

KENTUCKY

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 Kentucky. Some of the information contained within this memorandum does not relate directly to Kentucky’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

Section 77 of the Kentucky Constitution gives the governor the sole power to grant clemency.¹

b. The Decision Maker(s)

In Kentucky, the governor is not directed by the state constitution or statute to follow any specified procedures when reviewing an application for clemency in a death penalty case.² However, the governor may, at his or her discretion, request that the Kentucky Parole Board (“Board”) investigate the case and provide a report regarding the appropriateness of a commutation of sentence, essentially providing a recommendation.³ While the governor typically has *not* involved the Board in capital clemency decisions, the following is a description of the Board’s makeup, as well as some of the internal procedures it must follow.

The Board

The Board consists of nine full-time members who are appointed by the governor, who selects each from a list of three names provided by the Kentucky State Corrections Commission.⁴ The members serve four-year terms until their successors are appointed and confirmed by the state senate.⁵ Each member must have had at least five years of experience in penology, corrections, law enforcement, sociology, law, education, social work, medicine, or a combination thereof, or have served at least five years previously on the Board.⁶ No more than six Board members can be of the same political party.⁷ The governor may not remove any member of the Board except for disability, inefficiency, neglect of duty, or malfeasance in office.⁸

¹ Ky. Const. § 77 (West).

² *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010).

³ Ky. Rev. Stat. Ann. § 439.450 (West).

⁴ Ky. Rev. Stat. Ann. § 439.320(1) (West).

⁵ *Id.* at (3).

⁶ *Id.* at (1).

⁷ *Id.*

⁸ *Id.* at (5).

The Board is required to keep records of its acts, electronic records of its meetings, written records of individual members' votes, and the reasons for denying parole to prisoners.⁹ It is also required to submit to the governor an annual report with data about its operations and the cases it reviewed at the end of each fiscal year.¹⁰ These records must be available to the public. Given that the Board is not required to review clemency petitions in capital cases and typically does not do so, its annual reports usually do not provide any information directly relevant to death penalty cases.

c. When to Bring a Petition

Filing a clemency petition triggers the governor's consideration of a capital clemency request.¹¹ A death-sentenced prisoner does not have to wait until his or her execution is imminent to seek clemency.

d. How to Bring a Petition

To apply for clemency, a petitioner must request an official form from the Governor's Office of the General Counsel by mail, phone, or fax.¹² Forms are requested from:

Commonwealth of Kentucky
Office of the Governor
700 Capitol Avenue, Suite 100
Frankfort, KY 40601
ATTN: Office of the General Counsel
Tel: (502) 564-2611
Fax: (502) 564-2517

The petition requires the following information:

- (1) General information including social security number, marital status and number of children;
- (2) Criminal information, including a complete list of past and pending felony and misdemeanor charges and any parole or probation violations;
- (3) Educational information, including the highest level of education completed;
- (4) Employment information, including current and most recent employers;
- (5) Military information, including branch of service and type of discharge;
- (6) Contact information for three non-family references and emergency contacts.¹³

In addition to the information listed above, the petitioner must also provide (1) copies of previous clemency applications (if any); (2) a separate letter that describes the reasons he or she is seeking relief and the extenuating circumstances supporting the basis for the request, (3) a minimum of three letters of

⁹ Ky. Rev. Stat. Ann. § 439.330(4) (West).

¹⁰ *Id.*

¹¹ *Baze v. Thompson*, *supra* note 2 at 59.

¹² *Kentucky*, Criminal Justice Policy Foundation, <http://www.cjpf.org/clemency-ky/> (last visited Jun. 20, 2016).

