Burke Butler

Recommendation to the Sunset Advisory Commission
Re: The Texas Board of Pardons and Paroles

Capital Clemency in Texas

Submitted By:

Texas Defender Service, Texas Coalition to Abolish the Death Penalty, LatinoJustice, Texas Civil Rights Project, ACLU of Texas, Texas Fair Defense Project, Innocence Project of Texas, Texas Center for Justice and Equity, and Texas Appleseed

March 8, 2024

TEXAS
CIVIL RIGHTS
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Texas Center for
Justice & Equity
SOLUTIONS FOR SAFE, HEALTHY,
JUST COMMUNITIES

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ISSUE: When it comes to the capital clemency process, Texas is an extreme outlier. **We recommend that the Texas Board of Pardons and Paroles bring its practices in line with national norms by holding hearings in capital cases, thereby ensuring that the capital clemency process in Texas serves its intended role in the administration of justice.**

We also recommend that the Board increase transparency. It can do this by: (1) providing guidance on its criteria for assessing whether to grant capital clemency; (2) deliberating and voting publicly; and (3) providing a written, public explanation of its decisions.

BACKGROUND: Capital clemency is a foundational aspect of the administration of justice and serves an important function for both capital defendants and victim family members. Of the 27 U.S. states that maintain the death penalty, all have a clemency process. In the words of the U.S. Supreme Court, executive clemency is "the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). Clemency plays a particularly important role for death-sentenced prisoners. **Clemency is a capital defendant's final opportunity to petition for his life and, unlike the judicial process, allows consideration of evidence that may be procedurally barred from consideration in court.** Capital clemency also allows consideration of non-legal matters: issues that may not qualify for judicial relief but are nonetheless deserving of consideration by the state. This can include evidence of rehabilitation and remorse, signs of serious mental illness or other mitigating circumstances, testimony from corrections' officials, wishes of the victims' survivors that the petitioner's life be saved, and an exemplary record while incarcerated. **In addition, clemency hearings can let victims' families have a voice by granting them an opportunity to speak directly to all members of the clemency board at the same time.**

Texas has carried out more executions than any other state. But its clemency process is highly unusual and, as a practical matter, fails to fulfill clemency's intended purpose.

- **The Texas Board of Pardons and Paroles does not hold hearings on capital clemency petitions.**

The Texas Governor may grant clemency for a person serving a death sentence upon a recommendation by the majority of the Texas Board of Pardons and Paroles. The Board can recommend a commutation to a lesser sentence or a temporary reprieve. (The governor may also issue one 30-day reprieve without Board action.) A petitioner must submit their petition no later

than 21 days before their scheduled execution. **In their petition, a petitioner may request a hearing, but the Board is not required to hold hearings, and rarely holds them in practice. In the history of the modern death penalty in Texas, the Board has only heard a single clemency hearing, for Johnny Frank Garrett in 1992.**[1]

Texas's failure to provide a clemency hearing is unusual. Texas is one of six death-penalty states that require a board to recommend clemency prior to the governor's clemency grant.[2] **Of these six states, Texas is the only one that does not require Board deliberation. Texas is also one of only two states that do not require the board to hold a hearing or interview the petitioner.**[3] The other state is Idaho. While Idaho's written process is similar to Texas's, Idaho is not a high-use death penalty state; it has only executed three people since 1976 and has eight people on its death row. Moreover, although Idaho's board is not required to hold clemency hearings, it has held hearings in practice.[4]

In contrast to clemency practices in Texas, **Oklahoma** requires a hearing at which representatives for the State and the defense have an opportunity to present for 40 minutes each. The petitioner and the victim or victim's representative also have the opportunity to speak for 20 minutes.[5] **Florida** requires the Florida Commission on Offender Review to initiate an investigation into clemency upon request of the governor, and the results of that investigation are placed on the agenda of the Clemency Board's next meeting or addressed at a separate meeting.[6] **Pennsylvania** automatically schedules a hearing once an execution date is set.[7] And **Arizona** notifies capital defendants of their right to participate in clemency hearings that are public and recorded.[8]

- **Texas's clemency process is not transparent.**

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[1] Am. Bar Ass'n, *Overview of Capital Clemency in Texas*, https://www.capitalclemency.org/state-clemency-information/texas/ (last accessed Feb. 14, 2024).

