

# COLORADO

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

The Constitution of the State of Colorado grants exclusive clemency power to the governor.<sup>1</sup> Article 4, Section 7 states:

The governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses except treason, and except in case of impeachment, subject to such regulations as may be prescribed by law relative to the manner of applying for pardons, but he shall in every case where he may exercise this power, send to the general assembly at its first session thereafter, a transcript of the petition, all proceedings, and the reasons for his action.<sup>2</sup>

The Colorado Revised Statutes further specifies:

The governor is hereby fully authorized, when he deems it proper and advisable and consistent with the public interests and the rights and interests of the condemned, to commute the sentence in any case by reducing the penalty in a capital case to imprisonment for life or for a term of not less than twenty years at hard labor.<sup>3</sup>

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

While the governor holds sole authority to grant clemency in capital cases, the Executive Clemency Advisory Board (“Board”), which was reauthorized by executive order in 2012, is empowered to make advisory clemency recommendations to the governor.<sup>4</sup> According to the new authorization order, if a

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<sup>1</sup> Colo. Const. art. IV, § 7.

<sup>2</sup> *Id.*

<sup>3</sup> Colo. Rev. Stat. Ann. § 16-17-101 (West 2016) (effective July 1, 1977).

<sup>4</sup> Colo. Exec. Order No. B 2012-003 (Oct. 19, 2012),

[https://www.colorado.gov/governor/sites/default/files/executive\\_orders/b\\_2012\\_003.pdf](https://www.colorado.gov/governor/sites/default/files/executive_orders/b_2012_003.pdf).

recommendation for clemency receives favorable votes from at least four Board members, the recommendation proceeds to the governor.<sup>5</sup>

While the order reauthorizing the Board to consider clemency requests does not specifically mention capital cases, it does state that the Board is empowered to consider clemency requests “for **all offenses**, except treason and impeachment.”<sup>6</sup> Under the order, the Board consists of seven members appointed by the governor.<sup>7</sup> Initial appointments to the Board served three- and two-year terms, and all members thereafter shall serve three-year terms.<sup>8</sup> No member shall serve more than two terms.<sup>9</sup> Board members include, but are not limited to:

- a. The Executive Director of the Department of Corrections;
- b. The Executive Director of the Department of Public Safety;
- c. At least one member who is a crime victim or represents victims of crime.<sup>10</sup>

A January 2015 *Denver Post* article noted that the Board has rarely (if ever) met in person.<sup>11</sup> Despite having been created in 2012, the Board sat vacant until 2015.<sup>12</sup> According to that article, there was already a 150-case backlog of pardon and commutation applications for review by the time the Board appointments were filled.<sup>13</sup> Since that time, no articles or known government publications discuss whether the Board has been actively reviewing applications since it has been fully staffed, or whether any clemency decisions have yet been rendered.

### c. When to Bring a Petition

A clemency petition may be submitted any time after conviction to the Director of Executive Clemency.<sup>14</sup> Typically, however, a clemency petition in a capital case is not submitted until the petitioner has exhausted all legal appeals and is eligible to be placed under death warrant. While this practice is not mandated, decision makers are typically less receptive to considering petitions for capital clemency before judicial review of the conviction and death sentence is complete.

<sup>5</sup> *Id.* at § 3 (B). This new relationship between the Board and the governor has not yet been tested in practice. As will be discussed later in this memorandum, Colorado currently only has three individuals on death row and is in a state of governor-imposed moratorium. The last clemency request processed by the governor (which resulted in an indefinite reprieve of the prisoner’s sentence and a de facto moratorium on executions in the state) was considered before the current Board was functional and staffed. As a result, research indicates that there have been no capital clemency requests made through the Board or to the governor since this new process was put into place, and it is therefore difficult to describe what exactly the relationship between these entities is/will be in the future.

<sup>6</sup> *Id.* at § 3 (A) (emphasis added).

<sup>7</sup> *Id.* at § 2 (A).

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.* at § 2 (C).

<sup>11</sup> Jordan Steffen, *Reformed Inmate Frustrated by Backlog in Colorado’s Pardon Process*, The Denver Post, (Jan. 16, 2015), <http://www.denverpost.com/2015/01/16/reformed-inmate-frustrated-by-backlog-in-colorados-pardon-process/>.

<sup>12</sup> *Id.*

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

<sup>14</sup> *Clemency Requests*, Colorado Department of Corrections, <https://www.colorado.gov/pacific/cdoc/clemency-requests> (last visited July 28, 2016).

