



The Senate of
The State of Texas

SENATOR RODNEY ELLIS
District 13
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OPINION COMMITTEE

Dear General Abbott:

I am requesting an Attorney General opinion on the requirements necessary for a person to obtain a recommendation for a pardon for innocence from the Board of Pardons and Paroles. There is some debate as to whether the Board of Pardons and Paroles has the authority to waive their own rules and exercise discretion and recommend a pardon for innocence without written unanimous consent from three trial officials.

First, in a case presently before the Board of Pardons and Paroles, the person in question has submitted the written unanimous consent of the three trial officials: letters of recommendation for a full pardon from the District Attorney and County Sheriff and a transcript from a hearing during which the judge who presided over the case stated on the record that she would recommend a full pardon should the results of a second DNA test exclude the person in question as a possible contributor (as those results in fact did).

Whether or not a person has the written unanimous recommendation of the three trial officials or not, it has been argued that the Board has the authority to consider applications for pardons on the grounds of innocence even in the absence of such written unanimous recommendation. Board Rule 143.2 states: "On the ground of innocence of the offense for which convicted the board will only consider applications for recommendation to the governor for a full pardon upon receipt of... a written unanimous recommendation of the current trial officials of the court of conviction..." 37 TAC § 143.2. However, Board Rule 141.51, titled "Use and Effect of Rules," states: "In no event shall the rules be construed as a limitation or restriction upon the exercise of any discretion by the board or by a parole panel." 37 TAC § 141.5. Rule 141.51 makes it clear that the policy contained in Rule 143.2 does not preclude the Board from recommending a pardon based on innocence where the circumstances warrant such a recommendation, notwithstanding the lack of unanimous trial official support.

The Board itself appears to recognize its own power to consider applications for pardons on the grounds of innocence without unanimous written trial official recommendation. On the Board's own website it proclaims: "Innocence pardons are extremely unusual and are usually considered only on unanimous recommendation of an applicant's three trial officials." See http://www.tdcj.state.tx.us/bpp/exec_clem/exec_clem.html (emphasis added).

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I understand that the Board has in the past considered and voted to recommend a pardon on the grounds of innocence *without* the unanimous written recommendation of the three trial officials. In 2000, the Board considered and recommended a full pardon for A.B. Butler, Jr. even though the sentencing judge in the case, District Judge Cynthia Stevens Kent, did not recommend a pardon. In that case, Mr. Butler was convicted for sexual assault on the basis of the victim's identification. Subsequent testing of DNA evidence later exonerated Mr. Butler of any wrongdoing in the offense for which he was convicted. That case is virtually identical to the case presently before the Board.

Additionally, the failure to consider the applicant's application for pardon on the grounds of innocence constitutes a denial of his right of remonstrance guaranteed to Texas residents by art. I, § 27 of the Texas Constitution. The right of remonstrance guarantees meaningful review of petitions for executive clemency by requiring that the Board at a minimum "consider" the petition. A government body considers a remonstrance if it stops, looks, and listens to a grievance. *See Graham v. Texas Bd. of Pardons and Paroles*, 913 S.W.2d 745, 752 n. 10 (Tex. App.—Austin, 1996).

In particular, I am looking for an Attorney General opinion on the following questions:

1. What are the requirements for the Board of Pardons and Paroles to consider an application for a pardon based on innocence?
2. Does the Board of Pardons and Paroles have the authority exercise discretion in reviewing pardons of innocence?
3. Under what circumstances may the Board of Pardons and Paroles exercise that discretion?

Please consider this as a formal request for an Attorney General opinion clarifying the Board of Pardons and Paroles' duties and obligations regarding recommendations for pardons based on innocence.

Sincerely,



Rodney Ellis
RE:kb