislature authorized the Board to hire “parole

Board members must be “representative of the general public” and have lived in Texas for the two years preceding the appointment.¹²⁶⁴ A former employee of the Texas Department of Criminal Justice may not serve on the Board until two years have passed since his or her employment was terminated, and no more than three Board members may be former employees of the Department at any given time.¹²⁶⁵ Several provisions also disqualify a person from Board membership based upon conflicts of interest.¹²⁶⁶

Each Board member must receive training on the Board’s roles and governing laws.¹²⁶⁷ The governor designated one member of the Board to be the Presiding Officer; the Presiding Officer serves as the administrative head of the Board, delegating authorities and responsibilities, appointing advisory committees, and establishing administrative policies and procedures.¹²⁶⁸

Board members serve terms of six years, and the terms are staggered so that one-third of them expire every two years.¹²⁶⁹ Members receive salaries determined by the legislature.¹²⁷⁰ The governor may remove one of his or her own appointees “at any time and for any reason.”¹²⁷¹ However, members appointed by former governors may only be removed for cause.¹²⁷² Grounds for removal for cause are: (1) statutory ineligibility for membership; (2) inability to discharge duties for a substantial part of the term because of illness or disability; and (3) failure to attend half of the regularly scheduled Board or panel meetings during a calendar year.¹²⁷³

Board members have the power to issue subpoenas and administer oaths.¹²⁷⁴ By statute, Board members are not required to meet as a group to perform their duties in clemency matters.¹²⁷⁵

Process

Reprieve from a Death Sentence

The Board defines a reprieve as a “temporary release from the terms of an imposed

commissioners” to hear and decide parole matters in three-member panels that must include at least one Board member. The eleven people who were Board members at the time the legislation became effective but were not appointed in 2004 were employed as “parole commissioners.” Because three-member panels have always voted on parole decisions, this structural change in the Board has not affected parole considerations, as the eighteen people making parole decisions now are the same as those who made them before the change. Clemency decisions, however, are voted on by the entire Board and not by panels. Thus, rather than eighteen votes, clemency matters are now decided by only seven. Personal communication from representative of the governor’s office to authors.

1264. Tex. Govt. Code Ann. § 508.032(a)–(b) (2004).

1265. *Id.* at § 508.032(c)–(d).

1266. *Id.* at § 508.033.

1267. *Id.* at § 508.0362.

1268. *Id.* at § 508.035.

1269. Tex. Govt. Code Ann. § 508.037(a)–(b) (2004).

1270. *Id.* at § 508.039.

1271. *Id.* at § 508.037(c).

1272. *Id.* at § 508.034(a).

1273. *Id.*

1274. Tex. Govt. Code Ann. § 508.048(b) (2004).

1275. *Id.* at § 508.047(b).

sentence.”¹²⁷⁶ In a capital case, the governor is authorized to grant one reprieve not exceeding thirty days.¹²⁷⁷ However, the governor may grant a longer reprieve upon the recommendation of the Board.¹²⁷⁸

Once an inmate’s death warrant has been issued, he may apply for a reprieve from the governor.¹²⁷⁹ An application written by, or on behalf of, an inmate must contain (1) the name of the inmate and his attorneys or other representatives; (2) certified copies of the indictment, judgment, jury verdict, and sentence, including a document verifying the scheduled execution date; (3) a brief statement of the offense for which the inmate was sentenced to death; (4) a brief history of all relevant appellate proceedings, including any current proceedings; (5) a brief statement of all legal issues that have been raised during the judicial proceedings; (6) the requested length of time for the reprieve, in thirty-day increments; (7) all grounds for requesting the reprieve, as long as the grounds do not ask the Board to decide technical questions of law that are better decided by a court; and (8) a brief statement of the effect that the inmate’s crime has had upon the victim’s family members.¹²⁸⁰

An application for a reprieve must be delivered to the Board of Pardons and Paroles no later than twenty-one days before the scheduled execution date.¹²⁸¹ Any supporting documentation must be submitted to the Board no later than fifteen days before the scheduled execution date.¹²⁸²

An inmate may request an interview in his application or any supplementary filing.¹²⁸³ The interview is conducted at the prison by a member of the Board designated by the presiding officer.¹²⁸⁴ Only the inmate, the designated Board member, and Texas Department of Criminal Justice staff may attend the interview, and the Board may consider the inmate’s statements during the interview when evaluating his clemency application.¹²⁸⁵

After the Board has received the application and conducted the interview, it may recommend by majority vote that the governor grant the inmate a reprieve from execution or refuse to do so.¹²⁸⁶ The Board does not have to meet to do either.¹²⁸⁷ Alternatively, the Board may schedule a hearing on the request for a reprieve, at which any trial officials may attend and present information.¹²⁸⁸ Upon request, the Board must also notify a representative of the victim’s family, allowing that family member to attend

1276. Tex. Admin. Code tit. 37, § 141.111(31) (2006).

1277. *Id.* at § 143.41(a).

