

# The Unsuccessful Pardon in Georgia: Necessary Revisions to Georgia's Pardon System

## A. Introduction

The idea that a person's past acts should be considered when they are seeking an opportunity, such as a job, a license or an education, is not uncommon or at all illogical. There is a general and widely accepted view that a person's past acts are reliable tools to assess their character and the likelihood that they will commit similar acts in the future. Likewise, the state has an interest in protecting its citizens from known risks and allowing employers, and other creators of opportunity, to consider past acts that could pose a risk to the decision-makers' interests.

When those past acts are encounters with the criminal justice system and that system is governed, maintained and controlled by the state, then the state has the responsibility to take reasonable actions to achieve successful reintegration for those people. In light of the widespread availability of criminal justice information on the Internet, the significant expansion of the private background checking industry, and the general social anxiety about dealing with a person who has been convicted of a crime, the state cannot afford to be silent about how criminal records should be considered. There must be reasonable and intentional efforts by the state to allay the concerns of risk and liability for employers and other decision-makers.

Successful reintegration of those released from the criminal justice system is more critical in Georgia than any other state in the country. There are as many as 3.8 million, or one in three people with a criminal record in Georgia.<sup>1</sup> With 1 in 13 under correctional control, the state has the highest rate in the country per capita.<sup>2</sup> The state spends approximately \$1.1 billion per year (approximately 6% of the total budget) on corrections, and many expect that that this spending will

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<sup>1</sup> Hearing on Background Checks Before the Georgia Senate Expungement Reform Study Committee. (Nov. 18, 2013) (testimony of Terry Gibbons, Deputy Director of the Georgia Crime Information Center).

<sup>2</sup> PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (WASHINGTON, DC: THE PEW CHARITABLE TRUSTS (2009).

significantly increase over the next several years.<sup>3</sup> Moreover, of the 1 in 70 people currently incarcerated, more than 90% will be released back into society.<sup>4</sup>

Laws, policies and practices that decrease people's likelihood to return to jails and prisons would save taxpayers millions of dollars. In fact, the Georgia Department of Corrections has estimated that reducing the recidivism rate by just 1% would save taxpayers millions of dollars each year.<sup>5</sup> Despite the clear fiscal need to improve the reintegration of those with criminal records, Georgia is consistently ranked one of the hardest states in the country for people in the criminal justice system to successfully reintegrate. Moreover, the overwhelming research indicates that the single most important predictor of recidivism is access to stable and gainful employment but Georgia receives the worst possible score for access to employment by the Legal Action Center in New York.<sup>6</sup>

In the last two legislative sessions, the Georgia General Assembly reduced barriers caused by records of non-conviction through revisions to the state's record restriction law, formerly referred to as "expungement." The more difficult population to successfully reintegrate, however, are those with records of *conviction*, particularly when the conviction is for a felony offense. As recognized by Governor Nathan Deal in April of 2013, "[I]magine how difficult it is for people who do not have a criminal record to get a job – try getting a job when you have a felony on your record. No matter how good of a person you are, no matter how willing you are to work, no matter how dedicated you are to taking an opportunity to change your life, it is very difficult to find a job."<sup>7</sup>

Currently the only remedy for someone in Georgia to relieve the effects of a criminal conviction is to be pardoned by the State Board of Pardons and Paroles. This memo discusses the use of Georgia's pardon system to decrease recidivism and improve successful reintegration.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Georgia Department of Corrections, Risk Reduction Services website, found at: <http://www.dcor.state.ga.us/Divisions/OPT/Reentry/RiskReduction/RiskReduction.html> (last accessed Nov. 25, 2013)

<sup>6</sup> Legal Action Center, After Prison: Roadblocks to Reentry, Report Card, Georgia, available at [http://www.lac.org/roadblocks-to-reentry/upload/reportcards/12\\_Image\\_Georgia%20final.pdf](http://www.lac.org/roadblocks-to-reentry/upload/reportcards/12_Image_Georgia%20final.pdf)

<sup>7</sup> Governor Nathan Deal, "Atlanta Press Club Newsmaker Luncheon with Gov. Nathan Deal" (speech, April 30, 2013)

## **B. What Does it Mean to be Pardoned in Georgia**

### *I. System*

Article IV, Section II of the Georgia Constitution creates and defines the powers of the State Board of Pardons and Paroles. Paragraph 1 sets forth the five-member board, and Paragraph 2 vests in it, “the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.”

