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## ARTICLE

# THE PREROGATIVE OF MERCY IN MINNESOTA: CURRENT CLEMENCY PROCESS AND RECENT TRENDS

KARL C. PROCACCINI\*

### I. INTRODUCTION

Clemency has been part of Minnesota's constitutional framework since statehood in 1858,<sup>1</sup> and since then it has developed unique procedural and institutional characteristics. The Minnesota Constitution provides for a sharing of clemency power between the Governor and Board of Pardons—which is comprised of the Governor, Attorney General, and Chief Justice of the Minnesota Supreme Court—and current state law requires the Board to act unanimously for certain forms of clemency to have legal effect.<sup>2</sup>

Individuals seek clemency in Minnesota for a variety of reasons. A grant of clemency may end or shorten an individual's criminal sentence, and it may also improve their job and housing prospects, help them obtain a

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\* General Counsel & Deputy Chief of Staff, Office of Governor Tim Walz & Lt. Governor Peggy Flanagan. All views expressed are the author's and do not necessarily represent the views of the Office of the Governor & Lieutenant Governor. I first presented the framework for this article at the *University of St. Thomas Law Journal's* Editor-in-Chief Lecture in March 2022, and I am grateful for the comments and questions that I received from my fellow presenters and the symposium's attendees. I am also grateful to Professor Mark Osler for his insightful feedback, to Isaiah Baker and Lane Centrella for their assistance gathering and analyzing portions of the data used in this article, to Monica Shaffer for her thorough research into reprieves, to Benjamin Noeldner for his help researching legislative history, and to Mariah Glinski, Robert Rohloff, and Eric Kvasnicka for their careful review. Any errors or omissions are my own.

1. MINN. CONST. of 1857, art. V, § 4 (1858); see *Shefa v. Ellison*, 968 N.W.2d 818, 831 (Minn. 2022).

2. See MINN. CONST. art. V, § 7; MINN. STAT. § 638.01 (2022). In *Shefa*, the Minnesota Supreme Court adopted an interpretation of the Minnesota Constitution's pardon clause, according to which the Governor and the Board of Pardons—of which the Governor is a member—"[each] have an insufficient but necessary power to grant a pardon, which requires them to work together." 968 N.W.2d at 828–30. The Court likened this to "a military protocol made part of movie images—the simultaneous turning of two different keys to launch an intercontinental ballistic missile; both keys are necessary but neither key by itself can launch the missile." *Id.* at 828–29. The Court also noted that the current statutory unanimity requirement for certain forms of clemency is not the only voting rule that would withstand constitutional scrutiny under this "launch key" interpretation. *Id.* at 833 & n.22.

professional license, lift travel restrictions, restore firearm rights, and avoid immigration consequences.<sup>3</sup> Clemency also provides a uniquely public forum for mercy and redemption.<sup>4</sup>

This article provides an overview of clemency in Minnesota, beginning with an explanation of the different forms of clemency available in Minnesota and procedures applicable to each of them. I then present recent trends, including steadily increasing application and success rates, which have led to higher overall clemency rates, and trends related to applicant demographics. Recent years have featured some significant, consequential, and promising developments for applicants, including a series of clemency “firsts.” These trends, combined with recent interest in enhancing clemency practice and procedures, give hope to those who may seek redemption through clemency in Minnesota.

## II. CURRENT MINNESOTA CLEMENCY LAW AND PROCEDURE

### A. Overview

The Minnesota Board of Pardons (“Board”) generally holds public meetings twice a year to discuss and vote on clemency applications.<sup>5</sup> These meetings are referred to as “spring” and “fall” meetings, although they generally occur in June and December.<sup>6</sup> At its meetings, the Board hears directly from applicants for the forms of clemency outlined below. The Board also votes on applications for waivers of the waiting period for “pardons extraordinary” and for rehearing of denied applications.<sup>7</sup>

3. See discussion *infra* Section II.B.2; see also Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 *BROOK. PUB. INT. L.J.* 293, 314–19 (2013) (describing the circumstances necessary for state pardons to influence removability proceedings under the Immigration and Nationality Act).

4. See Mark Osler, *Clemency as the Soul of the Constitution*, 34 *J.L. & POL.* 131, 148–51 (2019); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 *HARV. J.L. & PUB. POL’Y* 833, 842–51 (2016).

5. Statute requires the Board to meet “at least twice each year” and also requires the Board to “hold a meeting whenever it takes formal action on an application for a pardon or commutation of sentence.” *MINN. STAT.* § 638.04. Until 1991, Board of Pardons meetings were exempt from Minnesota’s public meetings law. See 1973 *MINN. LAWS* 1835, ch. 680, S.F. 1480, sec. 1, § 471.705 (adding state boards to Minnesota’s open meetings law, *MINN. STAT.* § 471.705, subd. 1 (1971), but carving out the Board of Pardons); 1991 *MINN. LAWS* 2182, ch. 319, H.F. 693, sec. 22, § 471.705 (removing the Board of Pardons carveout from the open meetings law).

6. Compare *Application Process*, *MINN. DEP’T OF CORR.*, <https://mn.gov/doc/about/pardon-board/application-process/> (last visited Sept. 24, 2022) (referring to spring and fall meetings), with 2022 *MINN. BD. OF PARDONS ANN. REP.* 2, [https://mn.gov/doc/assets/2022%20Board%20of%20Pardons%20Report%20to%20Legislature\\_tcm1089-566396.pdf](https://mn.gov/doc/assets/2022%20Board%20of%20Pardons%20Report%20to%20Legislature_tcm1089-566396.pdf) (meetings held in June 2022 and December 2022).

7. Requests for waivers of the waiting period for a pardon extraordinary must be granted by a unanimous vote of the Board. *MINN. STAT.* § 638.02. Applicants who have previously been denied relief may seek rehearing. *MINN. R.* 6600.1100 (2022). Applicants for rehearing are expected to show “new and substantiated fact not previously considered by the board,” and such applications are granted upon a vote of two or more Board members. *Id.* The application is reheard at the meeting after the one in which the Board votes for rehearing. *Id.*

While the Governor and the Board have relatively expansive power to grant relief, the Minnesota Constitution imposes some important limits common to all forms of clemency. To start, the Board may grant relief only for Minnesota state offenses.<sup>8</sup> And, unlike the presidential clemency power, which includes the preemptive power to grant clemency for crimes not yet charged or convicted,<sup>9</sup> Minnesota clemency is available only for crimes for which an individual has already been convicted.<sup>10</sup>

## B. Relief Granted

The forms of clemency available in Minnesota derive from constitutional and statutory sources. The Minnesota Constitution states that “[t]he governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.”<sup>11</sup> Minnesota statutes further provide that “the Board may grant pardons and reprieves and commute the sentence of any person convicted of any offense against the laws of the state, in the manner and under the conditions and rules hereinafter prescribed, but not otherwise.”<sup>12</sup> Minnesota law also includes the “pardon extraordinary”—a relatively unique creature of statute. The constitutional and statutory provisions result in four general forms of substantive clemency relief: the pardon extraordinary, the pardon, the commutation, and the reprieve. Each is described further below.

