

# KANSAS

## 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 Kansas. Some of the information contained within this memorandum does not relate directly to Kansas’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 Information**

### **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**

Article I, section 7 of the Kansas Constitution vests the power to pardon with the governor.<sup>1</sup> By statute, the governor is empowered to pardon or commute the sentence of “any person convicted of a crime” in any Kansas court.<sup>2</sup> The same statute establishes a Prisoner Review Board (“Board”) to handle the initiation, processing, and review of clemency applications.<sup>3</sup>

#### **b. The Decision Maker(s)**

While the clemency power in Kansas lies exclusively with the governor,<sup>4</sup> he or she may not grant or deny clemency until either: a) receiving the Board’s recommendation or b) statutory notice requirements have been fulfilled and 120 days have passed since the petition’s referral to the Board.<sup>5</sup> In a capital case, the governor is only empowered to reduce a petitioner’s sentence to life in prison without the possibility of parole.<sup>6</sup> The governor may also grant a reprieve of execution for a limited time.<sup>7</sup>

According to the relevant statute, the Board generally receives the application for clemency, conducts the initial review of the case, and compiles a report; the Board also has the power to adopt rules and regulations regarding the clemency application process.<sup>8</sup>

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<sup>1</sup> Kan. Const. art. I, § 7.

<sup>2</sup> Kan. Stat. Ann. § 22-3701.

<sup>3</sup> *Id.*

<sup>4</sup> See Kan. Const. art. I, § 7.

<sup>5</sup> Kan. Stat. Ann. § 22-3701(d).

<sup>6</sup> Kan. Stat. Ann. § 22-3705(a)(1).

<sup>7</sup> Kan. Stat. Ann. § 22-3704.

<sup>8</sup> Kan. Stat. Ann. § 22-3701.

### c. When to Bring a Petition

There is no specific timetable for bringing a clemency petition in Kansas. As discussed above, the governor may not grant or deny a petition until he or she receives a report or 120 days have passed since the petition was filed.<sup>9</sup>

### d. How to Bring a Petition

The Board handles, processes, and reviews all initial clemency petitions, and the processes are the same for both capital and non-capital cases.<sup>10</sup> However, because Kansas has not implemented the death penalty in recent years, the capital clemency process has not actually been tested. These sections reflect the processes in place for both capital and non-capital clemency.

The Board has published instructions for executive clemency on its website.<sup>11</sup> These instructions are summarized below. Each of the documents required for a clemency application can be found within the Board's policy 23-101a.<sup>12</sup>

To initiate the clemency review process by the Board, petitioners must first send a copy of the Notice of Clemency Application-Sentencing Form to the judge, prosecuting attorney, sheriff, and police chief located in the county of the petitioner's conviction.<sup>13</sup> This document details the petitioner's sentencing record as well as the petitioner's arguments for clemency.<sup>14</sup>

Next, the petitioner must notify the public in the county of conviction by sending two copies of the Request for Publication Form to the official county newspaper within the county of conviction.<sup>15</sup> Petitioners are responsible for enclosing the costs of publication with the form, unless they submit a waiver of fees.<sup>16</sup> The Request for Publication Form must include the petitioner's name, date of sentencing, and county of conviction.<sup>17</sup> Additionally, the publisher has to submit an "affidavit of publication" to the Board after publishing the notice of the petitioner's clemency application.<sup>18</sup>

If the petitioner retains or seeks an appointed attorney in clemency proceedings, the attorney must complete and file an Attorney Affidavit with the Board.<sup>19</sup> The Attorney Affidavit details the extent of the attorney's representation, including when his or her representation ends and who is paying his or her fees.<sup>20</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Internal Management Policy and Procedure 23-101a*, Kansas Department of Corrections, (Apr. 29, 2015), available at: <http://www.doc.ks.gov/kdoc-policies/AdultMPP/chapter-23/23-101a> [hereinafter Policy 23-101a]. A phone call with a Legal Assistant in the Office of Chief Counsel for the Kansas governor on February 2, 2017, confirmed that the same processes are used for both capital and non-capital clemency cases.

<sup>11</sup> *Clemency*, Kansas Department of Corrections, (Aug. 23, 2016), <http://www.doc.ks.gov/prb/clemency>.

