

## 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 others that create opportunities, to consider past acts that may pose a risk to the decision-makers interests.

When those past acts, however, are encounters with the criminal justice system, and that system is governed, maintained and controlled by the state itself, the state also has a responsibility to take reasonable actions to achieve successful reintegration for those individuals. 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 and must make sensible attempts to allay the concerns of risk and liability for employers and other decision-makers. This can be done by promoting education and conducting trainings on criminal records and the risks posed as well as encourage and reward productivity of those who have been involved with the criminal justice system. The state should assertively encourage decision-makers that play an important role in successful reintegration to make reasonable decisions when considering an applicant's criminal history.

Successful reintegration is critical in Georgia. 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 significantly increase over the next several years. There are 3.7 million, or one in three Georgians with a criminal record. Moreover, of the 1 in 70 people currently incarcerated, more than 90% will be released back into society. Laws, policies and practices that encourage people not to return to jails and prisons would save taxpayers millions of dollars alone. In fact, the Georgia Department of Corrections has estimated that reducing the recidivism rate by just 1% would save taxpayers approximately \$7 million each year. Despite the clear fiscal need to improve the reintegration of those with criminal records, Georgia is

consistently ranked one of the worst states in the country for laws and policies that encourage successful reintegration. The single most important predictor of recidivism is access to stable and gainful employment; yet Georgia receives the worst possible score for access to employment by the Legal Action Center.<sup>1</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 "expungement." The more difficult population to successfully reintegrate, however, is 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>2</sup>

The only remedy available in Georgia for an individual who has been convicted of a crime is the pardon issued by the State Board of Pardons and Paroles. This memo discusses the use of a Georgia's pardon system to decrease recidivism and improve successful reintegration.

## **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>3</sup> The Board makes a decision by majority vote, and while it provides a written decision, it

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<sup>1</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>2</sup> Governor Nathan Deal, "Atlanta Press Club Newsmaker Luncheon with Gov. Nathan Deal" (speech, April 30, 2013)

<sup>3</sup> GEORGIA STATE BOARD OF PARDONS AND PAROLES, FREQUENTLY ASKED QUESTIONS, <http://www.pap.state.ga.us/opencms/opencms/> (last visited Aug. 2, 2013).

provides no reasons for its decisions.<sup>4</sup> An investigator for the Board conducts an in-person interview of the applicant, and the Board also considers the paper record of each case.<sup>5</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 a subsequent period of five years without criminal activity.<sup>6</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>7</sup> Individuals can also request a Restoration of Civil and Political Rights, which only requires a two-year post-sentence waiting period.<sup>8</sup> Georgia grants pardons at a comparatively high rate for a southern state, and in 2010 granted over 50% of the applications it received.

## *III. Effects*

The Georgia Code states that “All pardons shall relieve those pardoned from civil and political disabilities imposed because of their convictions.”<sup>9</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>10</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>11</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>12</sup> Although prior versions of application explicitly stated that an individual could not have their

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<sup>4</sup> GA. CODE ANN. § 42-9-42 (1986).

<sup>5</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>6</sup> GA. COMP. R. & REGS. 475-3-.10 (2009).

<sup>7</sup> *Id.*

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

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

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

<sup>11</sup> *Id.*

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

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>13</sup>

While a pardon does not restrict (expunge) or seal a criminal offense from an applicant's criminal history, it does create an official attachment to the criminal record stating the State of Georgia has pardoned that particular crime.<sup>14</sup> Like many other states, Georgia does not relieve convicted sex offenders from the duty to register on the Sex Offender Registry, even if they have received a pardon. Employers and other decision-makers that grant opportunities to people who have had an offense(s) pardoned are not relieved of any liability that may arise on the basis of the pardoned offense. Due to the vast discrimination suffered on the basis of the offense(s), individuals who have been convicted of crime are not encouraged to attain education, training or skills that will allow them to be productive members of society.

### **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>15</sup> Excluding most misdemeanor convictions, as seen in several other southeastern states, 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

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<sup>13</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>14</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>15</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)

they can attain a pardon and improve the likelihood of getting gainful employment and other opportunities.

The criteria for obtaining a pardon should be clear and unambiguous so that those with records of conviction and those granting opportunities 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 told they must complete all sentences including the payment of all fines and restitution, and wait a subsequent five-year period without any further criminal activity; however, even when these conditions are met, the board has such broad discretion that almost half of the applications are still denied. Despite many believing that these qualifications deem them rehabilitated, and despite the fact that many have taken significant strides to improve their lives and their community, decisions often seem arbitrary and many applicants are left wondering why they were not deserving of a pardon. Further, the eligibility requirements for receiving an exception to the two and five-year waiting periods are so stringent that to be granted such 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/school/landlord stating that the applicant will be denied without a pardon. In order to reflect the reality that recidivism is significantly reduced over time, particularly when individuals are granted opportunity, 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 things necessary to lead 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 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 even 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 to get 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. Proposal for Pardon Policy Reform**

