

ARKANSAS

Capital Clemency Information Memorandum

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Introduction

Clemency in capital cases serves as a “fail-safe” in our criminal justice system, by acting to prevent unjust executions and to ensure that there is meaningful due process and review at every stage of a capital case. Prior to the execution of a death-sentenced prisoner, a clemency petition asks a governor, board of pardons and paroles, or both, to review the case and grant either a *reprieve* (a delay of execution for a set or undetermined period of time); a *pardon* (effectively ‘undoing’ the initial conviction); or a *commutation* of sentence (for example, reducing a sentence of death to a sentence of life in prison). In the capital clemency context, death row petitioners typically seek either a *reprieve* or a *commutation*.

Because the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a death row prisoner may seek executive commutation for a wide range of reasons that may not have been raised or adjudicated in earlier legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that govern an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—additional investigation into the prisoner’s case and a nuanced understanding of the state-specific issues that can be relevant to the decision maker(s).

While clemency has long been recognized as an essential component of our criminal justice system, access to clemency is not explicitly guaranteed by the federal Constitution or otherwise governed by traditional due process requirements. States, therefore, have wide latitude in defining the procedures that govern their capital clemency processes. As a result, these processes, the quality of capital clemency representation, and the receptivity of decision makers vary widely nationwide.

The following information was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding clemency in Arkansas. Some of the information contained within this memorandum does not relate directly to Arkansas’s capital clemency process, but nevertheless provides important context and background for thinking about clemency in the state. Given capital clemency’s unique nature as a virtually unrestricted appeal to an executive branch decision maker, it is vital that practitioners seeking clemency on behalf of a death row prisoner have a full understanding of the target state’s historical, political, and legal landscape—or, at the very least, consider those factors as they approach the clemency process.

While the information contained within this memorandum is **not intended to serve as the basis for a capital clemency petition or campaign and is not designed to encapsulate all the diverse issues to consider in capital clemency**, we hope that it will provide a valuable starting point for all stakeholders interested in this important issue.

State Capital Clemency Practice

I. Basics of the State Capital Clemency Process

In many jurisdictions, the capital clemency process is opaque, with few national or state-specific resources available on the topic. As a result, extensive research has been conducted to prepare these memoranda—including lengthy interviews with local practitioners, calls to governors’ offices and parole boards, as well as online research—to help clarify the process for practitioners and others seeking information. Nevertheless, certain areas of practice, such as when to file a petition, and how a petition is likely to receive a response from the decision maker, are not governed by clearly established law or policy. As a result, any gaps noted within these documents reflect a lack of available information or clear answers. Additionally, it is important to remember that the capital clemency process often differs from non-capital clemency processes, and that much of the publicly available information regarding clemency pertains only to non-death-penalty cases.

a. The Power Defined

The Arkansas Constitution gives the governor the power to grant reprieves, commutations, and pardons in all criminal cases, except in cases of impeachment and treason.¹ In treason cases, the governor needs the “advice and consent” of the State Senate to exercise clemency authority.² Stays of execution may be issued by “the Governor, Director of the Department of Correction...and the Clerk of the Supreme Court.”³

The Arkansas Parole Board Policy Manual defines clemency as “kindness, mercy, forgiveness and leniency.”⁴

b. The Decision Maker(s)

Both the governor and the Arkansas Parole Board (“Board”) are involved in the clemency decision-making process. Before a clemency request can go to the governor, it must go to the Board for investigation and recommendation.⁵ Recommendations from the Board regarding commutations or pardons are not binding.⁶ In capital cases, a quorum of Board members is required to preside over the clemency hearing.⁷ If the governor grants a reprieve, commutation, or pardon, details regarding the name of the petitioner, his or her crimes, and the reasons for clemency must be given to the State Senate and the State House of Representatives.⁸

¹ Ark. Const. art. VI, § 18.

² *Id.*

³ Ark. Code Ann. § 16-90-506(c). Under § 16-90-506(d)(1), the director of the Department of Correction has a limited role in granting stays, as he or she is empowered to conduct evaluations if there is concern that “an individual does not understand the nature and reasons for his impending execution.” In such cases, the Director must notify the governor of the concerns and ensure that a mental health evaluation is conducted. If the evaluation confirms that the individual is incompetent to understand his or her sentence, the governor shall order that the “appropriate mental health treatment be provided.” The Director may then “order a reevaluation of the competency of the individual as circumstances warrant.” Additionally, the Director is responsible for suspending the execution of a female convict if there are grounds to believe she might be pregnant. § 16-90-506 at (d)(2).

⁴ *Arkansas Parole Board Policy Manual* (“Board Manual”) at 19, available at

<http://www.sos.arkansas.gov/rulesRegs/Arkansas%20Register/2015/oct2015/158.00.15-001E.pdf> (Sept. 25, 2015).

⁵ *Id.* at 22.

⁶ *Id.* at 23.

⁷ *Id.* at 22.

⁸ Ark. Const. art. VI, § 18; Ark. Code Ann. § 16-93-207(e).