### 1. Pardons Extraordinary

The pardon extraordinary was created by the Minnesota legislature in 1941.<sup>13</sup> The pardon extraordinary originally applied only to offenders who committed crimes before the age of twenty-one.<sup>14</sup> Over time, the legislature tinkered with the pardon extraordinary, removing the age limitation<sup>15</sup> and

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8. MINN. CONST. art. V, § 7 (providing that the Governor and Board have power to grant relief “for an offense against the state”).

9. In 1866, the Supreme Court held that the presidential pardon power “extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment.” *Ex parte Garland*, 71 U.S. 333, 380 (1866); see Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 86–87 (2019) (surveying historical examples of preemptive presidential pardons).

10. See MINN. CONST. art. V, § 7 (providing that the Governor and Board have power to grant relief “after conviction”).

11. *Id.*

12. MINN. STAT. § 638.01.

13. 1941 Minn. Laws 695–96, ch. 377, S.F. 462, sec. 3.

14. *Id.*

15. See 1963 Minn. Laws 1441, ch. 819, H.F. 1379, sec. 1, § 638.02 (removing the age requirement).

adding waiting periods as described below.<sup>16</sup> The pardon extraordinary has become, by far, the most common form of clemency in Minnesota. Because pardons extraordinary are available to individuals convicted of “crimes,”<sup>17</sup> relief extends to Minnesota felony, gross misdemeanor, and misdemeanor convictions.<sup>18</sup> Pardons extraordinary are not available for petty misdemeanor convictions because those convictions are not “crimes” under Minnesota law.<sup>19</sup> A pardon extraordinary “has the effect of setting aside and nullifying the conviction and of purging the person of it, and the person shall never after that be required to disclose the conviction at any time or place other than in a judicial proceeding or as part of the licensing process for peace officers.”<sup>20</sup>

Applicants may seek a pardon extraordinary for a Minnesota criminal conviction only after discharge of their sentence.<sup>21</sup> Applicants for pardons extraordinary must observe a waiting period of five years, unless the applicant was convicted of a “crime of violence.”<sup>22</sup> Convictions for a “crime of violence” trigger a ten-year waiting period.<sup>23</sup> If an individual is convicted of an additional crime during their waiting period, the intervening conviction resets the waiting period.<sup>24</sup> An applicant may request a waiver of the waiting period, but waivers are granted only upon a unanimous vote of the Board.<sup>25</sup>

Most pardon extraordinary applications follow a six-to-seven-month course from the application deadline to a decision by the Board. Per the Board’s longstanding practice, applications are accepted on or before two dates each year: Applications to be heard at the Board’s spring meeting are

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16. See 1992 Minn. Laws 1940, ch. 569, H.F. 2181, sec. 30, § 638.02 (imposing waiting periods for pardons extraordinary); see also *Eligibility Requirements*, MINN. DEP’T OF CORR., <https://mn.gov/doc/about/pardon-board/eligibility/> (last visited Sept. 24, 2022). The addition of waiting periods was a recommendation of the “Minnesota Pardon Board Review Commission,” which issued a report.

17. MINN. STAT. § 638.02, subd. 2.

18. See *id.* § 609.02, subs. 1–4 (defining “crime,” “felony,” “misdemeanor,” and “gross misdemeanor”).

19. *Id.* § 609.02, subd. 4a (defining “petty misdemeanor” as an offense “which does not constitute a crime”).

20. *Id.* § 638.02, subd. 3.

21. *Id.* § 638.02, subd. 2 (“Any person, convicted of a crime in any court of this state, who has served the sentence imposed by the court and has been discharged of the sentence either by order of court or by operation of law, may petition the Board of Pardons for the granting of a pardon extraordinary.”).

22. *Id.* The relatively expansive definition of “crime of violence” is set forth in MINN. STAT. § 624.712, subd. 5, and it includes a variety of arguably non-violent drug offenses.

23. MINN. STAT. § 638.02, subd. 2.

24. *Id.* (noting that applicants “must not have been convicted of any other crime” during the waiting period); see also *Eligibility Requirements*, *supra* note 16 (“If a person commits a new crime during the waiting period, the waiting period is reset and starts over again from the time the sentence for the new crime has expired or been discharged. Typically, that means that the waiting period effectively runs from the expiration of person’s most recent criminal sentence.”).

25. MINN. STAT. § 638.02, subd. 2 (requiring that applicants observe the waiting period unless the Board “expressly provides otherwise in writing by unanimous vote”).

due by December 1 of the preceding year, and applications to be heard at the fall meeting are due by June 1 of the same year.<sup>26</sup> The Minnesota Department of Corrections (“Department”), which acts as the Board’s secretary,<sup>27</sup> distributes and receives application forms.<sup>28</sup>

Upon receipt of a pardon extraordinary application, the Department reviews the applications according to guidelines set forth in statute, rule, and practice. The Department first reviews the application to ensure that the applicant has satisfied the applicable waiting period and is otherwise eligible for a pardon extraordinary. If the waiting period has been satisfied and the applicant is otherwise eligible, then the Department will conduct a thorough review of the applicant’s criminal history—both within Minnesota and in other jurisdictions.<sup>29</sup> The Department also publishes notice of the application in the county of conviction and seeks feedback from the prosecutor and judge related to the conviction, as well as any victims of the crime for which the pardon extraordinary is sought.<sup>30</sup> The Department compiles and summarizes the results of its review for the Board members.<sup>31</sup> Each Board member also conducts his or her own independent review of the application before it is heard.

Applicants for pardons extraordinary generally appear in person before the Board.<sup>32</sup> Counsel is not required, but applicants are often represented. Applicants and accompanying individuals speaking in support of the application are given an opportunity to present.<sup>33</sup> After the presentation of the application, victims of the applicant’s crimes, as well representatives of law

26. *Application Process*, MINN. DEP’T OF CORR., <https://mn.gov/doc/about/pardon-board/application-process/> (last visited Sept. 24, 2022). Although Board rules allow the Board to consider applications submitted after these deadlines, see MINN. R. 6600.0200 (2022), practically speaking, the earlier deadlines are necessary to complete the required screening and background check process.

27. Statute designates the Commissioner of the Minnesota Department of Corrections as the Board’s secretary. MINN. STAT. § 638.07. For simplicity, I refer to the Board’s secretary as “the Department” throughout this article.