1278. *Id.* at § 143.41(b)–(c).

1279. *Id.* at § 143.43(a) (stating that “[t]he written application in behalf of a convicted person seeking a board recommendation to the governor of a reprieve from execution must be delivered to the Texas Board of Pardons and Paroles, Clemency Section, Austin, Texas, not later than the twenty-first calendar day before the execution is scheduled”).

1280. *Id.* at § 143.42.

1281. Tex. Admin. Code tit. 37, § 143.43(a) (2006).

1282. *Id.* at § 143.43(b).

1283. *Id.* at § 143.43(d).

1284. *Id.* at § 143.43(e).

1285. *Id.*

1286. Tex. Admin. Code tit. 37, § 143.43(f)(1)–(2).

1287. Tex. Govt. Code § 508.047(b).

1288. Tex. Admin. Code tit. 37, § 143.43(f)(3), (g).

the hearing or submit written comments pertaining to the case.¹²⁸⁹ Additionally, advocates for and against the death penalty generally and members of the public may submit written comments for the Board's consideration at its headquarters at any reasonable time.¹²⁹⁰

Hearings are generally open to the public although the Board may meet in executive session to discuss confidential matters.¹²⁹¹ The Board's decision, which is by majority vote, must be made and announced in an open meeting within a reasonable time after the hearing.¹²⁹² If the Board recommends that a reprieve be granted, the governor does not have to act upon that recommendation.¹²⁹³

Pardon

The Board defines a full pardon as an "unconditional act of executive clemency . . . which serves to release the grantee from the conditions of his . . . sentence and from any disabilities imposed by law thereby."¹²⁹⁴ A full pardon does not, however, declare a person innocent of the crimes committed, nor does it truly absolve an offender of the legal consequences of his crime, such as registering as a sex offender.¹²⁹⁵ Only a special pardon—a full pardon on the grounds of innocence—declares a person innocent of the crime and provides for complete freedom from legal implications of the conviction.¹²⁹⁶

The Texas Board of Pardons and Paroles will not consider a request for a full pardon from an inmate who is currently in prison unless "exceptional circumstances exist."¹²⁹⁷ With respect to pardons on the grounds of innocence, the Board will not consider an application unless it has a written recommendation from at least two trial officials, accompanied by "documentary evidence of actual innocence," or the court's recommendation.¹²⁹⁸ Such evidence may include DNA tests, other forensic tests, or affidavits from witnesses.¹²⁹⁹ If the Board recommends that a pardon be granted, the governor is not obligated to act on that recommendation.¹³⁰⁰

1289. *Id.* at § 143.43(g).

1290. *Id.* at § 143.43(i).

1291. *Id.* at § 143.43(h).

1292. *Id.* at § 143.43(h), (j).

1293. Tex. Admin. Code tit. 37, § 143.42 (stating "the board will consider recommending to the governor a reprieve of execution of death sentence").

1294. Tex. Admin. Code tit. 37, § 141.111(20).

1295. *E.g. Taylor v. State*, 612 S.W.2d 566, 571 (Tex. Crim. App. 1981) (holding that a full pardon would not "wipe the slate clean" in terms of probation eligibility (citing *Watkins v. State*, 572 S.W.2d 339, 343 (Tex. Crim. App. 1978))).

1296. Tex. Admin. Code tit. 37, § 141.111(14) (defining full pardon as "[a]n unconditional act of executive clemency by the governor which serves to release the grantee from the conditions of his . . . sentence and from any disabilities imposed by law thereby"); *see also* Tex. Bd. Pardons & Paroles, *Executive Clemency in Texas*, http://www.tdcj.state.tx.us/bpp/exec_clem/exec_clem.html (accessed Mar. 22, 2007).

1297. Tex. Admin. Code tit. 37, § 143.6 (2006).

1298. *Id.* at § 143.2(a).

1299. *Id.* at § 143.2(b).

1300. *Id.* at § 143.1 (stating "[e]xcept in cases of treason or impeachment, after conviction, the governor *may* grant a full pardon upon the recommendation and advice of a majority of the board" (internal citations omitted) (emphasis added)).

Commutation of a Death Sentence to Life in Prison

Texas statutes define a commutation of sentence as an “act of clemency by the governor which serves to modify the conditions of a sentence.”¹³⁰¹ The Texas Board of Pardons and Paroles will consider a recommendation of commutation at the written request of the inmate,¹³⁰² the governor,¹³⁰³ or a majority of the trial officials of the court of conviction.¹³⁰⁴ The procedure followed by the Board upon receipt of a valid request is similar to that followed by the Board when considering a request for a reprieve.¹³⁰⁵

