

IMPARTIALITY IS A FUNDAMENTAL AND LEGAL OBLIGATION OF THE OKLAHOMA PARDON AND PAROLE BOARD

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The Oklahoma Pardon and Parole Board's ("The Board") structure precludes it from evaluating incarcerated people's parole cases in an impartial manner, which violates The Board's statutory mandate and incarcerated people's right to fair and impartial hearings. If successful in my litigation against The Board for infringing on this right, I will be the first incarcerated person in Oklahoma history to win a legal decision against The Board.

It is the opinion of this writer that no inmate² confined in the Oklahoma Department of Corrections will ever receive a fundamentally fair and impartial clemency hearing from the Oklahoma Pardon and Parole Board, so long as both of the state's highest courts are permitted to appoint retired judges, in violation of the separation of powers doctrine, as well as district attorneys, and law enforcement, to this executive board.

Oklahoma's Pardon and Parole Board ("The Board") was created in 1944 by a constitutional amendment during the administration of Governor Robert S. Kerr. The purpose of the Board's creation was to cool the moral passions of a citizenry that felt ethically betrayed by former Governor Leon Phillips.³ The public was outraged after learning that Governor Phillips had granted clemency to a physician, serving a life sentence for murder, stemming from an illegal abortion.⁴ In an attempt to restore confidence in the executive, the authors of the constitutional amendment felt compelled to significantly limit the clemency power of the Governor, by requiring the newly created Board to "make an impartial investigation" and then "recommend" to the Governor only the inmates that the Board deemed worthy of clemency.⁵

At first glance, the constitutional amendment does not appear to create an irreconcilable conflict with any part of Oklahoma's Constitution, presuming, of course, that the duties prescribed in Article VI, Section 10 are performed in a lawful and ethical manner.⁶ However, a closer look at the Board's composition reveals an

^{1∞} David Ray Fleenor was a 24-year-old, first time felon, when twelve strangers – without special skill or training – recommended that he spend the remainder of his natural life in prison without review, after being found guilty of his first felony offense.

² Editor's note: The Harbinger recognizes that many people who are incarcerated prefer not to be referred to as "inmates." We defer to the author's language in this case.

³ See 2B Vernon's Okla. Forms 2d, Crim. Prac. & Proc. § 34.3.

⁴ See Bobby Ross Jr., *Clemency board draws critics*, The Oklahoman (May 29, 2000, 12:00 AM), <https://www.oklahoman.com/story/news/2000/05/29/clemency-board-draws-critics/62196126007/> (referencing a paper by Attorney Gary Peterson on the history of capital clemency in Oklahoma).

⁵ Okla. Cons. Art. VI, § 10.

⁶ *Id.*

impartiality that in practice denies inmates a fair opportunity to plead for mercy. The Board's composition allows the judiciary to unduly influence the recommendations of the Governor's appointees, "which I believe was intentional on part of authors" to wit:

There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor; **one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals.**⁷

By passing this constitutional amendment, the Oklahoma legislature encroached upon an executive power that previously belonged exclusively to the Governor-appointing Pardon and Parole Board Members. This created a separation of powers issue due to the constitutional amendment grafting the judiciary into the executive, while using public unrest as a justification, rather than the dictates of necessity.⁸

No inmate has ever litigated successfully against the Oklahoma Pardon and Parole Board since its inception in 1944-the same year the judiciary was incentivized to shield the executive board from legal challenges. If the state were to answer the allegation that this is indicative of the court's collusion with the legislature, their affirmative defense would be based on the presumption that every complaint filed by an inmate after the Board's creation was frivolous and without merit-that's absurd.

There is one uncontroverted fact known to every inmate who has ever worked as a facility law clerk in an Oklahoma prison-the judiciary uses its gatekeeping function to silence – or metaphorically keep a knee on the neck– of every inmate who has ever attempted to expose the corruption that permeates the Board – myself included.

On September 15, 2020, I appeared before the Board on an application for commutation. In support of my application, I provided the Board with clear and convincing evidence that the state's medical examiner had committed forensic fraud by testifying to a neurological conclusion that was not supported by the autopsy report.⁹ Both of the medical experts made themselves available to the board, or the board's attorney, for questioning prior to and during the commutation hearing. However, rather than "make an impartial investigation" of my claim, as required by the Oklahoma Constitution,¹⁰ The Board refused to consult the medical experts. The Board then relied on the judicial training of Board member Judge Allen C. McCall to discredit the probative value of the affidavits for lack of cross examination. My application was denied.

⁷ *Id* (emphasis added).

⁸ 44 states have parole boards that are exclusively appointed by the governor. Beth Schwartzapfel, *Parole in America & the Status of Federal Sentencing Reform Legislation*, 28 Fed. Sent'g Reporter 2, 79-84 (Dec. 2015).

⁹ See Affidavits from a Board Certified Neurologist; and a Board Certified Forensic Pathologist.

¹⁰ Okla. Cons. Art. VI, § 10.