28. *Board of Pardons Application Forms*, MINN. DEP’T OF CORR., <https://mn.gov/doc/about/pardon-board/application-forms/> (last visited Sept. 24, 2022); see MINN. STAT. § 638.05 (setting out the requirement for applications to the Board); MINN. R. 6600.0300 (requiring the Board’s secretary to prepare and supply application forms); *id.* R. 6600.0400 (specifying additional requirements for those forms).

29. See *Application Process*, *supra* note 26.

30. MINN. STAT. § 638.06 (setting forth notice requirements for “[e]very application for relief”); *id.* § 638.04 (noting that victims and law enforcement agencies may submit oral or written statements to the Board at the meeting and that the Board “must consider the victim’s and the law enforcement agency’s statement when making its decision on the application”); *Application Process*, *supra* note 26.

31. *Application Process*, *supra* note 26.

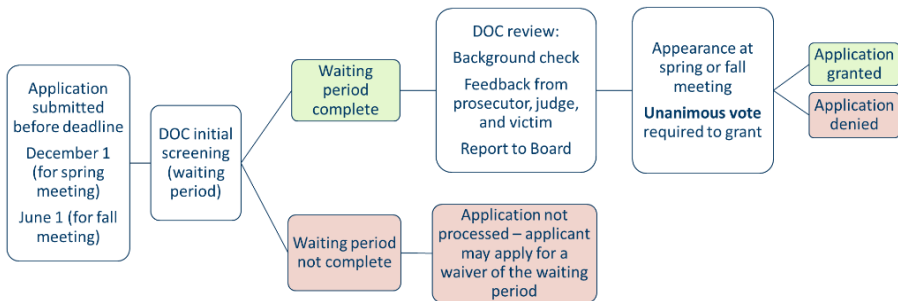
32. See *Board Meetings*, MINN. DEP’T OF CORR., <https://mn.gov/doc/about/pardon-board/board-meetings/> (last visited Sept. 24, 2022) (“All applicants for pardons extraordinary are expected to appear before the Board at the meetings so members can ask the applicants questions.”). *But see* MINN. R. 6600.0900 (setting out a process by which certain applicants could have an option not to appear before the Board).

33. *Board Meetings*, *supra* note 32.

enforcement agencies, may also speak for or against the application.<sup>34</sup> The Board may—and often does—ask questions of anyone appearing before it.<sup>35</sup> The Board generally votes immediately after hearing the application, but it occasionally continues its vote to a subsequent meeting, particularly when it desires additional information about the applicant or application.<sup>36</sup>

To grant a pardon extraordinary, the Board must determine that the applicant is of “good character and reputation.”<sup>37</sup> Statute requires that a pardon extraordinary has “no force or effect unless granted by a unanimous vote of the board duly convened.”<sup>38</sup> Applications receiving less than a unanimous vote are denied,<sup>39</sup> and those receiving a unanimous vote are granted.

FIGURE 1. PARDON EXTRAORDINARY FLOWCHART



When a pardon extraordinary is granted, it must be reduced to writing.<sup>40</sup> In practice, this takes the form of a pardon certificate signed by the Board members. The Department then files the certificate in the district court, and the district court must “order the conviction set aside and include a copy of the pardon in the court file.”<sup>41</sup> The court must also send a copy of

34. MINN. STAT. § 638.04.

35. *Board Meetings*, *supra* note 32.

36. *See, e.g.*, 2021 MINN. BD. OF PARDONS ANN. REP. 2, [https://mn.gov/doc/assets/2021%20Board%20of%20Pardons%20Report%20to%20Legislature\\_tcm1089-520296.pdf](https://mn.gov/doc/assets/2021%20Board%20of%20Pardons%20Report%20to%20Legislature_tcm1089-520296.pdf) (noting that the Board continued consideration of seven applications to a future meeting); 2020 MINN. BD. OF PARDONS ANN. REP. 2, [https://mn.gov/doc/assets/Board%20of%20Pardons%202020%20Report\\_Final\\_Accessible\\_tcm1089-468448.pdf](https://mn.gov/doc/assets/Board%20of%20Pardons%202020%20Report_Final_Accessible_tcm1089-468448.pdf) (noting that the Board continued consideration of one application to a future meeting).

37. MINN. STAT. § 638.02, subd. 2.

38. *Id.* § 638.02, subd. 1; *see Shefa v. Ellison*, 968 N.W.2d 818 (Minn. 2022) (upholding the constitutionality of the statutory unanimous vote requirement).

39. Per the Board’s rules, denied applicants may seek rehearing. MINN. R. 6600.1100 (2022). Such applicants are expected to show “new and substantiated facts not previously considered by the board,” and such applications are granted upon a vote of two Board members. The application is reheard at the meeting after the one in which the Board votes for rehearing. *Id.*

40. MINN. STAT. § 638.02, subd. 1 (requiring that “[e]very pardon . . . shall be in writing”).

41. *Id.* § 638.02, subd. 3.

its order and the pardon extraordinary to the Minnesota Bureau of Criminal Apprehension.<sup>42</sup>

## 2. Pardons & Commutations

Although they are two distinct forms of relief, pardons and commutations follow the same procedural path, and I address them together here. Both forms of relief are generally available to individuals who are still serving a sentence, including those serving probation or post-incarceration supervised release or parole.<sup>43</sup>

A pardon is “an act of forgiveness that exempts the convicted person from the punishment imposed by law.”<sup>44</sup> In Minnesota, pardons may be “absolute” or “conditional.”<sup>45</sup> When granting a conditional pardon, the Board may require the applicant to satisfy some condition precedent—for example, paying outstanding restitution or remaining crime-free for a specified period of time—before the pardon is effective. A commutation is a reduction or alteration of the applicant’s sentence.<sup>46</sup> Unlike a pardon, a commutation does not absolve the applicant of the conviction itself. The Board exercises its discretion in crafting commutations to suit individual circumstances.<sup>47</sup> Unlike pardons extraordinary,<sup>48</sup> pardons and commuta-

42. *Id.*

43. There is some ambiguity around an individual’s eligibility for a pardon (as opposed to a pardon extraordinary) after completion of their sentence. On the one hand, the applicable statutes do not appear to prohibit an individual who has completed their sentence from applying for a pardon. *See id.* § 638.02, subd. 1 (noting the availability of pardons and commutations without further requirements); *id.* § 638.02, subd. 2 (noting that individuals who have completed their sentences *may* apply for pardons extraordinary, subject to additional requirements). On the other hand, one might argue that the statutory logic of the pardon extraordinary—and the required waiting periods associated with pardons extraordinary—would be undercut by permitting individuals to apply for a pardon without satisfying the applicable waiting period. In practice, the Board and the Department have required individuals who have completed their sentences to observe the applicable waiting period. *See Eligibility Requirements, supra* note 16 (“To be eligible for a pardon or commutation, an applicant must meet all of the following requirements: (1) The applicant must still be serving the sentence for the crime in question. Once a criminal sentence has been completed, an applicant may only apply for a pardon extraordinary after satisfying the required waiting period.”). Full analysis of this legal question is beyond the scope of this article. It is also worth noting that recent legislative proposals have suggested the elimination of the distinction between pardons and pardons extraordinary entirely. *See* H.F. 2788, 93d Leg., Reg. Sess. (Minn. 2023); H.F. 3464, 92d Leg., Reg. Sess. (Minn. 2022); S.F. 3382, 92d Leg., Reg. Sess. (Minn. 2022).

