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STATE OF OKLAHOMA

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August 8, 2012

Mr. Terry Jenks
Executive Director, Oklahoma Pardon and Parole Board
First National Center
120 N. Robinson, Suite 900W
Oklahoma City, Oklahoma 73102-7436

RE: **NOTICE OF OPEN MEETING ACT VIOLATIONS BY THE OKLAHOMA PARDON AND PAROLE BOARD**

Dear Director Jenks:

On July 19, 2012, I received a call from the family of a man who was killed by Maelene Chambers, DOC #566933. Inmate Chambers was convicted of Manslaughter I on March 4, 2008. Chambers was sentenced to 25 years in the custody of the Oklahoma Department of Corrections. The sentence was to be served as 10 years to do and 15 years on suspended sentence upon release from incarceration. The family of the victim was concerned because they received a notice from the automated VINE program (the Victim Information and Notification Everyday program is a service of the Oklahoma Attorney General's Office and the Department of Corrections). The VINE system notified the family that Inmate Chambers was set for a parole hearing in July.

I advised the family that this was an obvious mistake because Inmate Chambers was convicted of Manslaughter I, a crime enumerated in 21 O.S. § 13.1, as a crime requiring the convicted person ***"...to serve not less than eighty-five (85%) of any sentence of imprisonment imposed by the judicial system prior to becoming eligible for consideration for parole. Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of sentence to less than eighty-five (85%) of the sentenced imposed".*** I advised the family that I would determine why this notification was sent to them.

I first called your office to speak to you, but I was informed that you were at the July 2012 Pardon and Parole Board meeting. I asked your assistant about Inmate Chambers. She advised that Inmate Chambers was on the July, "Stage 1" docket. The lady who I spoke with could give no explanation of how Inmate Chambers was placed on the parole docket early. I then verified this information by calling Inmate Chambers'

case worker at DOC. She had no idea how Inmate Chambers was placed on a parole docket earlier than she was qualified for.

I then called the victim's family back and advised them that Inmate Chambers was placed on a parole docket, notwithstanding her prohibition from parole consideration until she had served eight and one-half years. I advised the family that I would determine how this happened and report to them.

As I began my inquiry, I attempted to determine how Inmate Chambers found her way to the Parole Docket four years too soon. I learned that the members of the Pardon & Parole Board engaged in a practice of placing inmates on a docket called "Pre-Docket Investigation", or "PDI" (an abbreviation used by the Board). I learned that Board Members "Move" to place an inmate on the "PDI". The moving member then seeks a "second" on the motion. After a Motion and Second, the board then votes whether to place the Inmate on the "PDI". If three Board Members vote for the Inmate, they are approved for early parole consideration. Inmates who receive the requisite votes are automatically approved for placement on a Stage 1(violent offenders) or Stage 2 (non-violent offenders) parole docket. Inmates are placed on these dockets notwithstanding statutory prohibitions on their parole consideration due to mandatory minimum sentences.

When I learned of the "PDI" docket and its operation, I contacted the Assistant District Attorney and staff in my office who handle matters with the Pardon & Parole Board. I asked if they were aware of the "PDI" docket or if we have ever received any notice that an inmate from our county was being considered for the "PDI" docket and early release, notwithstanding the prohibition of early parole consideration. They were unaware of a "PDI" docket and advised that they did not know what it was, nor had they ever received notice that an Oklahoma County inmate was being considered for early parole consideration on the "PDI" docket.

I determined that the Pardon & Parole Board was not notifying District Attorney's offices of their unqualified inmates being placed on the "PDI" docket for early parole consideration. On July 25, I wrote you through the electronic mail system and requested Oklahoma Pardon and Parole Board Agendas and Official Minutes for the period of January 2010 through July 2012 (the most recent P & P Board Meeting). You replied on Friday, July 27, with the requested documents.

I reviewed the Agendas first. In the two and one-half years of Agendas, **NEVER** was "Pre-Docket Investigation" or "PDI" mentioned. It was **IMPOSSIBLE** to determine at what point in the Pardon and Parole Board meetings the "PDI" docket was being considered and voted on. Not until I carefully reviewed the Pardon and Parole Board Minutes that correspond with the Agendas for January 2010 through July 2012 was I able to ascertain the point in the Pardon and Parole Board meetings where the "PDI" docket was considered and voted on.

