UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSEPH STANLEY FAULDER	§	
	§	
vs.	§	**NO. A 98 CA 801 SS**
	§	
TEXAS BOARD OF PARDONS	§	
AND PAROLES, *et al.*	§	

DANNY LEE BARBER	§	
	§	
vs.	§	**NO. A 98 CA 803 SS**
	§	
TEXAS BOARD OF PARDONS	§	
AND PAROLES, *et al.*	§	

ORDER

BE IT REMEMBERED that on the 21st and 22nd days of December 1998, the Court held a joint evidentiary hearing in the above-styled and numbered causes. Each petitioner filed in this Court a request for temporary restraining order, preliminary injunction, and stay of execution in the form of a lawsuit against the Texas Board of Pardons and Paroles and its members, along with the Director of the Texas Department of Criminal Justice, pursuant to 42 U.S.C. § 1983. Joseph Stanley Faulder filed his lawsuit at 5:00 p.m. on December 8, 1998 and was scheduled to be executed in Texas on December 10, 1998, at 6:00 p.m. Danny Lee Barber filed his lawsuit December 9, 1998 at 3:00 p.m. and was scheduled to be executed three hours later. Faulder filed a petition for clemency with the Texas Board of Pardons and Paroles on November 4, 1998. Barber filed his petition December 1, 1998. On December 9, 1998, the Board of Pardons and Paroles advised the Governor there was no recommendation of clemency for either petitioner. Each petitioner argues

his execution would violate the Fourteenth Amendment due to deficiencies in the Texas death penalty clemency procedures.

On December 9, 1998, following an evidentiary hearing at which the defendants declined to offer any evidence, this Court entered orders staying both executions. The stays were appealed by the defendants, and the Fifth Circuit panel hearing the appeal in Barber's case upheld the stay, but a separate Fifth Circuit panel vacated Faulder's stay for lack of jurisdiction under Section 1983. This Court was puzzled that a Fifth Circuit panel found a District Court lacks jurisdiction to stay the execution under a Section 1983 attack on a state's clemency procedures for three reasons. First, *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1998), the leading Supreme Court case on the constitutional due process requirements of state death penalty clemency procedures, was a Section 1983 case. Second, a Section 1983 case is precluded in favor of a Section 2254 habeas corpus case when the relief requested would "challeng[e the] underlying conviction and sentence." *See Preiser v. Rodriguez*, 93 S. Ct. 1827, 1836 (1973). The sentence imposed in the cases before the Court are death sentences, and the petitioners do not seek to have their convictions and death sentences vacated by the Court; instead, they seek procedural safeguards in the form of improved clemency procedures. *See Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400, 402-03 (9th Cir. 1997) (finding that § 1983 was the proper vehicle for challenging the clemency process because the relief sought — a new clemency hearing — would not invalidate the petitioner's death sentence). Finally, the Court determined it should exercise jurisdiction because the Court did not

want to abdicate its responsibility by taking the simple route, sitting idly by, denying jurisdiction, and allowing two executions when the petitioners offered compelling constitutional arguments.[1]

Before the Court at the present hearing are the Petitioners' Motion for Preliminary Injunction and the Defendants' Motions to Dismiss and Alternatively for Summary Judgment. To obtain a preliminary injunction, the petitioner must demonstrate (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury without the injunction, (3) the threatened injury outweighs the threatened injury to the defendant, and (4) the preliminary injunction will not disserve the public interest. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1007 (5th Cir. 1991). Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). If genuine issues of material fact exist, the motion must be denied. In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991). The Fifth Circuit has concluded that "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record

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[1] The defendants correctly assert that both Eleventh Amendment immunity and Section 1983 preclude the petitioners from suing state agencies, and the petitioners' causes of action against the Board will therefore be dismissed. Nevertheless, the petitioners' claims for prospective injunctive relief against individual state officials are not barred, and those claims would serve the petitioners' purposes in this case. The petitioners state no constitutional violations against Gary Johnson, and the claims against him will therefore be dismissed.

evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)). However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (1996).