The Board states that an application takes approximately six to nine months to process.<sup>8</sup> The Board makes a decision by majority vote, and while it provides a written decision, it provides no reasons for the decisions.<sup>9</sup> An investigator for the Board can conduct an in-person interview of the applicant, and the Board also considers the paper record of each case.<sup>10</sup>

### *II. Eligibility*

In order to qualify for a full pardon, an applicant must have completed his sentence, including serving any probated sentence and paying a fine, and refrain from criminal activity for a subsequent period of five years.<sup>11</sup> The Board of Pardons and Paroles may waive the five-year waiting period if “the waiting period is shown to be detrimental to the applicant’s livelihood by delaying his qualifying for employment in his chosen profession.”<sup>12</sup> Individuals can also request a Restoration of Civil and Political Rights, which only requires a two-year post-sentence waiting period.<sup>13</sup> Georgia grants pardons at a comparatively high rate for a southern state, and in 2010 granted over 50% of the applications it received.

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<sup>8</sup> GEORGIA STATE BOARD OF PARDONS AND PAROLES, FREQUENTLY ASKED QUESTIONS, <http://www.pap.state.ga.us/opencms/opencms/> (last visited Aug. 2, 2013).

<sup>9</sup> GA. CODE ANN. § 42-9-42 (1986).

<sup>10</sup> Margaret Colgate Love, *NACDL Restoration of Rights Project* (2013), [http://www.nacdl.org/uploadedFiles/files/resource\\_center/2012\\_restoration\\_project/state\\_narr\\_ga.pdf](http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ga.pdf)

<sup>11</sup> GA. COMP. R. & REGS. 475-3-.10 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> GEORGIA STATE BOARD OF PARDONS AND PAROLES, PARDONS, <http://www.pap.state.ga.us/opencms/opencms/> (last visited Aug. 2, 2013).

### III. Effects

The Georgia Code states that “All pardons shall relieve those pardoned from civil and political disabilities imposed because of their convictions.”<sup>14</sup> While voting rights are automatically restored upon completion of a sentence, the rights to serve on a jury, become a Notary Public, and fill a public office are not restored without a Restoration of Civil and Political Rights or a pardon.<sup>15</sup> Certain individuals not convicted of a crime involving a firearm or a crime involving domestic violence, can also request a restoration of their right to own a firearm, and the Board can choose to grant a pardon with or without a restoration of gun rights.<sup>16</sup> Individuals convicted of a federal offense, a crime of domestic violence, and those convicted of “an offense arising out of the unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug” are not eligible for a restoration of their firearm rights.<sup>17</sup> Although prior versions of application explicitly stated that an individual could not have their firearms right restored if they had been convicted of a drug offense, the current application on the Board’s website does not articulate such limitation.<sup>18</sup>

There are significant challenges to securing opportunity for people with pardons, but Georgia has recently taken positive steps to reduce the liability concerns of employers and others. In 2014, a new law was enacted to protect decision-makers in Georgia who hire, lease, license, or admit to a school or program, anyone who was pardoned of their offense(s).<sup>19</sup> The law presumes an entity is not liable if sued for damages based solely on the fact that they knew or should have known a person who was pardoned was a risk because of the criminal conviction.<sup>20</sup> Simply put, after the state has officially forgiven someone and issued a pardon, an employer does not assume risk because of the criminal conviction. Instead liability must be based on relevant evidence beyond the pardon which was known or should have been known.

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<sup>14</sup> GA. CODE ANN. § 42-9-54 (1943).

<sup>15</sup> GA. COMP. R. & REGS. 475-3-.10 (2009).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Georgia State Board of Pardons and Paroles, Application, <http://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Pardon%20App%20June%202013.pdf> (last visited Aug. 13, 2013)

<sup>19</sup> Ga. L. 2014, p. 34, § 1-7/SB 365

<sup>20</sup> O.C.G.A. §51-1-54 (2014)

## C. Shortcomings in Georgia's Pardon Scheme as an Effective Reintegration Tool

There are several aspects of pardon policy where Georgia falls short. These shortcomings can be divided into two categories: eligibility and effects.