#### **d. How to Bring a Petition**

Petitions for clemency and all supporting documentation, including the standardized clemency application,<sup>15</sup> may be submitted to the Director of Executive Clemency. The current Director is:

Mary Kanan<sup>16</sup>  
Director of Executive Clemency  
940 Broadway  
Denver, Colorado 80203

All applications for commutation of sentence must be accompanied by a certificate from the superintendent of the petitioner's correctional facility, detailing the applicant's conduct during his or her confinement in the correctional facility, along with any evidence of former good character.<sup>17</sup>

Any application must first be submitted to the present district attorney of the district in which the petitioner was convicted, to the judge who sentenced the case, and to the attorney who prosecuted at trial, soliciting comments concerning the merits of the application.<sup>18</sup> The governor must make good-faith efforts to locate these parties and give them at least 14 days for comments. The requirements are met if, upon being contacted, the parties do not comment within 14 days.<sup>19</sup> The governor can then exercise his or her sole discretion in evaluating the application and in soliciting other comments as needed.<sup>20</sup>

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

Once a petition has been filed, the process is less straightforward. The governor and the Board may solicit further comments and hold hearings as they see fit, but there is no standard process for holding a hearing to consider a clemency request provided in either the Colorado Revised Statutes or the 2012 executive order reauthorizing the Board.

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

Colorado law does not require that the Board or governor respond to a capital clemency petition once it has been filed. Upon deciding to grant clemency, however, the governor must present a transcript of the petition, all proceedings, and the reasons for his or her action to the General Assembly at their next session.<sup>21</sup> There is no similar notice requirement in cases where the governor denies clemency.

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<sup>15</sup> The standardized clemency application is available online. *Id.*

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

<sup>17</sup> Colo. Rev. Stat. Ann. § 16-17-102 (West 2016) (effective July 1, 2012).

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

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

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

<sup>21</sup> Colo. Const. art. IV, § 7.

## II. State Political and Judicial Information

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

The current governor of Colorado is Democrat John W. Hickenlooper.<sup>22</sup> He was first elected in 2010 and then again in 2014.<sup>23</sup> In Colorado, governors are limited to two consecutive terms, but are re-eligible to run after four years out of office.<sup>24</sup> Before being elected Governor of Colorado, Hickenlooper served as the Mayor of Denver from 2003 to 2011.<sup>25</sup>

Governor Hickenlooper was born in Narberth, Pennsylvania, and was raised primarily by his mother after his father's death.<sup>26</sup> He received a master's degree in geology from Wesleyan University. Hickenlooper moved to Colorado in 1981, where he worked with a petroleum company for several years. After that position, he turned his attention to brewing beer and opened his first brewery in 1988 in Denver, which is credited with having led to the revitalization of the surrounding neighborhood. He continued to work as a business owner until running for mayor in 2003.<sup>27</sup>

#### i. Hickenlooper & the Death Penalty

Governor Hickenlooper supported the death penalty in his 2010 race, but his stance has since changed.<sup>28</sup> In a November 2014 interview, he said, **"I don't think government should be killing people who are no danger to society, no risk to society."**<sup>29</sup> In a statement made after issuing Nathan Dunlap a reprieve in 2013, he explained further, "the inmates currently on death row have committed heinous crimes, but so have many others who are serving mandatory life sentences."<sup>30</sup>

**"If the State of Colorado is going to undertake the responsibility of executing a human being, the system must operate flawlessly. Colorado's system for capital punishment is not flawless."**

- Gov. John Hickenlooper, May 2013

Although Hickenlooper has come out in favor of abolishing the death penalty, he has indicated that he would not push for abolition during his term. **"I think it would be better for Colorado, obviously, if [the death penalty were abolished before I leave office], but I don't think you can put a**

<sup>22</sup> *Governor John W. Hickenlooper*, Colorado Official State Web Portal, <https://www.colorado.gov/governor/gov-hickenlooper> (last visited July 05, 2016).

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

<sup>24</sup> Colo. Const. art. IV, § 1(2).

<sup>25</sup> Colorado Official State Web Portal, *supra* note 22.

<sup>26</sup> *Arena Profile: Gov. John Hickenlooper*, Politico, [http://www.politico.com/arena/bio/gov\\_john\\_hickenlooper.html](http://www.politico.com/arena/bio/gov_john_hickenlooper.html) (last visited July 20, 2016).

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

<sup>28</sup> Danny Vinik, *Colorado's Governor's Race Could Come Down to the Death Penalty*, New Republic, (Oct. 31, 2014), <https://newrepublic.com/article/120063/colorado-governor-john-hickenlooper-may-lose-over-death-penalty-issue>.

<sup>29</sup> Mark Z. Barabak, *Colorado governor says no regrets in death penalty case*, L.A. Times, (Nov. 3, 2014), <http://www.latimes.com/nation/politics/politicsnow/la-pn-hickenlooper-defends-colorado-death-penalty-case-20141102-story.html>.

<sup>30</sup> Vinik, *supra* note 28.