As I reviewed the Board minutes, an obscure, recurring Agenda item became the focus of my inquiry. The Agenda item, "***Docket Modifications – J.D. Daniels***", appeared without any explanation. Notably, no reference was made to a related docket or website containing a docket for consideration to be "modified". The "Docket Modification" Agenda item gives **NO** notice to the public of what business the Board will be conducting under this item.

Board Minutes verify that numerous Inmates' cases were "Moved and Seconded" to be considered by the Board. With the exception of only one inmate, every inmate was voted to be "Passed" onto an early parole docket. At least five inmates approved for the early parole docket were convicted of eighty-five percent crimes and prohibited by statute from being considered for early parole. It appears many other inmates "Passed" by the Board to an early parole docket were prohibited from early parole consideration because of other statutory restrictions.

In the case of Maelene Chambers, she was considered for "PDI" at the March, 2012 Board Meeting. The Meeting Minutes state, "Marlene (sic) Chambers' (#566933) file was discussed during the March 2012 Meeting. Mr. Dugger moved to give Ms. Chambers early consideration. Ms. Harkins seconded the motion. All Members voted "Yes". Ms. Chambers will be placed on the June 2012 Parole Docket." Inmate Chambers did not appear on the June 2012 docket, but rather July 2012. It is yet another mystery how her case moved from the June 2012 docket to the July 2012 docket. It was the placement of Inmate Chambers on the August 2012, "Stage II" docket that triggered the automatic VINE notification to the family of the man she killed.

During my inquiry, I called Mr. Richard Dugger. I asked him why he moved to consider Inmate Chambers for early parole. He began by telling me that the Board had the power to consider anyone they want. He said that, "Lee" contacted him and requested that Chambers be considered for early release. I asked who "Lee" was. Dugger told me he was referring to Leamon Freeman, a retired Oklahoma County Judge. Dugger revealed that he and Freeman were law school classmates and friends.

I asked Dugger if he thought that was proper. He responded by saying, "I have the authority to do it. He (Freeman) asked me to do it and I did." I again asked what authority he had to place Chambers on a parole docket early. Dugger said, "The Constitution." My conversation with Dugger ended with him advising me that I had the right to protest Chambers' release at the next parole board hearing if I did not want her released.

GENERAL GUIDELINES AND PURPOSES OF OKLAHOMA'S OPEN MEETING ACT

The Oklahoma Open Meeting Act, 25 O.S. 2001, §§ 301, *et seq.*, requires public bodies to post their agendas and conduct their meetings in public. *Id.* at 303. The definition of public bodies includes:

> [A]ll boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts or any entity created by a public trust, task forces or study groups in this state supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property, and shall include all committees or subcommittees of any public body. *Id.* at 304(1).

The Oklahoma Pardon and Parole Board is a public body falling under the definition of Oklahoma's Open Meeting Act. Thus, the requirements contained in the sections of Title 25 O.S. 2001 §§ 301 *et seq*. apply to your Board.

The Act is designed to "encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems." 25 O.S. 2001 §302. Because the Act was enacted for the public's benefit, it is to be construed liberally in favor of the public. *I.A.F.F. Local 2479 v. Thorpe,* 632 P.2d 408 (Okl.Cr. 1981). The Act serves to inform the citizenry of the governmental problems and processes by informing them of the business the government will be conducting. Advance notice to the public, via agendas, must "be worded in plain language, directly stating the purpose of the meeting ... [and] the language used should be simple, direct and comprehensible to a person of ordinary education and intelligence." *Andrews v. Independent School District No. 29 of Cleveland County,* 737 P.2d 929 (Okl.Cr. 1987).

AGENDA NOTICE VIOLATIONS

Two violations of the Open Meetings Act related to the Board's Agenda and actions are patently apparent:

> First, the lack of notice provided by the Agenda item, "Docket Modifications – J.D. McDaniels", that appears on every Agenda reviewed, violates the letter and the spirit of the Act. On its face, this Agenda item fails miserably in providing the notice to the public required by the Open Meeting Act. No *person of ordinary education and intelligence* could possibly infer what activity would be contemplated by the Board under this Agenda item.
>
> Second, the absence of any mention of a "Pre-Docket Investigation" or "PDI" on the Board's Agenda creates a vacuum in the Agenda wherein the "PDI" docket is considered and voted on. Additionally, the Agenda makes no mention or makes any reference to a docket or list of inmates who will be considered during the "Docket Modification" or the "Pre-Docket Investigation" Board activity.