¹³ A copy of the "Application for Gubernatorial Pardon and/or Commutation of Sentence" is on file with the Capital Clemency Resource Initiative; see also American Bar Association Death Penalty Due Process Review Project, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* 277 (2011) ("Assessment"), available at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.pdf.

recommendation in support of relief, which may be submitted from sources including—but not limited to—neighbors, employers, co-workers, pastors, church members, elected officials, judges, prosecutors, or family members.¹⁴

Historically, some Kentucky governors have required the form petition while others have not. Counsel should check with the current Governor’s Office about their particular requirements before preparing a clemency petition. Litigators have submitted clemency petitions that provide different and additional information.¹⁵

Although indigent defendants or death row prisoners are entitled to “be counseled and defended at all stages of the matter . . . including revocation of probation and parole,” Kentucky has not promulgated any rules, regulations, laws, or procedures that require courts to appoint counsel to represent the Commonwealth’s death row prisoners petitioning for clemency.¹⁶ In practice, however, the Department of Public Advocacy and the Louisville Metro Public Defender’s Office provide clemency representation to Kentucky’s death row prisoners, which includes drafting and researching clemency petitions and connected litigation, when appropriate.¹⁷

e. Hearing Practice

Kentucky does not require the governor to hold a hearing or meet with the petitioner or his attorneys in advance of making a capital clemency decision. According to information from current capital practitioners in Kentucky, the governor’s office has not granted informal hearings to capital clemency petitioners in recent years. Attorneys representing capital clients in clemency typically still request a meeting with the governor’s office subsequent to submitting a clemency petition, however.¹⁸

f. Responding to a Petition

After receiving a petition, the governor is required to make a decision and file a statement for the reasons for his decision, but there are no laws or regulations that dictate the timeframe in which the governor has to respond or when such a decision must be rendered.¹⁹ The governor frequently issues a press release to announce a particular decision rather than a more formal document explaining his rationale for denying the petition. Practitioners have reported that governors’ statements denying clemency are often accompanied by an announcement scheduling the petitioner’s execution.

¹⁴ *Id.*

¹⁵ This information is based on 2015 and 2016 interviews with Kentucky practitioners, which are on file with the Capital Clemency Resource Initiative.

¹⁶ See Assessment, *supra* note 13, at 277; see also Ky. Rev. Stat. Ann. § 31.110(2)(a) (West).

¹⁷ Assessment, *supra* note 13, at 279.

¹⁸ *Supra* note 15.

¹⁹ Ky. Const. § 77; see also *McQueen v. Patton*, 948 S.W.2d 418, 419 (Ky. 1997).

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Matt Bevin, the Republican governor of Kentucky, was elected to his first term in November 2015.²⁰ His campaign focused on national political issues, such as speaking out against gay marriage, Planned Parenthood, federal energy policy, and the Affordable Care Act.²¹ He is a supporter of the death penalty.²² Bevin selected Jenean Hampton, the first black statewide officeholder in the state's 223-year history, to be his Lieutenant Governor.²³ Since taking office, Bevin has reversed an executive order signed by former Democratic Governor Steve Beshear that had granted voting rights to nonviolent ex-felons who had completed their sentences.²⁴

b. Legislative Structure and Political Make-Up

Kentucky has a bicameral state legislature. The Senate is composed of 38 seats which are occupied by 27 Republicans and 11 Democrats.²⁵ The House of Representatives is composed of 100 seats which are held by 64 Republicans and 36 Democrats.²⁶

In 2016, House Bill 203, legislation that would abolish the death penalty in Kentucky, was sponsored by Republican state Representative David Floyd and gained close to the necessary number of votes to be sent to the House floor.²⁷ It failed to advance from Kentucky's House Judiciary Committee by a vote of 9-8.²⁸ There was diverse and significant support for the bill.²⁹

The Kentucky legislature has also proposed and considered several other bills aimed at reforming capital punishment procedure in the state. For example, less than a month after the release of the ABA Death Penalty Due Process Review Project's Assessment in 2011, *supra note 15*, team members presented their findings before the House and Senate Judiciary Committees, leading to the introduction of a bill to create a

²⁰ Sheryl Gay Stolberg and Alan Blinder, *Matt Bevin, Republican, Wins Governor's Race in Kentucky*, N.Y. Times (Nov. 3, 2015), http://www.nytimes.com/2015/11/04/us/republican-wins-governors-race-in-kentucky.html?_r=0.