**strict timeline on these things.** It might take decades more. It's hard to predict."<sup>31</sup>

## ii. The Current Executive Clemency Board

Governor Hickenlooper appointed the following people to the Board in January 2015.<sup>32</sup>

**Kelly Marie Kissell** was appointed as a representative of victims' rights. She was reappointed to this position in December 2016 (new term expires Jan. 15, 2020).<sup>33</sup> Kissell is the Office for Victims Program Manager in the Colorado Division of Criminal Justice.<sup>34</sup>

**Dianne Louise Tramutola-Lawson** was appointed as a representative for defendants' rights. She was reappointed to this position in December 2016 (new term expires Jan. 15, 2020).<sup>35</sup> Tramutola-Lawson is the Chair of Colorado-CURE, which is the regional section of the international criminal justice reform advocacy organization known as Citizens United for the Rehabilitation of Errants (CURE).<sup>36</sup> From 1968 to 1997, she served as a teacher for Denver Public Schools.<sup>37</sup>

**Pax Leia Moultrie** was appointed as a representative with expertise in child welfare (term expires Jan. 15, 2018). Moultrie, an Assistant Arapahoe County Attorney, was appointed to the Child Protection Ombudsman Board in 2015 by Colorado Supreme Court Chief Justice Nancy Rice.<sup>38</sup> Before moving to Arapahoe County in 2011, she was an Assistant County Attorney for Jefferson County. Moultrie received her J.D. in 2006 from the University of Denver's Sturm College of Law and immediately after began clerking for Colorado Supreme Court Justice Brian D. Boatright. She has also served as a clerk and judicial assistant for the Colorado Supreme Court Justice Gregory J. Hobbs. Most recently, Moultrie was the Chair of the Juvenile Law Section of the Colorado Bar Association.<sup>39</sup>

**Richard M. Swanson, J.D., Ph.D.**, was appointed as a representative with expertise in mental health (term expires Jan. 15, 2018). Dr. Swanson is a forensic psychologist at Metropolitan State College of Denver. Previously, Swanson was the Director of Research at the Center for the Study of Crime, Delinquency, and

<sup>31</sup> Rachel Estabrook, *Governor Won't Push to Abolish Colorado's Death Penalty*, Colorado Public Radio, (Sept. 9, 2015), <http://www.cpr.org/news/story/governor-wont-push-abolish-colorados-death-penalty> (alteration in original) (emphasis added).

<sup>32</sup> *Gov. Hickenlooper announces Boards and Commissions appointments*, Colorado Official State Web Portal, (Jan. 12, 2015) <https://www.colorado.gov/governor/news/gov-hickenlooper-announces-boards-and-commissions-appointments-43>.

<sup>33</sup> *Gov. Hickenlooper announces Boards and Commissions appointments*, Colorado Official State Web Portal, (Dec. 23, 2016) <https://www.colorado.gov/governor/news/gov-hickenlooper-announces-boards-and-commissions-appointments-215>.

<sup>34</sup> *Contact Information*, Colorado Division of Criminal Justice, Office for Victims Programs, <http://dcj.ovp.state.co.us/home/contact-us> (last visited July 21, 2016).

<sup>35</sup> Colorado Official State Web Portal, *supra* note 33.

<sup>36</sup> Citizens United for Rehabilitation of Errants, <http://www.curenational.org/9-resources/chapters.html> (last visited July 28, 2016); see also, *Far More Colorado S1 E14 – Dianne Tramutola-Lawson*, Freud Media Productions, Vimeo, (Oct. 28, 2013), <https://vimeo.com/78028656>.

<sup>37</sup> *Dianne Tramutola-Lawson*, LinkedIn, <https://www.linkedin.com/in/dianne-tramutola-lawson-0220137> (last visited July 22, 2016).

<sup>38</sup> *Rice Appoints Four to Ombudsman Board*, Law Week Colorado, (July 31, 2015), <http://www.lawweekonline.com/2015/07/rice-appoints-four-to-ombudsman-board/>.

<sup>39</sup> *Pax Moultrie*, Colorado Bar Association CLE, <http://cle.cobar.org/About/Faculty-Authors/Info/CUSTOMERCD/259049> (last visited July 22, 2016).