Notwithstanding the clear violations of the Open Meeting Act noted above, I made an effort to determine if any member of the public could anticipate the early

consideration of any of the inmates "Passed" to an early parole docket. Additionally, I researched the Board's alleged authority to parole, commute or otherwise modify the sentence of an inmate who was subject to a restriction on early release. I researched the Oklahoma Constitution, the Oklahoma Statutes, the Oklahoma Administrative Code, Oklahoma Case Law and the Pardon and Parole Board website.

I determined that the Board has no authority to pardon, commute or otherwise modify an inmate's sentence that was subject to a statutory restriction on early release. I also found that even the most diligent member of the public who had an interest in carefully monitoring a specific inmate, would not have known or anticipated the actions of your Board.

I began by reviewing the Oklahoma Constitution. Article VI § 10 created the Oklahoma Pardon and Parole Board and conferred to the Board its authority. *Okla. Const. art. VI, § 10 (1943).* As originally adopted, the constitutional amendment establishing the Pardon and Parole Board did not authorize the Legislature to establish a minimum time period that a prisoner must serve prior to becoming eligible for Parole. *Id.* That changed. A constitutional amendment in 1978 and a superseding constitutional amendment in 1994, added this language, "The Legislature shall have the authority to prescribe a minimum mandatory period of confinement which must be served by a person prior to being eligible to be considered for parole." *Okla. Const. art. VI, § 10 (amended 1994).*

The ability of the Legislature to limit the power and authority of the Pardon and Parole Board is clearly the will of the Oklahoma people. They voted twice to amend their constitution to do it. If there was ever a question of the Legislature's authority to limit the power of the Pardon and Parole Board, there should be no question after the Oklahoma Attorney General opined on the issue in at least two official Attorney General Opinions (*see*, Okl. A.G. Opin. No. 01-47 and Okl. A.G. Opin. No. 09-34, two official opinions issued by the Attorney General in response to opinion requests from "Terry Jenks, Executive Director, Oklahoma Pardon and Parole Board"). The Attorney General opined that the legislature's limitation on the Pardon and Parole Board's power to parole is constitutionally sound.

In addition to the cited Attorney General Opinions, the Oklahoma Court of Criminal Appeals has found the Legislature's limitations on the Pardon and Parole Board's authority constitutional by implication in *Anderson v. State,* 130 P.3d 273 (Okl.Cr. 1996). The *Anderson* case is known as the case wherein the Oklahoma Court of Criminal Appeals mandated the jury to be instructed on the eighty-five percent law. The Court held, "Far from a discretionary procedure exercised by the executive branch, the 85% rule is a legislatively-imposed restriction upon executive branch discretionary authority." *Id.* at ¶16. The Court continued in summation, "The issue is when, under Oklahoma law, a defendant is eligible to be considered for parole on a particular sentence. Unlike traditional parole questions, instruction on the 85% Rule does not require trial courts to speculate about possible future actions of the executive branch." *Id.* at ¶24.

The Oklahoma statute known as the eighty-five percent law is found at Title 21 O.S. § 13.1. As enacted, it is titled, "Required service of minimum percentage of sentence—Offenses specified" The statute reads in pertinent part, "Persons convicted of: ... (The statute enumerates 21 specific crimes)..., shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the *judicial system* (emphasis added) prior to becoming eligible for consideration for parole. Persons convicted of these offenses shall not be eligible for earned credits or any other type of credits which have the effect of reducing the length of sentence to less than eighty-five (85%) of the sentenced imposed." *Id.*

The Oklahoma Uniform Jury Instruction created by the OUJI Committee in response to the *Anderson* case reads:

OUJI-CR-2d 10-13B

REQUIRED SERVICE OF 85% OF SENTENCE WHERE LIFE IMPRISONMENT IS AN OPTION

> A person convicted of [**Specify Crime in** 21 O.S. Supp. 2005, § 13.1] shall be required to serve not less than eighty-five percent (85%) of the sentence imposed before becoming eligible for consideration for parole and shall not be eligible for any credits that will reduce the length of imprisonment to less than eighty-five percent (85%) of the sentence imposed.
>
> If a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years, so that a person would be eligible for consideration for parole after thirty eight (38) years and three (3) months.