44. 2022 MINN. BD. OF PARDONS ANN. REP., *supra* note 6, at 2. The Minnesota Supreme Court has further explained that “[a] pardon is the exercise of executive clemency. It completely frees the offender from the control of the state and relieves him of all legal disabilities resulting from his conviction. As a practical matter, it wipes out the conviction itself.” *State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949).

45. MINN. STAT. § 638.02, subd. 1; *see also* *Shefa v. Ellison*, 968 N.W.2d 818, 823 & n.7 (Minn. 2022) (discussing the distinction between absolute and conditional pardons).

46. *See* 2022 MINN. BD. OF PARDONS ANN. REP., *supra* note 6, at 2 (explaining that a commutation is “the substitution of a lesser or different type of punishment for that imposed in the original sentence”).

47. *See* discussion *infra* Section III.B.2 (noting recent approaches to commutations).



tions do not appear to be statutorily limited to “crimes.” The constitutional and statutory provisions authorizing pardons and commutations refer to “offenses” and not to “crimes.”<sup>49</sup> While a petty misdemeanor is not a “crime,” it is an “offense,” and therefore appears to be eligible for a pardon or commutation.<sup>50</sup>

Requirements for pardon and commutation applications are set forth in statute<sup>51</sup> and Board rules.<sup>52</sup> Applications for pardons and commutations undergo a prescreening and exclusion process also set forth in Board rules.<sup>53</sup> The Department reviews the application and determines whether to exclude an application based on grounds for exclusion that include those set forth in Board rules and additional grounds.<sup>54</sup> Where an applicant’s sentence includes the possibility of parole, the relevant Board rule encourages exclusion if the applicant has not yet been considered for parole.<sup>55</sup> Applicants who have failed to exhaust judicial remedies and those whose applications are otherwise premature are also likely to be excluded by the Department.<sup>56</sup> When an application is excluded, it is not included for review by the Board at its next meeting. Instead, the Department presents a summary of the excluded applications to the Board members for their review.<sup>57</sup> If any Board member disagrees with the Department’s decision to exclude an application

48. See *supra* Section II.B.1.

49. Compare MINN. CONST. art. V, § 7 (“The governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.”) (emphasis added) and MINN. STAT. § 638.01 (“The board may grant pardons and reprieves and commute the sentence of any person convicted of any offense against the laws of the state . . . .”) (emphasis added) with *id.* § 638.02, subd. 2 (“Any person, convicted of a crime in any court of this state, who has served the sentence imposed by the court and has been discharged of the sentence either by order of court or by operation of law, may petition the Board of Pardons for the granting of a pardon extraordinary.”) (emphasis added).

50. See MINN. STAT. § 609.02, subd. 4a (“‘Petty misdemeanor’ means a petty offense which is prohibited by statute, which does not constitute a crime and for which a sentence of a fine of not more than \$300 may be imposed.”) (emphasis added).

51. *Id.* § 638.05. Although this section’s headnote is “Application for Pardon,” its text makes clear that it applies more broadly to “[e]very application for relief.” *Id.*; see *id.* § 645.49 (headnotes before sections and subdivisions “are mere catchwords” and “are not part of the statute”).

52. MINN. R. 6600.0400 (2022); see also *id.* R. 6600.1000 (noting that an individual who has recently violated parole, probation, or other field supervision “and has been returned or committed to imprisonment” is not eligible to apply for a pardon or commutation until the individual “has been considered by the Minnesota Department of Corrections or has served at least 12 months from and after the date of return for commitment to imprisonment, all judicial remedies having been first exhausted.”).

53. *Id.* R. 6600.0500.

54. *Id.* (“Grounds justifying exclusion may include but are not limited to: failure to exhaust all judicial remedies; solely an appeal from a negative decision by the parole board; preferably a matter for (initial) consideration by the parole board; premature in light of recent violation of parole; unwarranted appeal from previous action by the pardon board because no new and substantial evidence is presented.”).

55. *Id.*

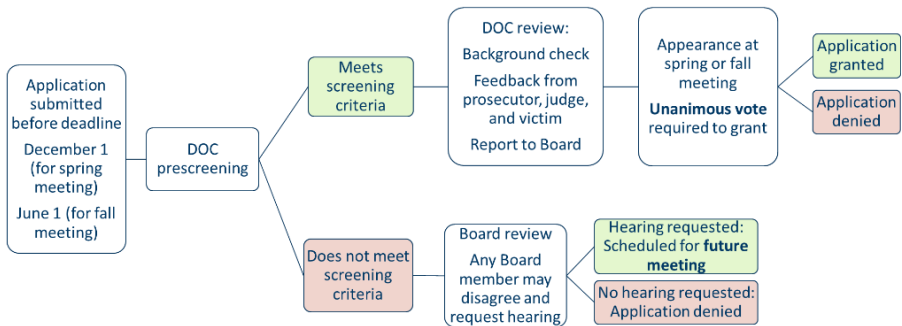
56. *Id.*

57. *Application Process*, *supra* note 26.

and requests to hear the application, that application is placed on the agenda of a future Board meeting.<sup>58</sup>

Pardon and commutation applications placed on the Board’s agenda undergo a vetting process similar to the process for pardon extraordinary applications described above. Applicants similarly appear before the Board (either in person or virtually), and the Board generally votes immediately after hearing from the applicant, their counsel, any accompanying individuals, and any victims. As with pardons extraordinary, pardons and commutations must be reduced to writing, and statute provides that they “have no force or effect unless granted by a unanimous vote of the board duly convened.”<sup>59</sup>

FIGURE 2. PARDON & COMMUTATION FLOWCHART



### 3. Reprieves

The Minnesota Constitution and applicable statutes include reprieves as a form of clemency in Minnesota.<sup>60</sup> Until very recently,<sup>61</sup> this form of relief had fallen out of use for decades. Neither statute nor Board rules provide a process for reprieve applications apart from the generic guidance related to all forms of relief.<sup>62</sup> The term “reprieve” has not been defined in Minnesota law. In other contexts and jurisdictions, reprieves generally entail a temporary delay in the execution of a sentence—commonly, but not exclusively, in the context of capital punishment.<sup>63</sup>

Unlike the forms of relief discussed above, reprieves do not appear to be subject to a unanimous vote requirement. Although reprieves are authorized and noted throughout the chapter of Minnesota statutes addressing the

58. *Application Process*, *supra* note 26.