Clemency refers to an executive procedure delaying, reducing, or excusing a criminal penalty. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-578 (1991). It is a traditionally executive power. *See Solem v. Helm*, 103 S. Ct. 3001, 3015 (1983) ("A Governor may commute a sentence at any time for any reason without reference to any standards."); *see also Ex Parte Grossman*, 45 S. Ct. 332, 337 (1925) (explaining that executive clemency exists because "the administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt"). As such, clemency is rarely subject to judicial review, and substantive clemency decisions are outside the province of the courts. *See Connecticut Board of Pardons v. Dumschat*, 101 S. Ct. 2460, 2464 (1981) (discussing non-capital clemency). In February 1998, this Court held that clemency procedures are not subject to any judicial review because it found there was "no constitutional right to clemency under the federal law." *See Tucker v. Texas Bd. of Pardons & Paroles*, Cause No. A-98-CA-064-SS, slip op. at 2 (W.D. Tex. February 2, 1998) (citing *Herrera v. Collins*, 113 S. Ct. 853, 867 (1993)). However, an intervening Supreme Court case, *Ohio Adult Parole Authority v. Woodard*, which was decided on March 25, 1998, indicates the reasoning applied by this Court in *Tucker* is no longer good law.

In *Woodard*, the plaintiff challenged the procedure in the Ohio clemency process. The Ohio Constitution gives the Governor the power and discretion to grant clemency. To regulate the

application and investigation process, the Ohio General Assembly created the Ohio Adult Parole Authority. When an inmate receives a death sentence, the Authority is required to conduct a clemency hearing within forty-five days of the scheduled date of execution. Although an inmate may request an interview with one or more of the parole board members prior to the hearing, the inmate is not permitted to have his attorney present during the interview. The Authority is required to conduct the hearing, complete its clemency review, and make a recommendation to the Governor even if the inmate subsequently obtains a stay of execution. If the inmate later discovers additional information relevant to his clemency petition, the Authority has the discretion to hold another hearing or alter its recommendation. *See Woodard*, 118 S. Ct. at 1247-48. Woodard challenged the fact that in Ohio's process, a person seeking clemency could seek a voluntary interview before the parole authority, but such a person would not benefit from the assistance of counsel or immunity for his or her own statements. *Id.* at 1248. Eight Justices agreed that the Ohio clemency procedures did not violate due process, *id.* at 1252, and the voluntary clemency interview did not violate the Fifth Amendment protection against self-incrimination, *id.* at 1253.

In analyzing Woodard's claims, five Justices, a majority of the Court and therefore enough votes to carry precedential value, agreed that a death-row inmate has a life interest in avoiding execution separate and independent from his life and liberty interests at stake in his trial and sentencing, and therefore "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 1253-54 (emphasis in original) (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, J., Ginsburg, J., and Breyer, J.); *see also id.* at 1254 (Stevens, J., concurring in part and dissenting in part) (stating that minimal due process standards must be met in clemency proceedings). "Judicial intervention might, for example, be warranted in the face of a

scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 1254 (O'Connor, J.); *see also id.* (Stevens, J.) (suggesting "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" are not constitutionally acceptable). The remaining four Justices found no constitutional due process right in clemency procedures, stressing that clemency is an "act of grace." (Rehnquist, C.J.). *But see Biddle v. Perovich*, 47 S. Ct. 664, 665 (1927) (Holmes, J.) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."); *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (Stewart, J., Powell, J., Stevens, J.) (explaining that capital punishment scheme which did not provide the opportunity for executive clemency would be "totally alien to our notions of criminal justice").