<sup>12</sup> Policy 23-101a, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

The last document to complete the process is the formal Application for Clemency (“Application”).<sup>21</sup> Clemency petitions do not have to be written solely by the petitioner; the petitioner may receive assistance from prison staff in preparing the Application.<sup>22</sup> The Application should state the explicit reasons for seeking clemency, including information about the petitioner’s conduct or achievements since conviction.<sup>23</sup>

Once all of these documents are completed, the petitioner should send the completed documents—Notice of Clemency Application-Sentencing Form; Request for Publication Form; Application for Clemency; and, if applicable, and the Attorney Affidavit—to the Board and the petitioner’s Department of Corrections “facility master file.”<sup>24</sup> The documents to the Board should be sent to the following address:<sup>25</sup>

Kansas Department of Corrections  
ATTN: Prisoner Review Board  
714 SW Jackson, Suite 300  
Topeka, Kansas 66603

The Department of Corrections maintains a public record of the number of clemency petitions received by the Board and the number of favorable recommendations given.<sup>26</sup> In 2014, the Board received 18 applications; in 2015, the Board received 3 applications; and, in 2016, the Board received 30 applications. All of these applications were for non-capital cases. The Board has not given a favorable recommendation in either a capital or non-capital case since 2013.<sup>27</sup>

#### **e. Hearing Practice**

There is no statutory requirement in Kansas that a hearing take place after a capital clemency petition has been submitted. However, the Board **may** conduct a hearing as part of its information-gathering function.<sup>28</sup> As there has not been a prisoner put to death in Kansas since 1965, however, there is no recent information available about the Board’s practice when holding a hearing on a capital clemency petition.

#### **f. Responding to a Petition**

The Board is responsible for ensuring that the petitioner’s trial judge, prosecuting attorney, and known victims are notified once a clemency petition has been submitted.<sup>29</sup> The Board does so by requiring the petitioner to follow the clemency application process detailed in section (d) of this memorandum. The petitioner is notified via a letter when the governor has made a decision.<sup>30</sup>

<sup>21</sup> Kansas Department of Corrections, *supra* note 11.

<sup>22</sup> Policy 23-101a, *supra* note 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Kansas Department of Corrections, *supra* note 11.

<sup>27</sup> *Id.*

<sup>28</sup> Kan. Stat. Ann. § 22-3713.

<sup>29</sup> Kan. Stat. Ann. § 22-3701(c).

<sup>30</sup> Kansas Department of Corrections, *supra* note 11.

The governor is required to report to the legislature on the pardon petitions granted in the past year along with the offense for which an individual has been pardoned, but the statute does not require the governor to report specific reasoning for the decisions.<sup>31</sup> Notably, as the governor does not have the power to pardon capital prisoners, this reporting requirement would not seem to apply to decision making in capital cases.

## II. State Political and Judicial Information

### a. Current Clemency Decision Maker(s)

#### The Governor

Republican Governor **Sam Brownback** is currently serving in his second and final gubernatorial term, which ends in 2018. He was first elected in 2010 with 63% of the vote.<sup>32</sup> Governor Brownback was reelected in 2014.<sup>33</sup> Prior to his role as Governor, Brownback served as the Congressman from Kansas's Second Congressional District from 1995 to 1996 and later served as a three-term U.S. Senator from 1996 to 2011. He was a presidential candidate in 2008.<sup>34</sup> After a short-lived primary campaign, Brownback withdrew from the race and endorsed eventual Republican presidential nominee John McCain.<sup>35</sup>

Governor Brownback has voted or spoken out on capital punishment-related issues throughout his years of public service and during electoral campaigns. While a congressman, Brownback voted on two issues of particular consequence for death row prisoners. In February 1995, he joined an overwhelming majority of congressmen in voting in favor of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which (among other things) significantly restricted the ability of federal courts to review state decisions on habeas corpus petitions.<sup>36</sup> In March 1996, he voted against an amendment that would have stricken from the bill language restricting the right of death row prisoners to pursue federal habeas appeals.<sup>37</sup> Additionally, during the 2014 gubernatorial campaign, Brownback called for the replacement of two Kansas Supreme Court justices who voted to overturn the death sentences of capital co-defendants who failed to receive separate sentencing hearings following conviction.<sup>38</sup> As part of his push to instill a "culture of life," Governor Brownback has maintained that capital punishment should be restricted to cases in which the defendant

<sup>31</sup> Kan. Stat. Ann. § 22-3703.

<sup>32</sup> *2010 General Election Official Vote Totals*, Kansas Secretary of State, available at [http://www.kssos.org/elections/10elec/2010\\_General\\_Election\\_Results.pdf](http://www.kssos.org/elections/10elec/2010_General_Election_Results.pdf).

<sup>33</sup> Kansas Secretary of State, *2014 General Election Official Vote Totals*, available at <https://www.sos.ks.gov/elections/14elec/2014%20General%20Election%20Official%20Results.pdf>.