The Board is made up of seven members appointed by the governor and confirmed by the senate.⁹ A quorum requires four members to be present, but five member votes are needed for the Board to take action.¹⁰ Board members serve staggered seven-year terms, with one Board member's term expiring each year.¹¹ Appointment requirements include that service on the Board is a member's sole employment,¹² and the member must have at least a bachelor's degree and five years' experience in a prescribed list of fields including law, law enforcement, psychology, psychiatry, social work, and other related areas.¹³ However, these qualifications are flexible, as what constitutes "other related fields" is subject to interpretation, and the attainment of an extra two years' experience in an appropriate field can be substituted for the education requirement.¹⁴ Board members must undergo training both annually and upon appointment "in compliance with guidelines from the National Institute of Corrections, the Association of Paroling Authorities International, Inc., or the American Probation and Parole Association," and the training must emphasize "(i) Data-driven decision making; (ii)(a) Evidence-based practice; iii) Stakeholder collaboration; and (iv) Recidivism reduction."¹⁵

c. When to Bring a Petition

By statute, an application for capital clemency must be filed no later than forty days prior to the execution date. Once filed, the Board will conduct a hearing at least thirty days prior to the execution date.¹⁶ Late applications are not accepted.¹⁷ When the execution date is set, the Institutional Release Services Office ("IRSO") notifies the prisoner and the prisoner's attorney of the clemency deadline.¹⁸

If a clemency application is not granted, reapplication periods vary depending on the original sentence and the governor's response to the Board's recommendation.¹⁹ If the governor does not act on a recommendation from the Board for 240 days after receipt, it is considered to be denied,²⁰ but the applicant may reapply immediately.²¹ The waiting period may be waived if a year has passed since the previously denied application was filed and "material evidence relating to the person's guilt or punishment has been discovered," the person's "physical or mental health has substantially deteriorated," or "other meritorious

⁹ Ark. Code Ann. § 16-93-201(a)(1).

¹⁰ *Id.* at (d)(1),(2).

¹¹ *Id.* at (a)(3).

¹² *Id.* at (a)(2)(A)(i).

¹³ *Id.* at (a)(4)(A).

¹⁴ *Id.* at (a)(4)(B).

¹⁵ *Id.* at (a)(5)(A).

¹⁶ Board Manual, *supra* note 4 at 22.

¹⁷ Arkansas, Criminal Justice Policy Foundation, (June 20, 2014), <https://www.cjpf.org/clemency-ar/>. According to interviews with practitioners in the state, however, the Board has not always followed the statutory timeline for setting execution dates or clemency application deadlines. In 2015, the Governor set execution dates for two prisoners only 42 days prior to the scheduled executions, but gave them an additional ten days to file a clemency request. Their submissions were therefore filed roughly a month prior to the scheduled executions. See Claudia Lauer, *Arkansas to resume lethal injections after 10-year gap with double executions next month*, U.S. News and World Report, (Sept. 9, 2015), <http://www.usnews.com/news/us/articles/2015/09/09/arkansas-governor-sets-execution-dates-after-10-year-gap>; compare Claudia Lauer, *Arkansas inmate sets for execution applies for clemency*, The San Diego Tribune, (Sept. 28, 2015), <http://www.sandiegouniontribune.com/sdut-arkansas-inmate-set-for-execution-applies-for-2015sep28-story.html>.

¹⁸ See Arkansas, *supra* note 17.

¹⁹ Ark. Code Ann. § 16-93-207(d)(1).

²⁰ *Id.* at (b).

²¹ *Id.* at (c)(2).

circumstances” are present.²² In death penalty cases, however, since the clemency review and hearing process is typically not triggered until an execution date is set, the rules for reapplication may not apply.

d. How to Bring a Petition

Prisoners seeking a commutation or a pardon must complete the appropriate application as provided by the Board.²³ A **pardon** application requires the petitioner to include: the judgment and commitment order, felony information and/or a probable cause affidavit from a clerk, the incident report from the arresting agency, and a copy of the judgment and commitment order.²⁴ In addition, the application notes that other materials (if available) should be submitted, including letters of recommendation from friends and family and a “letter of personal plea.”²⁵

The Board’s publicly available **commutation** application requires that petitioners declare why they are seeking a commutation, providing four choices: “(1) to correct an injustice which may have occurred during the person’s trial; (2) life threatening medical condition; (3) to reduce an excessive sentence; or (4) the person’s institutional adjustment has been exemplary, and the ends of justice have been achieved.”²⁶ The commutation application is submitted to the petitioner’s unit Institutional Release Officer (“IRO”), who then forwards it to the Board.²⁷ However, capital clemency petitioners who most recently sought clemency in the fall of 2015 indicated that they were provided a different application form than the one that appears on the Parole Board’s website.²⁸ As a result, these petitioners submitted both the publicly available form as well as the form provided to them when an execution date was set.

Typically, petitioners are represented through one of the federal defender offices in Arkansas throughout the state clemency process, and these lawyers assist the petitioner in preparing and submitting the clemency application form along with a detailed clemency memorandum. These lawyers also typically advocate on behalf of the petitioner at any clemency hearing that is scheduled.

e. Hearing Practice

Once a clemency application is filed, it will be reviewed by at least four Board members, who will either vote to recommend a grant, a denial, or a hearing before the full board in the case of a non-capital clemency application.²⁹ Although it normally takes five votes in favor to schedule a hearing,³⁰ hearings before a quorum are mandatory in capital cases.³¹

The receipt of an application and the scheduling of a hearing both require notice to be given to certain

²² *Id.* at (3)(A).

²³ *Executive Clemency Applications*, Arkansas Parole Board, <http://www.paroleboard.arkansas.gov/executive-clemency-applications> (last visited Nov. 15, 2016).

²⁴ Ark. Code Ann. §16-93-204(a)(2); see also *Pardon Application*, *infra* note 25.

²⁵ *Pardon Application*, Department of Community Corrections, Institutional Release Services, (May 4, 2015), <http://www.paroleboard.arkansas.gov/executive-clemency-applications>.

²⁶ *Board Manual*, *supra* note 4, at 20-21.

²⁷ *Id.*

²⁸ Please contact support@capitalclemency.org to request a copy of the commutation form mentioned above.

²⁹ *Board Manual*, *supra* note 4, at 22.