[2] These states are Arizona, Oklahoma, Florida, Idaho, Pennsylvania, and Texas. *See* Statement Regarding Senate Bill 685 by Laura Schaefer, Esq. (Senate Criminal Justice Committee Apr. 8, 2021) (attached to this Recommendation) (hereinafter Statement Regarding Senate Bill 685).

[3] Death Penalty Information Center, *Idaho, Additional Information*, *available at* https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/idaho; Statement Regarding Senate Bill 685 by Laura Schaefer, Esq.

[4] Statement Regarding Senate Bill 685 by Laura Schaefer, Esq.

[5] OKLA. ADMIN. CODE § 515:10-5-2(4).

[6] FLA. COMM'N ON OFFENDER REV., RULES OF EXECUTIVE CLEMENCY § 15(F), *available at* https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf.

[7] 37 PA. CODE § 81.231.

[8] ARIZONA BOARD OF EXECUTIVE CLEMENCY: WARRANTS OF EXECUTION, BOARD POLICY #107, *available at* https://boec.az.gov/sites/default/files/documents/files/107-Warrant%20of%20Execution.pdf.

The Texas Board of Pardons and Paroles does not publicly share the criteria it uses in assessing whether to grant or deny a petitioner's clemency request. As a result, petitioners lack information on what evidence they should present in their petitions. The Board also fails to explain the reasons for its decision, either orally or in writing. Further, Board members do not meet to deliberate and vote on the outcome of requests for clemency. In other states, clemency boards meet publicly to deliberate and vote. In **Arizona**, for example, the board votes at the clemency hearing once the clemency presentation is completed; the hearing is public and videotaped.[9] In **Oklahoma**, the board is required to vote on whether to recommend clemency before the clemency hearing is adjourned.[10] In **Pennsylvania**, the board votes publicly on the clemency petition.[11]

- **Texas has refused to consider capital clemency when there is no pending execution date.**

In some capital cases, the Texas Board of Pardons and Paroles has stated that it would not consider commutation requests unless there is a pending execution date. This occurred in the case of Jeff Wood, who is serving a death sentence after having been convicted under Texas's law of parties for a murder committed by someone else. In 2017, Mr. Wood's counsel filed a request for commutation. The police chief, prosecutor, and the district judge also wrote a letter in support of clemency, and ten Texas legislators submitted their own letter of support.[12] Yet, even though these officials agreed that Mr. Wood's death sentence was unjust, the Board refused to consider the petition on the grounds that Mr. Wood had no execution date pending. As a result, Mr. Wood remains incarcerated on Texas's death row.

Another example is the case of Max Soffar. Mr. Soffar was dying of terminal liver cancer when he petitioned the Board for mercy in 2014. Mr. Soffar had been litigating his actual innocence claim in the courts for years, arguing that no physical evidence connected him to the murders for which he was convicted. Many people, including judges, a former FBI Director, and a former Texas Governor, believed Mr. Soffar had been wrongly convicted.[13] Mr. Soffar's attorneys petitioned the Board to grant Mr. Soffar clemency so he could die privately and at home with his wife, but the Board rejected his plea, issuing a letter stating that it had no authority to consider his

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[9] *Id.*
[10] *See* OKLA. ADMIN. CODE § 515:10-5-2(13).
[11] 37 PA. CODE § 81.233.
[12] Jolie McCullough, *District Attorney Who Prosecuted Jeff Wood Now Wants Him off Death Row*, TEX. TRIB (Dec. 7, 2017), https://www.texastribune.org/2017/12/07/jeff-wood-death-sentence/.
[13] Am. Civ. Liberty Ass'n, *State of Texas v. Max Soffar*, https://www.aclu.org/cases/state-texas-v-max-soffar (last accessed Feb. 14, 2024).

petition because he had no pending execution date. Forced to live out his days on death row, Mr. Soffar died of liver cancer on April 24, 2016.[14]

There is nothing in Texas statute or in stated policies that prevents the Board from considering such requests before an execution date is set. This practice impedes the Board from ameliorating injustice and should be ended.