<sup>34</sup> Matthew Mosk, *Brownback Announces Presidential Bid*, The Washington Post, (Jan. 21, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/20/AR2007012000619.html>.

<sup>35</sup> Mark Santora, *Behind Brownback's McCain Endorsement*, N.Y. Times: The Caucus, (Nov. 7, 2007), [http://thecaucus.blogs.nytimes.com/2007/11/07/behind-brownbacks-mccain-endorsement/?\\_r=0](http://thecaucus.blogs.nytimes.com/2007/11/07/behind-brownbacks-mccain-endorsement/?_r=0).

<sup>36</sup> S. 735 (104<sup>th</sup>): *Antiterrorism and Effective Death Penalty Act of 1996*, GovTrack, <https://www.govtrack.us/congress/votes/104-1996/h126> (last visited Feb. 3, 2017).

<sup>37</sup> *H Amdt 954 – Habeas Corpus Reform Amendment – Key Vote*, Vote Smart, <https://votesmart.org/bill/7751/21525/21952/habeas-corpus-reform-amendment#.WJTwDu-QzDd> (last visited Feb. 3, 2017).

<sup>38</sup> Eric Armstrong and Brittany Glas, *Governor Brownback Speaks Out Against Justices Who Overturned Carr Death Penalty*, KSN.com, (Oct. 23, 2014), <http://ksn.com/2014/10/23/gov-brownback-speaks-out-against-justices-who-overturned-carr-death-pentalty/>.

poses an ongoing threat to public safety.<sup>39</sup> He has offered the example of Osama bin Laden as one such threat.<sup>40</sup>

Governor Brownback supported legislation to expand services for rehabilitation and reentry of prisoners into society during his time as a U.S. Senator.<sup>41</sup> In 2011 and 2012, Governor Brownback declined to grant any pardons.<sup>42</sup>

### **The Prisoner Review Board**

The Prisoner Review Board was created after the dissolution of the Kansas Parole Board on July 1, 2011.<sup>43</sup> The three-member Board is appointed by the Secretary of Corrections, who is a gubernatorial appointee.<sup>44</sup> The chairman works full-time on the Board, while the other two members split time between parole activities and other Kansas Department of Corrections assignments.<sup>45</sup>

**Johnathan Ogletree** chairs the Board.<sup>46</sup> Prior to his tenure on the Board, Ogletree served as a correctional counselor and director of the Shawnee County Reentry Program.<sup>47</sup> Ogletree is a member of the Kansas Council for Interstate Adult Offender Committee (IAOC) and the Professional Development Committee for Association of Paroling Authorities International.<sup>48</sup>

Board member **Jeannie Wark** began criminal justice work in 1991 as a corrections officer.<sup>49</sup> Wark has served in various parole capacities and is a member of the Association of Paroling Authorities International.<sup>50</sup>

Board member **Mark Keating** was a parole officer in Dallas, Texas, and a hearing officer for the Texas Board of Pardons and Paroles before returning to Kansas.<sup>51</sup> Keating was a parole officer for the Kansas Department of Corrections, the Director of Sex Offender Management, and continues to serve as the parole

<sup>39</sup> *Sam Brownback in 2007 Republican Presidential Forum at Morgan State University, with Tavis Smiley, On the Issues*, [http://www.ontheissues.org/Archive/2007\\_GOP\\_Morgan\\_State\\_Sam\\_Brownback.htm](http://www.ontheissues.org/Archive/2007_GOP_Morgan_State_Sam_Brownback.htm) (last visited Feb. 2, 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Sam Brownback on Crime, On the Issues*, [http://www.ontheissues.org/Governor/Sam\\_Brownback\\_Crime.htm](http://www.ontheissues.org/Governor/Sam_Brownback_Crime.htm) (last visited Feb. 2, 2017).

<sup>42</sup> Shaun Hittle, *Convicted Douglas County murderer among Kansans denied pardons in 2012*, Lawrence Journal-World, (Feb. 2, 2013), <http://www2.ljworld.com/news/2013/feb/02/convicted-douglas-county-murderer-among-kansans-de/>; Shaun Hittle, *Brownback Has No Plans to Pardon Any Kansas Inmates*, Lawrence Journal-World, (Dec. 11, 2011), <http://www2.ljworld.com/news/2011/dec/11/brownback-has-no-plans-pardon-any-kansas-inmates/>.