Commutation of Sentence in Non-Death Penalty Cases

The Board considers applications for commutation of sentence in non-death penalty cases only upon the written recommendation of a majority of the trial officials.¹³⁰⁶ In their recommendation, the trial officials must state that the penalty now appears excessive and suggest a definite term that would be more just.¹³⁰⁷ Finally, the recommendation must provide reasons based on facts directly related to the case that existed at the time of trial but were unknown to the court and jury.¹³⁰⁸ Alternatively, the reasons may be based on a statutory change in penalty for the offense that renders the original penalty excessive.¹³⁰⁹

Utah

Distribution of Powers

The Utah Constitution creates a Board of Pardons and Parole, which has the power by majority vote to commute punishments and grant pardons subject to legislative regulation.¹³¹⁰ Although the governor may grant respites or reprieves, any such grants may not extend beyond the next session of the Board, which will then consider whether to extend the reprieve or to grant a commutation or pardon.¹³¹¹

Structure of Board

By Constitution, Board members are appointed by the governor with the consent of the Senate.¹³¹² The Board has five full-time members and five pro tempore members.¹³¹³ Salaries of Board members are determined by the governor, based on a

1301. *Id.* at § 141.111(4).

1302. Tex. Admin. Code tit. 37, § 143.57(a)(2).

1303. *Id.* at § 143.58.

1304. *Id.* at § 143.57(a)(1).

1305. *Id.* at § 143.57.

1306. *Id.* at § 143.52 (a).

1307. Tex. Admin. Code tit. 37, § 143.52 (d)(1)–(2).

1308. *Id.* at 143.52(d)(3).

1309. *Id.*

1310. Utah Const. art. VII, §12(1), (2)(a).

1311. *Id.* at art. VII, §12(3)(a).

1312. *Id.* at art. VII, §12(1).

1313. Utah Code Ann. § 77-27-2(1) (Lexis 2003).

range specified by the legislature.¹³¹⁴

The Commission on Criminal and Juvenile Justice recommends five applicants to the governor for appointment to the Board of Pardons and Parole unless the governor is appointing a sitting board member to a new term in office.¹³¹⁵ All members serve a term of five years, though the expiration of terms is staggered.¹³¹⁶ The governor selects a chairperson who in turn selects a vice chairperson.¹³¹⁷ In addition, the Board must appoint a mental health adviser whose responsibilities include preparing reports and recommendations on “all persons adjudicated as guilty and mentally ill.”¹³¹⁸ Any member of the Board may be removed by the governor for inefficiency, neglect of duty, malfeasance, malfeasance in office, or for cause after a hearing.¹³¹⁹

A majority of the Board constitutes a quorum, and action taken by a majority of the Board constitutes an action of the Board.¹³²⁰ Additionally, one Board member or an examiner appointed by the Board may conduct any investigations, inquiries, or hearings that the Board has authority to undertake.¹³²¹ When approved and confirmed by the Board, actions taken by the appointee are deemed the action of the Board.¹³²² The Board is empowered to issue subpoenas to compel the attendance of witnesses and the production of evidence, to administer oaths, and to take testimony during an investigation.¹³²³

Process

The Board may grant a commutation or pardon only after a full hearing.¹³²⁴

Commutations for Death Penalty Cases

The Board of Pardons and Parole may consider the commutation of a death sentence only to life without parole.¹³²⁵ Only the applicant or the applicant’s attorney may apply.¹³²⁶ The petition must be in writing, signed by the inmate, and include the grounds upon which the applicant seeks review; the state must be given the opportunity to respond to the petition in writing.¹³²⁷ The Board reviews the petition to determine “whether [it] presents a substantial issue which has not been reviewed in the judicial process”; if there is no such issue, the hearing is denied.¹³²⁸ The Board may not consider legal issues that have already been reviewed by judicial courts, should have

1314. *Id.* at § 77-27-2(1), (2).

1315. *Id.* at § 77-27-2(3)(a).

1316. *Id.* at § 77-27-2(2)(a).

1317. *Id.* at § 77-27-4.

1318. Utah Code Ann. § 77-27-2(4)(a).

1319. *Id.* at § 77-27-2(2)(c).

1320. *Id.* at § 77-27-2(2)(e).

1321. *Id.* at § 77-27-2(2)(f).

1322. *Id.*

1323. Utah Code Ann. § 77-27-9(3) (Lexis 2003).

1324. *Id.* at § 77-27-5(1)(d) (Lexis Supp. 2006).

1325. *Id.* at § 77-27-5.5(1) (Lexis 2003).

1326. *Id.* at § 77-27-5.5(2).

1327. *Id.* at § 77-27-5.5(3)-(4).