Unfortunately, the Supreme Court opened a Pandora's Box with *Woodard*. Not only did the five Justices open up every state clemency procedure to due process review, they did not elaborate or describe what specific types of process was required to meet the "minimal" standards of due process. The scheme employed in Ohio, which included a mandatory hearing and allowed an interview with the Board, was upheld as sufficient, and the flip of a coin or the complete denial of access to the process as a whole was described as absurdly insufficient in dicta, but it is unclear whether the Texas procedure would exceed the Court's minimal threshold. Justice O'Connor did, however, italicize the term *minimal* when describing the "*minimal* procedural safeguards" required in a state's clemency procedure, apparently to stress that only a low threshold is required. Justice

O'Connor reinforces this position by pointing out that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." *Woodard*, 118 S. Ct. at 1253 (O'Connor, J.) (quoting *Ford v. Wainwright*, 106 S.Ct. 2595, 2612 (1986) (O'Connor, J., concurring in result in part and dissenting in part).

Two cases decided by Courts of Appeals outside the Fifth Circuit have not been particularly helpful in illuminating how to apply *Woodard*. In *Duvall v. Keating*, 98 WL 864117 (10th Cir. Dec. 14, 1998), the Tenth Circuit upheld the Oklahoma clemency procedures as applied to Duvall. *Id.* at *3. The Tenth Circuit interpreted *Woodard* to stand for the proposition that "the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law." *Id.* The Court disagrees with this simplistic application of *Woodard* because it eschews Justice O'Connor's critical "*minimal* procedural safeguards" language and replaces it with "in compliance with state law," which is a distinct concept. For example, if a death row inmate was provided with a clemency procedure even more elaborate than that upheld in *Woodard*, the Tenth Circuit's formula would strike down the very procedure upheld in *Woodard* if that procedure failed to comply with the state's more elaborate procedure. Conversely, if a state explicitly provided for an arbitrary, capricious, and whimsical capital clemency procedure, the Tenth Circuit's standard would inappropriately uphold that procedure. The Tenth Circuit's interpretation of *Woodard* would perversely incentivize states to provide very little process to clemency petitioners. The Court declines to follow that tortured reasoning.

At any rate, *Duvall* would not mandate a decision in favor of the defendants in this case. In *Duvall*, the plaintiff "did not challenge the Board's conduct." *Id.* The Tenth Circuit found the procedure as applied to Duvall clearly complied with Oklahoma's clemency procedures. *Id.* In

contrast, it is unclear to this Court whether the Texas clemency procedures in these cases even comply with the Texas Constitution and statutes. That is especially true considering the Texas Supreme Court's and the Court of Criminal Appeals's failures to evaluate the state's clemency on the merits following *Woodard*.[2] Cases pre-*Woodard* refused to scrutinize the clemency process under the theory that clemency is an executive process, not amenable to judicial review at all. *See, e.g., Sapp v. Patton*, 118 F.3d 460, 465 (6th Cir. 1997) ("The very nature of clemency is that it is grounded solely in the will of the dispenser of clemency. He need give no reasons for granting it,

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[2] Faulder and Barber are also pursuing remedies in the state courts regarding the legality of the Board's procedures under state law. In the interest of comity, the Court would have preferred for the state courts to address this matter as well as the constitutional matters now before this Court on the merits. Despite being given an opportunity, both of the state's highest courts have declined to do so. Faulder and Andre Lewis, both individually and on behalf of all other living persons who are or will be on death row in Texas, filed a Petition and Application for Temporary Restraining Order and Temporary Injunction in Travis County District Court. On November 30, 1998, Judge Paul Davis entered an order requiring the Board of Pardons and Paroles to comply with the Texas Constitution, Art. IV, § 11 by keeping a record of its actions and stating the reasons for its actions. Judge Davis further ordered the Board to post notices as required by §§ 551.041, 551.044 and 551.048 of the Open Meetings Act; to conduct meetings open to the public as required by § 551.002 of the Act and Texas common law; to keep minutes or tape recordings as required by § 551.021 of the Act; to convene in open meetings before conducting a closed meeting as required by § 551.101 of the Act; to deliberate and vote in public as required by the Act and Texas common law; and to act as a body as required by Texas common law. However, this order was meaningless on its face as to these petitioners. Under Texas law, a state district court has no authority to stay or interfere with an execution, and Judge Davis's order expired at 3:00 p.m. on the day of each petitioner's execution. The order set a hearing on the petitioners' request for a temporary injunction on December 14, 1998, days *after* the scheduled execution of these petitioners.

