BEFORE THE GOVERNOR FOR THE STATE OF TEXAS
AND
THE BOARD OF PARDONS AND PAROLES

In re

CLARENCE ALLEN LACKEY,

Petitioner

SUPPLEMENTAL INFORMATION MANDATED BY § 143.42 OF THE RULES OF THE TEXAS BOARD OF PARDONS AND PAROLES

IN SUPPORT OF

PETITION FOR REPRIEVE FROM EXECUTION OF DEATH SENTENCE AND COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE

The first time I met Clarence Lackey was also my first trip to death row in Huntsville[1]. I, not surprisingly, was a little uneasy. What would I say to this man? What in the world would we have in common? Agonizing over these questions on the drive out there, I decided I would just keep the conversation on a professional level. We could discuss his appeals and, if I could help him in any other way, I would be more than willing.

Passing through the gates, signing in at the front desk, I sat down in the visitor's room and waited for this man to come out. After what seemed like an eternity, he was there and, within minutes, all those anxieties were gone.

Clarence Allen Lackey is in his early forties and when he sits down across from you in the visitors' area, he always smiles, thanks you for helping him, and asks how you are doing. His brown hair, which he fastidiously combs back, is starting to thin on top and his stomach is beginning to show the impact of twenty years of prison fare. He is of average height and his appearance is largely unremarkable. Yet when he smiles, which he does often, his eyes shine with a happiness that hides a tragic past. He follows baseball, especially the Texas Rangers, and looks forward to watching the Indianapolis 500 every year. My meetings with Clarence are more about sports and news than they are about appeals and the law.

Sometimes when we are talking, he stops, shakes his head, and looks down at his hands. A moment or two later, he looks up and with sad eyes he tells me how much he

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[1]The experiences described in this portion of the petition are those of Collie James, a law student at the University of Texas School of Law in Austin. Mr. James worked on Mr. Lackey's case through the Capital Punishment Clinic.

wishes he would have listened to his parents when he was young. That is Clarence's advice and he tells it to everyone who will listen. They might not be perfect and they may tell you things you do not want to hear, but your parents always know what is best for you. With eyes that belie a sadness and weariness that he cannot hide once he stops smiling, Clarence looks at me and I know in his mind that he is a kid again and he is walking away from the influences that led him to the table across from me.

Clarence Lackey brings this clemency petition before the Governor and the Board of Pardons and Paroles to allow him to make a few steps in that direction. He seeks a thirty day stay of execution in order to conduct DNA testing on evidence that can conclusively establish his role in the crime for which he was convicted. Suffering from an alcoholic blackout on the night of the murder of Toni Kumph, Clarence Lackey has spent twenty years on death row agonizing over that missing night. Today, technology exists to give Clarence the certainty that will provide him with the strength to face his future.

Mr. Lackey also brings a request with this petition for the commutation of his sentence to life imprisonment. For *fourteen* of his twenty years on death row, Clarence waited for the courts of the State of Texas to finalize his conviction and sentence. May 20, 1997, is his *seventh* execution date. *Four* times he has been spared with last minute stays, two of which came within hours of his death. *Twice*, the United States Supreme Court has indicated that such a roller-coaster ride violates the Federal Constitution. The merits of his claims, however, have never been heard in a court of law due to procedural technicalities.

With the recent changes in the habeas corpus law, the Governor's Office must accept a heightened role in the administration of the death penalty. These new procedural barriers mean that the Governor will often be the only forum for inmates to bring their claims. No longer do clemency petitions represent a last ditch effort to push aside the conclusions of endless courts that have heard, considered, and dismissed innumerable claims on the merits. Today, the Governor and the Board are the first and only forum able to hear Clarence Lackey's story.

A. Clarence Allen Lackey

Clarence Lackey was born in El Paso on August 3, 1954. His mother, Ann Lackey, almost died during childbirth and when his father was told that the doctors could only save one of them, his father, Joe, chose to let Clarence die. Clarence, however, surprised them all and pulled through after an emergency cesarean delivery. It was Clarence's first struggle to find a place in his father's home but it was a struggle that lasted until he finally left to make a life for himself at age nineteen.