1328. Utah Code Ann. § 77-27-5.5(5), (7)(a).

been raised during the judicial process, or, if based on new information, are subject to judicial review.¹³²⁹ If a substantial issue is found, the Board must conduct a hearing.¹³³⁰

There are separate procedures for those inmates sentenced to death before April 27, 1992, and those inmates sentenced to death on or after that date.¹³³¹ In short, the limitations on the authority of the Board to consider the legal issues outlined above do not apply to those convicted before April 27, 1992.¹³³²

In cases of inmates sentenced to death before April 27, 1992, the inmate must file his petition no later than seven days after the sentencing court has signed a warrant setting an execution date.¹³³³ In cases of inmates sentenced to death on or after April 27, 1992, the inmate must file his petition no later than twenty-three days before the scheduled execution date.¹³³⁴ Regardless of the sentencing date, if an execution is stayed for any reason before the hearing has commenced, the commutation proceedings terminate.¹³³⁵ If, however, an execution is stayed after a hearing has begun, the hearing continues and the Board renders its decision.¹³³⁶

In all cases, the petition must include copies of all written evidence the petitioner intends to present at the hearing, as well as the names and summary of anticipated testimony of all witnesses he intends to call.¹³³⁷ If the petitioner was sentenced before April 27, 1992, the petition should also include a statement of reasons why the petitioner believes commutation should be granted.¹³³⁸ This statement, along with the above, is all that is required in the petition of such an inmate.

For petitioners sentenced on or after April 27, 1992, the application must include not only a statement of reasons the petitioner believes the sentence of death is not appropriate but also whether any of the proffered reasons have been reviewed in the judicial process.¹³³⁹ If the petition involves new information, the inmate must provide a statement explaining why it should be considered new and why it was not, nor currently is, subject to judicial review.¹³⁴⁰ If the petition is based on legal or constitutional grounds, the applicant must provide a statement explaining why the Board is not statutorily prohibited from considering it.¹³⁴¹ If the Board believes it cannot hear the petition due to legal or constitutional issues, it must deny the hearing for lack of a substantial issue.¹³⁴²

In any case, if the petitioner has already had a commutation hearing, the petition must also include a statement explaining "what, if any, new and significant information

1329. *Id.* at § 77-27-5.5(6).

1330. *Id.* at § 77-27-5.5(7)(b).

1331. Utah Admin. Code r. 671-312-2, 671-312-3 (July 1, 2006).

1332. *Id.* at r. 671-312-1 (July 1, 2006).

1333. *Id.* at r. 671-312-2(1).

1334. *Id.* at r. 671-312-3(1).

1335. *Id.* at rr. 671-312-2(1), 671-312-3(1).

1336. Utah Admin. Code r. 671-312-2(1), 671-312-3(1).

1337. *Id.* at rr. 671-312-2(2)(c), 671-312-3(2)(g).

1338. *Id.* at r. 671-312-2(2)(b).

1339. *Id.* at r. 671-312-3(2)(c).

1340. *Id.* at r. 671-312-3(2)(d).

1341. Utah Admin. Code r. 671-312-3(2)(e).

1342. *Id.* at r. 671-312-3(3).

exists” to justify another hearing.¹³⁴³ A copy of the petition must be sent to the attorney representing the state.¹³⁴⁴

After the petition has been filed, the process is substantially the same for all petitioners, regardless of the date of sentencing. The state has seven days to respond and must provide copies of written evidence, names of witnesses, and a summary of their anticipated testimony to the Board and the petitioner.¹³⁴⁵ The Board can request additional information from either side.¹³⁴⁶ The day after receiving the state’s response, the Board must hold a pre-trial conference to limit the number of witnesses for each side and to clarify the issues.¹³⁴⁷

The hearing itself is not adversarial and cross-examination is not allowed by either side.¹³⁴⁸ The Board itself may question any witness, the inmate, the inmate’s representative, and the state’s representative.¹³⁴⁹ The state’s representative is limited to rebutting the petitioner’s claim and assisting the Board in determining the relevant facts.¹³⁵⁰ All witnesses are under oath, and the Board may impose a time limit on each side for presenting its case.¹³⁵¹ The Board then reconvenes in open session to announce and distribute its written decision.¹³⁵²

The Board has not promulgated regulations regarding commutation procedures in non-death penalty cases.

Pardons

The Board may pardon or commute the sentence of any offender who was confined for a felony or class-A misdemeanor only after a full hearing in open session.¹³⁵³ However, a person sentenced to life without parole may not be pardoned unless the Board finds “by clear and convincing evidence that the person is permanently incapable of being a threat to the safety of society.”¹³⁵⁴

The Board only considers for pardon those whose sentence has been terminated or expired for five years and who have exhausted all judicial remedies including expungement.¹³⁵⁵ After verifying that the individual meets these criteria, the Board may investigate the petitioner, including his criminal, personal, and employment history.¹³⁵⁶ After considering an application, the Board may deny a petition by majority vote without a hearing.¹³⁵⁷ If the Board decides to consider granting a pardon, however, the Board

1343. *Id.* at rr. 671-312-2(3), 671-312-3(2)(f).

1344. *Id.* at rr. 671-312-2(1), 671-312-3(1).

1345. *Id.* at rr. 671-312-2(5), 671-312-3(6).

1346. Utah Admin. Code rr. 671-312-2(5), 671-312-3(6).

1347. *Id.* at rr. 671-312-2(6), 671-312-3(7).