### *I. Eligibility*

Many southeastern states generally allow both misdemeanor and felony offenses to be eligible for a pardon. In Georgia, however, while misdemeanor convictions are not barred from eligibility, the Board of Pardons and Paroles will only grant a misdemeanor pardon in exceptional circumstances. Misdemeanor pardons are granted for adoption, custody, foster care, daycare, housing, employment, and immigration if the applicant can provide specific documentation demonstrating that the opportunity will be granted if they receive the pardon.”<sup>21</sup> Excluding most misdemeanor convictions is rooted in a time when this type of conviction was not widely used to screen job and housing applicants. The policy is antiquated, however, because many Georgians with misdemeanor convictions have an incredibly difficult time accessing jobs and other opportunities. People with misdemeanor convictions in Georgia will be less likely to recidivate if they can attain a pardon and improve the likelihood of securing gainful employment and other opportunities.

The criteria for obtaining a pardon should be clear and unambiguous so that those with records of conviction and decision-makers are sufficiently aware of the requirements. While there are several “necessary” conditions for receiving a pardon, there is no combination of “sufficient” conditions. Thus, applicants are informed of the requirements to apply for the pardon but even when these conditions are met, the Board has such broad discretion that almost half of the applications are still denied. It is more than likely that many of these denials are based on the applicant failing to meet the requirements; however, because the reasons for denial are not provided, there are applicants who believe they met the conditions but are denied. Thus many who have taken significant strides to improve their lives and their community are denied and left wondering why they were not deserving of a pardon.

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<sup>21</sup> Georgia State Board of Pardons and Paroles, Application, <http://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Pardon%20App%20June%202013.pdf> (last visited Aug. 13, 2013)

Furthermore, the eligibility requirements an exception to the two and five-year waiting periods are so stringent that to be granted an exception is nearly impossible. As with misdemeanor convictions described above, it is not sufficient to demonstrate that the conviction makes it impossible to find employment, education, or housing; instead, an applicant must have an actual offer from an employer or other decision-maker stating that the applicant will be denied the opportunity without a pardon. In order to reflect the reality that likelihood of recidivism is significantly reduced over time, particularly when individuals can secure employment, individuals that meet the eligibility criteria should be granted a pardon, subject to reasonable exceptions.

## II. *Effects*

The purpose of the pardon is to relieve a person from the consequences of a conviction and allow them to move forward in their life. Georgia's pardon scheme, however, falls considerably short of this objective because a pardon is of limited value to employers and other decision-makers and therefore does not provide relief from denials based on the offense(s). A pardon does not make the offense(s) eligible for record restriction (expungement). Employers and others are not incentivized to hire a person with a pardon because there are no laws protecting or limiting their liability based on the offense(s). Those that have been pardoned are continuously denied employment, housing and many other necessities to leading productive lives.

The pardon in Georgia then is essentially just a piece of paper from the Board stating that a person has been forgiven of their crime by the State without any guidance as to how others should treat the individual in light of the offense. It's worth asking then whether it matters at all how frequently Georgia grants a pardon. Those who work hard to earn one will still be looked at by society as criminals undeserving of the chance to become productive taxpaying citizens. They will still be second-class citizens – or often not viewed as citizens at all. A pardon will not help most people to climb out of debt or homelessness; it will not meaningfully assist them in securing a job, housing, or any other type of opportunity. The limited value of the pardon does not show a commitment to reintegration because it does not assist reentry in any significant way.

## D. Proposals for Reforming Georgia's Pardon System

### I. Eligibility

The states in the southern region of the country seem to struggle with successful reintegration more than those in other regions. Thus, a helpful way to view potential policy shifts addressing reentry is to compare Georgia to the other eleven southeastern states. While Georgia certainly does not have the worst pardon system, it could learn quite a bit from its neighbors. For instance, other southeastern states such as Alabama, Arkansas, Florida and Mississippi grant misdemeanor pardons without requiring an extraordinary circumstance.<sup>22</sup> As discussed earlier, misdemeanor pardons are becoming a serious barrier to employment and housing – and reentry generally – and thus Georgia should alter its policy to allow misdemeanor pardons when reasonable criteria are met.

