

TENNESSEE

Capital Clemency Information Memorandum

Contents

- I. Introduction
- II. Basics of the State Capital Clemency Process
 - a. The Power Defined
 - b. The Decision Maker(s)
 - c. When to Bring a Petition
 - d. How to Bring a Petition
 - e. Hearing Practice
 - f. Responding to a Petition
- III. State Political and Judicial Information
 - a. Current Clemency Decision Maker(s)
 - b. Legislative Structure and Political Make-Up
 - c. Judicial Review of State Clemency
- IV. Supplemental State Information
 - a. State-wide Demographics
 - i. General Population
 - ii. Political Breakdown
 - iii. Religious Make-Up
 - iv. Income/Socioeconomic Breakdown
 - b. Criminal Justice
 - i. Overall Prison Population
 - ii. Death Row Population and Demographics
 - iii. Executions (Past and Pending)
 - iv. Exonerations/Innocence
 - c. Public Opinion Polling
- V. Additional Information for Consideration in Clemency
 - a. Significant Past Capital Clemency Decisions
 - i. Grants
 - ii. Denials (where newsworthy or controversial)
 - b. Relevant State Death Penalty (Non-Clemency) Opinions
 - c. Divisive/Important Political Issues in the State
 - d. Other Relevant Legal, Historical, or Social Issues

I. Introduction

Clemency in capital cases serves a vital role in our criminal justice system by acting as a “fail-safe” 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 parole, or both, to conduct a full review of 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*.

As the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a prisoner may seek executive commutation of a death sentence for a wide range of reasons that may not have been issues in his or her case at the time of legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that would govern bringing an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—a nuanced understanding of the relevant state-specific issues that can be brought to bear on the state decision-making entity.

While clemency has long been recognized as an essential component of our criminal justice system, it is not explicitly guaranteed by the federal Constitution. States, therefore, are given wide latitude in defining the procedures that govern their capital clemency process. As a result, this process—as well as the quality of representation and receptivity of decision makers—varies widely nationwide.

The following information about Tennessee was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding clemency in Tennessee. Some of the information contained within this memorandum does not relate directly to Tennessee’s capital clemency process or history but provides important context and background. Given capital clemency’s unique nature as a virtually unrestricted appeal to a state decision maker for mercy, it is vital that practitioners seeking clemency on behalf of a death-sentenced individual 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.

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**, but we hope that it will provide a valuable starting point for all stakeholders interested in this important issue.

II. Basics of the State Capital Clemency Process

In many jurisdictions, the capital clemency process is opaque, with few national or state-specific resources on the topic. As a result, extensive research has been conducted in preparing these memoranda – including online research, calls to governors’ offices and parole boards, and lengthy interviews with local practitioners – 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 oftentimes 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 Tennessee Constitution vests the governor with the power to “grant reprieves and pardons, after conviction, except in cases of impeachment.”¹ Although the governor alone may grant clemency, the Tennessee Board of Parole (“Board”) has delegated authority to review clemency applications and make a non-binding recommendation for or against clemency following a formal hearing.² Alternatively, the Board may unilaterally deny any non-capital application for clemency that it feels does not merit a formal hearing; this decision does not get forwarded to the governor for review.³ In capital cases, the involvement of the Board in issuing a recommendation is left to the discretion of the governor. The Board is not currently involved in the review of capital clemency recommendations, though it has been in past gubernatorial administrations.

Tennessee’s Code of Criminal Procedure further clarifies the governor’s clemency power and provides for the lesser grant of commutation in death penalty cases where a pardon is requested. Under the code, “[u]pon application for a pardon by a person sentenced to capital punishment, if the governor is of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon, the governor may commute the punishment of death to imprisonment for life in the penitentiary.”⁴ A separate provision also enables the governor to “commute the punishment from death to imprisonment for life, upon the certificate of the supreme court, entered on the minutes of the court, that in its opinion, there were extenuating circumstances attending the case, and that the punishment ought to be commuted.”⁵ A third provision grants the governor the power to fully exonerate any person whom he or she finds did not commit the crime for which that person was convicted after consideration of the “facts, circumstances, and any newly discovered evidence.”⁶ Such exonerations are unconditional and automatically expunge the crime from the person’s

¹ Tenn. Const. art. III § 6.