<sup>43</sup> Tim Carpenter, *Trio Named to New Parole Board*, Topeka Capital Journal, (June 10, 2011), <http://cjonline.com/news/2011-06-10/trio-named-new-ks-parole-panel>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *PRB Chair: Jonathan Ogletree*, Kansas Department of Corrections, <http://www.doc.ks.gov/prb/members/member> (last visited Nov. 20, 2016).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *PRB Member: Jeannie Wark*, Kansas Department of Corrections, <http://www.doc.ks.gov/prb/members/prb-member> (last visited Nov. 20, 2016).

<sup>50</sup> *Id.*

<sup>51</sup> *PRB Member: Mark Keating*, Kansas Department of Corrections, <http://www.doc.ks.gov/prb/members/Member> (last visited Nov. 20, 2016).

director of the Northern Parole Region, which has overseen the release of more than 2,500 prisoners in northern Kansas across 10 separate offices.<sup>52</sup>

### b. Legislative Structure and Political Make-Up

Under the Kansas Constitution, the state legislature is comprised of a House and a Senate.<sup>53</sup> The number of representatives is regulated by statute but may not exceed 125 members of the house and 40 senators.<sup>54</sup> Representatives and senators are elected from single-member districts.<sup>55</sup> Representatives are elected for two-year terms and senators for four-year terms.<sup>56</sup>

The state legislature is currently majority Republican. Of the 125 members of the House of Representatives, 92 are Republican.<sup>57</sup> Similarly, 32 of the 40 state senators are Republicans.<sup>58</sup>

### c. Judicial Review of State Clemency

The Kansas Supreme Court has held that the clemency power lies outside the scope of judicial review.<sup>59</sup> The court has maintained that “[c]ourts are limited to [the] exercise of ‘judicial function’ of interpreting and applying the law as it is and may not usurp . . . [the] executive power of exercising clemency.”<sup>60</sup>

In *Jamison v. Flanner*, the Kansas Supreme Court stated, “[the court] will not inquire into the motives which prompted the pardoning official to issue the pardon, for to do so would be to usurp the pardoning power; but the court will inquire into the authority of the pardoning official to issue the particular pardon in question . . . .”<sup>61</sup> In the same case, the Kansas Supreme Court held that the clemency power was not necessarily executive, but a power of the people that was vested in the executive branch by the people via the Constitution and statute.<sup>62</sup>

## 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.*

<sup>52</sup> *Id.*

<sup>53</sup> Kan. Const. art. II, § 1.

<sup>54</sup> See Kan. Const., art. II, § 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *House Roster*, Kansas Legislature, [http://www.kslegislature.org/li\\_2014/b2013\\_14/chamber/house/roster/](http://www.kslegislature.org/li_2014/b2013_14/chamber/house/roster/) (last visited Feb. 2, 2017).

<sup>58</sup> *Senate Roster*, Kansas Legislature, [http://kslegislature.org/li\\_2013s/b2013\\_14/chamber/senate/roster/](http://kslegislature.org/li_2013s/b2013_14/chamber/senate/roster/) (last visited Feb. 2, 2017).

<sup>59</sup> *Bernatzki v. Hand*, 375 P.2d 631 (Kan. 1962).

<sup>60</sup> *State v. Brady*, 137 P.2d 206, 207 (Kan. 1943); see also *Brenner v. Amrine*, 100 P.2d 688, 691 (Kan. 1940) (“We are neither clothed with legislative power nor with the exercise of executive clemency.”).

<sup>61</sup> *James v. Flanner*, 228 P. 82, 85 (Kan. 1924).

<sup>62</sup> *Id.*



*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. State-wide Demographics**

### **i. General Population**

In 2016, Kansas was estimated to have a population of 2,907,289 people.<sup>63</sup>

### **ii. Political Breakdown**

According to polling, roughly 34% of the population leans Democrat, while 51% leans Republican.<sup>64</sup> In the 2016 presidential election, Republican candidate Donald J. Trump won Kansas by more than 20%.<sup>65</sup> In the 2012 presidential election, Republican candidate Mitt Romney won by nearly 22% over President Barack Obama.<sup>66</sup>

On a national level, Kansas is entirely represented by Republicans in the U.S. Congress and Senate.<sup>67</sup>

Under the Kansas Constitution, justices of the Kansas Supreme Court are appointed from a list of three qualified candidates compiled by the state supreme court nominating commission.<sup>68</sup> Thereafter, justices are subject to periodic retention elections at the end of each six-year term in which they are placed on a separate ballot and must receive a majority of statewide support to continue in office.<sup>69</sup> These elections are officially nonpartisan, and justices and certain judges are prohibited from engaging in overt political activity.<sup>70</sup> However, the retention elections have been a source of partisan divide: Governor Brownback and other conservative state leaders have called for the removal of justices perceived to be “too” moderate or liberal.<sup>71</sup> As noted previously, the court’s decision in 2014 to overturn the death sentences of two brothers

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<sup>63</sup> *State & County Quick Facts: Kansas*, United States Census Bureau, (July 1, 2016), <https://www.census.gov/quickfacts/table/PST045215/20>.