Corrections of Southern Illinois University. He was an Associate Professor of Psychology and Clinical Psychology as well as Director of Criminal Justice Studies at the University of Florida, Chairman and Professor of the Department of Law and Mental Health at the University of South Florida, Acting Director of Florida's Alachua County Corrections Department, and Chief of Mental Health Diagnostics for Colorado's Department of Corrections. Moreover, Swanson formerly served as Chief of Operations for the Colorado Youthful Offender System. He is also the Director of the PsyLaw Institute, a consulting firm focused on crime prevention, juvenile justice, correctional programs, and mental health services. He earned his Ph.D. in Psychology from the University of Colorado at Boulder in 1970 and his J.D. from the University of Denver in 1985.<sup>40</sup>

**Alberto M. Dominguez, J.D.**, was appointed as a representative of law enforcement (term expires Jan. 15, 2018). Dominguez is a former Weld County District Attorney.<sup>41</sup> In 2013, before Dominguez's appointment to the Board, Governor Hickenlooper appointed Dominguez as a Republican appointee to the nominating commission for the Nineteenth Judicial District.<sup>42</sup>

**Richard F. Raemisch** is the Executive Director of the Colorado Department of Corrections. Raemisch has served in this role since 2013. Previously, he was the Dean of the School of Human and Protective Services at Madison College in Wisconsin, the cabinet secretary for the Wisconsin Department of Corrections, a tax appeals commissioner for the State of Wisconsin's Tax Appeals Commission, and the sheriff for Dane County in Wisconsin. Raemisch also served as a deputy at the Dane County Sheriff's Office and the Assistant U.S. Attorney for the Western District of Wisconsin and Assistant District Attorney for Dane County. Raemisch earned his J.D. from University of Wisconsin School of Law.<sup>43</sup> Notably, Raemisch has testified before a Senate Subcommittee about the misuse of solitary confinement after placing himself in confinement for twenty hours.<sup>44</sup>

**Stanley A. Hilkey** is the Executive Director of the Colorado Department of Public Safety and Chair of the Colorado Commission on Criminal and Juvenile Justice. As executive director, Hilkey oversees the Colorado Bureau of Investigation, the Colorado State Patrol, the Division of Criminal Justice, the Division of Fire Prevention and Control, the Division of Homeland Security and Emergency Management and the Colorado School Safety Resource Center. Previously, he was the sheriff of Mesa County for 11 years.<sup>45</sup> He sued Governor Hickenlooper over legislation that aims to limit ammunition magazine size and expand background checks.<sup>46</sup>

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<sup>40</sup> Dr. Richard Swanson, Western Interstate Commission for Higher Education, <http://www.wiche.edu/bhwebcasts/grandrounds/youthviolence> (last visited July 22, 2016).

<sup>41</sup> *Two Weld County residents appointed to state boards*, Windsor Now!, (Jan. 18, 2015), <http://www.mywindsornow.com/news/two-weld-county-residents-appointed-to-state-boards/>.

<sup>42</sup> Susan Hoyt, *Appointees to Nineteenth Judicial District Nominating Commission Announced*, Colorado Bar Association CLE Legal Connection, (Oct. 28, 2013), <http://cbaclelegalconnection.com/2013/10/appointees-nineteenth-judicial-district-nominating-commission-announced/>.

<sup>43</sup> Rick Raemisch, Colorado Official State Web Portal, <https://www.colorado.gov/governor/rick-raemisch> (last visited July 22, 2016).

<sup>44</sup> Erica Goode, *After 20 Hours in Solitary, Colorado's Prisons Chief Wins Praise*, N.Y. Times, (Mar. 15, 2014), <http://www.nytimes.com/2014/03/16/us/after-20-hours-in-solitary-colorados-prisons-chief-wins-praise.html>.

<sup>45</sup> *Leadership*, Colorado Department of Public Safety, <https://www.colorado.gov/pacific/publicsafety/leadership-1> (last visited July 22, 2016).

<sup>46</sup> Nancy Lofholm, *Mesa County Sheriff Stan Hilkey takes over at Colorado DPS*, Denver Post, (June 14, 2014), <http://www.denverpost.com/2014/06/14/mesa-county-sheriff-stan-hilkey-takes-over-at-colorado-dps/>.



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

The Colorado General Assembly is the state's bicameral legislature. In the Colorado State Senate, there are 17 Democratic and 18 Republican senators, respectively making up 48% and 52% of the State Senate.<sup>47</sup> There are 37 Democrats and 28 Republicans in the Colorado House of Representatives.<sup>48</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. 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

According to the U.S. Census Bureau, as of 2010, Colorado had an estimated population of 5,029,324. The Bureau estimated that the population of Colorado was 5,540,545 in July 2016.<sup>49</sup>

##### ii. Political Breakdown

According to Gallup Daily tracking polls conducted from January 1 to June 30, 2014, 42% of Colorado adults identify as Republicans or lean Republican, and 42% identify as Democrats or lean Democrat.<sup>50</sup> This is similar to the national average of 39% and 43% respectively.<sup>51</sup>

<sup>47</sup> *Senators*, Colorado State Senate, <http://www.leg.state.co.us/CLICS/CLICS2015A/csl.nsf/Directory?openFrameset> (last visited July 20, 2016).