²¹ *Id.*

²² Debrah Yetter, *'Self-made' Bevin on a mission to remake Ky.*, Courier Journal (Oct. 25, 2015), <http://www.courier-journal.com/story/news/politics/elections/kentucky/2015/10/15/self-made-bevin-mission-remake-kentucky/73597474/>.

²³ Natalie Johnson, *Meet Jenean Hampton, First Black Statewide Officeholder in Kentucky*, NBC News (Nov. 4, 2015), <http://www.nbcnews.com/news/nbcblk/meet-jenean-hampton-first-black-statewide-officeholder-kentucky-n457296>.

²⁴ Ryland Barton, *Bevin Rescinds Voting Rights to Ex-Felons, Changes Kentucky Marriage Licenses*, 89.3 WFPL (Dec. 22, 2015), <http://wfpl.org/gov-bevin-rescinds-voting-rights-to-non-violent-felons-changes-marriage-licenses/>.

²⁵ *Senate Members*, Kentucky Legislature, <http://www.lrc.ky.gov/senate/senmembers.htm> (last visited Mar. 26, 2016).

²⁶ *Kentucky elections, 2016*, Ballotpedia, https://ballotpedia.org/Kentucky_elections,_2016 (last visited Nov. 11, 2016).

²⁷ HB 203, 16 Reg. Sess. (2016), available at <http://www.lrc.ky.gov/record/16RS/HB203/bill.pdf>.

²⁸ Ryland Barton, *Bill to Abolish Death Penalty Fails in House Committee*, 89.3 WPFL (Mar. 9, 2016), <http://wfpl.org/bill-abolish-death-penalty-fails-committee/>.

²⁹ See Pat Delahanty, *Only 2 Shy of the 10 Needed Votes*, Kentucky Coalition to Abolish the Death Penalty (Mar. 10, 2016), <http://kcadp.org/2016/03/10/only-2-shy-of-the-needed-10-votes/>. (Noting the legislative testimony of Conservatives Concerned about the Death Penalty, the Kentucky American Civil Liberties Union, the Catholic Conference of Kentucky, the Kentucky Council of Churches, Kentuckians for the Commonwealth, the Kentucky NAACP, victim family members, evangelical leaders, the Kentucky Association of Criminal Defense Lawyers, former Assistant Commonwealth's Attorney Joseph Gutmann and retired Circuit Court Judge Stephen Ryan, and others.)

task force to implement all of its recommendations. The task force bill passed the House by a 73-18 bipartisan vote.³⁰

c. Judicial Review of State Clemency

In *Foley v. Beshear*,³¹ the Kentucky Supreme Court reaffirmed its holding in *Baze v. Thompson*³² that Kentucky's capital clemency procedures, which leave clemency decisions to "the unfettered discretion of the Governor," are compliant with the due process requirements of the Fourteenth Amendment.³³

Also of note, the Sixth Circuit in *Baze v. Parker* upheld a lower court decision finding that the federal courts are without jurisdiction to require the state to grant clemency petitioners access to other prisoners and prison personnel to conduct interviews in support of clemency.³⁴ The court wrote:

Baze argues that because [a federal statute] empowers a federal court to 'authorize the defendant's attorneys to obtain' investigative services, then it must also empower the court to order third-party compliance with the attorneys' investigations. Baze effectively interprets the statute to empower federal courts, not only to fund an attorney's efforts to obtain investigative services that the court finds to be reasonably necessary, but also to manage and enforce the collection of evidence in state clemency proceedings.³⁵

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.*

³⁰ H.R. Con. Res. 173, 2012 Leg., Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12rs/HC173.htm> (last visited Jan. 3, 2017).

³¹ 462 S.W.3d 389 (Ky. 2015).

³² *Supra* note 2.

³³ *Foley v. Beshear*, 462 S.W.3d 389, 392 (Ky. 2015).

³⁴ *Baze v. Parker*, 632 F.3d 338 (6th Cir. 2011).