59. MINN. STAT. § 638.02, subd. 1 (2022).

60. MINN. CONST. art. V, § 7 (“The governor in conjunction with the board of pardons has power to grant reprieves and pardons . . . .”); MINN. STAT. § 638.01 (“The board may grant pardons and reprieves . . . .”).

61. *See supra* Section III.B.4.

62. MINN. STAT. § 638.05 (setting forth requirements for “[e]very application for relief”).

63. *See, e.g.*, *Haugen v. Kitzhaber*, 306 P.3d 592, 598 (Or. 2013) (surveying common definitions of “reprieve”).

Board,<sup>64</sup> they are conspicuously absent from the statutory section containing the unanimous vote requirement, which applies specifically to “pardons and commutations.”<sup>65</sup> Although Minnesota abolished capital punishment in 1911,<sup>66</sup> until 1963, Minnesota law permitted *any member* of the Board to grant a reprieve of a death sentence, but only for a period of time “reasonably necessary to secure a [Board] meeting for the consideration of an application for pardon or commutation of sentence.”<sup>67</sup> This permissive standard for reprieves in the case of capital punishment appeared directly before the sentence containing the unanimous vote requirement for pardons and commutations.<sup>68</sup> When the legislature deleted the sentence related to reprieves for capital punishment in 1963, it could have subjected reprieves to a unanimous requirement, but it did not.<sup>69</sup> As a result, while the Minnesota Constitution and current statutes clearly authorize the Governor and Board to grant reprieves, they do not mandate a particular voting requirement for that form of relief.

### III. RECENT TRENDS

#### A. *Applications Heard and Granted (2009–2022)*

Recent years have witnessed a clear upward swing in applications heard and granted by the Board. In the decade from 2009 to 2018, the Board heard and voted on an average of thirty-seven pardon extraordinary applications and just over one pardon or commutation application per year.<sup>70</sup> In the past four years (2019–2022), the Board has heard and decided

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64. See MINN. STAT. § 638.01 (authorizing reprieves as a form of relief); *id.* § 638.03 (2022) (authorizing the Board to issue warrants to effect reprieves); *id.* § 638.07 (requiring record keeping for reprieves).

65. *Id.* § 638.02, subd. 1 (“Every *pardon or commutation* of sentence shall be in writing and shall have no force or effect unless granted by a unanimous vote of the board duly convened.”) (emphasis added).

66. See 1911 Minn. Laws 572, ch. 387, H.F. 2, sec. 1, § 4876 (abolishing capital punishment for first-degree murder); see John D. Bessler, *The “Midnight Assassination Law” and Minnesota’s Anti-Death Penalty Movement, 1849–1911*, 22 WM. MITCHELL L. REV. 577, 696–97 (1996).

67. MINN. STAT. § 5425 (1905) (“A reprieve in a case where capital punishment has been imposed may be granted by any member of the board, but for such time only as may be reasonably necessary to secure a meeting for the consideration of an application for pardon or commutation of sentence.”). The Minnesota Supreme Court’s recent opinion in *Shefa* calls into question the constitutionality of this abandoned provision, which vested the power to reprieve with any one of the Board members. See *Shefa v. Ellison*, 968 N.W.2d 818, 830–33 (Minn. 2022) (reasoning that the Minnesota Constitution’s pardons clause means that “the Board of Pardons may not act without the governor, and the governor may not act without the Board of Pardons”); see also discussion *supra* note 2.

68. MINN. STAT. § 5425 (1905).

69. 1963 Minn. Laws 1441, ch. 819, H.F. 1379, sec. 1, § 638.02. Because Minnesota abolished capital punishment in 1911, by 1963, reprieves of death sentences were obsolete.

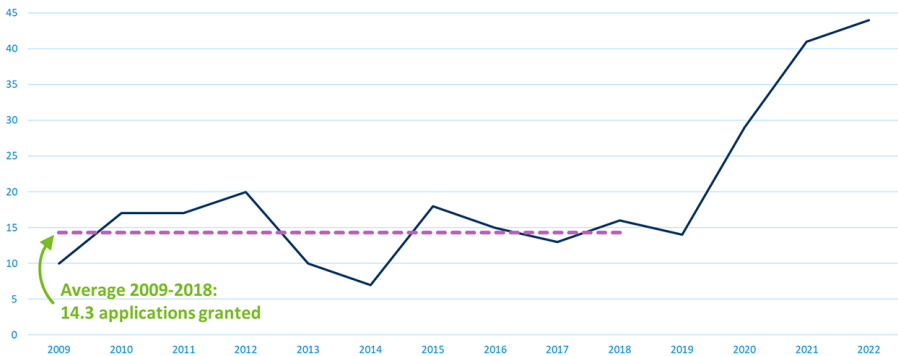
70. See 2009–2018 MINN. BD. OF PARDONS ANN. REPS., <https://mn.gov/doc/about/pardon-board/annual-reports/>. The precise figures are 36.9 pardon extraordinary applications and 1.3 pardon and commutation applications heard on average per year from 2009 through 2018.

an average of nearly forty-six pardon extraordinary applications and seven pardon, commutation, or reprieve applications per year.<sup>71</sup> In other words, in the past four years, the average number of clemency applications heard and decided by the board increased by nearly forty percent.

Applicants have also experienced considerably more success obtaining clemency in the past four years. From 2009 to 2018, an average of thirty-nine percent of pardon extraordinary applications heard by the Board were successful.<sup>72</sup> In the past four years, that rate increased to over sixty-five percent.<sup>73</sup>

These two trends—increased applications and increased grant rates—have led to an overall upward trend in clemency granted in Minnesota. From 2009 to 2018, an average of just over fourteen clemency applications (all pardons extraordinary) were granted per year.<sup>74</sup> In the past four years (2019–2022) that rate more than doubled to an average of thirty-two successful clemency applications per year.<sup>75</sup>

FIGURE 3. PARDONS, COMMUTATIONS, AND PARDONS EXTRAORDINARY GRANTED (2009–2022)



While this strong upswing in successful clemency applications is heartening, Minnesota still lags behind other similarly-sized and smaller states in the overall level of clemency granted. In 2021, when a total of

71. See 2019–2022 MINN. BD. OF PARDONS ANN. REPS., <https://mn.gov/doc/about/pardon-board/annual-reports/>. In this period, the Board heard and decided a total of 183 applications for pardons extraordinary and a total of 28 applications for pardons, commutations, or reprieves.

72. See 2009–2018 MINN. BD. OF PARDONS ANN. REPS., *supra* note 70. In this time period, the Board heard 369 applications for pardons extraordinary, and 143 were granted.