- **Texas grants clemency to an unusually small number of capital petitioners.**

Texas rarely grants clemency, especially when compared to the extraordinarily high number of people it has executed and when compared to other executing states. **Since 1982, Texas has executed 586 people, and in that time, the Texas Board of Pardons and Paroles has only recommended clemency for five individuals**, three of whom were ultimately granted clemency by the governor.[15] In contrast, Oklahoma, the second-highest executing state, has executed 123 people and granted clemency for five individuals; Virginia, the third highest-executing state, has executed 113 people and has granted clemency in 10 cases. Other states grant clemency at even higher rates: Georgia has executed 76 people in the modern era and granted clemency for ten people, while Ohio has executed 56 people and granted clemency for 21 people.[16]

RECOMMENDATIONS: As the American Bar Association has stated, "Texas should have confidence that the final safeguard to prevent wrongful execution is a meaningful one."[17] But, as the ABA explained, Texas's current clemency process, "which permits the Board of Pardons and Paroles (Board) to make a decision without a hearing [and] permits the Board to make a recommendation to deny or grant clemency without meeting as a body, … does not serve this function."[18]

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[14] *See* Michael Hall, *Maz Soffar Dies in Death Row Hospital*, TEX. MONTHLY (Apr. 25, 2016), https://www.texasmonthly.com/the-daily-post/max-soffar-died-on-death-row/; *State of Texas v. Max Soffar*, *supra* note 13.

[15] The Board of Pardons and Paroles recommended clemency in the cases of Henry Lee Lucas (commuted in 1998), Kenneth Foster (commuted in 2007), and Thomas "Bart" Whitaker (commuted in 2018). Then-Governor Rick Perry rejected the Board's recommendations to grant clemency for Kelsey Patterson (executed in May 2004) and Robert Lee Thompson (executed in 2009). *See* Tex. Coal. to Abolish the Death Penalty, *Stop Executions*, https://tcadp.org/stop-executions/ (last accessed Feb. 14, 2024); Death Penalty Information Center, *Clemency and Executions*, https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state (last accessed Feb. 14, 2024).

[16] *See* Death Penalty Information Center, *Clemency and Executions*, https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state (last accessed Feb. 14, 2024).

[17] *See* AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS CAPITAL PUNISHMENT ASSESSMENT REPORT xiv (2013).

[18] *Id.* at xiv, 284.

To address these issues, we recommend that the Texas Board of Pardons and Paroles:

- Hold **public hearings** (virtually or in person) on all petitions for capital clemency. The hearings should include an opportunity for victims' families, petitioners, petitioners' family members, petitioners' counsel, counsel for the state, and other interested parties to speak to the full Board. The board should then **deliberate and vote publicly**.
- Provide **written guidance** for capital petitioners and their counsel on the factors the Board is taking into consideration for assessing whether to recommend clemency.
- Take under consideration capital clemency petitions **without regard to whether there is a pending execution date.**
- Issue a **public explanation** of the reasons for its ultimate recommendation in each case.

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October 10, 2024
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To the Sunset Advisory Commission:

Texas Defender Service (TDS) respectfully submits these comments in response to the Sunset Staff Report on the Texas Department of Criminal Justice, Correctional Managed Health Care Committee, Windham School District, and Board of Pardons and Paroles issued on September 26, 2024 (the Report). TDS commends the Sunset Staff on its comprehensive review and the listed recommendations contained in the Report. While recognizing the importance of the entire Report and reserving the right to comment more fully later, TDS limits its comments here to the Report's discussion of Issues 4, 5, and 6, all of which pertain directly to TDS's work.[1]

The Report highlights the Texas legislature's decision long ago to "alter[] the mission of the Texas Department of Criminal Justice (TDCJ) to eliminate any mention of punishment and instead direct TDCJ to promote positive change in inmate behavior through rehabilitation and reintegration efforts." (Report at 73.) For the Board of Pardons and Paroles (the Board), what this means is that its ultimate responsibility is determining when an individual is "sufficiently rehabilitated to release" back into the community safely and successfully. (Id.)