² Tenn. Code Ann. § 40-28-104(a)(10) (West).

³ *Executive Clemency Information*, Tenn. Board of Parole, https://web.archive.org/web/20190112195551/https://www.tn.gov/content/dam/tn/boardofparole/documents/20160713-New_Executive_Clemency_Info_sheet.pdf (archived Jan. 12, 2019); Benjamin Raybin, *Pardon Me: How Executive Clemency Works in Tennessee (and How It Doesn’t)*, Tenn. Bar Ass’n, (Aug. 01, 2016), <https://www.tba.org/journal/pardon-me>.

⁴ Tenn. Code Ann. § 40-27-105 (West).

⁵ Tenn. Code Ann. § 40-27-106 (West).

⁶ Tenn. Code Ann. § 40-27-109 (West).

record, and the governor may choose to exonerate someone who previously applied for a pardon or convert a past or proposed pardon to a full exoneration. According to archived information, the Board's Executive Clemency Unit processes all non-capital commutation, exoneration, and pardon applications, while the governor's office handles reprieves (more typically made in capital cases).⁷ Tennessee governors have previously granted reprieves in capital cases based upon the recommendation of the attorney general or to accommodate judicial decisions.⁸

b. The Decision Maker(s)

As discussed above, while the governor has the sole authority to grant clemency, the Board has delegated authority to review non-capital applications for pardon, commutation, or exoneration and make non-binding recommendations for action based on criteria established by the governor.⁹ The Board does not currently outline any procedure for review in capital cases, and Tennessee death penalty attorneys indicate that current practice is to bring applications for clemency in capital cases to the governor's office directly.¹⁰

Although the Board is not currently involved in capital case clemency review, because there is precedent for their involvement if the governor so wishes, we are including information about their statutory authority and makeup here.

There are seven members of the Board, who are appointed by the governor.¹¹ Members serve six-year terms and are eligible for reappointment.¹² The governor also appoints a chair, who serves two-year terms.¹³ There are no formal requirements for appointment; however, the governor is instructed to give "preference" to candidates with experience in "the criminal justice system, law, corrections, medicine, education, social work or the behavioral sciences."¹⁴

⁷ *Executive Clemency Information*, *supra* note 3.

⁸ Anita Wadhvani and Natalie Neysa Alund, *Gov. Haslam announces 10-day reprieve in Zagorski execution*, WBIR, (Oct. 11, 2018), <https://www.wbir.com/article/news/local/gov-haslam-announces-10-day-reprieve-in-zagorski-execution/51-603378093>. Governor Bill Haslam granted a 10-day stay of execution to allow for time to accommodate the federal court's decision that Mr. Zagorski could be executed by electrocution rather than the state's lethal injection protocol. *Governor grants reprieve to Sedley Alley*, WMC Action News 5, (May 16, 2006), <https://www.wmcactionnews5.com/story/4911792/governor-grants-reprieve-to-sedley-alley/>. Explaining his choice to grant Mr. Alley a 15-day reprieve, Governor Bredesen stated: "As has been my policy, and the policy of previous governors, I referred Mr. Alley's clemency request to the Board of Probation and Parole to hold a hearing and make a recommendation." *Tennessee Governor Issues Reprieve to Philip Workman*, Death Penalty Info. Ctr. (Sept. 15, 2003), <https://deathpenaltyinfo.org/news/tennessee-governor-issues-reprieve-to-philip-workman>. The Governor's Communication Office indicated Mr. Workman's reprieve was granted at the request of Attorney General Paul Summers.