Georgia could also learn from other southeastern states when it comes to the application of waiting periods to determine eligibility for a pardon. In Georgia, a waiting period of five years is almost always necessary to receive a pardon, but it is not considered to be sufficient to establish worthiness for a pardon. Though no southeastern state considers a period of lawfulness to create a presumption of rehabilitation, Arkansas does deem a five-year waiting period with no subsequent criminal history to be “prima facie evidence of sufficient rehabilitation.”<sup>23</sup> This policy reflects the truth that the likelihood of reconviction drops dramatically as time passes.

A prominent study by Alfred Blumstein and Kiminori Nakamura found that someone who has been convicted of a felony and does not commit another after a period of nine to thirteen years is no more likely to return to prison than someone who has never been convicted of a crime.<sup>24</sup> The fact that after a period of time people with records of conviction are statistically indistinguishable

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<sup>22</sup> ALABAMA BOARD OF PARDONS AND PAROLES, FREQUENTLY ASKED QUESTIONS, <http://www.pardons.state.al.us/alabpp/main/FAQ.html> (last visited July 12, 2013); ARK. CODE ANN. § 16-93-207 (2011); FLORIDA PAROLE COMMISSION, RULES OF EXECUTIVE CLEMENCY, [https://fpc.state.fl.us/PDFs/clemency\\_rules.pdf](https://fpc.state.fl.us/PDFs/clemency_rules.pdf) (last visited July 12, 2013); MISS. CONST. art. 5, § 124.

<sup>23</sup> ARK. CODE ANN. § 17-1-103 (2005)

<sup>24</sup> Alfred Blumstein and Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, 263 Nat'l Inst. Just. J. 10 (2009); Megan Kurlychek, Robert Brame, and Shawn Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483 (2006); Megan Kurlychek, Robert Brame, and Shawn Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 Crim. & Delinquency 64 (2007).

from those who have never been convicted, suggests it is appropriate for the Board in Georgia to consider the completion of a similar waiting period as prima facie evidence of rehabilitation for the purpose of a pardon. The Blumstein-Nakamura Study only compared the likelihood to commit a crime between those never convicted and those convicted of a felony. Since the propensity for recidivism after a misdemeanor conviction is less than after a felony conviction, it is more than reasonable to infer that those with misdemeanor convictions would be found to be indistinguishable from those without conviction after a shorter period of time. An appropriate policy reform in Georgia then would be to apply the current five-year waiting period to a misdemeanor pardon and a ten-year waiting period to a felony pardon.

In order to demonstrate a commitment to the successful reintegration of those who have demonstrated rehabilitation, the Board should adopt a clear set of reasonable criteria for pardon eligibility, including established waiting periods as prima facie evidence in favor of the applicant. Those who meet the criteria should be granted a pardon from the state, with limited exception. It is crucial that Georgians who are pardoned should be free from the stigma of their criminal act and able to lead productive lives in their communities as opposed to living as social outcasts. Further, similar to the law in Arkansas, the Board should not summarily deny applicants who have not completed the required period of lawfulness. Instead people with records of conviction should have the opportunity to demonstrate rehabilitation through specific efforts and activities that led to positive changes in their lives.

## *II. Effects*

There are several changes that could be made to Georgia's pardon system to improve the efficacy of the pardon, and each aspect is represented in some capacity in at least one other southeastern state. The first is to reward rehabilitation and protect against unreasonable discrimination by restricting the availability of records of the offense(s). While Georgia does indicate that an offense has been pardoned on an individual's criminal history report, this is only the most basic step toward successful reintegration. As has been said, after the completion of the required waiting period, there is no statistical distinction between people with criminal histories and people who have never committed a crime.



Based on the reduced likelihood of recidivism and the state's need to recognize and reward rehabilitation, individuals with conviction records should be permitted to have their pardoned offense(s) restricted from the public, with limited exception. Restricting these records will signify to the individual and to society that the state deems the person fully rehabilitated, and encourages opportunity for these individuals to successfully reintegrate. Arkansas and West Virginia both allow the expungement (restriction) of records of pardoned offenses, though the availability of expungement is limited to certain convictions.<sup>25</sup> Allowing the records of pardoned offenses to become private would be a strong expression of Georgia's commitment to reintegration and fairness in its criminal justice system.