### *I. Eligibility*

The states in the southern region of the country seem to struggle more than those in other regions to achieve successful reintegration. 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 has a lot it can learn from its neighbors. For instance, other southeastern states such as Alabama, Arkansas, Florida and Mississippi grant misdemeanor pardons without requiring an extraordinary circumstance.<sup>16</sup> As discussed earlier, the Board of Pardons and Paroles will not grant a misdemeanor pardon unless there is an extraordinary reason to grant an exception. Misdemeanor pardons are becoming a serious barrier to employment and housing – and reentry generally – and therefore 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 consistent application of the eligibility requirements 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, or even a major indicator of rehabilitation for an applicant. Though no southeastern state considers a period of lawfulness as creating a presumption of rehabilitation, Arkansas does have a statute which states that a five-year period with no subsequent criminal history “shall be deemed prima facie evidence of sufficient rehabilitation for the purposes of employment licensing and certification.”<sup>17</sup> This kind of policy reflects the truth that the likelihood of reconviction drops dramatically as time passes; an individual who has not recidivated within 9-13 years after the completion of his last sentence is no more likely to return to prison than an individual with no criminal convictions.<sup>18</sup>

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<sup>16</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>17</sup> ARK. CODE ANN. § 17-1-103 (2005)

<sup>18</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).

Individuals with criminal records are statistically indistinguishable from those with no convictions after a certain period of time, and thus Georgia should consider the completion of a similar waiting time prima facie evidence of rehabilitation for the purposes of a pardon. Since the cited studies only deal with the likelihood of recidivism for felony offenses, it is reasonable to require those convicted of a misdemeanor offense(s) wait a shorter time period, perhaps the currently required period of five years, and require those convicted of a felony wait a period of 10 years. To reduce the amount of discretion that the board has, and to demonstrate a commitment to successful reintegration, the Board should adopt a small, clear set of fair criteria for applying for a pardon (that would include the waiting periods). Applicants who meet these criteria should be granted pardons, with limited discretion. If an individual completed their sentence and lived a crime-free life for five or ten years as a contributing member of society, that person *is* rehabilitated and *deserves* a pardon. These rehabilitated individuals should be set free from the societal burden of their criminal act and not have to live the rest of their lives as social outcasts continually denied the opportunity to lead productive lives.

Further, the Board should disengage from the practice of denying almost all applicants who have not completed the required period of lawfulness and instead provide individuals the opportunity to demonstrate specific efforts to achieve rehabilitation. Again, Arkansas sets a great example with no required period of lawfulness to obtain a pardon. If an application for a pardon is denied for any reason, however, the applicant cannot reapply for a period of four years to reapply for a pardon. There is, though, a specific grant of power to the Parole Board to waive this requirement in the event that new evidence is found, there is significant deterioration of mental or physical health, or if an applicant can establish that “other meritorious circumstances justify a waiver of the waiting period.”<sup>19</sup> This is an area where the Arkansas Parole Board has great discretion, and it is an area where the Georgia Board of Pardons and Paroles can retain some discretion in its decision-making.

In Georgia, the Board can only waive the waiting period for very rigid, specific categories of needs: Adoption / Custody / Foster Care/ Daycare, Section VIII (8) Housing, Truck driver into Canada, Education, Employment, Immigration, or Peace Officer Standards and Training Council.<sup>20</sup> There is no category for other meritorious circumstances, or other rehabilitative services. Since many formerly incarcerated individuals seek rehabilitative services such as alcohol and drug addiction services, mental health services, GED or other education programs, and job training, the Board should strive to incentivize such efforts by creating an exception to the application requirements for demonstrated rehabilitation. The criteria for this exception

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<sup>19</sup> ARK. CODE ANN. § 16-93-207 (2011).

<sup>20</sup> STATE BOARD OF PARDONS AND PAROLES, APPLICATION FOR RESTORATION OF RIGHTS, <http://www.pap.state.ga.us/opencms/export/sites/default/index.html?page=index.html> (last visited Aug. 2, 2013).

should be clear and fair, but the Board should retain much more discretion to deny these requests for clemency than those who have completed the five or ten-year waiting period.

## *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 suggestion to achieve successful reintegration, which should be defined as equal status and treatment by the government and society, is to reward rehabilitation and protect against unreasonable discrimination by restricting the availability of records regarding 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 reward rehabilitation, individuals with records of conviction should be permitted to have their pardoned offense(s) restricted from the public. Restricting these records will signify to the individual and to society that the government deems the person fully rehabilitated, and encourages opportunity for these individuals to successfully reintegrate. This incentivizes individuals with a criminal history to work toward rehabilitation and strive to become productive, taxpaying citizens, as opposed to creating permanent social outcasts forced out of opportunities that will allow them to take care of themselves and their families. 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>21</sup> Allowing the records of pardoned offenses to become private would be a strong expression of Georgia's commitment to reintegration and fairness in our 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>22</sup> Florida and Kentucky both prohibit the use of former criminal convictions for the purposes of state employment or licensing (with some exceptions).<sup>23</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

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<sup>21</sup> ARK. CODE ANN. § 16-90-605 (1991); W. VA. CODE § 5-1-16 (1923)

<sup>22</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>23</sup> FLA. STAT. § 112.011 (2011). KY. REV. STAT. ANN. § 335B.020 (LexisNexis 1978).

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 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 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>24</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>25</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 has can learn from its neighbors. With a focus on the pardon system, this paper discussed 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 create a presumption 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

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<sup>24</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>25</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).

restricted on the individual's criminal history, 5) protect pardoned individuals from unreasonable discrimination, and 6) allow certain individuals to restore public benefits. These changes, when combined, would align Georgia on the track towards more successful reentry and significantly reduce recidivism. Furthermore, the changes would demonstrate Georgia's 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.

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