⁹ *Executive Clemency Unit*, Tenn. Board of Parole, <https://www.tn.gov/bop/agency-services/executive-clemency-unit.html> (last visited Oct. 6, 2020); Tenn. Code Ann. § 40-28-104(a)(10) (West).

¹⁰ This information comes from conversations with experienced practitioners.

¹¹ Tenn. Code Ann. § 40-28-103 (a) (West).

¹² *Id.* at (b).

¹³ *Id.* at (e).

¹⁴ *Id.* at (c).

c. When to Bring a Petition

Per statute, the governor may grant pardons, reprieves, or commutations any time after conviction in a criminal case.¹⁵ Exonerations may only be granted after “the person has exhausted all possible state judicial remedies,” however.¹⁶ The Board’s pardon application forms also indicate that there are limitations on when the governor will consider pardon applications (only after the petitioner has been “neither convicted, nor confined under sentence, nor under community supervision within five years”), but these limitations do not typically apply to clemency sought in capital cases.¹⁷

According to Tennessee attorneys, clemency petitions in death penalty cases are typically submitted to the governor at least one month before the scheduled execution. It is therefore prudent for practitioners to communicate with the governor’s office once an execution date has been requested or set to establish an agreed-upon timeline for the submission of clemency materials. There is no statutory or regulatory timeframe in which clemency requests in death penalty cases must be submitted.¹⁸

d. How to Bring a Petition

In non-capital cases, a clemency petitioner must submit an application for the type of relief being sought to the Board’s Executive Clemency Unit.¹⁹ Applications for pardons, exonerations, and non-capital commutations are currently available on the Board’s website under “Executive Clemency Unit.”²⁰ Although the current commutation application provided by the Executive Clemency Unit does not include a portion for capital cases, a 2017 commutation application containing instructions for capital commutation and reprieve requests has been archived.²¹ It is being included here because the possibility remains that current or future gubernatorial administrations may wish to engage the Board in review of capital clemency cases.

¹⁵ Tenn. Code Ann. § 40-27-101 (West).

¹⁶ Tenn. Code Ann. § 40-27-109(a) (West).

¹⁷ *Application for Pardon*, Tenn. Board of Parole,

<https://www.tn.gov/content/dam/tn/boardofparole/documents/BP0245%20Application%20for%20Pardon%207-23-19%20.pdf> (last visited Oct. 6, 2020). “The Governor will give serious consideration to Pardon requests when: a. Petitioner has been neither convicted, nor confined under sentence, nor subject to community supervision within five (5) years since the completion of the sentence(s) from which he or she seeks a pardon; and b. Petitioner has demonstrated exemplary citizenship since the completion of the sentence(s) from which he or she seeks a pardon, which shall mean both specific achievements and incident-free behavior that indicates an extraordinary transformation following the conviction(s) at issue; and c. Petitioner has demonstrated a compelling reason for a pardon.”

¹⁸ This information comes from conversations with experienced capital practitioners.

¹⁹ *Executive Clemency Information*, *supra* note 3.

²⁰ *Application for Pardon*, *supra* note 17; *Application for Commutation*, Tenn. Board of Parole, <https://www.tn.gov/content/dam/tn/boardofparole/documents/BP0044%20Commutation%20Application%207-29-19.pdf> (last visited Oct. 6, 2020); *Application for Exoneration*, Tenn. Board of Parole, <https://www.tn.gov/content/dam/tn/boardofparole/documents/BP0247%20Application%20for%20Exoneration%207-23-19%20.pdf> (last visited Oct. 6, 2020).

²¹ *Application for Commutation*, Tenn. Board of Parole,

https://web.archive.org/web/20171014032015/http://www.tn.gov/assets/entities/bop/attachments/BOP_Commutation_Application-BP_0044.pdf (archived Oct. 14, 2017).