<sup>64</sup> See *State of the States: Kansas*, Gallup, <http://www.gallup.com/poll/125066/state-states.aspx> (last visited Feb. 2, 2017).

<sup>65</sup> *2016 Election Results: Kansas*, Politico, (Dec. 13, 2016), <http://www.politico.com/2016-election/results/kansas>.

<sup>66</sup> *Federal Elections 2012*, Federal Election Commission at 31, (July 2013), available at <http://www.fec.gov/pubrec/fe2012/federalections2012.pdf>.

<sup>67</sup> See *Kansas*, GovTrack, <https://www.govtrack.us/congress/members/KS> (last visited Feb. 2, 2017).

<sup>68</sup> See Kan. Const. art. 3, § 5.

<sup>69</sup> *Id.*

<sup>70</sup> Kan. Const. art. 3, § 8.

<sup>71</sup> See, e.g., Erik Eckholm, *Outraged by Kansas Justices’ Rulings, Republicans Seek to Reshape Court*, N.Y. Times, (Apr. 1, 2016), <http://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html>.

convicted of multiple murders prompted calls for non-retention from Governor Brownback and others.<sup>72</sup> Currently, the Kansas Supreme Court is made up of three justices appointed by Republican governors and four justices appointed by Democratic governors.<sup>73</sup>

**iii. Religious Make-Up**

Kansas has a religious makeup similar to that of the nation on average:

	<b>Kansas<sup>74</sup></b>	<b>U.S.<sup>75</sup></b>
<b>Christian</b>	76%	71%
<b>Evangelical</b>	31%	25%
<b>Catholic</b>	18%	21%
<b>Muslim</b>	1%	1%
<b>Absolutely or fairly certain of belief in God</b>	88%	83%
<b>Atheist, Agnostic, or no religion in particular</b>	20%	23%
<b>Religion very important</b>	50%	53%
<b>Religion is somewhat important</b>	29%	24%

**iv. Income/Socioeconomic Breakdown**

Thirteen percent of the Kansas population lives below the poverty line.<sup>76</sup> According to the Center for American Progress, poverty is concentrated in African-American and Latino communities in Kansas, with 24.8% and 26% of those communities living below the poverty line, respectively.<sup>77</sup>

**b. Criminal Justice**

**i. Overall Prison Population**

Statistics are derived from the Kansas Department of Corrections Annual Report for Fiscal Year 2015, unless otherwise noted:<sup>78</sup>

- o Total Offender Population, 2015: 9,822
- o Total Male Population: 8,989

<sup>72</sup> John Hanna, *Carr brothers case thrusts Kansas Supreme Court into governor's race*, The Associated Press, (Oct. 26, 2014), <http://cjonline.com/news/2014-10-26/carr-brothers-case-thrusts-kansas-supreme-court-governors-race>.

<sup>73</sup> See Ballotpedia, *Kansas Supreme Court*, [https://ballotpedia.org/Kansas\\_Supreme\\_Court](https://ballotpedia.org/Kansas_Supreme_Court) (last visited Nov. 30, 2016).

<sup>74</sup> *Religious Landscape Study: Adults in Kansas*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/kansas/> (last visited July 5, 2016).

<sup>75</sup> *Religious Landscape Study: Religions*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/> (last visited June 6, 2016) (numbers rounded to the nearest whole number).

<sup>76</sup> See United States Census Bureau, *supra* note 63.

<sup>77</sup> *Talk Poverty: Kansas*, Center for American Progress, <https://talkpoverty.org/state-year-report/kansas-2014-report/> (last visited July 6, 2016).

<sup>78</sup> *Annual Report FY 2015*, Kansas Department of Corrections at 14, (2015), available at <https://www.doc.ks.gov/publications/Reports/Archived/2015/view>.