³⁰ *Id.*

³¹ *Id.*

individuals. In a capital case, the Executive Clemency Coordinator must give the sentencing court, the prosecuting attorney, and the sheriff of the county of conviction the opportunity to make a recommendation concerning the clemency request.³² Additionally, two announcements must be placed in a “newspaper of general circulation” in the county of the offense, and the victim(s) or victim(s)’ next of kin must also be given the chance to comment.³³

In rendering its decision, the Board may take information into account in addition the clemency application and required letter(s) of recommendation.³⁴ According to published Board policy and by statute, the Board may seek out any other information it deems necessary to complete its investigation,³⁵ and has the authority to issue subpoenas for witnesses to appear, testify, and submit documents.³⁶

At a hearing, while anyone may submit a written statement on the petitioner’s behalf, only four persons—the petitioner, his or her attorney, and two others—may speak at the hearing.³⁷ In addition, their testimony must be confined to two hours in total.³⁸ The petitioner’s presence is not required if he or she is incarcerated in another state.³⁹

In practice, hearings on capital clemency petitions have taken place in two parts: first, there is a morning meeting at the prison unit where the prisoner is incarcerated and at which the petitioner is allowed to make his or her case. Then, in the afternoon, the Board members return to Little Rock where they will hear from any victims, prosecutors, or others who wish to be heard concerning the clemency application.⁴⁰

f. Responding to a Petition

Following a clemency hearing, the Board will vote to recommend to the governor whether the application is with or without merit.⁴¹ Though the Board “may specify the nature and terms of the commutation being recommended,” such explanation does not appear to be mandatory.⁴² If the Board recommends to the governor that an application has merit, it must issue both a public notice concerning this recommendation as well as individually notify all individuals and offices that received notice of the hearings.⁴³ Additionally, although not statutorily required, the Board’s website lists *all* applications for commutation—both with and without merit.⁴⁴

The governor is not required to meet with the petitioner or other interested parties prior to acting on a Board

³² Ark. Code Ann. §16-93-204(d)(1).

³³ *Id.* at (d)(2)(B); *Board Manual*, *supra* note 4, at 22.

³⁴ *Board Manual*, *supra* note 4, at 22.

³⁵ *Id.*

³⁶ Ark. Code Ann. § 16-93-204(c)(1).

³⁷ *Board Manual*, *supra* note 4, at 22.

³⁸ *Id.* at 30.

³⁹ *Id.* at 22.

⁴⁰ This information comes from a January 2017 conversation with an Arkansas capital practitioner. Notes of this interview are on file with the author.

⁴¹ *Board Manual*, *supra* note 4, at 22.

⁴² *Id.*

⁴³ Ark. Code Ann. § 16-93-204(e).

⁴⁴ *Clemency Recommendations*, Arkansas Parole Board, <http://www.paroleboard.arkansas.gov/clemency-recommendations> (last visited Feb. 17, 2016).

recommendation, but individuals either in favor or against clemency may seek to make an appointment with the Governor's Counsel for Clemency and Corrections to discuss a petition for a pardon.⁴⁵ In addition, before the governor grants an application for pardon or commutation, he or she must notify the Secretary of State and direct the Department of Corrections to notify the same group required to receive notice of the clemency hearings that a decision to issue a clemency grant has been made.⁴⁶ Filing this notice does not prevent the governor from later denying the application, however.⁴⁷

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

The Governor

Republican Governor **Asa Hutchinson** began his term in January 2015. A lawyer by training, Governor Hutchinson was a U.S. Attorney under President Ronald Reagan, served as Director of the Drug Enforcement Administration from 2001 to 2003, and from 2003 to 2005 was the first Undersecretary of the Department of Homeland Security under President George W. Bush.⁴⁸ He is also a former three-term U.S. Representative, and is currently the chairman of the Southern Regional Education Board and vice chairman of the National Governors Association's Homeland Security and Public Safety Committee.⁴⁹

Governor Hutchinson supports the death penalty, although he believes it should only be imposed in "certain prescribed cases that are very specific with aggravated circumstances."⁵⁰ He cited the Boston Marathon bomber case as one example where the death penalty would be appropriate.⁵¹ Following stays of execution issued by the Arkansas Supreme Court in October 2015, he released the following statement:

I am disappointed for the families of the victims since the Court ruling will mean more delays and more uncertainty. ... While the case is sent back to have a full hearing, it is my hope that the Court will expedite the case so that 20 year delays do not become 21 year delays.⁵²

In non-capital cases, however, Governor Hutchinson has indicated a willingness to grant clemency. A press release from early 2016 announced the Governor's intent to grant pardons for several convictions of theft

⁴⁵ *Pardon (Executive Clemency)*, Arkansas Legal Services Partnership at 1, (Oct. 2014), available at <https://www.arlegalservices.org/files/FSPardon.pdf>.

⁴⁶ Ark. Code Ann. § 16-93-207(a)(1)(A).

⁴⁷ *Id.* at (a)(2).

⁴⁸ *Governor Asa Hutchinson*, <http://governor.arkansas.gov/governor-hutchinson> (last visited Jan. 13, 2016); see also *Asa Hutchinson*, Wikipedia, https://en.wikipedia.org/wiki/Asa_Hutchinson#Executive_branch (last visited Mar. 1, 2017).

⁴⁹ *Id.*

⁵⁰ Nina Totenberg, *Why Has the Death Penalty Grown Increasingly Rare?*, NPR News (Dec. 7, 2015), <http://www.npr.org/2015/12/07/457403638/why-has-the-death-penalty-grown-increasingly-rare>.