For the sake of argument, if the position of the Board is that, "Commutation" is not addressed, limited or restricted, their position is without support or legal merit. It would be an act of unimaginable arrogance and dishonesty for the Board to believe that they could do indirectly, what they are prohibited from doing directly. The Constitutional amendments and subsequent Legislative action could not be clearer. Restrictions on early release shall be followed.

The Legislature addressed sentence modification in Title 21 O.S. § 13.1. The language, "...shall be required to serve not less than eighty-five percent (85%) of any sentence of imprisonment imposed by the *judicial system* prior to becoming eligible for consideration for parole" mandates the early parole restriction to be calculated on a sentenced imposed by the judicial branch of our government, not any subsequent executive branch action. This plain, unambiguous language was purposefully created by the Legislature and it must be interpreted as such. "In the interpretation of statutes, courts

. . . construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences." *McNeill v. City of Tulsa*, 953 P.2d 329, 332 (Okl.Cr. 1998). "When the language of the statute is plain, it will be followed without further inquiry." *Okla. City Zoological Trust v. State ex rel. Pub. Employees Relations Bd.*, 158 P.3d 461, 464 (Okl.Cr. 2007).

A sentence modification performed by the Board, whether by commutation or early parole, is a function of the executive branch of the government. The Board's attempt to modify an inmate's sentence has no legal effect because the judicial branch's action is binding by statute.

I reviewed the Board's website to gain additional insight. I reviewed the "Frequently Asked Questions" link. By reviewing the FAQs, a person is led to believe that the Board complies with the limitations placed on the Board by Title 21 O.S. § 13.1, with rare exception, though the "exceptions" are not explained. Your website also addresses commutation. It notes, "There is no special process to apply for commutation. The Parole Board can consider someone for a commutation *at the time of his or her regular parole consideration (*emphasis added*)*." By reviewing the Board's own website, it is impossible to anticipate a prohibited inmate would be considered for early parole or early commutation by the Board.

Finally, I reviewed your Board's Administrative Code, found at Okla. Admin. Code 515:1-1-1, *et seq*. The Pardon and Parole Board's administrative rules verify that inmates are not eligible for parole consideration until they have met their statutorily mandated minimum sentence. OK ADC 515:3-3-1, *et seq*. Your administrative rules restrict the Board's ability to place an inmate on a docket early. Title 515, Chapter 9-1 (a) states: "With the concurrence of three board members of the Pardon and Parole Board, an offender may be placed on *a docket* earlier than those prescribed above *so long as the offender is not subject to any mandatory terms as described in Subchapter 3 above*." (emphasis added). Subchapter 3 acknowledges the Oklahoma statutory restrictions on early parole consideration. This section clearly restricts an inmate from being placed on any docket (parole, commutation or clemency) early if they are prohibited from consideration by statute.

Members of the public should be able to trust their Public Boards and certainly assume that they are following mandates, restrictions and requirements of substantive law governing them. Citizens have every right to believe that Oklahoma laws regarding sentencing are not being violated by the Pardon and Parole Board. Unfortunately, that has not been the reality of the situation. I determined that the public had no ability to be aware of the inmates who your Board "Passed" to an early docket, nor would they have any reason to believe that these inmates would be considered when the Board considered them.

Therefore, a member of the public who was interested in monitoring a specific inmate would not begin checking the parole dockets until the time drew near for the legal

consideration of the inmate. Outside of Board members, no person had the ability to determine what inmate would or could be the next fortunate soul to emerge from the darkness of the "Docket Modification" portion of the Board's business with an undeserved opportunity to attain an early and illegal release.

This result illustrates why compliance with the Open Meeting Act is vital to public awareness and governmental transparency. At the least, the public deserves the opportunity to observe a public board violate the law in the light of day.

WILLFUL VIOLATIONS OF THE OPEN MEETINGS ACT

Any action taken in willful violation of the Open Meetings Act shall be invalid. 25 O.S. 2001 § 313. By operation of law, the action taken in violation of this act is void. *Id.* Additionally, any person or persons willfully violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a period not exceeding one (one) year or by both such fine and imprisonment. *Id.* at § 314.

For purposes of determining if a violation of the Open Meeting Act has occurred, willfulness does not require a showing of bad faith, malice, or wantonness, but, rather, encompasses conscious, purposeful violations of law or blatant or deliberate disregard of law by those who know, or should know requirements of the Act; notices of meetings of public bodies which are deceptively vague and likely to mislead constitute willful violations. *Excise Board of Greer County v. Rogers,* 701 P.2d 754.