³⁵ *Id.* at 342.

a. State-wide Demographics

i. General Population

The U.S. Census Bureau estimated Kentucky's population to be 4,425,092 as of July 1, 2015.³⁶

ii. Political Breakdown

The following table provides data on the political make-up of Kentucky as of March 2016, according to the Kentucky State Board of Elections.³⁷

Party	Population
Democrat	1,682,510
Republican	1,288,797
Other	181,052
Independent	71,390
Libertarian	5,006
Green	929
Constitution	276
Reform	78
Socialist Workers	82

iii. Religious Make-Up

The following table provides an estimate of the religious composition of the state.³⁸

Religion	Estimated Percentage of Population
Christian	76
Evangelical Protestant	49
Mainline Protestant	11
Historically Black Protestant	5
Catholic	10
Non-Christian Faiths	2
Unaffiliated	22

³⁶ *State & County QuickFacts, Kentucky*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/21> (last visited Jun. 20, 2016).

³⁷ *Voter Registration Statistics*, Kentucky State Board of Elections, <https://vr.sos.ky.gov/stats/voterstats.xls> (last visited Mar. 15, 2016).

³⁸ *Religious Landscape Study*, Pew Research Center Religion & Public Life, <http://www.pewforum.org/religious-landscape-study/state/kentucky/> (last visited Mar. 25, 2016).

iv. Income/Socioeconomic Breakdown

The following table compares Kentucky's population with the rest of the United States in several socioeconomic categories.³⁹

Category	Kentucky	U.S.
Per capita income in past 12 months (in 2014 dollars)	\$23,741	\$28,555
Median household income (in 2014 dollars), 2010–2014	\$43,342	\$53,482
Persons in poverty	19.1%	14.8%
Language other than English spoken at home	5.0%	20.9%
Bachelor's degree or higher	21.8%	29.3%
Unemployment rate	5.8% ⁴⁰	4.9% ⁴¹

b. Criminal Justice

i. Overall Prison Population

Kentucky's prison population is 23,487 prisoners.⁴² The prison population's demographic makeup is represented in the chart below:

Race	Percentage of State Population ⁴³	Percentage of Prison Population ⁴⁴
White	88.3%	75%
Black	8.2%	22%
Hispanic	3.4%	1%
Two or More Races	1.8%	1%
Asian	1.4%	<1%
Native American	<1%	<1%
Other	<1%	<1%

³⁹ *State & County QuickFacts, Kentucky*, *supra* note 36.

⁴⁰ *Local Area Unemployment Statistics*, United States Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/web/laus/laumstrk.htm> (last visited Nov. 25, 2016).

⁴¹ *Employment Situation Summary*, United States Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/news.release/empst.nr0.htm> (last visited Nov. 4, 2016).

⁴² *Daily Count Sheet*, Kentucky Department of Corrections (Mar. 25, 2016), available at <http://corrections.ky.gov/about/Documents/Research%20and%20Statistics/Daily%20Count%20Sheet/2016/03/03-25-16.pdf>.

⁴³ *State & County QuickFacts*, *supra* note 36.

⁴⁴ *Inmate Profiles*, Kentucky Department of Corrections (Mar. 15, 2016), available at <http://corrections.ky.gov/about/Documents/Research%20and%20Statistics/Monthly%20Reports/Inmate%20Profile/2016/Inmate%20Profile%2003-2016.pdf>.

ii. Death Row Population and Demographics

Between 1976 and 2011, 78 people were sentenced to death in Kentucky, roughly 2 per year.⁴⁵ This rate has continued to decrease in recent years. Since 2006, there have only been five new death sentences in Kentucky.⁴⁶

Kentucky has 33 prisoners on death row.⁴⁷ Though Kentucky does not provide demographic details of its death row population, it does post photographs of all of its death row prisoners on its website, along with descriptions of the crimes for which they were each convicted.⁴⁸

iii. Executions (Past and Pending)