⁵¹ *Id.*

⁵² Marine Glisovic, *AR State Supreme Court grants stay, halting scheduled executions*, KATV Little Rock, (Oct. 20, 2015), <http://katv.com/news/local/ar-supreme-court-grants-request-for-stay-halting-scheduled-executions>.

and possession of controlled substances.⁵³ A previous release stated that Governor Hutchinson intended to grant 12 pardon applications and deny 48;⁵⁴ an earlier announcement included a grant of seven pardons and 42 denials.⁵⁵ Concerning the pardons, the press releases all state that the actions were justified on the grounds that “all terms of the applicant’s sentence have been completed.”⁵⁶

The Board

- **Chairman John Felts** was first appointed to the Board in 1998 by Governor Huckabee and was reappointed by Governor Beebe in 2012.⁵⁷ His term expires in 2019.
- **Jerry Riley** was appointed by Governor Hutchinson in 2016, with his term expiring in 2023.⁵⁸ He previously served on the Arkansas Workforce Development Board.⁵⁹
- **Dawne Vandiver**, whose term expires in 2020, was appointed by Governor Beebe. Previously, she was executive director of the Democratic Party of Arkansas and a County Justice of the Peace.⁶⁰ She is also on the Little Rock Capital City Crime Prevention Task Force.⁶¹
- **Andy Shock**, a former county sheriff, was appointed by Governor Hutchinson to finish a term expiring in 2018.⁶²
- **Abraham Carpenter** was appointed to consecutive terms, set to expire in 2021, by Governor Beebe.⁶³ Carpenter manages a farming operation, and owns and operates Carpenter Produce.⁶⁴ He participates in USDA practices and services, and he credits this participation as well as his family values for his farming success.⁶⁵

⁵³ *Governor Asa Hutchinson Announces Intent to Grant Executive Clemency*, Arkansas’s Governor (Jan. 4, 2016), <http://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-announces-intent-to-grant-executive-clemency-160104>.

⁵⁴ *Governor Asa Hutchinson announces intent to grant executive clemency*, THV11, (Nov. 4, 2015), <http://www.thv11.com/story/news/2015/11/04/governor-asa-hutchinson-announces-intent-to-grant-executive-clemency/75178858/>.

⁵⁵ *Governor Asa Hutchinson announces intent to grant Executive Clemency*, THV11, (Aug. 4, 2015), http://www.thv11.com/news/politics/governor-asa-hutchinson-announces-intent-to-grant-executive-clemency_2016051307034768/188889938.

⁵⁶ *Id.*

⁵⁷ *Gov-Elect Hutchinson Announces Director of Rural Services, Chair of Parole Board*, Arkansas Matters, <http://www.arkansasmatters.com/news/news/gov-elect-hutchinson-announces-director-of-rural-services-chair-of-parole-board> (last visited March 1, 2017).

⁵⁸ *Governor Asa Hutchinson Announces Appointments*, Press Releases, (Jan. 29, 2016), <http://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-announces-appointments-160129>.

⁵⁹ *Governor Asa Hutchinson Announces Appointments*, Press Releases (June 2, 2015), <http://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-announces-appointments2>.

⁶⁰ *Democratic Party Executive Director Departs Post (updated)*, Talk Business, (Aug. 22, 2011), <http://talkbusiness.net/2011/08/democratic-party-executive-director-departs-post-updated/>.

⁶¹ Max Brantley, *As crime concerns rise, Little Rock mayor names a task force*, Arkansas Times, (Mar. 13, 2015), <http://www.arktimes.com/ArkansasBlog/archives/2015/03/13/as-crime-concerns-rise-little-rock-mayor-names-a-task-force>.

⁶² *Gov. Hutchinson appoints Sheriff Andy Shock to State Parole Board*, THV11, (Aug. 10, 2015), <http://www.thv11.com/story/news/local/2015/08/10/gov-hutchinson-appoints-sheriff-andy-shock--state-parole-board/31426711/>.

⁶³ *About Us*, Arkansas Parole Board, <http://www.paroleboard.arkansas.gov/about-us> (last visited Feb. 17, 2016).

⁶⁴ Creston Shrum, *Success Stories Abraham Carpenter Jr. Conservation Campaign Story*, USDA Natural Resources Conservation Service, https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/home/?cid=nrcs143_023506 (last visited Dec. 1, 2016).

⁶⁵ *Id.*

- **John Belken's** term will expire in 2022.⁶⁶ Belken was a Correctional Officer for the Texas Department of Corrections.⁶⁷ He subsequently attended Seminary, which led him to Arkansas in roles as a prison Chaplain Assistant, head Chaplain, and then Assistant Warden.⁶⁸

b. Legislative Structure and Political Make-Up

The Arkansas General Assembly consists of a House of Representatives and a Senate. The House has one hundred members who are limited to three two-year terms.⁶⁹ Currently, there are 76 Republicans, 23 Democrats, and one Independent in the House.⁷⁰ The State Senate has 35 members, with 26 Republicans and nine Democrats.⁷¹

c. Judicial Review of State Clemency

In 2013, the Supreme Court of Arkansas upheld the Board's role in the clemency process in *Holloway v. Beebe*,⁷² confirming that the Board's power to recommend actions on clemency does "regulate access to the governor for such pleas, but the rules . . . do not proscribe the governors ability to grant pardons."⁷³ Two earlier state Supreme Court cases, *Pickens v. Tucker* and *Smith v. Huckabee*, also affirmed the governor's power to grant clemency and the requirement that some minimal due process be afforded in clemency.

In 1994, appellant Pickens claimed that Governor Jim Guy Tucker should not be eligible to make a determination on his clemency application because the Governor had represented the state in his appeal in *Pickens v. Tucker*.⁷⁴ The Arkansas Supreme Court denied a stay of execution to Mr. Pickens in a per curiam decision, but Justice Brown wrote a concurring opinion conceding that though there is "no inherent constitutional right to a commutation of sentence.... a right to a fair and impartial tribunal...is engrained in the Due Process clauses of our state and federal constitutions."⁷⁵ On that basis, Justice Brown recommended that the Lieutenant Governor rather than the Governor determine whether to grant clemency, though the per curiam decision not to grant the stay of execution was issued without a written opinion.⁷⁶

In an unpublished 2007 opinion concerning a non-capital clemency case, *Smith v. Huckabee*,⁷⁷ the

⁶⁶ *About Us*, *supra* note 63.