- Total Female Population: 833
- Number of White Prisoners: 6,571
- Number of Black Prisoners: 2,969

The Kansas prison population is 91.5% male and 30.2% black.<sup>79</sup> Notably, only 6.3% of the overall Kansas population is black.<sup>80</sup> Although the prisoner population is majority white (67%), there are fewer white prisoners in Kansas compared to their share of the overall state population (86.7%).<sup>81</sup> A significant portion (35%) of prisoners in Kansas have some form of severe mental illness.<sup>82</sup>

The most common offenses are “non-sexual other person” offenses (those typically involving bodily harm), which account for 49.3% of male prisoners’ and 40.9% of female prisoners’ convicted crimes.<sup>83</sup> For male prisoners, the next most frequent offenses are sexual offenses followed by drug crimes.<sup>84</sup> Women in Kansas are overwhelmingly convicted for either “non-sexual other person” offenses or drug crimes.<sup>85</sup>

## ii. Death Row Population and Demographics<sup>86</sup>

Total Number of Prisoners on Death Row: 10

- Number of Women on Death Row: 0
- Number of Black Prisoners on Death Row: 3
- Number of White Prisoners on Death Row: 7

## iii. Executions (Past and Pending)<sup>87</sup>

Total Number of Executions since 1973: 0

- Most Recent Execution: June 22, 1965
- Number of Executions Scheduled for 2015: 0
- Number of Executions Scheduled for 2016: 0
- Stays Issued in 2015: 0

<sup>79</sup> *Id.*

<sup>80</sup> See United States Census Bureau, *supra* note 63.

<sup>81</sup> *Id.*

<sup>82</sup> Kansas Department of Corrections, *supra* note 78 at 20.

<sup>83</sup> *Id.* at 17.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Capital Punishment Information*, Kansas Department of Corrections, (Nov. 2016), <https://www.doc.ks.gov/newsroom/capital>.

<sup>87</sup> *Upcoming Executions*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/upcoming-executions> (last visited June 2, 2016).

#### iv. Exonerations/Innocence<sup>88</sup>

There have not been any death penalty exonerations in Kansas.<sup>89</sup>

##### c. Public Opinion Polling

In 2007, in a poll commissioned by the Kansas Coalition Against the Death Penalty, 57% of the 500 respondents indicated that the death penalty is arbitrarily enforced.<sup>90</sup> In the same poll, 65% indicated that they would prefer life without parole to the death penalty if prisoners were required to work in prison industries, with proceeds going to victims' families.<sup>91</sup>

#### IV. Additional Information for Consideration in Clemency

##### a. Past Capital Clemency Decisions

###### i. Grants

As Kansas has not scheduled any executions since 1964, there have not been any capital clemency grants (or denials) in the forty years since the death penalty was reinstated nationwide.<sup>92</sup> **Earl Wilson** and **Bobbie Joe Spencer** were the last two Kansas death row prisoners to be granted clemency. Their sentences were commuted by Governor George in 1960, who was generally opposed to the death penalty.<sup>93</sup>

###### ii. Denials (where newsworthy or controversial)

See above.

<sup>88</sup> For inclusion in this section, an individual must have been convicted, sentenced to death, and subsequently either been acquitted of all charges related to the crime that placed them on death row, had all charges related to the crime that placed them on death row dismissed by the prosecution, or been granted a complete pardon based on evidence of innocence. This characterization mirrors the language used by national entities tracking death row exonerations, such as the National Registry of Exoneration and the Death Penalty Information Center. See *Glossary*, The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 19, 2016); *Innocence: List of those freed from death row*, Death Penalty Information Center, <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Dec. 19, 2016).

<sup>89</sup> *Kansas*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/kansas-1#history> (last visited July 6, 2016).

<sup>90</sup> *State Polls and Studies, Kansas*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/state-polls-and-studies?scid=23&did=210#kansas> (last visited July 6, 2016).

<sup>91</sup> *Id.*

<sup>92</sup> *See Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited July 6, 2015). *See also* Death Penalty Information Center, *supra* note 89.

<sup>93</sup> *Id.*

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

Some observers think that the Kansas Supreme Court will continue its thorough review of capital sentences, potentially barring future executions, though court the upheld a death sentence in 2015 for the first time under the 1994 capital punishment scheme.<sup>94</sup>

In *State v. Marsh*, the Kansas Supreme Court found the state’s capital punishment statute unconstitutional because it required that upon the jury finding both aggravating and mitigating factors equal, the death penalty must be imposed.<sup>95</sup> The court’s decision in *Marsh*, however, was subsequently overruled by the U.S. Supreme Court in 2006.<sup>96</sup> In an opinion written by Justice Clarence Thomas, the Court held that a state “may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators *do not outweigh* aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.”<sup>97</sup> Because the Kansas statute met the twin requirements of narrowing the pool of death-eligible defendants via its requirement that death only be imposed for capital murder and permitted the consideration of individual mitigating evidence, it did not violate the Eighth Amendment.<sup>98</sup>