73. See 2019–2022 MINN. BD. OF PARDONS ANN. REPS., *supra* note 71. In this time period, the Board heard 183 applications for pardons extraordinary, and 120 were granted.

74. See 2009–2018 MINN. BD. OF PARDONS ANN. REPS., *supra* note 70. The precise figure is an average of 14.3 applications granted from 2009 through 2018.

75. See 2019–2022 MINN. BD. OF PARDONS ANN. REPS., *supra* note 71. In this time period, a total of 128 clemency applications were granted (120 pardons extraordinary, 1 pardon, 6 commutations, and 1 reprieve).

forty-one clemency applications were granted in Minnesota,<sup>76</sup> Arkansas's governor announced his intention to grant a total of 138 pardons,<sup>77</sup> and Missouri's governor granted 181 pardons.<sup>78</sup> That same year, Connecticut's Board of Pardons and Paroles received nearly 2,000 applications and granted over 1,000 pardons.<sup>79</sup>

## B. Recent "Firsts"

In addition to the aggregate trends noted above, the Board has also recently taken action to provide forms of relief not seen for decades—or ever—in Minnesota.

### 1. First Posthumous Pardon

To start, in 2020, the Board took a step toward righting a heinous wrong in Minnesota legal history by voting to grant what is believed to be Minnesota's first posthumous pardon to Max Mason.<sup>80</sup> In 1920, Mason was accused alongside several of his fellow traveling circus workers of a rape in Duluth. Although Mason escaped the horrific lynching faced by three of his fellow workers—Elias Clayton, Elmer Jackson, and Isaac McGhie—he was nonetheless convicted of the crime in a trial that was almost immediately decried as based on flimsy evidence and testimony.<sup>81</sup> In 1923, the county attorney stated, "I never was of the impression that the evidence was any too strong in his case, and if [Mason] had been a white man, I am rather doubtful if he would have been convicted."<sup>82</sup> And, in 1925, the presiding judge noted that he had "always had some doubt about [Mason's] guilt" and, as a result, he "earnestly recommend[ed] that [Mason] be either paroled or pardoned."<sup>83</sup> That same year, Mason was paroled on the condition that he leave the state and not return for at least sixteen years, but he was

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76. 2021 MINN. BD. OF PARDONS ANN. REP., *supra* note 36, at 2–3 (reporting forty pardons extraordinary and one commutation).

77. This data was compiled by the author from the 2021 monthly press releases from the Office of Arkansas Governor Asa Hutchinson. See Arkansas Governor Asa Hutchinson, *Executive Clemency*, <https://governor.arkansas.gov/our-office/clemency-and-extraditions/> (last visited Oct. 10, 2022).

78. This data was compiled by the author from the 2021 press releases from the Office of Missouri Governor Mike Parson. See Missouri Governor Mike Parson, *Press Releases*, OFF. OF GOVERNOR MICHAEL L. PARSON, <https://governor.mo.gov/press-releases/archive> (last visited Jan. 16, 2023).

79. *Board of Pardons and Parole Statistical Information*, CONN. BD. OF PARDONS & PAROLE, <https://portal.ct.gov/BOPP/Research-and-Development-Division/Statistics/Historical> (last visited Oct. 9, 2022).

80. See Corey L. Gordon, *Righting Wrongs Through Posthumous Pardons: Max Mason, the Duluth Lynchings, and Lessons for the Future*, 18 U. ST. THOMAS L.J. 87 (2022).

81. *Id.* at 92–98.

82. *Id.* at 99.

83. *Id.* at 100.

not pardoned.<sup>84</sup> On June 12, 2020—just days before the one-hundredth anniversary of the Duluth lynchings—the Board voted to grant an application for pardon extraordinary filed on Mason’s behalf.<sup>85</sup>

## 2. *First Commutation in Nearly Three Decades*

In June 2020, at the same meeting, the Board voted to grant Minnesota’s first commutation in twenty-eight years.<sup>86</sup> In that matter, the Board agreed to reduce the remainder of the applicant’s sentence for first-degree methamphetamine possession to supervised release.<sup>87</sup> A second commutation followed later the same year, when the Board voted to commute a life sentence to twenty years, making the applicant immediately eligible to serve the remainder of his sentence on supervised release.<sup>88</sup> The trend continued. After Minnesota’s nearly three-decade pause on commutations ended in 2020, applicants successfully sought commutations in 2021 and 2022.<sup>89</sup>

## 3. *First Absolute Pardon in over Three Decades*

In early 2021, Minnesota witnessed its first absolute pardon in over thirty-five years.<sup>90</sup> The applicant—a mother and grandmother who had lived in Minnesota for many years—feared that her convictions could lead to her deportation.<sup>91</sup> The Board originally considered the application in De-

84. *Id.* at 100, 104. As the Minnesota Supreme Court explained in *State v. Meyer*, a critical difference between parole and a pardon is that parole “does not obliterate the crime or forgive the offender.” 37 N.W.2d 3, 13 (Minn. 1949) (quoting *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 899 (Pa. 1942)).

85. Gordon, *supra* note 80, at 130; Brooks Johnson, ‘100 Years Overdue’: Minnesota Grants First Posthumous Pardon in Case Connected to Duluth Lynchings, STAR TRIB. (June 12, 2020), <https://www.startribune.com/100-years-overdue-man-who-was-scapegoat-in-1920-duluth-lynchings-pardoned/571215122/>; Brooks Johnson, *State’s First Posthumous Pardon Could Come Friday in Case Called ‘a Stain’ on Minnesota History*, STAR TRIB. (June 11, 2020), <https://www.startribune.com/state-s-first-posthumous-pardon-could-come-friday-in-case-called-a-stain-on-minnesota-history/571171472/>.

86. Kevin Featherly, *Woman Receives Rare Commutation of Sentence*, MINN. LAW. (June 18, 2020), <https://minnlawyer.com/2020/06/18/woman-receives-rare-commutation-of-sentence/>; see 2020 MINN. BD. OF PARDONS ANN. REP., *supra* note 36, at 3.

87. Featherly, *supra* note 86.

88. Leslie E. Redmond & Mark Osler, *The Seven (at Least) Lessons of the Myon Burrell Case*, 47 MITCHELL HAMLINE L. REV. 185, 197–200 (2021); Will Wright, *Minnesota Releases Myon Burrell, Man Given Life Sentence After a Murder*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/myon-burrell-released-commuted.html>; 2020 MINN. BD. OF PARDONS ANN. REP., *supra* note 36, at 3.

89. 2021 MINN. BD. OF PARDONS ANN. REP., *supra* note 36, at 3 (noting single commutation granted in 2021); 2022 MINN. BD. OF PARDONS ANN. REP., *supra* note 6, at 3 (noting three commutations granted in 2022).