As the Report makes abundantly clear, however, neither TDCJ nor the Board are meeting these statutory obligations. Among other shortcomings, TDCJ is failing to provide effective, timely, and accessible programming to help individuals build the skills and mindset needed for them to succeed on parole. While the Board does not have access to complete, accurate, and meaningful information about the people it is reviewing and on which it should be basing its determinations.

It is incumbent on the Sunset Advisory Commission to address these failings as comprehensively and boldly as possible or risk having Texas continue to incarcerate tens of thousands of individuals who could safely return to the community and lead productive, meaningful lives. The research is clear that the most effective way to reduce recidivism is to get people out of prison and reintegrated into their community as quickly as possible. To do otherwise wastes hundreds of millions of taxpayer dollars,

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restate its position on these issues here, a copy of TDS' submission to the Sunset Staff is attached.
ints the Commission and its staff to an embargoed copy provided to Sunset Staff of a soon-to-be-
t that discusses in more detail recommendations for strengthening Texas's parole process. *See*
ole Reform in Texas: Recommendations to Achieve Forward-Looking Justice (forthcoming) (a
The University of Texas Law School's Civil Rights Clinic and William Wayne Justice Center for
est Law).

threatens community safety, and undermines TDCJ's obligation to rehabilitate and reintegrate individuals back into the community.

Altogether, the Report paints a picture of an agency unable to meet its core functions. The parole process is one area where strategic common-sense reform will also bring immediate and significant relief to the severe challenges facing TDCJ and the Parole Division.

Issue #4: Inmate Rehabilitation Programs

Programming Standards, Pre-Release Requirements, and Delays in Accessing

The Sunset Advisory Commission rightly identified concerns involving TDCJ programming and its implementation, namely the lack of evaluation of programs, individualized program assignment, and lengthy delays for parole-voted program placement. Among the Report's recommendations, TDS specifically calls out 4.4, 4.5, and 4.10 for immediate action.

Most individuals who are incarcerated understand the benefits of programming and are eager to begin building new skills and preparing for their return home as soon as they arrive at TDCJ. Individuals should be able to gain the skills and growth they desire when they seek it out, especially since those are the skills and growth that BPP is looking for in determining an individual's readiness for parole. Waiting to enroll individuals in critical programs until after they have been approved for parole makes no sense – it delays the individuals' release by months or even years, and it means the Board is deeming someone to be parole ready before they have even taken the class that the Board thinks is necessary for safe release.

The overutilization of pre-release programming also is problematic. Many of the parole-voted programs are duplicative of other programs an individual may have already completed. Cognitive Intervention and Changes, for example, are often completed early in an individual's incarceration, however, both programs are commonly required pre-release even for individuals who have previously completed the programs. Likewise, because parole-voted programs come at the end of an individual's incarceration, they can be unnecessary. Substance use programs are often assigned to individuals who have been sober for years or even decades and attending programs where they learn basic recovery tips and skills they already know only causes undue delays in their return home.

Delays due to parole-voted programming can impact an individual's reentry plan. When an individual is accepted into a transitional home, they will not know if a bed is available until they are close to their release date. The lack of communication from TDCJ about program delays and unexpected moves between units creates uncertainty about an individual's release date and they cannot accurately communicate with the transitional home to make certain plans.

Pre-release programming should be utilized only when deemed necessary for public safety. It should be the exception, not the norm, and should focus only on issues that cannot otherwise be addressed through programming in the community.