Life in the Lackey home was a difficult and often terrifying battle to make it from day to day. There was young Clarence, his mom and dad, and when Clarence was six, his sister Joann was born. The Lackeys moved from trailer park to trailer park and Clarence never had the opportunity to settle in, make friends, and live the normal life of a young boy. The family stayed in El Paso for several years before moving on to Arkansas. Clarence spent some time in Alabama with his grandparents but returned to take care of his mother and sister. The family finally ended up in Lubbock where Clarence spent his

teenage years.

School was always difficult for Clarence and his mother describes him as a "slow learner." Clarence's earliest memories are from junior high, where he recalls the special education classes he took because of his "slowness." IQ tests revealed that intellectually he is borderline mentally retarded and expert medical tests determined that he suffered from learning disabilities that further limited his scholastic opportunities. His grade school transcripts record an "F" for all subjects except physical education and art. He had a joy and aptitude for drawing and painting and, in that world, he found one subject in which he felt he could succeed. That passion continues to today; he enjoys the comic illustrations of Calvin and Hobbes and, in his letters, one will often find cheerful doodles that convey the emotions he is unable to express with words. Clarence also excelled in citizenship, where he received and "A" or "B" every year, and his teachers noted that he was cheerful, courteous, worked well, and followed directions.

Clarence, feeling that is was time to become a man and support himself, dropped out of school in tenth grade and began working. It is a decision he regrets to this day because of the limitations it put on his future and has worked hard during the last twenty years on death row to improve his reading and writing skills. For him, it is one of the few small ways he can take back the mistakes he made along the way.

The one constant in Clarence's life was his father's explosive violence that followed his nightly alcoholic binges. Joe Lackey was a trucker most of his life, which kept him on the road for long stretches of time. Instead of looking forward to his return, however, Clarence, Joann and Ann Lackey cringed at the prospect, aware of the insults,

beatings and broken furniture that were sure to follow the empty bottles. The children avoided being alone with their father out of pure terror and would wait at the park until their mother got off work so that she could protect them. When the children were young, Mrs. Lackey would distract the rampaging Joe long enough for Clarence and Joann to slip out of the trailer to safety. The next day, after Joe had passed out, they would return to see on their mother the sacrifice she made to protect her children. When Clarence was fourteen, he stopped letting mother step in the way. Instead, he would distract his father, letting his mother and sister escape, and let Joe exhaust his rage by taking the beatings until his father finally grew tired and stopped. Clarence never fought back.

Unable to find refuge in his schoolwork and terrified to go home, Clarence, not surprisingly, was a shy and solitary young man. He hardly talked, never discussed his emotions, and found it difficult to make friends. He and Joann would often dream of what it would be like to live in a happy, normal family. The two attended church regularly, without their parents, because it was the one place in their lives that offered the prospect of a happy future.

Clarence longed for a relationship with his father. Despite all the pain and terror, he desperately wanted to forge a bond with this man. Eventually they found a common ground in alcohol. Joe Lackey first handed his bottle to Clarence when he was ten years old. He took the bottle in order to prove to his father that he was a man; to make the man who once had chosen to let him die know that he was a tough kid of whom his father could be proud. Soon after, he found himself in trouble with the law, compiling a juvenile record with numerous petty offenses such as breaking curfew and minor in

possession. The police seemed to be at every turn. The record that trailed behind Joe Lackey was a long one, including ten years in prison for the attempted murder of a black man he felt was following his wife, and the police kept an eye on Clarence in case he turned out like his dad.

After leaving school, Clarence made the turn in his life that has haunted him since. Against his mother's warnings, Clarence fell in with the wrong crowd, staying out all night drinking and carousing. It was the late '60's then and drugs were common and freely available. Soon Clarence and his friends were breaking into houses in order to fund their partying and eventually Clarence found himself in jail for burglary. Leaving prison, Clarence tried to turn his life around, moving in with his girlfriend and finding steady work as a welder for a tent-building company.