⁶⁷ *In Christ Testimony of John Belken*, 10 *In Christ* 3, (Summer 2009), available at <http://www.livingbygrace.org/newsletters/3Q2009.pdf>.

⁶⁸ *Id.*

⁶⁹ *Members*, Arkansas House of Representatives, <http://arkansashouse.org/member> (last visited Jan. 13, 2016).

⁷⁰ *Arkansas House of Representatives Elections, 2016*, Ballotpedia, https://ballotpedia.org/Arkansas_House_of_Representatives_elections,_2016 (last visited Feb. 9, 2017); *see also* Brandon Riddle, *3rd Arkansas Representative Switches to Republican Party*, Arkansas Online, (Dec. 9, 2016), <http://www.arkansasonline.com/news/2016/dec/09/2nd-arkansas-representative-switches-republican-pa/?f=news-politics-legislature>.

⁷¹ *Seniority 2017-2018*, Arkansas Senate, available at <http://www.arkansas.gov/senate/docs/Seniority-2017-2018.pdf> (last visited Feb. 9, 2017).

⁷² No. 11-937 2013 WL 7851272 (Ark. Jan. 17, 2013).

⁷³ *Id.* at 6.

⁷⁴ 875 S.W.2d 835 (Ark. 1994).

⁷⁵ *Id.* at 836 (Brown, J., concurring).

⁷⁶ *Id.*

⁷⁷ No. 06-917 2007 WL 701045 (Ark. Mar. 8, 2007).

Arkansas Supreme Court upheld the constitutionality of the non-binding nature of the Board's recommendations. In that case, the Board had recommended commuting a life sentence to a term of years for an individual convicted of murder, but then-Governor Mike Huckabee denied the application. The Court found that Governor Huckabee was within his rights to deny a commutation recommendation from the Board, stating that "the statute simply does not provide for any limitations on the discretion to grant clemency. It does not require the governor to follow parole board recommendations or otherwise place restrictions on the governor's discretion."⁷⁸

III. Supplemental State Information

*In thinking about clemency, it is vital to remember that this stage of the death penalty process takes place outside of a courtroom, and is typically directed at a non-legal (or at the very least, non-judicial) audience. Depending on where the petitioner has been convicted and sentenced, a clemency petition will be considered either by the governor, a board of pardons and paroles, or both. Regardless of the individual or entity responsible for the ultimate clemency decision, **politics and public opinion will almost always come into play as this critical decision is made.** For governors, clemency decisions are often perceived (rightly or wrongly) as political 'hot potatoes' that can be used against them if the public is not supportive. Even in states where clemency authority rests solely with a board, members are almost always appointed by the governor, and, therefore, also frequently feel constrained by the inherently political nature of their roles. As such, it is crucial to remember that local politics, history, demographics, culture, and ethos are always at play when a plea for clemency is being considered. In recognition of the fact that a truly compelling clemency petition cannot be brought without first considering how the issues raised will play out in that particular jurisdiction, the remainder of this memorandum is dedicated to providing some generalized information to better understand the culture and politics in the state where clemency is being sought.*

a. Statewide Demographics

i. General Population

As of July 2016, Arkansas is recorded as having a total population of 2,988,948.⁷⁹ Of that overall population, 79.5% of Arkansans are non-Hispanic White (U.S. 62.1%), 15.7% are Black (U.S. 13.2%), 1.6% are Asian (U.S. 5.4%), and 7% are Hispanic or Latino (U.S. 17.4%).⁸⁰

ii. Political Breakdown

Polls conducted in 2014 indicate that Arkansas is relatively politically moderate. In one poll, Arkansas citizens identified themselves as 38% Independent, 33% Democrat, and 28% Republican.⁸¹ In a different poll, where voters identified as 39% Democrat, 36% Republican and 26% Independent, 43% of voters said

⁷⁸ *Id.*

⁷⁹ *State & County Quickfacts, Arkansas*, U.S. Census Bureau, (Dec. 1, 2015), <https://www.census.gov/quickfacts/table/PST045215/05>.

⁸⁰ *Compare State & County Quickfacts, Arkansas*, *supra* note 79, with *United States Quick Facts*, U.S. Census Bureau, (Dec. 1, 2015), <https://www.census.gov/quickfacts/table/PST045215/00>.

⁸¹ *Current Arkansas Polling*, Gravis Marketing, (Sept. 13, 2014), <http://gravismarketing.com/polling-and-market-research/telephone-survey-arkansas-political-poll/>.

they would vote for a “generic” Republican, 35% said they would vote for a “generic” Democrat, and 22% had yet to decide.⁸² Republican candidate Donald J. Trump won the electoral votes of Arkansas in the 2016 general election, with 60.6% of the state vote.⁸³

iii. Religious Make-Up

	Arkansas ⁸⁴	U.S. ⁸⁵
Christian	79%	70%
Evangelical	46%	25%
Catholic	8%	20%
Muslim	2%	0.9%
Absolutely or fairly certain of belief in God	92%	83%
Atheist, Agnostic, or no religion in particular	18%	22.8%
Religion very important	70%	53%
Religion is somewhat important	16%	24%

According to the Pew Research Center, Arkansas has more Christians, especially in Protestant denominations, and fewer religious minorities than other states. The number of “Mainline Protestants” and “Historically Black Protestants” in Arkansas is similar to national averages among other states.⁸⁶

iv. Income/Socioeconomic Breakdown

A socio-economic comparison between Arkansas and U.S. national averages is found below:⁸⁷

	Arkansas	U.S.
Per capita income (2013 dollars)	\$22,170	\$28,155
Median household income (2009-2013)	\$40,768	\$53,046
Persons below poverty level	19.2%	15.4%
Language other than English spoken at home	7.2%	20.7%
Bachelor’s degree or higher	20.1%	28.8%
Unemployment rate	5% ⁸⁸	5% ⁸⁹

⁸² Ryan Saylor, *Poll numbers confirm ‘Independent’ streak among Arkansas voters*, City Wire, (Feb. 20, 2014), <http://talkbusiness.net/2014/02/poll-numbers-confirm-independent-streak-among-arkansas-voters/>.