<sup>48</sup> *Colorado elections, 2016*, Ballotpedia, [https://ballotpedia.org/Colorado\\_elections\\_2016](https://ballotpedia.org/Colorado_elections_2016) (last visited Nov. 11, 2016).

<sup>49</sup> *Quick Facts, Colorado*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/08> (last visited July 20, 2016).

<sup>50</sup> Lydia Saad, *Colorado's Politics Are as Divided as They Get*, Gallup, (Sept. 25, 2014), <http://www.gallup.com/poll/177305/colorado-politics-divided.aspx>.

<sup>51</sup> *Id.*

**iii. Religious Make-Up**

The Colorado population is predominantly Christian, with 64% identifying with some Christian denomination. Non-Christians, including 1% reporting as Jewish, less than 1% reporting as Muslim, 1% reporting as Buddhist, and less than 1% reporting as Hindu, account for 5% of the religious make-up of the state. 29% of people reported as unaffiliated, including 4% reporting as atheists, 5% as agnostics, and 20% reporting as “nothing in particular.”<sup>52</sup>

**iv. Income/Socioeconomic Breakdown**

The median Colorado household income in 2011–2015 was \$60,629,<sup>53</sup> while the national median household income reported in that period was \$53,889<sup>54</sup>. Similarly, per capita income in 2015 was \$32,217<sup>55</sup>, higher than the 2015 national per capita income of \$28,930<sup>56</sup>.

**b. Criminal Justice**

**i. Overall Prison Population**

The Colorado Department of Corrections prisoner population of 19,782, 90% of whom are currently located in prisons.<sup>57</sup> 47% of Colorado prisoners are Caucasian, 31% are Hispanic, and 18% are African American.<sup>58</sup> By contrast, current census data indicates that the Colorado population is 69% Caucasian, 21% Hispanic, and 4.5% African American.<sup>59</sup>

	Caucasian	African American	Hispanic
<b>Colorado Population</b>	69%	4.5%	21%
<b>Colorado Prison Population</b>	47%	18%	31%

**ii. Death Row Population and Demographics**

In Colorado, three crimes are punishable by death. These include first-degree murder (made first-degree with the finding of at least one of seventeen aggravating factors),<sup>60</sup> first-degree kidnapping resulting in

<sup>52</sup> Pew Research Center: Religion & Public Life, *Adults in Colorado*, <http://www.pewforum.org/religious-landscape-study/state/colorado/> (last visited July 22, 2016).

<sup>53</sup> *Colorado, State & County Quick Facts*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/08> (last visited Nov. 10, 2016).

<sup>54</sup> *United States, State & County Quick Facts*, United States Census Bureau, <http://www.census.gov/quickfacts/table/INC110215/00> (last visited Nov. 10, 2016).

<sup>55</sup> *Colorado, State & County Quick Facts*, *supra* note 53.

<sup>56</sup> *United States, State & County Quick Facts*, *supra* note 54.

<sup>57</sup> *Departmental Reports and Statistics*, Colorado Department of Corrections, <https://www.colorado.gov/pacific/cdoc/departmental-reports-and-statistics> (last visited Nov. 10, 2016).

<sup>58</sup> *Id.*

<sup>59</sup> *Colorado, State & County Quick Facts*, *supra* note 53.

<sup>60</sup> Colo. Rev. Stat. Ann. § 18-3-102 (West 2016) (effective July 1, 2000) (defining first-degree murder); *see also id.* § 18-1.3-1201(5) (West 2016) (effective Aug. 6, 2014) (listing aggravating factors).

death,<sup>61</sup> and treason.<sup>62</sup> While only 4.5% of the Colorado general population is African American,<sup>63</sup> all three death row prisoners in the state are African Americans.<sup>64</sup> In addition, the state has never put a woman to death.<sup>65</sup>

There are currently three death row prisoners in the state of Colorado:<sup>66</sup> Nathan Dunlap, Robert Ray, and Sir Mario Owens.<sup>67</sup>

**Nathan Dunlap:** Nathan Dunlap was sentenced to death for the 1993 murder of four people during a robbery of a Chuck E. Cheese restaurant in Aurora, Colorado. At trial, lawyers suggested that Dunlap committed the crime as revenge for his recently having been fired from the establishment.<sup>68</sup> In 2013, Governor Hickenlooper issued a reprieve to stay Dunlap's execution, due to what Hickenlooper saw as the imperfect nature of the Colorado capital punishment system.<sup>69</sup> While he did not commute the sentence—and the reprieve may be lifted by the next governor of Colorado—neither Dunlap nor any of the remaining death row prisoners in Colorado will face execution during Hickenlooper's term as governor.