1348. *Id.* at rr. 671-312-2(7), 671-312-3(8).

1349. *Id.* at rr. 671-312-2(7), 671-312-3(8).

1350. *Id.* at rr. 671-312-2(7), 671-312-3(8).

1351. Utah Admin. Code rr. 671-312-2(8), 671-312-3(9).

1352. *Id.* at rr. 671-312-2(9), 671-312-3(10).

1353. Utah Code Ann. § 77-27-9(1)(a), (c).

1354. *Id.* at § 77-27-9(2)(d), (6).

1355. Utah Admin. Code r. 671-315-1 (July 1, 2006).

1356. *Id.*

1357. *Id.*

will schedule a hearing and notify the victim, the chief law enforcement officer of the arresting agency, the presiding judge of the court of conviction, and the prosecuting attorney.¹³⁵⁸ A conditional or unconditional pardon may be granted, and the petitioner is notified in writing of the results.¹³⁵⁹

Decisions of the Board in cases involving pardons and commutations are final and are not subject to judicial review.¹³⁶⁰

Virginia

Distribution of Powers

The Virginia Constitution vests in the governor the sole power to grant reprieves and pardons after conviction, except when the prosecution was carried out by the House of Delegates, and to commute capital punishment.¹³⁶¹ The Virginia legislature has authorized the Parole Board, at the request of the governor, to investigate and report to him or her on cases in which executive clemency is sought.¹³⁶² Additionally, the Board may investigate and report to the governor with its recommendations on any other case in which it believes action by the governor is proper or in the best interest of the public.¹³⁶³ Recommendations are not binding on the governor in any way.¹³⁶⁴ The Board, at the governor's request for conditional pardon and after violation of those conditions, is empowered to re-incarcerate the once-pardoned individual.¹³⁶⁵

Structure of Board

The Virginia Parole Board consists of up to five members appointed by the governor subject to confirmation by the General Assembly.¹³⁶⁶ At least one member of the Board must be a representative of a crime victims' organization or a victim of crime.¹³⁶⁷ Board members have no limitation on the amount of time they can serve, instead serving at the pleasure of the governor.¹³⁶⁸

The governor designates one member of the Board as the chairperson, who is considered a full-time state employee.¹³⁶⁹ No more than two other members may be designated by the governor as full-time employees.¹³⁷⁰ All other members are part-time

1358. *Id.*

1359. *Id.*

1360. Utah Code Ann. § 77-27-5(3).

1361. Va. Const. art. V, § 12.

1362. Va. Code Ann. § 53.1-136(5) (Lexis Supp. 2006); *id.* at § 53.1-231 (Lexis 2005).

1363. *Id.* at § 53.1-231.

1364. Va. Const. art. V, § 12; Va. Code Ann. § 53.1-231. All clemency authority is vested solely in the governor. Sec. of the Cmmw., *Clemency*, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/clemency.cfm> (accessed Mar. 20, 2007).

1365. Va. Code Ann. § 53.1-136(3).

1366. Va. Code Ann. § 53.1-134.

1367. *Id.*

1368. *Id.*

1369. *Id.* at § 53.1-135.

1370. *Id.*

employees.¹³⁷¹

Process

Executive clemency is handled by the Secretary of the Commonwealth. Although there is no apparent formal application process for commutations, the Secretary has established a procedure to apply for three types of pardons: (1) an absolute pardon (which is predicated on the belief that the inmate is innocent and serves as the basis for record expungement); (2) a conditional pardon (which allows presently incarcerated inmates to secure their release from confinement under conditions which, if violated, may result in re-incarceration); and (3) a simple pardon (which provides “official forgiveness” but does not serve to expunge records).¹³⁷²

To apply for a pardon, an individual must send a letter to the governor containing (1) reasons for the request; (2) name; (3) date of birth; (4) Social Security number; (5) current address; (6) the crime the inmate has been convicted of; (7) the date and court of conviction; (8) sentence or other disposition of conviction; and (9) location of incarceration.¹³⁷³

Once the application is received, the request is reviewed to determine if it warrants investigation by the Virginia Parole Board.¹³⁷⁴ If so, an investigation is requested and the governor’s office then proceeds based on the Board’s recommendation.¹³⁷⁵ If a petition for clemency is denied, the petitioner has no right of appeal but may reapply after a two-year period.¹³⁷⁶

Washington

Distribution of Powers

The Washington Constitution vests the pardoning power in the governor, limited by legislative regulations.¹³⁷⁷ The governor must report to the legislature at each session each case of reprieve, commutation, or pardon granted and the reasons for granting them.¹³⁷⁸ The Clemency and Pardons Board is charged with receiving petitions from individuals, organizations, and the Department of Corrections for commutation of sentences and pardoning of offenders in extraordinary cases and making recommendations to the governor.¹³⁷⁹ These recommendations, however, are not binding on the governor.¹³⁸⁰

1371. Va. Code Ann. § 53.1-135.

1372. Sec. of the Cmmw., *Clemency: Pardons*, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm> (accessed Feb. 4, 2007); *see also* Va. Code Ann. § 19.2-392.2 (Lexis 2004).