⁸³ *Presidential Elections in Arkansas, 2016*, Ballotpedia, https://ballotpedia.org/Presidential_election_in_Arkansas,_2016 (last visited Dec. 1, 2016).

⁸⁴ *Adults in Arkansas*, Pew Research Center 2014 Religious Landscape Study, <http://www.pewforum.org/religious-landscape-study/state/Arkansas/> (last visited Jan. 13, 2016).

⁸⁵ *Religions*, Pew Research Center 2014 Religious Landscape Study, <http://www.pewforum.org/religious-landscape-study/> (last visited Jan. 6, 2016).

⁸⁶ *Compare Adults in Arkansas*, *supra* note 84, with *Religions*, *supra* note 85.

⁸⁷ *Id.*

⁸⁸ *Unemployment Rates for States*, U.S. Bureau of Labor Statistics, (Dec. 18, 2015), <http://www.bls.gov/web/laus/laumstrk.htm>.

⁸⁹ *Employment Situation Summary*, U.S. Bureau of Labor Statistics, (Jan. 8, 2015), <http://www.bls.gov/news.release/empst.nr0.htm>.

b. Criminal Justice

i. Overall Prison Population

As of 2015, Arkansas had the sixth highest state incarceration rate in the U.S., at 591 prisoners per 100,000 citizens.⁹⁰ During that same year, a highly-publicized case led to increased interest in the Arkansas parole system and policy changes. Specifically, an Arkansas parolee committed a murder in 2013 after he had also committed parole violations that failed to result in revocation of his parole.⁹¹ As a result, new requirements for parole hearings and supervision were promulgated to tighten the state's parole system.⁹² The new requirements resulted in a one-year 17.7% increase in Arkansas's prison population.⁹³ As of June 2015, there were more than 18,000 individuals under the control of the Arkansas Department of Corrections.⁹⁴

Total Prisoner Population (by percentage):⁹⁵

- Number of Male Prisoners: 92.2%
- Number of Female Prisoners: 7.8%
- Number of Black Prisoners: 43.55%
- Number of White Prisoners: 53.1%
- Number of Hispanic Prisoners: 2.8%

The prison population skews disproportionately male and Black compared to the state's overall population.⁹⁶ Drug-related offenses represented the largest category of both admission and population offenses in 2014.⁹⁷ In the same year, Arkansas classified 49% of its prisoners as "violent" based on offenses, including some drug crimes.⁹⁸

ii. Death Row Population and Demographics

Total Number of Prisoners on Death Row: 34⁹⁹

- Number of Women on Death Row: 0
- Number of Black Prisoners on Death Row: 17

⁹⁰ *Corrections Statistics by State*, National Institute of Corrections, (2013), <http://nicic.gov/statestats/?st=ar> (last visited March 1, 2017); see also *Annual Report FY 2013*, Arkansas Department of Correction (2013), available at <http://adc.arkansas.gov/images/uploads/2013annualReport.pdf>.

⁹¹ Lindsey Millar, *Arkansas's prison population, and related expense, is exploding*, Arkansas Times, (July 23, 2015), <http://www.arktimes.com/arkansas/arkansas-prison-population-and-related-expense-is-exploding/Content?oid=3973297>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Annual Report FY 2015*, Arkansas Department of Correction, (2015), available at http://adc.arkansas.gov/images/uploads/Annual_Report_2015_rev1.pdf.

⁹⁵ *Facts Brochure*, Arkansas Department of Correction at 16, (2014), available at <http://adc.arkansas.gov/images/uploads/2014-Facts-Brochure.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.* at 4.

⁹⁸ *Facts Brochure*, *supra* note 101.

⁹⁹ *Death Row*, Arkansas Department of Corrections, (Aug. 5, 2015), <http://adc.arkansas.gov/death-row/>.

- Number of White Prisoners on Death Row: 16
- Number of Hispanic Prisoners on Death Row: 1

iii. Executions (Past and Pending)

Total Number of Executions since 1973: 27¹⁰⁰

- Most Recent Execution: November 29, 2005
- Number of Executions Scheduled for 2015: 6
- Number of Executions Scheduled for 2016: 2
- Number of Executions Scheduled for 2017: 8
- Stays Issued in 2015: 8

Arkansas has executed 196 prisoners since 1913.¹⁰¹ Though Arkansas reinstated the death penalty in 1973, the state did not resume executions until 1990.¹⁰² Since 1990, Arkansas has executed twenty-seven prisoners, including seven black males, one white female, and nineteen white males.¹⁰³

Arkansas has seen a number of controversial executions since executions resumed in 1990. In 1992, then-Presidential candidate Bill Clinton famously returned to Arkansas to oversee the execution of **Ricky Ray Rector**, who was convicted and sentenced to death for two killings, one of a police officer.¹⁰⁴ After killing the police officer, Rector shot himself in the head in an apparent suicide attempt, destroying his frontal lobe and leaving him brain damaged.¹⁰⁵ Critics of the execution alleged that Rector's severe mental disabilities rendered him incapable of understanding his sentence or upcoming punishment.¹⁰⁶ He told correctional personnel that he was saving part of his last meal "for later"—i.e., after the execution.¹⁰⁷

Barry Fairchild was executed in 1995 for a rape and murder despite a coerced confession and the absence of any physical evidence linking him to the crime scene.¹⁰⁸

c. Public Opinion Polling

Polls of Arkansans show broad support for the death penalty. The 2015 Arkansas Poll, conducted by the University of Arkansas, found that more Arkansans support capital punishment, with 71% in favor, than the

¹⁰⁰ *Upcoming Executions*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/upcoming-executions#stays> (last visited Dec. 1, 2016).