Further, because of the difficulty that the internet has created in suppressing criminal history information, Georgia should consider policies which would protect individuals who have received a pardon from discrimination. Arkansas, Louisiana, South Carolina, and Virginia all prohibit the use of either pardoned criminal offenses or any former criminal offenses from being used by state agencies in the process of granting licenses for employment (with some exceptions).<sup>26</sup> Florida and Kentucky both prohibit the use of former criminal convictions for the purposes of state employment or licensing (with some exceptions).<sup>27</sup> While no southeastern state prohibits the use of criminal convictions in private employment or housing decisions, the public sector is a great place to set an example for private employers, and the state of Georgia as an employer can lead the movement of implementing a reasonable policy when considering criminal histories and remove barriers to employment and licensing for individuals who have been pardoned of their offense(s).

The final measure that Georgia can take to alleviate some of the social and economic pressures placed on individuals with criminal records, and to aid in the process of reintegration, involves the availability of certain public benefits to people with certain criminal convictions. In 1996, the federal government adopted the Personal Responsibility and Work Opportunity Reconciliation Act, which created the law that anyone with a state or federal felony conviction involving the possession, use, or distribution of drugs is permanently ineligible to receive food stamps or TANF. The Act does permit states to opt out of this blanket ban, but each state has to

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<sup>25</sup> ARK. CODE ANN. § 16-90-605 (1991); W. VA. CODE § 5-1-16 (1923)

<sup>26</sup> ARK. CODE ANN. § 17-1-103 (2005). LA. REV. STAT. ANN. § 37:2950 (2012). S.C. CODE ANN. § 40-1-140 (1996). VA. CODE ANN. § 54.1-204 (2009).

<sup>27</sup> FLA. STAT. § 112.011 (2011). KY. REV. STAT. ANN. § 335B.020 (LexisNexis 1978).

adopt legislation which specifically states a desire to opt out. Only ten states have adopted the federal government's blanket ban on food stamps for drug offenders, and Georgia is one of the ten.<sup>28</sup> To date seven of the twelve southeastern states have adopted legislation which makes it possible for individuals with drug convictions to regain eligibility for food stamps.<sup>29</sup> Most states have adopted these measures due to realization that people with drug convictions can be rehabilitated and a permanent ban on access to food stamps and TANF benefits only contributes to the hardships suffered by individuals seeking successful reintegration. To promote reintegration and reward rehabilitation, Georgia should adopt legislation to allow individuals with certain drug convictions to regain the right to federal benefits, whether it is through a list of certain eligible offenses or through the pardon system.

## **E. Conclusion**

Georgia's criminal justice system lags far behind the rest of the nation in terms of the ease of reintegration after an individual's involvement with the criminal justice system. Further, other southeastern states are better responding to the need for a more active role of the state to achieve successful reintegration, and as such, Georgia should learn from its neighbors. With a focus on the pardon system, this paper discusses the significant benefits that could be gained from making changes to both the eligibility requirements and the effects of a pardon in Georgia.

The six key changes are to: 1) allow misdemeanor offenses to be pardoned without requiring an exceptional circumstance, 2) establish reasonable waiting periods that establish prima facie evidence of rehabilitation, 3) provide opportunities to seek a waiver of the waiting period based on specific efforts to improve themselves and their community, 4) allow pardoned offenses to be restricted on the individual's criminal history, 5) protect pardoned individuals from unreasonable discrimination, and 6) allow those who are pardoned to restore public benefits. These changes, when combined, would place Georgia on track towards more successful reentry and significantly reduce recidivism. Furthermore, the changes would demonstrate Georgia's

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<sup>28</sup> OPTING OUT OF FEDERAL BAN ON FOOD STAMPS AND TANF, LEGAL ACTION CENTER, <http://www.lac.org/toolkits/TANF/TANF.htm> (last visited Aug. 2, 2013).

<sup>29</sup> ARK. CODE ANN. § 20-76-409 (1997); FLA. STAT. § 414.095 (2010); KY. REV. STAT. ANN. §205.2005 (1998); LA. REV. STAT. ANN. § 46:233.2 (1997); N.C. GEN. STAT. § 108A-25.2 (2008); TENN. CODE ANN. § 71-5-308 (2002); VA. CODE ANN. § 63.2-505.2 (2005).

commitment to fairness in its criminal justice system by helping to create a society where individuals who serve their time, pay their debt, and move on to lead law-abiding lives are considered rehabilitated, and are granted the opportunity to be treated equally in society.