**Robert Ray** was arrested for the murder of Gregory Vann in 2004 in Aurora, Colorado. Javad Marshall-Fields was expected to be a witness in the case against Ray for the prosecution. However, in 2005, Marshall-Fields and his wife, Vivian Wolfe, were killed by Sir Mario Owens. The State asserted that Ray plotted and ordered Owens to kill the couple and, as a result, Ray was charged with those murders, too, and was sentenced to death in 2010.<sup>70</sup> Ray is seeking a new trial for his original murder trial based on claims of faulty jury instructions, lack of evidence, and procedural issues.<sup>71</sup>

<sup>61</sup> See *id.* § 18-3-301 (West 2016) (defining first-degree kidnapping).

<sup>62</sup> See *id.* § 18-11-101 (West 2016) (classifying treason as a class 1 felony); *id.* § 18-1.3-401 (presumptive maximum penalty for a class 1 felony is death); see also *Summary of States' Death Penalty Statutes*, Death Penalty Information Center (May 2014).

<sup>63</sup> *Colorado, State & County Quick Facts*, *supra* note 53.

<sup>64</sup> *Death Row U.S.A., Summer 2016*, NAACP Legal Defense and Educational Fund, Inc. at 50, available at [http://www.naacpldf.org/files/publications/DRUSA\\_Summer\\_2016.pdf](http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf).

<sup>65</sup> *Id.* at 19 (Gary Lee Davis).

<sup>66</sup> *Death Row Inmates by State*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited July 20, 2016).

<sup>67</sup> *Death Row U.S.A.* *supra* note 64.

<sup>68</sup> Natasha Gardner and Patrick Doyle, *The Politics of Killing*, 5280, (Dec. 2008), <http://www.5280.com/magazine/2008/12/politics-killing>; see also *Gunman Kills 4 Workers at Colorado Restaurant*, N.Y. Times, (Dec. 16, 1993), <http://www.nytimes.com/1993/12/16/us/gunman-kills-4-workers-at-colorado-restaurant.html>.

<sup>69</sup> *Nathan Dunlap granted "temporary reprieve" by governor*, Denver Post, (May 22, 2013), <http://www.denverpost.com/2013/05/22/nathan-dunlap-granted-temporary-reprieve-by-governor/>.

<sup>70</sup> Carlos Illescas, *Aurora witness killer formally sentenced to death*, Denver Post, (May 5, 2010), <http://www.denverpost.com/2010/05/05/aurora-witness-killer-formally-sentenced-to-death/>.

<sup>71</sup> Associated Press, *Colorado Court Considers Appeal From Death Row Inmate*, CBS Local, (Dec. 9, 2014), <http://denver.cbslocal.com/2014/12/09/colorado-court-to-hear-appeal-from-death-row-inmate/>.

**Sir Mario Owens** was sentenced to death in 2008 for the murder of witness Marshall-Fields and his wife in 2005.<sup>72</sup> Owen's attorneys are currently challenging his death sentence arguing that there is evidence that suggests prosecutors bribed key witnesses in securing his conviction and sentence.<sup>73</sup>

### iii. Executions (Past and Pending)

Colorado's first execution took place in 1859, when the state hanged John Stoefel for murder.<sup>74</sup> The death penalty was briefly abolished in Colorado between 1897 and 1901.<sup>75</sup> Between 1905 and 1967, the State executed another 65 men.<sup>76</sup> Following the 1972 U.S. Supreme Court ruling in *Furman v. Georgia*, 408 U.S. 238 (1972), the Colorado legislature passed new death penalty statutes that were subsequently approved by the U.S. Supreme Court.<sup>77</sup> Since then, Colorado has executed only one person, Gary Lee Davis, in 1997.<sup>78</sup>

**Gary Lee Davis:** In 1986, Davis and a co-conspirator kidnapped their female neighbor in front of her children. They drove her to a deserted field where Davis raped and shot her 14 times with a rifle. Davis was charged and sentenced to die in 1987. At trial, evidence emerged that he was sexually abused as a child and had a history of predatory sexual behavior. Colorado Governor Roy Romer denied Davis clemency because he didn't think that the rehabilitation he had undergone warranted an "extraordinary event" worthy of clemency.<sup>79</sup>

### iv. Exonerations/Innocence<sup>80</sup>

Governor Bill Ritter granted a posthumous pardon to **Joe Arridy** on January 7, 2011.<sup>81</sup> Arridy was executed in 1939 for allegedly being an accomplice to a murder in 1936.<sup>82</sup> Arridy's pardon came 72 years after he was executed, marking the first posthumous pardon in Colorado history.<sup>83</sup> A press release from the

<sup>72</sup> Brandon Johansson, *Aurora theater shooting judge takes over Sir Mario Owens case*, Aurora Sentinel, (April 13, 2016), <http://www.aurorasentinel.com/news/aurora-theater-shooting-judge-takes-sir-mario-owens-case/>.