Issue #5: Unnecessary Barriers to Effective Supervision

This section focuses on the severe understaffing in the Parole Division and the unmanageable caseloads that each parole officer must carry as a result. The burdens and challenges faced by the

Parole Division staff also have real and far-reaching impacts on the individuals under supervision. The current crisis means that many individuals receive inappropriate levels of oversight; cycle through multiple parole officers, making it impossible to build long-term, trusting relationships; and are left on their own to identify and access the kinds of reentry support they will need to succeed.

It is unsurprising, then, that the Report's list of parole officer duties is purely investigative, administrative, or punitive in nature, for example, overseeing electronic monitoring equipment, documenting violations, administering UA tests, or performing compliance checks. (Report at 93.) The list includes nothing related to providing support or resources to individuals who are on supervision and struggling with the challenges that come with reintegration following incarceration.

For parole to be effective and to provide the kind of support that individuals will need to succeed, TDCJ must ensure that Parole Offices have robust resources and staffing. For these reasons, TDS supports all the recommendations contained in the Report on this issue and offers the following additional recommendations:

1) Incorporate State Certified Peer Support Specialists in all Parole Division Offices.
   Parole Offices across the state should incorporate the use of state certified peer support specialists. TDCJ's use of peer educators inside its facilities has greatly expanded the range of programming available and has proved hugely successful. So too, employing peer support specialists to provide reentry, mental health, and recovery support would allow the Parole Division to provide individuals with a trusted community and access to direct support that is most needed when someone first comes home from incarceration.

2) Identify a meaningful process by which individuals may be discharged early from parole supervision based on good conduct and length of time served.
   Just as good time inside TDCJ is used to incentivize good behavior, so too parole could implement a process for receiving good time for those who are meeting all their parole conditions and are successfully reintegrating into society. Given the every-increasing length of sentences in Texas over the past thirty-plus years, it makes sense to relieve the Parole Division of the need to monitor older individuals who are doing well but are facing decades of parole due to sentences they received in their 20's or 30's. Rewarding good behavior, service to community, and long-term recovery will benefit the Parole Division, the individual under supervision, and the larger community.

Issue #6: Ensure Individuals are Given the Opportunity for Timely, Safe, and Successful Reintegration.

We commend the Sunset Committee Staff Report for identifying that current IPO interviews focus on the wrong information and fail to create a full picture of an individual's past and their growth over time. Moreover, interviewer bias coupled with a lack of transparency likely leads to inaccurate and incomplete case summaries.

The Board of Pardons and Paroles has the authority to interview any parole-eligible person and review all available files. The Board's overwhelming workload, however, means that it has no choice but to lean heavily – in many, if not most, cases almost entirely – on the IPO's case summary, risk assessment calculation, and recommendation when rendering these life-altering determinations. Currently, the interview portion of the IPO's investigation is the only opportunity most parole-eligible persons will have to speak to and provide context for the dynamic factors the Board is obligated to consider in its determination.

The importance of the IPO interview cannot be overstated. It is the parole-eligible person's one opportunity to speak person-to-person about themselves, their internal growth and changed mindset, and the history of trauma and other life circumstances that led them to TDCJ in the first instance. If the Board's mission is to assess a person's reintegration potential, it is impossible to gather the kind of information necessary for such a determination based solely on a paper review.

We concur with the Report's recommendations on issue #6, in particular relating to IPO interviews and MRIS reviews. The Committee needs to do even more, however, to ensure that the Board has the information that it needs to render fully informed parole determinations, including:

1) <u>IPO interviews must be accurate, comprehensive, and trauma informed.</u>
   Every parole-eligible individual should be interviewed by someone trained in trauma-informed interviewing. The interviews should be structured and substantive in nature and provide the individual being interviewed with a meaningful opportunity to offer context and history to a range of topics, including criminal and substance use histories, personal growth, and details of their reentry plans beyond basic housing and employment prospects. Interviews should be recorded to allow for periodic auditing.

2) <u>Provide individuals in parole or DMS review the opportunity to timely review and challenge information provided to the Board for consideration.</u>
   There should be a mechanism by which the individual who is interviewed and/or their representative can verify the accuracy and completeness of the information gathered during the interview. The individual should be provided with a copy of a transcription, along with copies of the IPOs case summary and matrix calculation to verify the accuracy of the information.