Unfortunately, Clarence could not escape his alcoholism, which continued to grow steadily worse. In the months preceding his arrest, Clarence would often wake unable to remember anything about the previous night. It appeared as if the prophecy was being fulfilled. Clarence was becoming Joe as son followed father into self-destruction. Clarence, however, is not his father. He was always gentle with his mother and sister and never exhibited any violence around his girlfriends. Most importantly, Clarence is acutely aware of the pain that he has caused people in his life and now, in the rare opportunities that arise on death row, he tries to atone for those mistakes by being a source of strength and an example to those around him.

B. Trial and Appellate History

In early August of 1977, the State of Texas indicted Clarence Allen Lackey for the July 31, 1977, capital murder of Toni Kumph in Lubbock. Mr. Lackey was immediately arrested and has remained in incarceration for the last two decades.

Tried in Tom Green County on a change of venue from Lubbock County, Clarence Lackey was convicted of capital murder and sentenced to death in the spring of 1978. Mandatory direct appeal to the Texas Court of Criminal Appeals followed his conviction. For fifty-four months his appeal sat pending until September 15, 1982, when the court reversed his conviction because of the improper exclusion of a juror based on her views on the death penalty. Lackey v. State, 638 S.W.2d 439, 471-476 (Tex. Crim. App. 1982).

The case was then remanded to the trial court for a new trial. A change of venue to Midland County followed, whereupon Mr. Lackey was tried and again convicted of capital murder and sentenced to death in April of 1983. Clarence returned to death row and mandatory appeal to the Court of Criminal Appeals once again followed. This time the CCA waited eight years before ruling on Mr. Lackey's claims, finally affirming the conviction and sentence in late 1991. See Lackey v. State, 819 S.W.2d 211 (Tex. Crim. App. 1989)(on original submission); id. at 128-141 (Tex. Crim. App. 1991)(on rehearing). No petition to the United States Supreme Court followed and ninety days later Clarence's conviction became final. It took over fourteen years -- from early 1977 to late 1991 -- for the State to secure a final sentence against him. When his first execution date was set for July 17, 1992, Clarence Lackey had been under sentence of

death for over 5000 days, most of which was spent waiting for the courts to examine his automatic mandatory appeals.

The trial court stayed his first execution upon the filing of his first state habeas corpus petition. The State, suddenly interested in Clarence, hurried his appeals along and the first round of state and federal discretionary appeals were completed in January 1995. During this time, Mr. Lackey faced two more execution dates -- on October 17, 1992 , and December 17, 1992 -- while he was attempting to locate volunteer state habeas counsel. The trial court again stayed the second execution date. The federal district court granted Mr. Lackey his third stay on December 16, 1992, mere hours before his scheduled execution. After the Supreme Court denied review of his federal habeas petition on January 9, 1995, his first round of discretionary appeals came to a close. The State immediately responded by setting a fourth execution date for March 5, 1995.

In February of 1995, Clarence filed a second habeas application in the Texas Courts raising only an Eighth Amendment claim. Mr. Lackey claimed that it was cruel and unusual punishment to be held under sentence of death for eighteen years, a large portion of it waiting for the State to rule on his mandatory appeals. The Texas courts dismissed his claim without ever addressing its merits, at which point Mr. Lackey filed a petition for a writ of certiorari with the United States Supreme Court. Pending the outcome of the petition, Clarence's fourth execution date was stayed by the Supreme Court on March 3, 1995, two days before the scheduled execution.

The Supreme Court denied the petition on March 27, 1995. Two Justices -- Justices Stevens and Breyer -- explicitly stated that Mr. Lackey's claim was "important"

and should be carefully examined by the lower courts and that the denial should not be viewed as a ruling on the merits. Lackey v. Texas, 115 S. Ct. 1421, 1421-1422 (1995). The next morning, Mr. Lackey filed his second federal habeas petition in district court in order to give the lower courts the opportunity to examine his Eighth Amendment claim. One hour later, the State set his fifth execution date for April 28, 1995.