In 2016 in *Kansas v. Carr*, the U.S. Supreme Court again overturned a Kansas Supreme Court case invalidating two capital sentences.<sup>99</sup> Originally, the Kansas Supreme Court vacated the death sentences for two reasons: 1) the jury instructions did not affirmatively state that mitigating factors need not be proven beyond a reasonable doubt, and 2) defendants of the same crime were sentenced jointly.<sup>100</sup> In reversing the state court decision, the U.S. Supreme Court reasoned that the relative weight of mitigating factors was a judgment based upon the jury’s discretion—not a purely factual determination—and therefore was not subject to *any* standard of proof.<sup>101</sup> While a jury could be required to find the facts *establishing* the mitigating evidence by a preponderance of the evidence, for example, this same standard of proof nevertheless would not apply to the weighing of those mitigating factors against the aggravators. *Id.* Moreover, the U.S. Supreme Court reaffirmed that the Constitution does not require states to structure a jury’s consideration of evidence in a particular fashion.<sup>102</sup> Addressing the claim that the joint sentencing of two defendants prejudiced the jury’s imposition of a death sentence, the Court reasoned that “[t]he mere admission of evidence that might not otherwise have been admitted in a severed proceeding does not demand the automatic vacatur of a death sentence.”<sup>103</sup> Therefore, the introduction of mitigating evidence that portrayed one defendant as the ringleader and one as the pawn was not unduly prejudicial, given that juries are instructed to consider each defendant separately.<sup>104</sup>

Both of these U.S. Supreme Court cases overturning the Kansas Supreme Court on death penalty issues were cited during the campaigns against the Kansas Supreme Court justices in the 2016 retention

<sup>94</sup> John Hanna, *Kansas court’s approval of death sentence not seen as shift*, Topeka-Capital Journal, (Nov. 15, 2015), <http://cjonline.com/news/2015-11-15/kansas-courts-approval-death-sentence-not-seen-shift>.

<sup>95</sup> *State v. Marsh*, 278 Kan. 520 (Kan. 2004).

<sup>96</sup> *Kansas v. Marsh*, 548 U.S. 163, 173 (2006).

<sup>97</sup> *Id.* (emphasis added).

<sup>98</sup> *Id.* at 175–76.

<sup>99</sup> *Kansas v. Carr*, 136 S.Ct. 633 (2016).

<sup>100</sup> *Id.* at 635.

<sup>101</sup> *Id.* at 642.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 645.

<sup>104</sup> *Id.*

elections.<sup>105</sup> Five justices on the Kansas Supreme Court faced retention votes on November 8, 2016, and each justice retained his or her seat.<sup>106</sup> While their death sentences remain in place, neither the Carr brothers nor Marsh have been executed.

### c. Divisive/Important Political Issues in the State

In recent years Kansas has seen controversy over its economic situation,<sup>107</sup> which lawmakers from both parties have blamed on substantial income tax cuts proposed and supported by Governor Brownback and passed by the legislature.<sup>108</sup>

Inequity in school funding from the state is one of the most pressing fiscal issues.<sup>109</sup> In 2016, the Kansas Supreme Court ruled that the state's current financing system created wealth-based disparities among schools, violating the state constitution. The court threatened to shut down the public school system if the legislature did not pursue a timely remedy.<sup>110</sup> In response, the state legislature passed a bill later that year that attempted to equalize funding for poorer school districts and keep the state's public schools open.<sup>111</sup>

Budgetary concerns led a bipartisan group of state legislators to propose a bill to repeal the state's death penalty.<sup>112</sup> A recent study commissioned by the Kansas legislature found that capital cases are three- to four-times more expensive for the state to prosecute than non-capital cases.<sup>113</sup>

### d. Other Relevant Legal, Historical, or Social Issues

#### Push for State Criminal Justice Reform & Abolition

In early 2016, Kansans for Smart Justice and thirteen other entities organized a push for criminal justice reform within the state legislature.<sup>114</sup> The coalition's agenda included a focus on reducing incarceration

<sup>105</sup> See Erik Eckholm, *supra* note 71.

<sup>106</sup> *Kansas judicial elections, 2016*, Ballotpedia, [https://ballotpedia.org/Kansas\\_judicial\\_elections,\\_2016](https://ballotpedia.org/Kansas_judicial_elections,_2016) (last visited Jan. 25, 2017).

<sup>107</sup> KAKE News, *Kansas tax receipts for June come in \$34.5 million below expectations*, KAKE.com, (July 1, 2016), <http://www.kake.com/story/32358051/kansas-tax-receipts-for-june-come-in-345-million-below-expectations>.