1373. Personal communication from representative of the governor’s office to authors.

1374. Va. Code Ann. § 53.1-231.

1375. *Id.*

1376. Sec. of the Cmmw., *supra* n. 1372.

1377. Wash. Const. art. III, sec. 9.

1378. *Id.* at art. III, sec. 11.

1379. Wash. Rev. Code Ann. § 9.94A.885(1) (West 2003).

1380. *Id.* at § 10.01.120 (West 2002).

Structure of Board

The Washington State Clemency and Pardons Board is housed within the office of the governor and consists of five members serving staggered four-year terms appointed by the governor and confirmed by the Senate.¹³⁸¹ Board members elect their own chairperson and are uncompensated except for travel reimbursement.¹³⁸²

Process

The Board receives petitions for executive clemency.¹³⁸³ Prior to recommending clemency on behalf of a person, the Board must hold a public hearing on the petition wherein the prosecuting attorney is given thirty days' notice along with a copy of the petition.¹³⁸⁴ The prosecuting attorney, in turn, is to notify victims, victim's family members, witnesses, and the law enforcement agency or agencies that conducted the investigation about the hearing.¹³⁸⁵ The Board must consider the statements given by those so notified in whatever form.¹³⁸⁶

The Board itself does not publish the rules and regulations it follows in making clemency recommendations. According to the Criminal Justice Policy Foundation, the Board's review committee determines which clemency applications will be heard by the full Board.¹³⁸⁷ The Board reviews only those cases referred to it by the review committee.¹³⁸⁸

Wyoming

Distribution of Powers

The governor has the power to grant reprieves, commutations, and pardons for all offenses except treason and cases of impeachment, subject to legislative regulation of the application process.¹³⁸⁹ At each regular session, the governor must communicate to the legislature who was granted executive clemency and the reasons for the grant.¹³⁹⁰ The Wyoming Constitution grants the legislature the power to create a penalty of life in prison without parole for a class of crimes over which the governor has no commutation power.¹³⁹¹ The legislature has used this constitutional grant and created a class of

1381. *Id.* at § 9.94A.880(1)–(2) (West 2003). It should be noted that the Indeterminate Sentence Review Board is also authorized to “pass on the representations made in support of applications for pardons for convicted persons and make recommendations thereon to the governor,” but only when requested to do so by the governor. *Id.* at § 9.95.260(1) (West Supp. 2006).

1382. *Id.* at § 9.94A.880(3)–(4).

1383. Wash. Rev. Code Ann. § 9.94A.885(1).

1384. *Id.* at § 9.94A.885(3).

1385. *Id.*

1386. *Id.*

1387. Crim. J. Policy Found., *Clemency: Washington*, <http://cjp.org/clemency/Washington.html> (last updated Jan. 19, 2007).

1388. *Id.*

1389. Wyo. Const. art. IV, sec. 5.

1390. *Id.*

1391. *Id.* at art. III, sec. 53.

crimes punishable by life in prison without parole over which the governor has no commutation power.¹³⁹² The legislature may also limit commutations of death sentences to life in prison without parole, which cannot in turn be commuted any further.¹³⁹³ However, the power of the governor to issue pardons is not so limited.¹³⁹⁴ Although the Wyoming Board of Parole makes recommendations for commutations, the governor is not bound by any recommendation and retains the sole authority to grant or deny pardons, reprieves, and commutations subject to the substantive limitations imposed by the legislature.¹³⁹⁵

Structure of Board

The Wyoming legislature has created the Wyoming Board of Parole.¹³⁹⁶ The Board is composed of seven members appointed for six-year terms by the governor with the advice and consent of the Senate, with no more than four members being of the same political party.¹³⁹⁷ Board members serve at the pleasure of the governor.¹³⁹⁸ The members elect their own chairperson.¹³⁹⁹ Board members receive a salary equivalent to that of Wyoming's legislators.¹⁴⁰⁰ The Board's role in executive clemency decisions is limited to recommending prisoners for commutations of sentence.¹⁴⁰¹ Although three members constitute a hearing panel empowered to make parole decisions, fewer than three are empowered to make decisions regarding commutation recommendations to the governor.¹⁴⁰² A decision by the majority of a panel constitutes a decision of the Board.¹⁴⁰³

Process

Wyoming's legislature regulates the manner in which applications for pardons and reprieves are made. Applications for pardons and reprieves are sent to the governor.¹⁴⁰⁴ In the case of pardons, the governor must notify the district attorney of the county in which the applicant was indicted or informed against at least three weeks before considering the application.¹⁴⁰⁵ Within ten days after receiving such notice, the district attorney must send the governor "a statement setting forth the time of the trial and conviction, the date and term of the sentence, the crime of which the person was convicted and any circumstances in aggravation or extenuation which appeared in the

1392. Wyo. Stat. Ann. § 6-10-301(a), (c) (2005).

1393. Wyo. Const. art. III, sec. 53.

1394. *Id.*

1395. Personal communication from representative of the governor's office to authors.

1396. Wyo. Stat. Ann. § 7-13-401(b) (2005).

1397. *Id.*

1398. *Id.*; Wyo. Stat. Ann. § 9-1-202(a) (2005).