On April 28, 2021, I filed a civil complaint¹¹ against Judge McCall, alleging, among other things, that he was sitting on the Board in violation of Oklahoma law. Several months after the denial of my application, I discovered that Judge McCall had been assigned by the Oklahoma Supreme Court to post-retirement judicial service on the Judicial Ethics Advisory Panel while simultaneously serving as a paid member of the Board, which the Office of the Attorney General has identified as a violation of Oklahoma's Constitution.¹² I alleged that my entire commutation process was voidable because of the law's violation. I am seeking mandamus relief, in which the Director of the Board must make a request to Governor Kevin J. Stitt to waive the three-year waiting period for cause and allow me to reapply for commutation immediately. The egregiousness of Judge McCall's official misconduct not only corrupted the impartiality of my commutation hearing; it also tainted every business meeting and hearing conducted by the Board during the past four years.

However, as predicted, I faced judicial interference by the District Court. Oklahoma's Pleading Code mandates that upon the filing of a petition, the clerk of the court shall forthwith issue a summons.¹³ On December 16, 2021, the District Court Judge, not the clerk, mailed me the summons, 232 days after I filed my petition. I promptly affected service. Notwithstanding, on July 7, 2021, Judge McCall resigned from the board, 70 days after I filed my complaint. It may be viewed by some as hubris, but I am absolutely resolved in my belief that Judge McCall's decision to resign from the Parole Board was not an exercise of free will. And in case you were wondering, my complaint was not mooted by Judge McCall's resignation. The attorney for the Board responded on January 28, 2022, and I have since moved to strike a portion of his defense because it went outside the scope of the pleading. I have moved for summary judgment based on a set of uncontroverted facts that I believe entitle me to judgment as a matter of law. Should I get a favorable ruling, I will be the first inmate in Oklahoma history to have successfully litigated against the Board based on the Board failing to engage in an impartial process.

It is without question that comprehensive changes, which go far beyond the scope of my pleading, are needed at the Board to ensure that all allegations of innocence are taken seriously and impartially investigated. In my opinion, meaningful reform must first start by repealing the appointment power of both of the state's highest courts in order to seat an unbiased executive panel. Impartiality of the mind cannot exist when the powers of the judiciary and executive are united in one person or one political body. This is made evident by the expressed beliefs of Judge McCall in an email made public:

“So why is our board attempting to undermine verdicts in cases of violent crimes...I absolutely trust a criminal justice system designed and refined by names like Jefferson, Adams, Jay, Madison, Marshall

¹¹ Case No. CV-2021-988.

¹² “Retired judges or justices who, under the authority of Article 7, § 11(c) of the Oklahoma Constitution are assigned to post-retirement judicial service, may not simultaneously serve as members on the Oklahoma Pardon and Parole Board.” 24 Okl. Op. Atty. Gen. 101.

¹³ 12 OK Stat § 12-2004 (2014).

(John and Thurgood), O'Connor and Roberts.”¹⁴

This quotation supports the notion that judges serving on the Parole Board presents an issue of impartiality. My life has been transformed by the study of law and I am envious of the distinguished career of the Honorable Judge Allen C. McCall, but not even a pillar of a man such as he could overcome the division of loyalties necessary to accept the fact that on occasion, the judiciary makes wrong decisions. To date, we know for a fact that the official misconduct of state actors lead to the wrongful conviction of nearly 1,300 people between 1989 and 2019.¹⁵

I would recommend that every person involved in the criminal justice system read the 2020 report titled “Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement”.¹⁶ This report confirmed my belief that I am not the first person in the State of Oklahoma to be incarcerated for life based on the fraudulent testimony of an Oklahoma Medical Examiner. In 1984, medical examiner Ralph Erdmann changed his testimony to satisfy the desire of the prosecutor in Adolph Munson’s murder trial.¹⁷ Ralph Erdmann first testified that the victim was killed by a large caliber bullet. After prosecutors told him that they needed it to be a small caliber bullet, he revised his testimony and said that maggots had enlarged the .22 caliber holes. Ralph Erdmann lost medical examiner licenses after it was uncovered that he filed reports in thousands of autopsies that he never conducted.

In closing, I want the world to know that I did not commit the crime of murder in the first degree. I did not cause the burglary of my home, nor did I commit the first act of aggression. I did however use deadly force, justifiably, as a means to resist an assault from an intruder inside of my home. I will not allow fear to silence me any longer!

¹⁴ Ben Felder, *Parole board member threatens director in effort to stop Julius Jones commutation hearing*, The Frontier (Jun. 30, 2020), <https://www.readfrontier.org/stories/parole-board-member-threatens-director-in-effort-to-stop-julius-jones-commutation-hearing/> (referencing Judge McCall’s email on page seven of an internal memo compiled by The Frontier).

¹⁵ Samuel R. Gross, Maurice Possley, Kaitlin Roll & Klara Stephens, *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, U of Michigan Public Law Research Paper No. 21-003 (Sept. 1, 2020).

¹⁶ *Id.*

¹⁷ *Id.*