Total Number of Executions since 1976: 3

- Most Recent Execution: November 21, 2008
- Number of Executions Scheduled for 2015: 0
- Number of Executions Scheduled for 2016: 0
- Stays Issued in 2015: 0

Kentucky carried out 424 executions prior to 1972. Since 1976, however, the state has carried out only three executions. Kentucky's most recent execution took place in 2008, when **Marco Chapman** was put to death by lethal injection after waiving his remaining appeals.⁴⁹ The only person to have been executed in Kentucky after exhausting all his appeals was **Harold McQueen, Jr.** on July 1, 1997. **Edward Lee Harper**, executed in 1999, also waived his appeals and volunteered for execution.⁵⁰

iv. Exonerations/Innocence⁵¹

Larry Osborne was seventeen years old when he was sentenced to death in 1999 for the murder of an elderly couple in Whitley County. After the Kentucky Supreme Court reversed his original conviction, finding

⁴⁵ *Kentucky*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/kentucky-1#sent> (last visited Jan. 3, 2016).

⁴⁶ *Id.*

⁴⁷ *Death Row Inmates*, Kentucky Department of Corrections, <http://corrections.ky.gov/depts/AI/Pages/DeathRowInmates.aspx> (last visited Jan. 3, 2016).

⁴⁸ *Id.*

⁴⁹ *See Executions*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/views-executions> (last visited June 20, 2016).

⁵⁰ *Id.*

⁵¹ 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).

that it was based on the improper hearsay testimony of a 15-year-old boy who had died before the trial, a new jury acquitted Mr. Osborne at a re-trial in 2002.⁵²

Of the 78 people sentenced to death in Kentucky between 1976 and 2011 in Kentucky, 52 have had their death sentences overturned on appeal or have been granted clemency.⁵³ This means that roughly 60% of the individuals that received death sentences in the modern era in Kentucky have had their death sentences vacated.

c. Public Opinion Polling

In 2013, about 67% of Kentuckians supported the death penalty for murder and did not want it replaced with a life sentence.⁵⁴ However, there is some indication that these views are changing, as is evidenced by the *Lexington Herald Leader's* recent call for the abolition of the death penalty.⁵⁵

In August 2016, the University of Kentucky Survey Research Center released a new poll on the views of Kentuckians on the death penalty:⁵⁶

- 72.4% would support a moratorium on executions while problems in Kentucky's administration of the death penalty are fixed.
- 62.6% who support the death penalty were still in favor a moratorium.
- 57.8% would prefer a long prison term (options ranged from 20 years to life without parole) for first-degree murder over capital punishment.
- 68% said they would support replacing the death penalty with life without parole if the death penalty were found to cost substantially more than life in prison.
- 71.6% of all respondents (and 61.4% of death penalty supporters) agreed that capital punishment risks executing an innocent person.
- 64% supported replacing the death penalty with life without parole when asked to consider the impact of lengthy appeals on victims' families.

Additionally, the Foundation for a Healthy Kentucky conducted a poll in 2009 which showed that 72% of Kentuckians favor replacing prison sentences with mandatory mental illness treatment programs for people who are convicted of nonviolent crimes.⁵⁷ The same foundation also conducted a poll in 2010 which found

⁵² See *Larry Osborne*, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4216> (last visited Aug. 25, 2016).

⁵³ See Assessment, *supra* note 13, at xii.

⁵⁴ Kevin Willis, *Poll: Capital Punishment has Strong Support in Kentucky*, WKU Public Radio (Jan. 31, 2013), <http://wkyufm.org/post/poll-capital-punishment-has-strong-support-kentucky#stream/0>.

⁵⁵ Editorial, *Kentucky Should Abolish the Death Penalty*, *Lexington Herald Leader* (Mar. 4, 2016), <http://www.kentucky.com/opinion/editorials/article64140792.html>.

⁵⁶ *What Kentuckians Say About the Death Penalty*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/University_of_Kentucky_2016_Death_Penalty_Poll (last visited Nov. 3, 2016).