3) <u>Provide individuals coming into parole or DMS review with the information and support needed to meaningfully advocate on their own behalf.</u>
   TDCJ should implement peer education programming that teaches individuals coming into review about the parole process and what they can do to advocate on their own behalf. This might include workshops to assist individuals in drafting letters to the Board, collecting letters from family and friends that detail the specific supports the person will receive on their return home, and identifying the person's reentry needs and the reentry supports available to them in the geographic location where they are planning to release and helping to connect them to those resources early. Not only will this enable more individuals to provide the IPO and the Board the kind of information that will help in determining who is ready to return home safely, but the act of thinking

about and planning for the future in a way that makes a different life trajectory feel possible is itself empowering for the individual and helps prepare them for long term success.

4) Focus the Board's decision-making on forward-looking factors and eliminate the Offense Severity Class from the final Guideline score.

   The Board has a legitimate interest in assessing whether a person who is parole eligible can safely return home. But today, this determination is overly reliant on the crime of conviction and other backward-facing, static factors that can never change. The Board's duty is to assess an individual's "rehabilitation," which is inherently a dynamic, forward-looking inquiry. The Guideline scoring should focus solely on the list of static and dynamic factors (which already scores the commitment offense) and eliminate Offense Severity Class from consideration.

Recommendation to the Sunset Advisory Commission
re: The Texas Board of Pardons and Paroles

Parole in Texas

Submitted by:

Texas Defender Service

Helen Gaebler, The University of Texas School of Law[1]

Texas has one of the largest criminal-justice systems in the world and incarcerates more people than any other State in the United States. Moreover, people incarcerated in Texas are forced to endure some of the most brutal conditions of confinement in the country. Housed in aging, dangerous facilities that are severely understaffed and under-resourced, ninety-five percent of these individuals will one day come home from prison—and their experience of incarceration will have real and lasting consequences for all of us.

Texas is well-known for its long sentences. These sentences extract an enormous human toll on our communities with a ripple effect felt across many related systems: education, healthcare, government benefits, child welfare, and the state's workforce, to name just a few. Eighty percent of people who are incarcerated are parents of minor children, and half a million Texas children have experienced an incarcerated parent. For every person incarcerated, that is one less person ready and capable of supporting their children or aging parents, participating in the state's burgeoning workforce, saving for their eventual retirement, or contributing to Texas's tax base.

The research clearly shows that the most effective way to reduce recidivism is to get people out of prison and reintegrated into their communities as quickly as possible. For every additional year of incarceration beyond one's parole eligibility date, a person's ties to family and community are further strained, their physical and mental health worsens, and their exposure to the trauma and criminality of life inside prison deepens. Moreover, incarcerated people have limited access to high-quality, evidence-based programming due to staffing shortages and strained prison budgets. Therefore, for all of their additional time in prison, they gain nothing in terms of educational opportunities or reentry support.

Half of incarcerated Texans are parole eligible, and most of them are ready to serve the remainder of their sentence at home. Yet most of these individuals will not be released until years or

[1] The opinions and conclusions expressed here are solely those of Professor Gaebler and do not represent the opinion or policy of the William Wayne Justice Center for Public Interest Law, The University of Texas School of Law, or The University of Texas at Austin.

decades after their parole eligibility date—a date that was taken into consideration at the time of the prosecutor's charging decision and at sentencing. The failure to release individuals to community supervision who are ready and able to safely return home serves only to increase the risks of recidivism and places an overwhelming burden on Texas's already strained correctional system.

It also places an enormous toll on Texas families and communities. It is not just the incarcerated individual who suffers with each additional year served and experiences the emotional despair and hopelessness that accompanies every parole denial. Family members waiting on the outside for their loved one's return experience these same burdens and the emotional rollercoaster of parole. These are the people who are shouldering the burdens of caring for children without their parents, filling in care gaps for aging parents and extended family, and supporting their loved ones financially and emotionally. These are the people who are also victims of the system and yet are provided little, if any, voice in the process.