The Texas Supreme Court, instead of interpreting the relevant state law and ruling on the merits, stayed the district court order except to the extent that it set a hearing and maintained jurisdiction over the Board's writ of mandamus, writ of prohibition and injunction challenging Judge Davis's order. The Texas Court of Criminal Appeals denied the Board's application for mandamus in a one sentence order without opinion. This Court bemoans the fact that neither of the state's highest courts have ruled on the merits of these claims or stayed the execution to give themselves time to consider the merits. This failure has further complicated this Court's task in determining whether these petitioners have received the minimal due process required by *Woodard*.

or for denying it."); *Ex Parte Tucker*, 973 S.W.2d 950, 950 (Tex. Ct. Crim. App. 1998) ("Clemency proceedings do not create a liberty interest and thus federal due process rights are not implicated.") Although eight Justices in *Woodard* agreed clemency and pardons are not traditionally "the business of the courts," *see Woodard*, 118 S. Ct. at 1254 (O'Connor, J.), the five-Justice majority stated some *minimal* procedural requirements are mandated, indicating that a minimal level of judicial review of clemency procedures is appropriate.

The Ninth Circuit has interpreted *Woodard* to stand for the novel proposition that "*minimal* procedural safeguards" require notice of what information is being considered by the clemency board. *See Wilson v. United States Dist. Court for the N. Dist. of Cal.*, 1998 WL 806433 (9th Cir. Nov. 16, 1998). However, *Wilson* itself is actually weak support for that proposition. The district court issued a stay of execution to consider whether California's clemency procedure satisfied *Woodard*'s minimal due process requirements. The Court of Appeals considered whether the stay was "clearly erroneous," which is the standard in a writ of mandamus proceeding. *Id.* at *2. The Ninth Circuit did not substantively determine what process was required, but merely found the district court's entry of a temporary restraining order was "not clearly erroneous as a matter of law." *Id.* at *3.

Under the Texas Constitution, "[t]he Legislature shall by law establish a Board of Pardons and Paroles and shall require it to keep record of its actions and the reasons for its actions." TEX. CONST. art. 4, § 11. Before the Governor can pardon a defendant or commute a conviction or sentence, he must receive a recommendation for clemency from a majority of the Board, *see* 37 TEX. ADMIN. CODE § 143.1 (pardons), 37 TEX. ADMIN. CODE § 143.51 (commutation), but the Governor may grant one reprieve of only thirty days or less without the approval of the Board, 37 TEX. ADMIN.

CODE § 143.41 (pardons). In other words, the Governor cannot grant a pardon, commutation, or lengthy reprieve without a recommendation to do so from the Board. *See* TEX. CONST. art. 4, § 11. Under Texas statutes, the Board is not required to meet as a body to determine clemency matters, TEX. GOV'T CODE ANN. § 508.047, but if the Board chooses to meet it *may* hold clemency hearings by telephone conference call. TEX. GOV'T CODE ANN. § 551.124 (emphasis added). Although individual board members testified they would not be opposed to having hearings nor in giving reasons for their votes, the Board's legal position is adamant–it is not required to meet in public (or meet at all) or to give any reasons for recommending a denial of clemency. The Board's position is that the process afforded to the plaintiff is the right to file a petition for clemency without limitation on its content.[3]

According to the evidence before the Court, a death row inmate is visited by a parole officer as soon as an execution date is set. That parole officer talks to the inmate and makes a report, which is submitted to the Board of Pardons and Paroles and placed in a file. Any subsequent clemency documents are then placed in that file. Once a death row inmate files a clemency petition, Brett Hornsby, an Administrative Technician IV for the Board, date-stamps the petition and begins generating copies. Hornsby then contacts interested parties such as the prosecutor and victims