The federal district court soon issued a stay of execution and granted a motion to hold an evidentiary hearing on the claim the Supreme Court had recognized as "important." The State immediately appealed to the Court of Appeals for the Fifth Circuit which vacated the stay after ruling that Mr. Lackey's claim was procedurally barred because it should have been brought earlier. This, of course, was an amazing ruling considering the substance of the claim. The Fifth Circuit never considered the merits of the Eighth Amendment claim. On the eve of his fifth execution date, Clarence Lackey again made an appeal to the United States Supreme Court. At 9:00 p.m. on April 27, 1995, just three hours before poison was to begin flowing into Clarence's arms, the Supreme Court reinstated the district court's stay, effectively reversing the Fifth Circuit's order. Exhausted, Clarence was led back to his cell to wait for his sixth date. His only source of relief was that for the second time the highest court in the land had hinted at the validity of his Eighth Amendment claim.

An extensive evidentiary hearing was finally held in the district court, where, at long last, Clarence was able to present substantial evidence of the extreme psychological toll of spending nearly two decades waiting to be killed. Despite an adverse ruling by the Fifth Circuit in a related case which was decided in the middle of the evidentiary hearing,

the district court continued the evidentiary hearing to its conclusion. However, the district court was bound by the Fifth Circuit's ruling in the related case, and dismissed the application because of the procedural barrier. Again, no legal conclusions were made on the merits. The Fifth Circuit quickly affirmed, again, without ever reaching the merits. Lackey v. Johnson, 83 F.3d 116 (5th Cir. 1996). Left with only the legalities of the procedural bar to examine, the Supreme Court denied certiorari. Lackey v. Johnson, 117 S. Ct. 276 (1996).

In October of the same year, Clarence received his sixth execution date, set for November 15, 1996. Remarkably, Mr. Lackey received another stay pending the Court of Criminal Appeals' disposition of a shared claim raised in another inmate's appeal. In March, the Court of Criminal Appeals denied relief in that case, thereby lifting the stay. A few days later, Clarence was notified of his seventh execution date when his mother called one of his attorneys after hearing about it on the news. It is now scheduled for Tuesday, May 20, 1997.

C. Reasons Why Mr. Lackey's Death Sentence Should be Commuted to Life Imprisonment

A new era has dawned on the administration of criminal justice in this country. In no area of the law have those changes had a greater impact than in the implementation of capital punishment. When the Federal Anti-Terrorism and Effective Death Penalty Act came into force on April 23, 1996, the protections that were guaranteed to death row inmates around the country were fundamentally altered. The Act's changes marked the

final step in a series of developments in both state and federal law that created new rules for those seeking relief by habeas corpus petition. Among those were sharp limits on a court's ability to review the decision of the lower courts, speedy time limits on the filing of appeals, and, most importantly, very strict limitations on the ability to overcome procedural barriers to allow review of claims on the merits. All of these were recently held by the Fifth Circuit to apply retroactively to all inmates, including Mr. Lackey. These developments were the result of the democratic process attempting to find a balance between the rights of inmates and society's legitimate interest in finality.

This is not the appropriate forum to dispute the propriety of those changes. Their existence, however, fundamentally alters the role of the Governor and the Board in the process. Since the reintroduction of the death penalty in 1976, the Governor's Office has always been able to assume -- correctly -- that the courts had thoroughly examined every last appeal by the time the clemency petitions reached their desks. Accordingly, the Governor and the Board's power was reserved for only the most exceptional of cases. These recent alterations swept away the validity of that assumption and, thus, require a new diligence in the Governor's oversight of the process. The limits on multiple petitions and nearly insurmountable procedural barriers mean that clemency petitions such as this one will be the only forum for the review on the merits of legitimate and compelling claims.

Clarence Lackey's situation today is a perfect example of the need for the closer involvement of the Governor and the Board in the future. Although most of Clarence Lackey's time on death row predated the new Act, his experience personifies these

concerns. Twice, the United States Supreme Court has extraordinarily expressed the legitimacy of his claim that prolonged detention on death row due to state-created delay in resolving mandatory appeals violates the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution. Tragically, despite that endorsement, procedural technicalities have prevented any court from considering the merits of the claim. One day, another inmate similarly situated will come before the Court and may prevail. For Clarence Lackey, however, the only forum for his claim is the Governor's Office.