Texas's parole system should uphold our collective societal interest in improving public safety and supporting a safer, more functional prison system for everyone. The Texas Board of Pardons and Paroles can do this by releasing people from prison on their parole eligibility date unless doing so presents an objective, measurable and imminent risk to the wider community. This would improve community safety, help close understaffed prisons, and free up resources to increase in-prison programming that can reduce recidivism. And if the Board denies an individual for parole, clear guidance should be provided regarding what more is needed to assuage the Board's concerns and what that individual (and their family) can be doing to ensure success on the next review.

Texas's current parole system does none of these things. Instead, it perpetuates unnecessary incarceration, permits unbounded subjectivity in deciding when to release someone to community supervision, and leaves incarcerated individuals and their families in the dark as to what more is needed before release is possible.

The Texas Board of Pardons and Paroles currently grants parole to only a tiny fraction of the people who could safely go home. Even for individuals deemed to be the lowest possible risk of reoffending, it denies roughly 40% of the parole reviews. Parole decision-making is unduly backward-looking, meaning that an individual's risk of reoffending is based almost entirely on the crime of conviction. The evidence and related research on recidivism is clear, however, that people who commit the more serious or violent offenses are the ones least likely to commit a new crime post-release. Similarly, the Texas Department of Criminal Justice and the Texas Board of Pardons and Paroles grossly under-utilize Texas's compassionate release statute, which offers a humane and rational path to reducing our prisons' burgeoning population of aging and medically fragile prisoners—individuals who are statistically the least likely to commit a new offense, regardless of their prior offense history.

Texas's dysfunctional parole system means that the Texas Department of Criminal Justice pours vast financial resources into caring for the unwell and the elderly, and into imprisoning

individuals who are ready and able to return home safely. As a result, Texas's prisons are too under-resourced to offer comprehensive rehabilitative, trauma-focused programming to those who are most in need of that programming and who will also one day be released. The Texas Board of Pardons and Paroles is too overwhelmed with its current workload to meaningfully review the most complex and potentially risky cases that come before it.

These problems are serious, but there are solutions. The Texas Department of Criminal Justice (TDCJ) and the Board of Pardons and Paroles (the Board) can make urgently needed, common-sense changes to get more people out of prison more quickly and with more support.

1. **Reframe parole decision-making so that the only question for decision-makers is whether a person can safely serve the remainder of their sentence on community supervision.**

Once a person becomes parole eligible, the sole question for the Board should be whether they can safely serve the remainder of their sentence in the community. Any societal interest in punishment and retribution has been served: the parole eligibility date was contemplated in the person's initial sentence and, if released, they will continue to live under criminal supervision for the duration of their sentence (i.e., life, for those serving life sentences). People who are eligible for parole have already been incarcerated for years, in many cases decades. Serving the remainder of their sentence at home was expressly contemplated at the time of their original sentencing and is fully consistent with the spirit and letter of the law under which they were convicted.

For individuals deemed to be at lower risk of reoffending (i.e., categories five, six, and seven per the Board's current matrix), release should be automatic as soon as eligible—and without additional required programming—absent a specific, enumerated, objective reason to deny release. For individuals who are identified as being at higher risk of reoffending (i.e. categories one through four), the Board decision-makers must focus solely on the question of whether the person can safely serve the remainder of their sentence at home. Concerns of possible future technical parole violations should not enter into the determination whether to release an individual to community supervision. The sole question should be whether releasing the individual presents an identifiable, imminent safety risk to their home community.

2. **Focus decision-making criteria on forward-looking rather than backward-looking factors.**

The Board has a legitimate interest in assessing whether a person who is parole eligible can safely return to their community. But today, this determination is overly reliant on the crime of conviction and other backward-looking, static factors that can never change. Crime of conviction is not an evidence-based way to determine future risk. In fact, people who commit serious crimes usually have the lowest risk of recidivism.