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[3] Although the Board does not expressly limit the type of information that a petitioner may include with his application, the Board members freely admit they do not consider all the information sent in reference to a particular applicant's application if sent separate from the application. The Board received approximately four thousand letters in reference to Faulder's application. Some of these letters were from members of the general public, but some of the letters were from members of Faulder's family and at least one letter was from a psychiatrist writing to inform the Board that the psychiatrist who had testified about Faulder's potential future dangerousness had been expelled from the American Association of Psychiatrists for his unethical testimony in capital cases. None of these letters were forwarded to the individual Board members for consideration.

services, and gives them 24 hours in which to deliver or fax any input they wish to offer for the Board's review. The Board's General Counsel prepares a synopsis of the petitioner's case history. These materials are collated into a packet and issued to all Board members, whose offices are located throughout the state, and to the Governor by airborne courier. Any materials that come after the initial disbursement are either faxed or shipped overnight to the members. Under some circumstances, materials are sent to Board offices, which are located only in certain cities, not necessarily the cities where each Board member resides.

When the Board members are prepared to vote, they send their votes to Hornsby, who enters the results into a computer. The members vote when they are ready, not on any given date. The only guideline is that votes should be completed before 3:00 p.m. on the day preceding the scheduled execution.[4] The votes are placed on a form which states that the member has reviewed the petition and gives spaces in which the member signs and dates to show that they do or do not recommend clemency. When materials are submitted to the Board after a member has voted, the materials are still forwarded to that member, either by mail or fax depending on the space and time constraints. None of the members or anyone in the office of the Board investigates or verifies any of the information provided to them for consideration. The Board does not provide the Governor with any reason for their failure to recommend clemency. The members individually testified they do not

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[4] The dates of the votes on Faulder's petition were from November 13, 1998 to December 9, 1998; and the dates of the votes on Barber's petition were from December 3 to December 9, 1998. In the Faulder case, the majority of the Board members had voted to reject the clemency petition by November 26, 1998. In the Barber case, the majority of the Board members had voted to reject the clemency petition by December 4, 1998 — a mere three days after the petition was filed. In both cases, Rodriguez entered the final vote, on December 9, 1998 and then notified the Governor of the action of the Board.

discuss with each other the basis for their votes and they state no reason for their votes on their voting sheets.

Rodriguez, obviously frustrated and angered by the petitioners' challenge to his process, testified adamantly that the Board has the power to call hearings, conduct investigations, interview petitioners, and request testimony. However, Rodriguez concedes that the Board has not conducted any such activities since he began his tenure as Chair in 1995. This is remarkable, especially considering the fact that the Board has reviewed fifty-seven clemency petitions during the tenure of Rodriguez as Chair of the Board.[5]

Only once has the Board recommended clemency to a death-row inmate. On June 26, 1998, Governor George W. Bush, in accordance with a recommendation by the Board of Pardons and Paroles, commuted the death sentence of Henry Lee Lucas to life imprisonment.[6]

As for the procedures applied to the petitioners in their individual clemency petitions, the Court makes the following findings, without repeating the findings stated in the factual background above. Faulder's clemency petition was filed November 4, 1998, over a month prior to his scheduled execution date of December 10, 1998. Faulder's clemency petition contained peculiar issues because Faulder was a Canadian citizen at the time he was arrested for committing the crime that led to his death sentence. Faulder's case raised issues of international law that, as a result, has attracted

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[5] Paul Prejean, who has been a member since 1993, testified no board member has ever requested a hearing or teleconference on any of the seventy-six clemency petitions considered during his tenure. He has never voted in favor of a recommendation of clemency.