<sup>108</sup> Associated Press, *Kansas loses patience with Gov. Brownback's Tax Cuts*, CBS News, (Apr. 19, 2016), <http://www.cbsnews.com/news/kansas-loses-patience-governor-sam-brownback-tax-cuts/>.

<sup>109</sup> Julie Bosman, *Kansas Lawmakers Pass Bill in Bid to Stop Court From Closing Schools*, N.Y. Times, (June, 24, 2016), <http://www.nytimes.com/2016/06/25/us/kansas-lawmakers-pass-bill-in-bid-to-stop-court-from-closing-schools.html>.

<sup>110</sup> Julie Bosman, *Kansas Supreme Court Rejects School Funding Plan, Citing 'Intolerable' Inequities*, N.Y. Times, (May 27, 2016), <http://www.nytimes.com/2016/05/28/us/kansas-supreme-court-rejects-school-funding-plan-citing-intolerable-inequities.html>; The Star and news services, *Kansas Supreme Court rules latest school funding plan unconstitutional*, The Kansas City Star, (May 27, 2016), <http://www.kansascity.com/news/state/kansas/article80426327.html>.

<sup>111</sup> Julie Bosman, *supra* note 109.

<sup>112</sup> See Miranda Davis, *House members press for repeal of Kansas death penalty*, Topeka Capital-Journal, (Feb. 11, 2016), <http://cjonline.com/news/state/2016-02-11/house-members-press-repeal-kansas-death-penalty>.

<sup>113</sup> See *Report of the Judicial Counsel Death Penalty Advisory Committee*, Kansas Judicial Council, (Feb. 13, 2014), available at <http://www.kansasjudicialcouncil.org/death%20penalty%20cost%20report%20final.pdf>.

<sup>114</sup> Tim Carpenter, *Kansans for Smart Justice pushing for criminal justice reform*, Topeka Capital-Journal, (Feb. 29, 2016), <http://cjonline.com/news-legislature-local-state/2016-02-29/kansans-smart-justice-pushing-criminal-justice-reform>.

rates as well as improving services available for recidivism prevention.<sup>115</sup> Around the same time, a bipartisan effort to reform the state's criminal forfeiture law, which allows seizure of property without a conviction, led to a state bill that would require a conviction before seizure of property.<sup>116</sup> Two other reform bills were introduced with the forfeiture bill: one requiring police interrogations to be recorded and one providing compensation to those wrongfully convicted.<sup>117</sup> The Kansas state legislature passed, and Governor Brownback signed, Senate Bill 367 to shift funding from youth residential centers or group homes to community-based programs that the state hopes will be more effective than incarceration.<sup>118</sup>

In January 2017, Republican Representative Steven Becker introduced House Bill 2167 to abolish the death penalty in the Kansas state legislature.<sup>119</sup> The bill had fifteen sponsors, including both Republicans and Democrats.<sup>120</sup> The bill is not retroactive, meaning that those currently on death row in Kansas could still be executed even if the bill were to pass. It reads, "No person shall be sentenced to death for a crime committed on or after July 1, 2017."<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> Karen Dillon, *Kansas' criminal forfeiture law, among nation's toughest, faces bipartisan effort to change*, (Feb. 15, 2016), <http://www2.ljworld.com/news/2016/feb/15/kansas-criminal-forfeiture-law-among-nations-tough/>.

<sup>117</sup> *Id.*

<sup>118</sup> Bryan Lowry and Edward M. Eveld, *Kansas Senate approves juvenile justice reforms*, The Wichita Eagle, (Feb. 23, 2016), <http://www.kansas.com/news/politics-government/article61981097.html>.

<sup>119</sup> Mary Clarkin, *Becker launches new bid to eliminate death penalty*, The Hutchinson News, (Jan. 26, 2017), [http://www.hutchnews.com/news/local\\_state\\_news/becker-launches-new-bid-to-eliminate-death-penalty/article\\_8ea92b54-3044-522b-9c81-95769aeb25a0.html](http://www.hutchnews.com/news/local_state_news/becker-launches-new-bid-to-eliminate-death-penalty/article_8ea92b54-3044-522b-9c81-95769aeb25a0.html).

<sup>120</sup> *Id.*

<sup>121</sup> H.B. 2167, 2017 Leg., Reg. Sess. (Kan. 2017), available at [http://kslegislature.org/li/b2017\\_18/measures/documents/hb2167\\_00\\_0000.pdf](http://kslegislature.org/li/b2017_18/measures/documents/hb2167_00_0000.pdf).