90. Briana Bierschbach, *Minnesota Officials Grant State’s First Full Pardon in More than 35 Years*, STAR TRIB. (Jan. 25, 2021), <https://www.startribune.com/minnesota-officials-grant-state-s-first-full-pardon-in-more-than-35-years/600014913/>; 2020 MINN. BD. OF PARDONS ANN. REP., *supra* note 36, at 3.

91. Bierschbach, *supra* note 90.

ember 2020 but continued its vote pending confirmation that the applicant had paid her remaining restitution, which amounted to a little over \$15,000.<sup>92</sup> A group of students at the University of St. Thomas School of Law started a successful crowdsourcing effort to raise the funds, and less than two months later, the Board reconvened to vote for the pardon.<sup>93</sup>

#### 4. *First Reprieve in over Three Decades*

In another first, in December 2022, the Board of Pardons voted to grant its first reprieve for the first time in decades.<sup>94</sup> The Board used its reprieve power to solve a unique problem. In 2020, the applicant was certified to be prosecuted as an adult at the age of fourteen, and he pled guilty to second-degree unintentional murder and was sentenced to twelve years in prison.<sup>95</sup> The applicant's age at the time of his conviction left him in correctional limbo; he was too young to be placed in an adult facility, but his certification as an adult prevented him from being placed in, and receiving services and programming from, a secure juvenile facility.<sup>96</sup> In these circumstances, the Board granted the applicant a conditional reprieve in which it temporarily suspended his certification as an adult until he reaches the age of eighteen, allowing him to be transferred to a juvenile facility in the meantime.<sup>97</sup>

#### C. *Demographic Trends (2019–2022)*

Between 2019 and 2022,<sup>98</sup> the Board of Pardons heard and voted on a total of 183 pardon extraordinary applications, and 120 (65.6%) of those applications were granted.<sup>99</sup> An analysis of pardon extraordinary<sup>100</sup> out-

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92. Bierschbach, *supra* note 90.

93. Bierschbach, *supra* note 90.

94. The Board began publishing annual reports in 1993. In those reports, there is no record of the Board considering or granting a reprieve prior to 2022. See 1992–2022 MINN. BD. OF PARDONS ANN. REPS., <https://mn.gov/doc/about/pardon-board/annual-reports/>.

95. Liz Sawyer, *For Minors Convicted as Adults, the Sentence Is 'Purgatory,'* STAR TRIB. (Jan. 21, 2023), <https://www.startribune.com/for-minors-convicted-as-adults-the-sentence-is-purgatory/600245415/>.

96. *Id.*

97. *Id.*; 2022 MINN. BD. OF PARDONS ANN. REP., *supra* note 6, at 5.

98. This analysis of demographic trends is limited to the past four years due to the information and data available to the author. See text *infra* note 102. During this timeframe, the Minnesota Board of Pardons consisted of Governor Tim Walz, Attorney General Keith Ellison, and Chief Justice Lorie Gildea.

99. In a handful of cases, an application was partially granted, with some crimes pardoned and others not. Because the applicants were partially successful and received a pardon for at least one conviction, I have accounted for those applications in the successful category for the purposes of the analysis in this article.

100. In this section, I focus only on applications for pardons extraordinary because those applications make up the vast majority of those heard in recent years. While the Board heard and voted on 183 pardon extraordinary applications from 2019 through 2022, the Board heard and decided only twenty-eight applications for pardons, commutations, and reprieves. Author-compiled data from 2019–2022 MINN. BD. OF PARDONS ANN. REPS. (available at <https://mn.gov/doc/>

comes by demographics reveals some trends. Individuals identified as female were more likely to obtain clemency than individuals identified as male. People identified as white received clemency at a higher rate than those identifying as people of color, Indigenous, or Hispanic—although the gap appears to have closed over time.<sup>101</sup> To be clear, this analysis does not account for many important variables that may explain these differences, such as the offender’s age at the time of the offense and at application, the severity of the crime for which the pardon extraordinary is sought, and myriad other factors impacting the strength of an individual’s application. Additional analysis may help explain the trends illuminated by the data.

### 1. Gender

From 2019 to 2022, a large majority of pardon extraordinary applicants (152 out of 183, or eighty-three percent) were identified as male, and the balance (31 out of 183, or seventeen percent) were identified as female.<sup>102</sup> This proportion matches fairly closely to the proportion of felony cases in Minnesota against male and female offenders from 1981 through 2020.<sup>103</sup> In those years, the proportion of felony cases against male offenders ranged from approximately eighty percent to eighty-nine percent.<sup>104</sup>

Although the numbers have shifted from year to year, the data show that female applicants were more successful in receiving a pardon extraordinary (74.2% of applications granted) than male applicants (63.8% of applications granted).<sup>105</sup>

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about/pardon-board/annual-reports/). The relatively low number of pardon, commutation, and reprieve applications heard by the Board during this time frame makes meaningful statistical trends difficult to discern.

101. See discussion *infra* Section III.C.2 (noting the narrowing grant rate between applicants identified as white and those identified as people of color, Indigenous, or Hispanic).

102. Demographic information related to pardon extraordinary applicants was compiled and calculated by the author from records submitted to the Board for consideration at public Board meetings. This data is arguably public and non-protected. See MINN. STAT. § 638.05 (2022) (noting that applicants consent to the disclosure to the Board of “any private data concerning the applicant contained in the application or in any other record relating to the grounds on which the relief is sought”); see also *id.* § 13D.05, subd. 1 (describing use of “not public data” at public meetings). Out of an abundance of caution, only summary demographic data is used throughout this article. See *id.* § 13.05, subd. 7 (permitting the public use of summary data derived from private or confidential data under the Minnesota Government Data Practices Act).

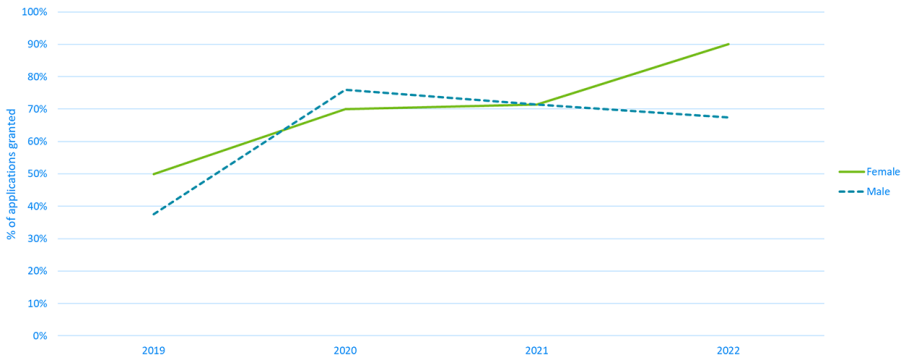
103. See MINN. SENT’G GUIDELINES COMM’N, 2020 SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY CASES SENTENCED IN 2020, 41–42 (June 29, 2022), [https://mn.gov/sentencing-guidelines/assets/2020MSGCAnnualSummaryStatistics\\_tcm30-532424.pdf](https://mn.gov/sentencing-guidelines/assets/2020MSGCAnnualSummaryStatistics_tcm30-532424.pdf) (showing the volume of felony cases by gender from 1981 through 2020). This information relates only to felony cases. Pardons are also available for individuals with misdemeanor and gross misdemeanor convictions, but the Minnesota Sentencing Guidelines Commission does not publish similar annual statistics related to those convictions.