1399. Wyo. Stat. Ann. § 7-13-401(c).

1400. *Id.* at § 7-13-401(d).

1401. *Id.* at § 7-13-401(f).

1402. *Id.*

1403. *Id.* at § 7-13-401(f).

1404. Wyo. Stat. Ann. §§ 7-13-801(a), 7-13-804(a) (2005).

1405. *Id.* at § 7-13-804.

trial and sentencing of the person.”¹⁴⁰⁶

The Parole Board does not maintain any current regulations regarding procedures or substantive criteria for making commutation recommendations to the governor. Nor are there any available procedures and criteria used by the governor in making clemency decisions.

1406. *Id.* at § 7-13-805.

APPENDIX C: DISPOSITIONS OF CASES RAISING CLAIMS UNDER *HOUSE V. BELL*,
AS OF OCTOBER 9, 2006

In the following cases, the inmate failed to overcome procedural default, either because he did not present any new reliable evidence (NRE) or because the court was not persuaded that a reasonable juror would have voted differently (NRJ).

Allee v. Neb. Atty. Gen., 2006 WL 1867037 (D. Neb. June 29, 2006) (NRE)

Alongi v. Hendricks, 2006 WL 2129107 (D.N.J. July 26, 2006) (NRJ)

Arrington v. Williams, 2006 WL 2615512 (10th Cir. Sept. 13, 2006) (NRE)

Arthur v. Allen, 459 F.3d 1310 (11th Cir. Aug. 14, 2006) (NRE)

Artiaga v. Money, 2006 U.S. Dist. LEXIS 46935 (N.D. Ohio July 11, 2006) (NRE)

Ballard v. Quarterman, 2006 WL 1983182 (S.D. Tex. July 13, 2006) (NRE)

Benjamin v. Crosby, 2006 WL 1890295 (M.D. Fla. July 10, 2006) (NRE)

Breault v. Super, 2006 WL 2521394 (W.D. Pa. Aug. 29, 2006) (NRE)

Breault v. Wakefield, 2006 WL 2583625 (W.D. Pa. Sept. 7, 2006) (NRJ)

Brown v. Quarterman, 2006 U.S. Dist. LEXIS 54919 (N.D. Tex. June 22, 2006) (NRE)

Cobbs v. McDonough, 2006 WL 2092381 (N.D. Fla. July 26, 2006) (NRE) (Petitioner did not show any new evidence but instead claimed that his counsel was ineffective because he failed to investigate whether or not the petitioner was competent to stand trial. This was not enough to overcome the procedural default.)

Coffield v. Quarterman, 2006 WL 1852015 (S.D. Tex. June 30, 2006) (NRE)

Collins v. U.S., 2006 WL 1789119 (N.D.N.Y. June 27, 2006) (NRE)

D'Amario v. Walsh, 2006 WL 2360167 (D. Mass. Aug. 16, 2006) (NRE)

Daniels v. McDonough, 2006 WL 2620143 (M.D. Fla. Sept. 13, 2006) (NRE)

Darity v. McDonough, 2006 WL 2792891 (M.D. Fla. Sept. 27, 2006) (NRE)

Davis v. McDonough, 2006 WL 2801986 (M.D. Fla. Sept. 27, 2006) (NRE)

Davis v. Stowitzky, 2006 WL 2642403 (W.D. Pa. Sept. 13, 2006) (Petitioner argued that he had new DNA evidence that would exonerate him, but his petition was filed about nine years too late. The Court ruled that the petition was so untimely that relief was not warranted.)

Edmond v. Norris, 2006 WL 2792177 (E.D. Ark. Sept. 28, 2006) (NRJ)

En Matti v. Houston, 2006 WL 2176613 (D. Neb. July 31, 2006) (Petitioner presented no evidence of actual innocence which is one avenue to overcome the procedural default.)

Escobar v. Miller, 2006 WL 2239080 (E.D.N.Y. Aug. 4, 2006) (NRE) (In support of his actual innocence claim, the petitioner presented several affidavits claiming that someone else committed the crime. However, the court ruled that the affidavits were insufficient to overcome the procedural default because they conflicted with each other.)