Capital practitioners in Tennessee should communicate with the staff and representatives of the current gubernatorial administration to agree on details for the submission of a clemency petition. As the archived Board materials show, prior gubernatorial administrations allowed capital practitioners to submit clemency applications through the Board as well as directly to the governor. In Governor Bill Lee's administration, however, death penalty clemency review has not gone through the Board. Instead, petitions for clemency and letters in support have been submitted to the governor directly. Because of the discretionary nature of the clemency process and the freedom given the governor to determine how to process different requests for clemency, practitioners should always ensure they communicate directly with the decision makers—the Board and the governor's staff—prior to submitting an application.

e. Hearing Practice

In Governor Lee's administration to-date, no clemency hearings have been held in capital cases.²² Prior Tennessee governors have asked the Board to review clemency applications in death penalty cases and hold hearings,²³ but it is left to the discretion of each administration whether to involve the Board in this manner. Although attorneys for death penalty prisoners seeking clemency have had opportunities to speak with members of Governor Lee's administration concerning the merits of their clients' cases for clemency, they have not been granted a formal hearing as has been done in the past.

In non-capital cases, upon receipt of a written application for the above-mentioned forms of clemency, the Board conducts an administrative review and votes on whether or not to grant a formal clemency hearing. If a formal hearing is denied, the application goes no further, but if a hearing is granted, then the petition is forwarded to the governor with either a favorable or unfavorable recommendation from the Board.²⁴

In 2018, fewer than 6% of the 389 clemency applications sent to the Board made it to the governor.²⁵ However, current governor Bill Lee has made changes to the specified criteria in applications for clemency that may allow more recommendations to reach his desk.²⁶ In 2020, Lee loosened the language regarding criteria for a pardon from "a specific and compelling need" to "a compelling reason."²⁷ For commutation applications, Lee replaced language requiring "clear and convincing evidence" of rehabilitation with language requiring evidence of rehabilitation "relative to the nature of the offense(s) committed."²⁸ For petitions for exoneration, Lee eliminated the requirement that the exoneration be proven by "clear and convincing evidence."²⁹

²² This information comes from conversations with experienced capital defenders.

²³ *Governor grants reprieve to Sedley Alley*, *supra* note 8.

²⁴ *Executive Clemency Information*, *supra* note 3.

²⁵ Adam Taburin, *Lee loosens clemency conditions; With new standards for commutations and pardons, defense attorneys find hope*, Nashville Tennessean, (Jan. 21, 2020), <https://www.tennessean.com/restricted/?return=https%3A%2F%2Fwww.tennessean.com%2Fstory%2Fnews%2Fcrime%2F2020%2F01%2F21%2Ftennessee-gov-bill-lee-loosens-pardon-commutation-requirements%2F4271062002%2F>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

f. Responding to a Petition:

Tennessee law requires that “[t]he governor shall cause to be entered, in a book kept for that purpose, any reasons for granting pardons or commuting punishment, and preserve on file all documents on which the governor acted, and submit the same to the general assembly when requested.”³⁰ This statutory provision suggests that in cases where the governor determines that clemency should be granted, the General Assembly is empowered to request information about the decision and the records on which it was based. In addition, in 2011 the law was modified to require that in cases where clemency is granted, before the intention to grant clemency is made public, “the governor shall notify or cause to be notified the attorney general and reporter and the district attorney general of the judicial district in which the conviction occurred of the impending clemency action.” This code provision also specifies that “[p]rior to notice of the clemency action being made public, the district attorney general, through the victim-witness coordinator, shall notify the victim or victims of the offense for which the person is receiving clemency, or the victim’s representative, of the impending grant of clemency.”³¹

The governor is not under any statutory obligation to disclose information as to why clemency has been denied, however.

On his final day in office, Governor Haslam issued 23 grants of clemency, at which time he gave a glimpse into his thought process. Haslam explained that “These individuals receiving pardons have made positive contributions to their communities and are worthy of the forgiveness . . . Clemency requires attempting to balance mercy and justice, and my legal team and I have taken this responsibility seriously during a thorough review of many cases.”³²

Governor Lee has indicated that in making clemency decisions, he will “take in all of the information that is available to [him] and consider all of it, consider victims, consider justice, consider the crime itself, consider the verdict of the jury and the makeup of the court.”³³ Lee further indicated that he discusses clemency decisions in death-penalty cases with a close circle, including his wife, pastor, and close friends.³⁴

³⁰ Tenn. Code Ann. § 40-27-107 (West).