104. *Id.*

105. See text *supra* note 102.



FIGURE 4. PARDON EXTRAORDINARY GRANT RATE BY GENDER  
(2019–2022)



## 2. Race and Ethnicity

Of the 180 pardon extraordinary applications for which race and ethnicity data were available,<sup>106</sup> 121 applicants (67.2%) were identified as white and non-Hispanic, and 59 applicants (32.8%) were identified as Black, Indigenous, or a person of color (“BIPOC”), or Hispanic.<sup>107</sup> This proportion falls within the range of the racial and ethnic demographics of felony offenders reported by the Minnesota Sentencing Guidelines Commission.<sup>108</sup> From 1981 to 2020, the proportion of Minnesota felony cases against white offenders fell steadily from a high of around eighty percent in the early 1980s to approximately fifty-seven percent in recent years.<sup>109</sup>

An analysis of grant rates between white applicants versus BIPOC and Hispanic applicants shows divergence. From 2019 through 2022, 70.2% of white applicants successfully petitioned for a pardon extraordinary, while 55.9% of BIPOC and Hispanic applicants were successful.<sup>110</sup> The trend over the years indicates that this gap is closing as the grant rate for BIPOC and Hispanic applicants has risen significantly. In fact, in 2022, BIPOC and Hispanic applicants were more successful (77.8% of applications granted) than white applicants (70.3% of applications granted).<sup>111</sup>

106. Race and ethnicity could not be determined for three applicants. Those applicants have been excluded from this portion of the analysis.

107. See text *supra* note 102.

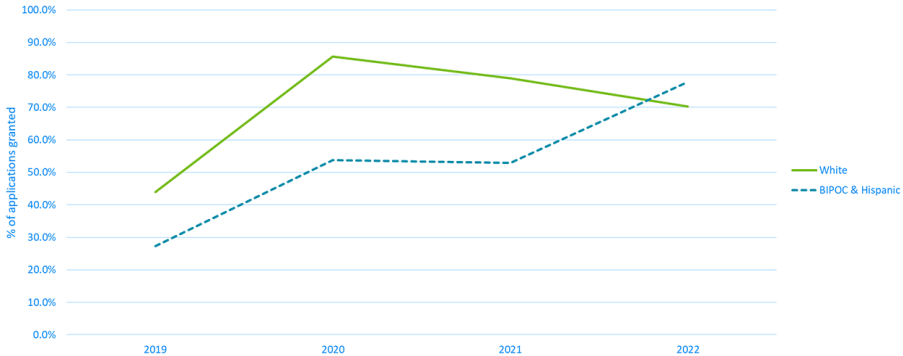
108. See MINN. SENT’G GUIDELINES COMM’N, *supra* note 103, at 45–46 (tabulating the volume of felony cases by race and ethnicity from 1981 through 2020). As noted above, the Minnesota Sentencing Guidelines Commission does not publish equivalent data related to misdemeanors and gross misdemeanors.

109. See MINN. SENT’G GUIDELINES COMM’N, *supra* note 103, at 45–46.

110. See text *supra* note 102.

111. See text *supra* note 102.

FIGURE 5. PARDON EXTRAORDINARY GRANT RATE BY RACE AND ETHNICITY (2019–2022)



#### IV. CONCLUSION

As others have noted, Minnesota’s approach to clemency imposes unique institutional hurdles,<sup>112</sup> and may cause Minnesota to continue to trail behind other states in extending clemency to deserving individuals.<sup>113</sup> Recent efforts toward legislative reform could accelerate positive momentum. Those efforts include increasing resources and capacity (by creating a Clemency Commission to review applications and make recommendations to the Board),<sup>114</sup> shortening waiting periods and eliminating the distinction between the pardon and pardon extraordinary,<sup>115</sup> modifying the Board’s voting rules (by moving away from unanimity requirements),<sup>116</sup> changing the way that the Board is staffed (by removing the Commissioner of Corrections as the Board’s secretary),<sup>117</sup> and changing processes so that pardoned offenses are automatically sealed.<sup>118</sup>

Each of these proposed changes may remove institutional hurdles, make the Board more productive, and increase opportunities for redemption and reintegration through clemency in Minnesota. But recent positive trends should also give hope to individuals seeking mercy and redemption for Minnesota convictions. The past four years have been some of the Board’s

112. See, e.g., Maddie Post, *Inefficient Mercy: The Procedural, Constitutional, and Prudential Issues that Plague Minnesota’s Pardoning Process*, 48 MITCHELL HAMLINE L. REV. 307 (2022); see also Tim Walker, *Changes to Board of Pardons Would Bring More Efficiency and More Mercy*, *Bill Sponsor Says*, MINN. HOUSE OF REPRESENTATIVES: SESSION DAILY (Mar. 4, 2022, 1:53 PM), <https://www.house.leg.state.mn.us/SessionDaily/Story/17196>.

113. See *supra* Section III.A (discussing Minnesota’s pardon rate in comparison with other states).

114. H.F. 2788, 93d Leg., Reg. Sess. (Minn. 2023); H.F. 3464, 92d Leg., Reg. Sess. (Minn. 2022); S.F. 3382, 92d Leg., Reg. Sess. (Minn. 2022).

115. H.F. 2788; H.F. 3464; S.F. 3382.

116. H.F. 2788; H.F. 3464; S.F. 3382; see also H.F. 2584, 92d Leg., Reg. Sess. (Minn. 2021); S.F. 2487, 92d Leg., Reg. Sess. (Minn. 2021).

117. H.F. 2788; H.F. 3464; S.F. 3382.

118. H.F. 599, 92d Leg., Reg. Sess. (Minn. 2021); S.F. 402, 92d Leg., Reg. Sess. (Minn. 2021).

most consequential in modern history: The rate of applications received, heard, and granted, has markedly increased.<sup>119</sup> And, for the first time in decades, the Board has demonstrated a willingness to grant clemency beyond pardons extraordinary, including pardons, commutations, and reprieves.<sup>120</sup>

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119. *See supra* Section III.A.

120. *See supra* Section III.B.