¹⁰¹ *Executions, 1913-Present*, Arkansas Department of Corrections, <http://adc.arkansas.gov/executions> (last visited Jan. 13, 2017).

¹⁰² *Arkansas*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/arkansas-1> (last visited Jan. 13, 2017).

¹⁰³ *Executions, 1913-Present*, *supra* note 104.

¹⁰⁴ Peter Applebome, *THE 1992 CAMPAIGN: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. Times, (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html>.

¹⁰⁵ *Arkansas*, *supra* note 102.

¹⁰⁶ Applebome, *supra* note 104.

¹⁰⁷ *Arkansas*, *supra* note 102.

¹⁰⁸ *Id.*

Gallup Poll national average of 61%.¹⁰⁹ When life in prison was presented as an alternative, the death penalty was still favored 57% to 31%, though 39% favored abolition in light of that alternative.¹¹⁰ Men were more supportive of capital punishment than women and whites more supportive than people of color.¹¹¹

IV. Additional Information for Consideration in Clemency

a. Significant Past Capital Clemency Decisions

Arkansas Governor Winthrop Rockefeller declared a moratorium on executions when he took office in 1967, before subsequently granting clemency in December 1970 to all fifteen men on death row.¹¹² Since then, the only “modern” grant of capital clemency in Arkansas was in 1999, when Mike Huckabee commuted Bobby Ray Fretwell’s sentence to life in prison without parole after a juror came forward with reservations about his vote for death.¹¹³ This is the only post-Rockefeller grant of capital clemency in Arkansas.

In 2011, the Board recommended in a 4-3 vote that **Frank Williams**, an intellectually disabled man, be spared from execution.¹¹⁴ The Arkansas Supreme Court overturned his death sentence before Governor Beebe could act in response to the recommendation, however.¹¹⁵

b. Relevant State Death Penalty (Non-Clemency) Opinions

In 2012, the Arkansas Supreme Court struck down part of the state’s death penalty statute as unconstitutional.¹¹⁶ The particular provision struck allowed the Department of Corrections to choose the lethal injection drugs used in an execution.¹¹⁷ This law was partially put into place because of the shortage of lethal injection drugs across the nation; many pharmaceutical companies had stopped selling lethal injection drugs on account of ethical and other concerns.¹¹⁸

After this ruling, the General Assembly passed a new statute that required the Department of Correction to select a barbiturate, phenobarbital, as the execution drug.¹¹⁹ The 2013 Act also put some FOIA exemptions

¹⁰⁹ *Arkansas Poll Finds Little Shift in State Partisanship, Notable Shifts of Issues*, University of Arkansas, (Nov. 5, 2015), <http://news.uark.edu/articles/32870/arkansas-poll-finds-little-shift-in-state-partisanship-notable-shifts-on-issues>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Andrea Ringer, *Rockefeller and death row*, Arkansas Times, (Feb. 27, 2014),

<http://www.arktimes.com/arkansas/rockefeller-and-death-row/Content?oid=3220502>.

¹¹³ See Steve Barnes, *Death-Row Inmate Spared After Juror Makes Plea*, N.Y. Times, (Feb. 6, 1999),

<http://www.nytimes.com/1999/02/06/us/death-row-inmate-spared-after-juror-makes-plea.html>.

¹¹⁴ *Arkansas Parole Board Recommends Life Without Parole for Mentally Disabled Man*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/arkansas-parole-board-recommends-life-without-parole-mentally-disabled-man> (last visited Jan. 15, 2016).

¹¹⁵ *Death row inmate’s sentence overturned*, Arkansas Online, (Dec. 15, 2011),

<http://www.arkansasonline.com/news/2011/dec/15/death-row-inmates-sentence-overturned/>.

¹¹⁶ *Arkansas*, supra note 102.

¹¹⁷ Robbie Brown, *Arkansas Court Upends Death Penalty*, N.Y. Times, (June 22, 2012),

<http://www.nytimes.com/2012/06/23/us/arkansas-justices-strike-down-death-penalty.html>.

¹¹⁸ See *id.*

¹¹⁹ *Arkansas*, supra note 102.

in place, but did not specifically shield the identity of the drug suppliers from disclosure.¹²⁰ The prisoners challenged the new statute on the ground that the barbiturate requirement still provided the Department of Correction too much discretion in selecting a method of execution.¹²¹ The Arkansas Supreme Court rejected that challenge in March 2015 by a 4-3 vote.¹²²

Then, in April 2015, the Arkansas General Assembly passed another “method of execution” law, this time to allow the Department of Correction to use the sedative midazolam in executions.¹²³ The 2015 act also specifically shielded the identity of drug suppliers.¹²⁴ The prisoners challenged the 2015 act on the grounds that midazolam previously had been used in botched executions in other states, potentially rendering the form of punishment cruel and unusual in violation of the Eighth Amendment, and also on the grounds that the secrecy provisions were unconstitutional.¹²⁵ Governor Hutchinson set execution dates while this litigation was still pending in the trial court, leading the Arkansas Supreme Court to stay all executions pending its resolution.¹²⁶ The Arkansas Supreme Court rejected the challenge in June 2016 by a 4-3 vote, but stayed the finality of its ruling pending a decision on certiorari to the Supreme Court (also by a 4-3 vote).¹²⁷ The midazolam portion of the ruling (but not the secrecy portion) was challenged on petition for certiorari.¹²⁸

The United States Supreme Court rejected this challenge in February 2017, with Governor Hutchinson commenting that the ruling “sets the stage for execution in the specified cases to proceed.”¹²⁹ Governor Hutchinson then set eight execution dates for April 2017, the same month in which the state’s supply of midazolam used for executions is set to expire.¹³⁰

c. Divisive/Important Political Issues in the State

Several recent state controversies have garnered national attention and help provide insight into Arkansas’s current political climate. In April 2015, for example, Governor Hutchinson was poised to sign a religious freedom protection bill which, according to its detractors, would also permit discrimination in services and employment against LGBT individuals. After Indiana Governor Mike Pence signed a similar bill resulting in

¹²⁰ Michael Stratford, *Judge: Ark. lethal injection records FOIA exempt*, News OK, (Mar. 25, 2013), <http://newsok.com/article/feed/518384>.