⁵⁷ *Kentucky Health Issues Poll: What Kentuckians Think about Treatment vs. Prison for People with Severe Mental Illnesses*, Foundation for a Healthy Kentucky (Mar. 2010), available at <http://www.healthy-ky.org/sites/default/files/docs/KHIP09%20-%20Treatment%20vs%20Incarceration.pdf>.

that 69% of Kentucky adults favor replacing prison sentences with mandatory treatment and probation for people convicted of nonviolent illegal drug use.⁵⁸

IV. Additional Information for Consideration in Clemency

a. Past Capital Clemency Decisions

i. Grants

From 1920–2007, 10 Kentucky governors have granted clemency to 37 persons sentenced to death.⁵⁹

Since 1976, two death row prisoners have received clemency in Kentucky.⁶⁰ In 2003, two years before the U.S. Supreme Court held the death penalty unconstitutional for juvenile offenders, Governor Paul Patton commuted the sentence of **Kevin Stanford** to life without parole.⁶¹ Stanford had been convicted of murder, rape, and sodomy of a 20-year-old woman when he was 17.⁶² Governor Patton cited Stanford's age at the time of the crime as the reason for the commutation.⁶³

In 2007, Governor Ernie Fletcher commuted **Jeffrey D. Leonard's** death sentence to life without parole noting that Leonard was not provided with adequate representation at the time of his conviction.⁶⁴ Leonard was originally convicted under the name James Earl Slaughter⁶⁵ for murder and first degree robbery.⁶⁶

ii. Denials (where newsworthy or controversial)

In recent years, Kentucky's clemency process has been criticized for its lack of mandated transparency regarding clemency procedures.⁶⁷ The Kentucky Supreme Court's 2015 decision in *Foley v. Beshear*, *supra* note 32, which reaffirmed the constitutionality of Kentucky's governor-centric clemency model, came in response to a novel legal challenge to the state's capital clemency process. There, prisoners argued that the governor's total discretion in approaching the clemency process—from deciding whether to allow petitioners a hearing, to being permitted to conceal the grounds upon which clemency was decided—

⁵⁸ *Kentucky Health Issues Poll: What Kentuckians Think about Treatment vs. Incarceration for People with Substance Use Disorders*, Foundation for a Healthy Kentucky (Mar. 2011), available at <http://www.healthy-ky.org/sites/default/files/docs/KHIP10%20-%20Treatment%20vs%20Incarceration.pdf>.

⁵⁹ Ed Monahan, *The Power, Practice and Process of Commutation of Persons Sentenced to Death* (Oct. 2008). This memorandum is no longer available online, but is available on request from the Capital Clemency Resource Initiative.

⁶⁰ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited May 19, 2016).

⁶¹ Andrew Wolfson, *From Death Row to Parole? Killer Could Apply*, Courier Journal (Feb. 7, 2016), <http://www.courier-journal.com/story/news/local/2016/02/05/stanford-other-teen-killer-could-get-parole/79873254/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Kentucky Governor Commutes Death Sentence Before Leaving Office*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/node/2233> (last visited May 19, 2016).

⁶⁵ *Id.*

⁶⁶ *Slaughter v. Comm.*, 744 S.W.2d 407 (Ky. 1987).

⁶⁷ See The Associated Press, *Ky. Alone in lack of formal clemency procedure*, The Herald Dispatch (July 5, 2013), http://www.herald-dispatch.com/news/recent_news/ky-alone-in-lack-of-formal-clemency-procedure/article_3fa4cda0-655f-58e7-ab6a-6120684fa963.html.

violated the due process requirements of the federal Constitution.⁶⁸ Although this legal challenge ultimately failed in the courts, it succeeded in bringing some public attention to an otherwise opaque and little discussed issue.

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

In addition to the aforementioned Kentucky Supreme Court rulings on clemency, the U.S. Supreme Court has also ruled in at least two major cases of constitutional significance that originated in Kentucky.