³¹ Tenn. Code Ann. § 40-27-110(c)(1) (West).

³² Natalie Neysa Alund, *Governor Haslam grants executive clemency to 23 people. Here’s who they are.*, The Tennessean, (Jan. 18, 2019), <https://www.tennessean.com/story/news/2019/01/18/tennessee-governor-bill-haslam-grants-clemency-23-people/2614945002/>.

³³ Kimberlee Kruesi and Jonathan Mattise, *AP Interview: Tennessee governor talks death penalty, faith*, Associated Press, (Dec. 22, 2019), <https://apnews.com/4932e5fe21d35d1be221169596f5ec8a>.

³⁴ *Id.*

III. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Governor Bill Lee (R) was elected in 2018, after the previous Governor Bill Haslam (R) was term-limited out of office.³⁵ Prior to taking office, Governor Lee worked solely in the private sector, most recently as chief executive officer of his family business, Lee Company.³⁶ After graduating from college, Lee returned home to join the family business, where he held several roles before becoming president of the company in 1992.³⁷ Governor Lee's stated priorities during his tenure include "good jobs, great schools, and safe neighborhoods."³⁸ Regarding the death penalty, Lee has said he would allow death penalty sentences to proceed, unless extraordinary circumstances forced his hand.³⁹ Lee has said he expected the most difficult decisions he would face as governor would be weighing the fate of a prisoner's life, but that the death penalty is "appropriate for those most heinous of crimes."⁴⁰ Governor Lee considers his family to be "people of strong faith."⁴¹ He is an active member of Grace Chapel Church and participates in numerous faith-based ministries.⁴²

Board Members

Note: Although the Board is not currently involved in the review of clemency applications in capital cases, because Board involvement in capital clemency case review may be requested by the governor at any point, we are including information about the Board decision makers as well.

Chairman **Richard Montgomery** was appointed to the Board in January 2013 by former Governor Bill Haslam.⁴³ In July 2013, Governor Haslam appointed Montgomery to the post of Chairman of the Board. Since becoming Chair of the Board, Montgomery has been appointed to the Governor's Task Force on Public Safety, the Governor's Task force on Sentencing and Recidivism and the Tennessee Council for Interstate Adult Offender Supervision. Montgomery is a former state representative from Sevier County, who served in the General Assembly for 14 years, from 1998–2012. During his term in office, Montgomery served as Chairman of the House Education Committee and also served on several joint committees, including the Select Committee on Corrections Oversight.

³⁵ Kimberlee Kruesi and Jonathan Mattise, *Republican Bill Lee sworn in as Tennessee's 50th governor*, Associated Press, (Jan. 19, 2019), <https://www.apnews.com/7f85e6cf8a83478db239d5fc8cb7225b>.

³⁶ *Bill Lee, 50th Governor of Tennessee*, Tenn. Office of the Governor, <https://www.tn.gov/governor/about-bill-lee.html> (last visited Oct. 6, 2020).

³⁷ *About*, Bill Lee for Governor, <https://www.billlee.com/about/> (last visited Oct. 6, 2020).

³⁸ *Id.*

³⁹ Stephen Elliott, *Dean, Lee make closing arguments*, Nashville Post, (Oct. 12, 2018), <https://www.nashvillepost.com/politics/elections/article/21027228/dean-lee-make-closing-arguments>.

⁴⁰ *AP Interview: Tennessee governor talks death penalty, faith*, *supra* note 33.

⁴¹ *Bill Lee, 50th Governor of Tennessee*, *supra* note 36.