¹²¹ Max Brantley, *Arkansas Supreme Court upholds death penalty rewrite*, Arkansas Times, (Mar. 19, 2015), <http://www.arktimes.com/ArkansasBlog/archives/2015/03/19/arkansas-supreme-court-upholds-death-penalty-law-rewrite>.

¹²² *Id.*; *Hobbs v. McGehee*, 458 S.W.3d 707 (Ark. 2015).

¹²³ *State Officials Prepare for Executions by Lethal Injection*, Arkansas Senate, (Jul. 8, 2015), http://www.arkansas.gov/senate/newsroom/index.php?do:newsDetail=1&news_id=540.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Sam Levine, *After a Decade Without Executions, Arkansas Sets Dates to Kill 8 Inmates*, The Huffington Post, (Sept. 12, 2015), http://www.huffingtonpost.com/entry/arkansas-death-penalty_us_55f444dae4b063ecbfa49335.

¹²⁷ *Johnson v. Kelley*, No. 16-6496, cert. pending (Oct. 20, 2016); see *No. 16-6496*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-6496.htm> (last visited Dec. 1, 2016).

¹²⁸ *Id.*

¹²⁹ John Lyon, *U.S. Supreme Court rejects challenges by nine Arkansas death-row inmates*, Times Record, (Feb. 21, 2017), <http://www.swtimes.com/news/20170221/us-supreme-court-rejects-challenges-by-nine-arkansas-death-row-inmates>.

¹³⁰ Andrew DeMillo, *Arkansas Governor Schedules Execution Dates for 8 Inmates*, The Baxter Bulletin, (Feb. 28, 2017), <http://www.baxterbulletin.com/story/news/2017/02/28/arkansas-governor-schedules-execution-dates-inmates/98523356/>.

political backlash, Governor Hutchinson asked the General Assembly to amend the bill so it more closely mirrored the U.S. Religious Freedom Restoration Act of 1993.¹³¹

In October 2015, the Eighth Circuit U.S. Court of Appeals ruled that a 2013 Arkansas ban on abortions after twelve weeks of pregnancy was unconstitutional. This bill had been passed by overriding Democratic then-Governor Mike Beebe's veto.¹³² Following this decision, Arkansas Attorney General Leslie Rutledge opined that "Arkansas and other states should be allowed to advance their profound interests in defending the life of the unborn, which is exactly what the Arkansas Human Heartbeat Protection Act accomplishes."¹³³ The U.S. Supreme Court declined to hear an appeal.¹³⁴

In 2014 Arkansas also passed a voter identification law, which the Arkansas Supreme Court ruled was an unconstitutional limitation on voting. The court noted that the state constitution had requirements specifying citizenship, age, and registration, but the requirements did not include any proof-of-identity in order to vote—as the overturned law would have required.¹³⁵

Also of note, the Wal-Mart Corporation has significant influence in Arkansas. Wal-Mart's headquarters in Northwest Arkansas not only employs tens of thousands of Arkansans, but Wal-Mart also entices hundreds of its vendors to open offices there.¹³⁶ Given its economic significance in the state, Wal-Mart's policy positions carry weight; for example, its opposition to the religious freedom bill described above helped influence Governor Hutchinson's demand for its amendment.¹³⁷

d. Other Relevant Legal, Historical, or Social Issues

The expense of maintaining the prison population is a logical target for Governor Hutchinson's budget priorities, as Arkansas's current incarceration rate has been a subject of ongoing discussion.¹³⁸ The 2015 Criminal Justice Reform Act is an indication of some reform, as it focused on addressing overcrowding, allowed for easier prisoner application for Medicaid, expanded specialty courts (to remove from jail groups like addicts, veterans, and the mentally ill), and funded re-entry centers to provide housing (and in some cases, training and counseling) for new parolees.¹³⁹

¹³¹ John Lyon, *Fallout from 'religious freedom' controversy different for Hutchinson, Pence*, Arkansas News Bureau, (Apr. 6, 2015), <http://arkansasnews.com/news/arkansas/fallout-religious-freedom-controversy-different-hutchinson-pence>.

¹³² Adam Lidgett, *Will Arkansas 12-Week Abortion Ban Be Overturned? US Supreme Court Should Review Controversial Law, State Attorney General Says*, International Business Times, (Oct. 7, 2015), <http://www.ibtimes.com/will-arkansas-12-week-abortion-ban-be-overturned-us-supreme-court-should-review-2130737>.

¹³³ *Id.*

¹³⁴ Hannah Levintova, *Supreme Court Throws Out Arkansas' Abortion Ban*, Mother Jones, (Jan. 19, 2016), <http://www.motherjones.com/politics/2016/01/arkansas-abortion-ban-supreme-court>.

¹³⁵ Associated Press, *Arkansas Voter ID Law Struck Down*, Politico, (Oct. 15, 2014), <http://www.politico.com/story/2014/10/arkansas-voter-id-law-struck-down-111929>.

¹³⁶ Steve Brawner, *Wal-Mart influences continue to push rapid growth in Bentonville*, City Wire, (Mar. 19, 2014), <http://talkbusiness.net/2014/03/wal-mart-influences-continue-to-push-rapid-growth-in-bentonville/>.

¹³⁷ Lyon, *supra* note 131.

¹³⁸ Millar, *supra* note 91.

¹³⁹ *Id.*