After careful consideration of all the facts and circumstances in this matter, I have determined that the violations of the Open Meetings Act are willful, conscious and purposeful violations of the law. Additionally, I find the Board's actions to be in deliberate disregard of Oklahoma's Open Meeting Act. The Oklahoma Pardon and Parole Board's violations in this matter are egregious, aggravated and a clear attempt to operate in secrecy, outside of public scrutiny.

In forming my conclusion, I considered the violations related to the lack of notice regarding the Board's action under the "Docket Modification" item on the Agenda, the Board's blatant violations of Oklahoma's laws regarding sentencing and parole, and what appears to be gross partiality exercised by Board members who place certain inmates on the early parole docket without any apparent policy or procedure. Though the patent violations of the Open Meeting Act are condemnable, it is the apparent presence of patent partiality, operating in the darkness of Board meetings that is equally disturbing. This practice of partiality could not have survived had the Board complied with the Open Meeting Act.

By operation of law, the action taken by the Board pursuant to the Agenda item, "Modification of Dockets" or action taken by the Board related to consideration of

inmates to be placed on "Pre-Docket Investigation" or early parole consideration are **INVALID**. Additionally, any subsequent actions taken by this Board, by any agency or by the Governor, on these inmates' matters are **INVALID**.

The effect of the Board's illegal actions requires the executive branch to take immediate steps to remediate the damage caused by the Board. Immediate steps should be taken to reverse the decisions made subsequent to the Board's invalid actions. Obviously, this will include taking inmates who have been released back into custody.

I have attached as an addendum to this correspondence, the list of inmates who the board took action on during the violative portion of their meetings. Any inmates who are scheduled to be considered on a Stage I or Stage II docket for the August 2012 or any subsequent meeting should be stricken.

Please immediately forward this correspondence to all Board members.

Sincerely,

David W. Prater
District Attorney

Attachment

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ADDENDUM

TO NOTICE OF OPEN MEETING ACT VIOLATIONS

The inmates listed below are persons who the Pardon and Parole Board took action on during the "Docket Modification" Agenda Item. The action taken by the Board and any subsequent action by the Board, any other agency or the Governor is invalid. The inmates are listed in the order they appear on the Board Minutes and by year.

2010

Kyle W. McCullar	#379644	Leray D. Bitz	#195479

Kevin K Broussard-Barrs #192467 There is no record of this inmate on the DOC website by name or DOC number. This inmate's case originated out of Oklahoma County, CF1988-5501.

Penny Calise	#257939	Curtis B. McFarland	#139961
Ben W. Jones Jr.	#88216	James A. McElfresh	#145155
Nicholas W. Molt	#425943	Robert H. Taylor	#196417
Daryl E. Whitebird	#234967	Michael R. Hicks	#143124

Traci L. Switch #145155 This DOC number reported on the Board's minutes is incorrect. Inmate Switch was the only inmate who was not passed to the next stage.

Clayton J. Appleton	#135764	Roger Duvall	#585374
Cody Lee Black	#546845	Charles Schnoebelen	#574763
Pamela A. Dover	#175800	Leroy Albert Jordan	#422194
James R. Bibbee	#208665	Bart L. Morris	#394109

Lawrence T. Watts	#483988	Earnest D. Fairchild	#440254
Nickey D. Hamilton	#138445	Pedro Huerta	#400910
Joe A. Johnson	#67563	Jeremy L. Ross	#598349
Richard W. Sipe III	#464566	Donald J. Webb	#216250
Callie J. Barrington	#281514	Kevin A. Daniels	#257285
Daniel G. Liles	#131013	James T. Turner III	#576499

2011

DeAngelo Gordon	#256692	Ronald Skinner	#145128
Gordon Lewis	#590737	Karen Matthews	#220493
Larry Yarbrough	#125218	Randel Cherry	#234549
James Godbey	#170449	Westley Gabelt	#584891
Walter Hill Jr.	#222287	Richard Sipe III	#464566

2012

Patricia Spottedcrow	No DOC # Given	Jack A. Logsdon	#581018
Marlene (sic) Chambers	#566933	Stephen Chancellor	#522176
Rocky McKinley	#608810	Easker Brooks III	#456389
Curtis Horton	#578191	Jonathan Davis	#135656
Jeno Jones	#592523		

There were no approved minutes corresponding with the July 2012 Agenda provided.