- Fisher v. Dretke*, 2006 WL 2129062 (S.D. Tex. July 27, 2006) (NRE)
- Foster v. Quarterman*, 2006 WL 2806686 (5th Cir. Oct. 2, 2006) (The petitioner's "stand-alone" innocence claim was denied because *House v. Bell* did not change the existing law to recognize the validity of stand-alone innocence claims.)
- Free v. Nish*, 2006 WL 2583462 (W.D. Pa. Sept. 6, 2006) (NRE)
- Garcia v. Quarterman*, 2006 WL 2413714 (S.D. Tex. Aug. 18, 2006) (NRE)
- Gilreath v. McDonough*, 2006 WL 2620149 (M.D. Fla. Sept. 13, 2006) (NRE)
- Greene v. Lafler*, 2006 WL 2457524 (E.D. Mich. Aug. 23, 2006) (NRJ)
- Hazelton v. Shannon*, 2006 WL 2302666 (M.D. Pa. Aug. 8, 2006) (NRE)
- Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir. 2006) (The petitioner's claim was based on his Title 42 U.S.C. § 1983 suit against the police for refusing to entertain his claim of erroneous identification. The court cited *House v. Bell* to explain why this suit was improper.)
- Hill v. Mitchell*, 2006 WL 2807017 (S.D. Ohio Sept. 27, 2006) (NRE)
- In re Brown*, 457 F.3d 392 (5th Cir. 2006) (NRE)
- Kan. v. Marsh*, 126 S. Ct. 2516 (2006) (This case did not address an actual innocence claim; instead, the dissent discussed actual innocence to highlight contentious issues surrounding the death penalty.)
- LaFleur v. White*, 2006 WL 2559806 (E.D. Mich. July 28, 2006) (NRE)
- Lantanasio v. Beard*, 2006 WL 2794571 (W.D. Pa. Sept. 27, 2006) (NRE)
- Leggett v. Brooks*, 2006 WL 2641196 (W.D. Pa. Sept. 13, 2006) (NRE)
- Lenz v. Norris*, 2006 WL 2682171 (E.D. Ark. Sept. 18, 2006) (NRE)
- Luckett v. Berghuis*, 2006 WL 1779383 (E.D. Mich. June 26, 2006) (NRE) (The petitioner presented affidavits that would serve to impeach a trial witness but did not present any new evidence.)
- Lynn v. Roberts*, 2006 WL 2522490 (10th Cir. Sept. 1, 2006) (NRE)
- McCaleb v. Gansheimer*, 2006 WL 2785772 (N.D. Ohio Sept. 25, 2006) (NRE)
- Nuetzel v. Walsh*, 2006 WL 2742000 (S.D.N.Y. Sept. 26, 2006) (NRE)
- Pelton v. Duncan*, 2006 WL 2792742 (N.D.N.Y. Sept. 26, 2006) (NRE)
- Richardson v. Greene*, 2006 WL 2707334 (S.D.N.Y. Sept. 20, 2006) (NRE)
- Rios v. Quarterman*, 2006 WL 1877094 (W.D. Tex. July 5, 2006) (NRE)
- Spencer v. Farrey*, 2006 WL 2691611 (W.D. Wis. Sept. 19, 2006) (NRE)
- Stanley v. Shannon*, 2006 WL 2191268 (E.D. Pa. July 31, 2006) (The petitioner presented new evidence, but his claims were dismissed until the state court ruled on the timeliness of the petition.)
- Taylor v. McDonough*, 2006 WL 2660115 (M.D. Fla. Sept. 15, 2006) (NRE) (The petitioner did not deny committing the crime; instead, he raised an actual innocence

claim because the jury found he was guilty of robbery with a deadly weapon without identifying or describing the weapon.)

Thorp v. Dormire, 2006 U.S. Dist. LEXIS 63323 (E.D. Mo. Sept. 6, 2006) (The petitioner did not raise an actual innocence claim, but the court cited *House v. Bell* as one method of overcoming a procedural bar.)

Torre Franca v. Schriro, 2006 WL 1981788 (D. Ariz. July 13, 2006) (NRE)

Urcinoli v. Cathel, 2006 WL 2246368 (D.N.J. Aug. 3, 2006) (NRE)

Villegas v. Hendricks, 2006 WL 2806291 (D.N.J. Sept. 27, 2006) (NRE)

Watts v. Roper, 2006 WL 2708630 (E.D. Mo. Sept. 20, 2006) (NRE)

Wendt v. McDonough, 2006 WL 2189145 (M.D. Fla. July 31, 2006) (NRE)

Wheeler v. U.S., 2006 WL 2078425 (M.D. Fla. July 24, 2006) (NRE & NRJ)

White v. Warden, 2006 WL 2640633 (S.D. Ohio Sept. 13, 2006) (NRE & NRJ)

In the following case, *House v. Bell* was used, not to address an actual innocence issue, but to allow postconviction DNA testing:

Osborne v. D.A.'s Off. 3d Jud. Dist., 2006 WL 2456467 (D. Alaska Aug. 3, 2006) (The petitioner was granted an injunction requiring police to provide him with access to evidence so that he could perform postconviction DNA testing. The court used *House v. Bell* to explain its ruling, noting that the United States Supreme Court's reliance on *House's* new DNA evidence influenced its decision.)