⁴² *Id.*

⁴³ *Board Members*, Tenn. Board of Parole, <https://www.tn.gov/bop/about-us/information/abtus-info-board-members.html> (last visited Oct. 6, 2020).

Zane Duncan was appointed to the Board in 2016 by former Governor Bill Haslam.⁴⁴ Duncan is the son of Republican congressman U.S. Representative John J. Duncan Jr.⁴⁵ Prior to his appointment to the Board, Duncan worked as Public Relations Manager for the R.J. Corman Group. Duncan also served as an appraiser for the Knox County Property Assessor and worked in public affairs at the Air Transport Association in Washington, D.C.

Tim Gobble was first appointed to the Board in July 2013 by former Governor Bill Haslam and re-appointed in January 2016.⁴⁶ Gobble worked as a police officer in Tennessee beginning in 1988, before he joined the United States Secret Service as a special agent and supervisor from 1989 to 2004. Gobble served as director of the Cleveland/Bradley County Emergency Management Agency from 2004–2006, before serving as sheriff of Bradley County from 2006–2010. In 2010, Gobble unsuccessfully ran for an open seat in the U.S. House of Representatives. In 2013, Gobble rejoined the Hamilton County Sheriff's Office as Interim Deputy Chief and served in that role until his appointment to the Board.

Mae Beavers was appointed to the Board by Governor Lee in December 2019. Her six-year term began in February 2020.⁴⁷ Beavers was elected to the Wilson County Commission in 1990, where she served for four years. In 1994, Beavers was elected to the 57th District House of Representatives. From 2002 to 2017, Beavers served as a Senator for the 17th District. While in the Senate, Beavers served as the Chairman of Senate Judiciary Committee, Chair of Joint Government Operations Judiciary and Government Subcommittee and as a First Vice Chair of the Transportation Committee.

Roberta Nevil Kustoff was appointed to the Board in January 2016 by former Governor Bill Haslam.⁴⁸ Kustoff began her career as an attorney in 1998 and spent several years in private practice before joining the Shelby County Trustee's Office in 2010, where she served as the Delinquent Tax Attorney.

Barrett Rich was appointed to the Board by former Governor Bill Haslam in 2014.⁴⁹ Prior to his appointment to the Board, Rich served three terms in the Tennessee General Assembly beginning in 2008. In his time serving as a Representative for the Tennessee House of Representatives from the 94th District, Rich held the positions of Republican Majority Whip, Vice Chairman of the Government Operations Committee and Chairman of the Health Sub-Committee. Additionally, Rich was a member of the Judiciary Committee, the Health Committee, the Criminal Justice Committee, and the Ethics Committee.

a. Legislative Structure and Political Make-Up

Tennessee has a bicameral legislature, composed of a 33-member Senate and a 99-member House.⁵⁰ Both bodies are held by overwhelming Republican majorities. There are currently 28 Republicans to five

⁴⁴ *Id.*

⁴⁵ Tom Humphrey, *Haslam names Duncan, Kustoff to Board of Parole*, Knox News, (Jan. 11, 2016), <http://knoxblogs.com/humphreyhill/2016/01/11/haslam-names-duncan-kustoff-to-board-of-parole/>.

⁴⁶ *Board Members*, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *About the Tennessee Legislature*, Tenn. Gen. Assembly, <http://www.capitol.tn.gov/about/> (last visited Oct. 6, 2020).

Democrats in the Senate; and 73 Republicans to 26 Democrats in the House.⁵¹ These majorities have been increasing steadily over the past decade.⁵²