In *Baze v. Rees*,⁶⁹ the Court upheld the constitutionality of Kentucky's method of lethal injection—finding that it was not cruel and unusual punishment in violation of the Eighth Amendment—and also established a standard for determining if a method of execution is unconstitutional. For a method of execution to violate the Eighth Amendment, it must pose a “substantial” or “objectively intolerable” risk of serious harm.⁷⁰ The case had nationwide implications because the particular drugs used for lethal injections in Kentucky were—at least at that time—the same combination used by most other death penalty states. Since then, the standard in *Baze* has been challenged in most capital punishment states, and was again considered by the U.S. Supreme Court in *Glossip v. Gross*, 576 U.S. ___, 135 S.Ct. 2726 (2015).⁷¹ However, in Kentucky (as in many other states), the decreased availability of sodium thiopental and other drugs previously used in executions has led to the creation of new drug protocols for lethal injections and the increasing use of compounding pharmacies or secrecy surrounding the drug suppliers.⁷²

The U.S. Supreme Court also famously reviewed a Kentucky death penalty case in *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that a prosecutor may not use peremptory challenges in criminal cases to exclude jurors based solely on their race. Since *Batson*, Kentucky has undertaken a number of initiatives to investigate and address racial disparities and discrimination in the Commonwealth's criminal justice system.⁷³ For example, in 1992, then-Kentucky Supreme Court Chief Justice Robert Stevens established the Kentucky Racial Bias Task Force. Over a number of years, this taskforce investigated allegations of racial bias in the court system against people convicted of felony offenses, including small claims plaintiffs and domestic violence respondents.⁷⁴

⁶⁸ Bruce Schriener, *Ky. Death row inmates lose clemency challenge*, The Courier Journal (June 11, 2015), <http://www.courier-journal.com/story/news/local/2015/06/11/ky-death-row-inmates-lose-clemency-challenge/71079976/>.

⁶⁹ *Baze v. Rees*, 553 U.S. 35 (2008).

⁷⁰ *Id.* at 47-48.

⁷¹ See Death Penalty Information Center, *Lethal Injection*, <http://www.deathpenaltyinfo.org/lethal-injection> (last visited May 19, 2016).

⁷² *Id.*

⁷³ Assessment, *supra* note 13, at 351.

⁷⁴ *Id.*

c. Divisive/Important Political Issues in the StateIncreased Drug Abuse

In recent years, drug abuse and addiction has become an epidemic in Kentucky, particularly with heroin and fentanyl.⁷⁵ Fatal drug overdoses in the state totaled 1,248 in 2015 and 1,071 in 2014.⁷⁶ Governor Matt Bevin said on the matter, “As I read the latest report on overdose deaths in Kentucky, I am heartbroken for the Commonwealth. More than three families a day are shattered by this epidemic of untimely death. This is unacceptable and will be vigorously addressed with every resource at our disposal.”⁷⁷

To that end, the state legislature passed a bill in 2015 that included harm reduction efforts (like increased access to a drug that can stop overdoses) and harsher penalties for drug traffickers.⁷⁸ Clean needle exchange programs have started in community health departments all over the state.⁷⁹ Additionally, Kentucky has allotted \$15.7 million in fiscal year 2017 and \$16.3 million in fiscal year 2018 to anti-drug efforts, an increase of over \$5 million from the 2016 fiscal year.⁸⁰

⁷⁵ *The Heroin Epidemic*, Office of Drug Control Policy, <http://odcp.ky.gov/Pages/The-Heroin-Epidemic.aspx> (last visited Nov. 4, 2016).

⁷⁶ *Northern Kentucky Counties Rank High for Heroin, Fentanyl Overdose Deaths*, The River City News (June 14, 2016), <http://www.rcnky.com/articles/2016/06/14/northern-kentucky-counties-rank-high-heroin-fentanyl-overdose-deaths>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *The Heroin Epidemic*, *supra* note 75.

⁸⁰ *Northern Kentucky Counties Rank High for Heroin, Fentanyl Overdose Deaths*, *supra* note 76.