<sup>73</sup> Marc Stewart, *Death penalty conviction for Sir Mario Owens now in limbo*, The Denver Channel, (Sept. 8, 2015), <http://www.thedenverchannel.com/news/local-news/death-penalty-conviction-for-sir-mario-owens-now-in-limbo>.

<sup>74</sup> Michael L. Radelet, *Capital Punishment In Colorado: 1859–1972* available at <http://www.coloradodefenders.us/wp-content/uploads/2012/09/capital-punishment-history.pdf> (last visited July 20, 2016).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Death Penalty Developments in 1997*, Amnesty International at 10, available at <https://www.amnesty.org/download/Documents/152000/amr510201998en.pdf>.

<sup>80</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>81</sup> *Colorado Governor Grants Unconditional Pardon Based on Innocence to Inmate Who Was Executed*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/colorado-governor-grants-unconditional-pardon-based-innocence-inmate-who-was-executed> (last visited July 20, 2016).

<sup>82</sup> *Id.*

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

governor's office concerning the pardon cited the overwhelming evidence that Arridy was innocent, including the high likelihood that Arridy was out of town at the time of the murder.<sup>84</sup> The governor also pointed to evidence of Arridy's intellectual disabilities, as Arridy had a recorded IQ of 46.<sup>85</sup>

### c. Public Opinion Polling

Public Policy Polling, a Democratic polling firm, asked voters in September 2015 whether Colorado should replace the death penalty with life in prison without the possibility of parole.<sup>86</sup> The survey found 47.2% of respondents were “probably” or “definitely” in favor of keeping the death penalty, and 42.9% were “probably” or “definitely” in favor of replacing the death penalty with life without parole.<sup>87</sup> The same poll showed that 10% remained undecided on the issue.<sup>88</sup> When the question was phrased differently so that respondents were presented with a series of four options, three involving life sentences and a fourth option of the death penalty, only 32.6% selected the death penalty, with 61.9% selecting one of the life sentence options and 5.4% not sure.<sup>89</sup>

A similar question from a Quinnipiac University poll in July 2015 found that a 2-1 majority in Colorado favored keeping the death penalty, although these results may have been influenced by the James Holmes case. At the time of the survey, Holmes was awaiting sentencing for killing 12 people in an Aurora, Colorado theater. Survey respondents favored a death sentence for Holmes by a nearly identical margin of 2-1.<sup>90</sup>

## IV. Additional Information for Consideration in Clemency

### a. Significant Past Capital Clemency Decisions

#### i. Grants

Governor Hickenlooper's May 2013 decision to grant a reprieve to death row prisoner Nathan Dunlap stands alone as the only major act of capital clemency in Colorado over the last 40 years.

Hickenlooper said that his decision to stay Dunlap's execution was made “not out of compassion or sympathy,” but because there “is a legitimate question whether we as a state should be taking lives.”<sup>91</sup> In his executive order advising the public of his decision, the Governor wrote, “Colorado's system for capital punishment is not flawless.”<sup>92</sup>

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

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

<sup>86</sup> *Colorado Survey Results*, Pub. Policy Polling (Sept. 8, 2015), available at <http://www.betterpriorities.org/wp-content/uploads/2015/09/Final-PPP-Poll-Better-Priorities-Initiative.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Virginia Voters Split On Confederate Flag, Quinnipiac University Swing State Poll Finds; Colorado Voters Back Death For Holmes 2-1*, Quinnipiac University Poll, (July 27, 2015), <https://poll.qu.edu/colorado/release-detail?ReleaseID=2263>.

<sup>91</sup> *Gov. Hickenlooper Grants Temporary Reprieve of Death Sentence*, Colorado Official State Web Portal, (May 22, 2013), <https://www.colorado.gov/governor/news/gov-hickenlooper-grants-temporary-reprieve-death-sentence>.

<sup>92</sup> *Id.*

The decision prompted backlash, including from one of the victim's fathers, who said, "He took the coward's way out at the expense of my daughter... He's a coward who doesn't deserve to be in office. If you can do anything, Coloradans, get this guy out of here before he screws everything up."<sup>93</sup> In addition, Governor Hickenlooper received criticism from Republicans, Democrats, the district attorney, and the attorney general for what they saw as a failure to make a firm decision for death or clemency.<sup>94</sup> In a

**"The Colorado Constitution provides for one final review by the governor before the State executes a human being. This check is one that, from its Common Law origins, embeds in the governor the authority to grant a reprieve. I have taken this responsibility seriously. [...] I am confident that most Coloradans—no matter what their views on the death penalty may be—will respect and understand the unique burden of this decision."**

- Gov. John Hickenlooper, May 2013

CNN interview, the governor hinted that if he lost the 2014 election, he wouldn't rule out commuting Dunlap's sentence. As a result, his political opponent in the election, Republican Bob Beauprez, attacked what he considered evidence of Hickenlooper's weak leadership and inability to uphold the law.<sup>95</sup> Despite of this controversy, Hickenlooper was reelected to a second term as Colorado Governor in November 2014.