The arguments and issues that these courts have been unable to hear are both compelling and disturbing. Moreover, the cruelty of subjecting an inmate to both a life sentence and the death penalty has been recognized in courts across the globe.

* *"There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long, extended period of time."*[2]

* *"[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."*[3]

The execution of a prisoner pursuant to a constitutionally-obtained judgment is not cruel and unusual punishment *per se* under the Eighth and Fourteenth Amendments to

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[2] Pratt & Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, slip op., at 16, *reported at* 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (British Privy Council Nov. 2, 1993) (*en banc*).

[3] Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*).

the United States Constitution. However, it has long been recognized that while the death penalty itself may not be a cruel and unusual punishment, *the manner of its imposition* may violate the Eighth Amendment depending on the circumstances. As discussed above, the Supreme Court of the United States has twice indicated the legitimacy of this claim. It is now the Governor's duty to finally consider and accept the merits of that argument.

Because of the unusual circumstances surrounding the State's attempt to implement capital punishment in this case, the State of Texas has forfeited its right to execute Clarence Lackey under the Eighth and Fourteenth Amendments. This forfeiture has resulted both from the inordinate amount of time that Mr. Lackey has spent on Texas' death row and the State's *unnecessary* setting of repeated execution dates in his case.[4] Largely the result of unnecessary delays by the Texas courts in hearing Mr. Lackey's two mandatory, automatic direct appeals, Mr. Lackey has been required to spend almost two decades on death row. To execute Mr. Lackey at this late date exceeds the limits that our Constitution places on the punishment of those who violate society's laws. Accordingly,

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[4] The first three execution dates scheduled in this case were set by the Texas trial court solely in order to force Mr. Lackey to initiate his habeas corpus appeals in state and federal court. It is widely understood by members of the bench and bar in Texas -- although not understood by death row inmates facing such execution dates -- that in the overwhelming majority of Texas capital cases, such premature execution dates will not result in an actual execution. Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit has noted this largely peculiar Texas practice of setting premature execution dates solely to force the immediate filing of habeas corpus appeals by death row inmates. See Hon. Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 851 (1990) (referring to the practice as "[d]ocket control by execution date"); see also Mark Ballard, *Death Penalty System Ridiculed*, TEXAS LAWYER, May 11, 1992, at 4 (quoting Fifth Circuit Judge Thomas Reavley's criticism of Texas' system of "jump-starting" habeas corpus appeals by setting premature execution dates).

Mr. Lackey does not dispute that the state has a legitimate interest in seeing that habeas corpus appeals are pursued efficiently by death row inmates; however, considerably less cruel methods are available to assure that habeas corpus appeals are pursued by death row inmates in an efficient manner than Texas' preferred method of setting execution dates.

Clarence Lackey should be allowed to serve the life sentence the State of Texas has chosen to give him.

D. Reasons Why A 30 Day Reprieve Should Be Granted

After nearly twenty years on death row waiting to die, Clarence Lackey will not tell you that looking death in the face six times has been the hardest part of the last two decades. For him, spending those years with only a black abyss where the night of July 31, 1977, should be is the greatest pain. To know for certain whether it was his own hands that took the life of Toni Kumph would give Clarence the comfort and strength he needs to face God. That alcoholic blackout has robbed Mr. Lackey of the ability to accept the justice that awaits him. Today, the technology exists to grant Mr. Lackey that last request. Unfortunately, the trial court in Lubbock refused to order the release of evidence for DNA testing to be paid for by Mr. Lackey. The Governor and the Board are Mr. Lackey's last chance to find comfort at the end. Accordingly, Clarence Lackey respectfully requests the State of Texas to grant him thirty days to conduct the DNA testing. If the results miraculously exculpate Mr. Lackey, we can all rest knowing that justice truly has been served. If, on the other hand, the tests prove conclusively that Clarence Allen Lackey murdered Toni Kumph, Clarence is willing to face the consequences of that act if the State wishes to execute his death sentence.