[6] There was, of course, no evidence as to why this recommendation was made by the Board, but it is beyond dispute this action was requested by the Attorney General, law enforcement officials, as well as those representing the judicial system.

international attention. Specifically, Faulder asserts that the Geneva Convention was violated because the Canadian consulate was not notified of his arrest, charges, conviction, or sentence.[7]

The evidence shows Faulder's petition and the information in support of and opposing the petition was distributed in the normal fashion. There was evidence a doctor wrote a letter attacking the competency and validity of the testimony of the state's psychiatric expert in the trial court, Dr. Grigson, and that letter was not passed on to Board members. Several documents from family members and friends of Faulder, submitted in Faulder's 1997 clemency proceedings, were inadvertently not passed on to Board members during Faulder's 1998 clemency request, thereby violating the Board's own procedure. Furthermore, letters from a United States congressman and a national organization representing thousands of churches in favor of Faulder's clemency were not passed on to the Board members.[8] There was also evidence that United States Secretary of State Madeleine Albright submitted a letter to the Board on November 28, 1998, although all but four of the members had voted by that date. Only one of the voters, Rissie Owens, requested a new voting form in light of the Secretary of State's letter. None of the members changed their vote due to that letter.

The defendants offered the testimony of eleven Board members, as well as Rodriguez, and each member testified that in both Faulder's and Barber's cases, they undertook a review of the

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[7] That international law issue is not before the Court, and it is only mentioned as background information regarding Faulder's clemency process.

[8] Hornsby testified that the letters the Board receives are first reviewed by a staff member. If the staff member believes the letter is noteworthy, he will bring it to Hornsby's attention. If Hornsby agrees, he will forward a copy to Rodriguez or the General Counsel. However, if the staff member does not bring Hornsby's attention to a particular letter, it will not be brought to any member's attention.

materials in their petitions before entering their votes. Each member testified he or she had never voted by the flip of a coin[9] or based on a petitioner's race, national origin, or any other factor of that sort.[10]

Since the emergency hearing before this Court on December 9, 1998, the Board has produced evidence demonstrating its capital clemency process. Specifically, it has submitted copies of the voting ballots, on which each Board member attests he or she "has reviewed" the petition before coming to a conclusion on a vote. Therefore, the state has a process that:

(1) allows petitioners to file petitions for clemency with supporting information;

(2) provides much of the information submitted to the voting members; and

(3) provides for the members to vote after reviewing the petitions.

The testimony makes it clear that all pertinent information is not given to all Board members before they vote, and some information is inadvertently never provided to the Board members. For example, in Faulder's case, fourteen Board members had voted before receiving Madeleine Albright's letter. In Barber's case, a majority had voted against the recommendation of clemency within three days of its filing.[11] Members are provided with an opportunity to recast their votes in light of subsequent filings, but they are not required to re-attest that they have reviewed the entire

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[9] It is clear to the Court that members do not flip a coin to determine whether to recommend clemency as their votes are almost always unanimous against the recommendation. The Board has voted to recommend clemency only once in the past 76 petitions. It is elemental a flip of the coin would be more merciful than these votes.

[10] The members consistently testified they considered a petitioner's guilt or innocence, but no member could specify with any particularity what he or she would look for to determine a recommendation for clemency.

[11] One member, Juanita Gonzalez, received the petition sometime on the morning of December 4, 1998 and then voted at 10:45 a.m. that same morning.

petition. It is apparent none of the members read every word on every line of every piece of paper in the clemency application. Most of the members who testified admitted this, although each emphasized that they fully considered and reviewed the entire application. Only Rodriguez testified that he reads every bit of every file, and his credibility is suspect. Rodriguez hedged too much in his responses, stating the members and he "wade through," "review," and "consider" all materials submitted to them and testified it would not be proper to do otherwise.

Nevertheless, *minimal* procedural safeguards do not require that every Board member read every page of every document submitted. It is clear a clemency petitioner has a right to submit a petition, along with any supporting material he or she desires at the time of that submission. Thereafter, state officials attest they "review" that petition. Then, the eighteen Board members vote whether or not to recommend clemency. This process may not meet normal due process standards, but it does meet "*minimal* procedural safeguards." Justice O'Connor certainly chose to italicize "*minimal*" in *Woodard* for a reason. And she chose the examples of coin flipping and denial of all access to the process for a reason.