Rather than focus on past or "static" factors, the Board should weigh more heavily forward-looking or "dynamic" factors, such as current age, in-prison programming, and current security level. It should also limit prosecutor and victim statements to forward-looking and post-offense information and remove the "Offense Severity Class" from the formula it uses to make parole decisions. Parole's focus should be on the individual who is incarcerated and that person's ability to live safely in their community. It is not a time to relitigate the underlying offense or for the voting decision-maker to second guess charging or sentencing decisions that were made at the time of the original prosecution.

3. **Expand the scope of Texas's compassionate release statute.**

Texas's compassionate release statute contemplates community supervision for people who are medically fragile, as well as those who are elderly, but TDCJ and the Board rarely utilize this authority despite an ever growing population of individuals who have aged out of criminal behavior or whose medical conditions are so limiting that they pose no risk to their community. Fifteen percent of people in Texas prisons are over the age of 55, of whom 10,108 are parole eligible; 4% of people in our prisons are over the age of 65. There are more than 600 people over the age of 75 in Texas prisons, many of whom have serious health problems. Yet in 2022, the Board only released 58 people under the compassionate release statute, or 2% of the cases it even screened. It released no one who was eligible because of mental illness, intellectual disability, or physical handicap and only seven people who were eligible because of age. Elderly individuals pose virtually no public safety risk, and are at high risk of developing health conditions that are difficult to care for in a prison setting and that put these individuals at heightened risk of being preyed upon and victimized inside prison.

Compassionate release should be used more effectively by releasing people who are over 55 years of age solely on the basis of their age, without additional medical reasons. Working together, the Board and TDCJ can notify all elderly incarcerated people of their eligibility for compassionate release, and assign correctional staff members to coordinate these applications. The Board should set a target to grant more applications from people seeking compassionate release.

4. **Increase the fairness of the parole process by enhancing transparency, providing people with the resources they need to meaningfully participate in their own parole review, and limiting offsets to no more than two years.**

Texas's current parole process is opaque. People seeking parole are left with little to no information about what they can do to effectively prepare for parole review, how a particular parole decision was made, and how they can improve their chances of parole in the future. Transparency should be a cornerstone of the parole process because it ensures outcomes that are accurate, fair, and consistent with public safety. When people are deprived of the resources they need to effectively advocate for themselves, the Board lacks the information needed to more accurately and fairly assess who is a good candidate for release. So too, the lack of transparency means that the prospect of being

granted parole loses its value at incentivizing good behavior and productive use of one's time while incarcerated.

A parole attorney can partly compensate for this opacity because they at least understand how the process operates and they typically will be granted an opportunity to speak with the lead voter. But parole attorneys can easily cost thousands of dollars, a price tag that is prohibitive for most incarcerated people, who largely come from marginalized and impoverished communities. Absent legal representation, family members and their incarcerated loved ones are left to figure out on their own how parole decision-making works and what they can do to influence the process. Moreover, unlike attorneys, family members are rarely afforded the opportunity to speak with the lead voter. The result is a process that systematically disadvantages people who are poor and fails to incentivize people to grow and improve.

TDCJ and the Board should empower individuals to advocate on their own behalf when in parole review. This should include classes on making parole packets and assistance in preparing a comprehensive reentry plan in anticipation of going into parole review. These classes will help individuals share important, relevant information about their lives and the changes they have experienced since their incarceration with the parole board—information that would bear on the Board's decision-making in many cases. The person under review should also be provided a copy of the Institutional Parole Officer's (IPO) parole summary and matrix calculation so they can verify the accuracy of that information before the Board votes on their case. (The IPO interview should be recorded to verify that information conveyed during the interview is accurately included in the IPO summary, in case of any later alleged discrepancy.)

When a person is denied parole, the Board must be transparent about its reasons. It should provide the person who is incarcerated with a copy of the Board's complete file. In addition, the Board should provide specific guidance explaining what the person can do differently before their next parole review. Finally, the Board should be limited to not longer than two-year offsets absent extraordinary grounds. These changes will allow a person who is denied parole to learn from the Board's decision and address any concerns in advance of their next review cycle.