## ii. Denials (where newsworthy or controversial)

Former Colorado Governor Roy Romer denied clemency to Gary Lee Davis, who was executed in 1997.

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

#### i. Marijuana Legalization

Colorado legalized recreational marijuana in 2012 with a bill that went into effect starting in 2014, though many towns in the state still prohibit it from being sold.<sup>96</sup> Legalization of marijuana has earned the state over \$79 million in taxes. However, the majority of the support for legalization came from Denver and surrounding metropolitan areas, while more rural areas of the state were opposed. 228 out of the 321 municipalities in Colorado opted out of allowing marijuana distribution due to skepticism about the benefits, and some have threatened lawsuits against the governor over its legalization.<sup>97</sup>

<sup>93</sup> Lynn Bartels, *Dunlap death row decision by Gov. John Hickenlooper haunts victim's father but not other family members*, Denver Post, (Oct. 20, 2014), <http://blogs.denverpost.com/thespot/2014/10/20/hickenlooper-death-row-nathan-dunlap/114253/>.

<sup>94</sup> Lynn Bartels, *Hickenlooper accused of trying to have it both ways with death penalty*, Denver Post, (May 22, 2013), <http://www.denverpost.com/2013/05/22/hickenlooper-accused-of-trying-to-have-it-both-ways-with-death-penalty/>.

<sup>95</sup> Eli Stokols, *Beauprez hits Hickenlooper on Dunlap decision after clemency comment*, Fox 31 Denver, (Aug. 25, 2014), <http://kdvr.com/2014/08/25/beauprez-hits-hickenlooper-on-dunlap-decision-after-clemency-comment/>.

<sup>96</sup> Laura Palmisano, *Despite Legalization, Marijuana Remains Divisive In Colorado Communities*, KVNF Public Radio, (Oct. 13, 2014), <http://kvnf.org/post/despite-legalization-marijuana-remains-divisive-colorado-communities>.

<sup>97</sup> Clarissa Cooper, *Colorado profits, but still divided on legal weed*, The Center of Public Integrity, (Aug. 16, 2015), <https://www.publicintegrity.org/2015/08/16/17841/colorado-profits-still-divided-legal-weed>.

Opponents claim that legalization has led to a spike in pot-related emergency room visits and new cartel-related drug operations, and some parents are worried about marijuana being sold close to their homes and schools.<sup>98</sup> Less affluent communities around the state worry that they will become new homes to the controversial industry. The Colorado town of Pueblo has seen a 47% increase in local homeless shelter demand and a 50% increase in marijuana-related emergency room visits by children under the age of 18 since the drug's legalization.<sup>99</sup> The City of Denver passed an ordinance that keeps dispensaries and grow facilities at their present levels, in order to "rein in pot capitalism"<sup>100</sup>

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

#### i. *Ring v. Arizona*

In *Ring v. Arizona*, 536 U.S. 584 (2002), the U.S. Supreme Court held that a death penalty sentencing scheme is unconstitutional if it allows a judge, and not the jury, to find the aggravating circumstances necessary to elevate the sentence to death. In response, the Colorado Supreme Court held in 2003 that death sentences that had previously been handed out by three-judge panels were also unconstitutional because judges made the factual findings necessary for the death penalty. This ruling overturned the death sentences of George Woldt and Francisco Martinez Jr.<sup>101</sup> The court ordered both men to be resentenced to life without the possibility of parole.

**"I am a strong supporter of the death penalty. There is no question in my mind that it is a deterrent. That's why, after the decision rendered by the U.S. Supreme Court last year, I called the legislature into special session to make the necessary changes in state statute. Unfortunately, the state cannot retry those earlier cases under the revised statutes. Two vicious criminals have been given a second chance to live, a chance they never gave their victims."**

- Former Colorado Gov. Bill Owens, 2003

Governor Bill Owens expressed dissatisfaction with the outcome and the inability to retry these individuals, as he was convinced that any jury also would have sentenced these individuals to death.<sup>102</sup>

<sup>98</sup> Jennifer Alsever, *Is Pot Losing Its Buzz in Colorado?*, Fortune, (June 29, 2016) <http://fortune.com/pot-marijuana-colorado/>.

<sup>99</sup> *Id.*

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

<sup>101</sup> *Woldt v. People*, 64 P.3d 256 (2003).

<sup>102</sup> *Three-Judge Panel Death Sentences Overturned*, The Denver Channel, (Feb. 24, 2003), <http://www.thedenverchannel.com/news/three-judge-panel-death-sentences-overturned>.