Therefore, the key is that the process implemented in these cases as to these petitioners satisfied the minimal requirements of the due process as suggested in *Woodard*. The petitioners have failed to prove that they were denied access to the clemency process or that the votes in their cases were arbitrary, capricious, whimsical, or based on improper factors. The Board members testified that they did not base their votes on arbitrary or impermissible reasons. The testimony of the Board members that the voting process was not arbitrary or capricious is essential to the Court's finding that Faulder and Barber indeed received "*minimal* procedural safeguards" in the review of their clemency petitions.

The Board could render frivolous any future cases attacking the its clemency procedures by implementing the following procedural safeguards:

(1) allow the petition and exhibits to be filed with the appropriate authority;

(2) disseminate the petition to those persons with authority to act;

(3) hold a hearing before those with authority, or, in the event of not holding a hearing, requiring the reason(s) for each vote to be stated.

This procedure could be met by simply adapting the current procedures to require members to succinctly state their reasons for recommending or not recommending clemency. This could be a minor addition to the current fax form used for voting on clemency petitions. Ironically, the only reason Rodriguez objects to having members give the reasons for their votes is that he fears it would lead to further litigation. If that fear was not nonsensical in the past, it is certainly nonsensical after *Woodard*: requiring Board members to give reasons for their votes provides a "procedural safeguard" to ensure that members don't "flip a coin" to arrive at their votes or otherwise vote based on arbitrary or impermissible reasons. Without even a minimal institutionalized procedure to protect against arbitrary decision making, every clemency denial will be subject to judicial review to determine whether each petitioner received "minimal procedural safeguards."

It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal. Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system. The Board would not have to sacrifice its conservative ideology to carry out its duties in a more fair and accurate fashion. Giving reasons for its decisions and/or holding hearings to allow petitioners and other interested parties to present evidence would not threaten the employment of the

Huntsville executioner. Instead, it would ensure the legality of the system and provide greater protection against arbitrary or improper outcomes.

But of course, the Court's duty is not to legislate and mandate wise policies–it is to apply the law as stated by the Constitution as interpreted by the Supreme Court. Regardless of whether the Texas clemency procedure that denied clemency to Faulder and Barber was desirable, the Court concludes the procedure did provide *these* petitioners with the "*minimal* procedural safeguards" suggested by the five Justices in *Woodard*. The issue of whether the procedures comply with Texas law is not a question for this Court and must be reserved for the Texas Supreme Court and/or the Texas Court of Criminal Appeals, whether those Courts have the desire to address those issues on the merits or not. The issue of improving the procedures of the Board and instituting a process that will not require judicial review of the clemency procedures on a case by case basis is the responsibility of the Board, the Governor, and the Texas Legislature.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the Faulder Defendants' Motion for Leave to File Amended Motion to Dismiss, Answer, and Motion for Summary Judgment [#20 in Cause No. A-98-CA-801] is GRANTED;

IT IS FURTHER ORDERED that the defendants' Motions to Dismiss in both causes are GRANTED IN PART, insofar as they relate to the defendants the Board of Pardons and Paroles and Gary Johnson;

IT IS FURTHER ORDERED that the defendants' Motions for Summary Judgment in both causes are GRANTED IN PART, insofar as they relate to the individual members of the Board of Pardons and Paroles;

IT IS FURTHER ORDERED that the petitioners' Motions for Temporary Restraining Order and Preliminary Injunction are DENIED;

IT IS FURTHER ORDERED that the stay of Danny Lee Barber's execution ordered in this Court is WITHDRAWN;

IT IS FURTHER ORDERED that the stay of Joseph Stanley Faulder's execution ordered in this Court is WITHDRAWN;

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.

SIGNED on this the 28th day of December 1998.

SAM SPARKS
UNITED STATES DISTRICT JUDGE