Clarence does not seek to relitigate his case with this request. The time to present evidence drew to a close many years ago. Rather, Mr. Lackey seeks what two trials and nineteen years of appeals could never give him. In addition to the simple difficulty of

connecting this crime to the boy who would suffer horrible beatings without reaction to spare his mother and sister the same pain, inconsistencies in the evidence provide a reasonable source of doubt in Clarence's mind. Notable among these:

➜ A witness testified that he saw a man leaving the victim's house, get into a white pick-up truck and drive away. The witness claimed that he saw a woman slumped over the truck's seat and that the driver of the car roughly matched Mr. Lackey's appearance. Mr. Lackey did drive a white pick-up, but it was a Chevrolet, not the Ford that the witness claimed he saw. Moreover, the witness testified that the only notable aspect of the vehicle was a missing hubcap. He never mentioned the flashy air horns and running lights that ostentatiously adorned the roof of Clarence's truck.

➜ The witness also described the man driving the white pick-up as having long hair and a mustache. Mr. Lackey, however, had short hair and side burns. No line up was performed at the time of his arrest, just a few days after the murder, to allow the witness to positively identify the man he saw that night while the memory was fresh in his mind.

➜ No autopsy was ever performed on Ms. Kumph. Examinations of photographs of the body by a board certified forensic pathologist revealed no evidence of sexual assault. Rape was the sole aggravating factor that made Mr. Lackey eligible for the death penalty at trial.

Clarence Lackey does not come to you arguing that these inconsistencies mandate his immediate release. He only seeks permission to lay his doubts to rest. After twenty years, most of which were the result of state-created delay, and six execution dates, it is the least the State of Texas can do for Clarence Lackey. The testing is to be paid for by Mr. Lackey and the only assistance he seeks from the State is the permission to obtain the evidence for the test. It is said that the death penalty serves two purposes; as a deterrent to crime and as retribution for the most heinous of crimes. Neither of those goals are advanced when the man put to death genuinely has no recollection of the night at issue. Clarence Allen Lackey only seeks the truth. Please grant him that last request.

E. Conclusion

The execution of Clarence Allen Lackey will serve none of the purposes for which the State of Texas imposes the death penalty on those convicted of capital murder. Twenty years waiting for death and six previous occasions where that day became concrete only to be spared at the last minute is a far greater punishment than death itself. That pain becomes even more agonizing knowing that alcoholism robbed Mr. Lackey of any memory of the night which landed him on death row. Having suffered greatly already under those circumstances, the State's interest in retribution is more than satisfied with life imprisonment. Moreover, death as a deterrent to future crime is undermined when death is only a distant, uncertain threat. Without either of these justifications, the execution of Clarence Lackey next Tuesday will just be the purposeless extinction of another human life.

Clarence Lackey has been punished with a life sentence and a death sentence and the courts are unable to address the injustice in this double sentence. Accordingly, the Governor, upon the recommendation of the Board of Pardons and Paroles, should officially commute Clarence Lackey's sentence to the life sentence that he has already been serving. Over the last twenty years, Clarence has proven himself the type of inmate that will be a benefit in the general prison population. He has defeated the alcoholism that sent him to prison in the first place. He has struggled to overcome the intellectual limitations that have plagued him since his difficult birth. He has proven his hard-

working, industrious nature by spending most of his time on death row as a work-eligible inmate. In sum, he has escaped the ghost of his father and hopes to have the opportunity to impart the lessons that he has learned and spread the advice that he gives to me every time we meet.

Thirty years ago, Clarence stepped in front of his father's violent rampage to save his mother and sister from certain suffering. With the grace of the Governor and the Board, Clarence Allen Lackey may yet again be able to prevent another innocent person's pain by being a positive influence to those inmates who may once again re-enter society after serving their sentences.

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REQUIRED EXHIBITS

LETTER FROM CLARENCE LACKEY TO THE BOARD OF PARDONS AND PAROLE