Both U.S. senators from Tennessee as of 2019 (Lamar Alexander and Marsha Blackburn) are Republicans.⁵³ Senator Alexander will face reelection in 2020.⁵⁴ Senator Blackburn will face reelection in 2024.⁵⁵

b. Judicial Review of State Clemency

Because of separation of powers concerns, a decision by a Tennessee governor to grant or deny clemency is typically not reviewable by the courts.⁵⁶ Judicial review is limited to analyzing the procedures used during the clemency proceedings and not the substantive merits of that decision.⁵⁷ However, Tennessee has a unique statute that allows the governor to commute a sentence from death to life imprisonment upon certification by the Tennessee Supreme Court.⁵⁸ Although the Court recommended commutation in the past under earlier versions of the statute, it has yet to certify a case for commutation under the statute in its current form.⁵⁹ The Tennessee Supreme Court has held that in considering issuing such certification, it should consider only facts contained in the record or facts that are uncontroverted.⁶⁰ Furthermore, it has held there is no legal basis why an execution date should not be set if the prisoner has exhausted all judicial remedies and the conviction and sentence are final as a matter of law.⁶¹ Although the Court has limited its review of certificates of commutation to facts on the record, it also recognizes that the governor's ability to commute a death sentence is not constrained by the same limitations, and the governor may consider any evidence she wishes to while weighing the decision, including extrajudicial facts.⁶²

The Supreme Court of Tennessee has also held that the governor's authority to commute a sentence is limited only by the language of the Constitution, and that neither the legislature nor the courts may regulate or control the governor's power to commute a sentence.⁶³

⁵¹ *Tennessee General Assembly*, Ballotpedia, https://ballotpedia.org/Tennessee_General_Assembly (last visited Oct. 6, 2020).

⁵² *Id.*

⁵³ *Senators of the 116th Congress*, U.S. Senate, https://www.senate.gov/general/contact_information/senators_cfm.cfm?State=TN (last visited Oct. 6, 2020).

⁵⁴ *Tennessee*, Govtrack, <https://www.govtrack.us/congress/members/TN> (last visited Oct. 6, 2020).

⁵⁵ *Id.*

⁵⁶ *Workman v. Summers*, 136 F. Supp. 2d 896, 898 (M.D. Tenn.).

⁵⁷ *Id.*

⁵⁸ Tenn. Code Ann. § 40-27-106 (West).

⁵⁹ *Bass v. State*, 231 S.W.2d 707, 715 (Tenn. 1950) ("The court cannot exercise the prerogative of pardon. This belongs to the Governor alone. [Internal citation omitted] We are willing, however, to state that in the opinion of the individuals who compose this court, the question concerning the defendant's deliberation well warrants the indulgence of executive clemency to the extent that the death sentence be commuted to one of life imprisonment."); *Green v. State*, 14 S.W. 489, 489 (Tenn. 1890) (recommending commutation based on self-inflicted gunshot wounds that resulted in the defendant's diminished capacity after his conviction).

⁶⁰ *Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Lemay v. State, Dep't of Correction*, 29 S.W.3d 483, 485 (Tenn. 2000).

IV. Supplemental State Information

*In thinking about clemency, it is vital to remember that this oftentimes last 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 in support. 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 in some sense 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 the state at issue, the remainder of this memorandum is dedicated to providing some generalized information to better understand the culture and politics generally in the jurisdiction where clemency is being sought.*

a. State-wide Demographics

i. General Population

In 2019, Tennessee was estimated to have a population of 6,829,174 people.⁶⁴ 78.5% of the population is estimated to be white or Caucasian; 17.1% of the population is estimated to be black or African American; and 5.6% of the population is estimated to be Hispanic.⁶⁵

ii. Political Breakdown

According to a Pew Research poll, in 2014, 48% of Tennessee residents identified themselves as Republican or lean Republican,⁶⁶ up from 41% in 2007.⁶⁷ Those self-identifying as Democrat or lean Democrat shrunk from 43% in 2007⁶⁸ to 36% in 2014.⁶⁹ Unaffiliated residents have stayed relatively stable over time, reducing slightly from 16% in 2007 to 15% in 2014.⁷⁰

⁶⁴ U.S. Census Bureau, Quick Facts, Tennessee, <http://www.census.gov/quickfacts/table/PST045215/47> (last visited Oct. 6, 2020).

⁶⁵ *Id.*

⁶⁶ *State of the States: Tennessee*, Gallup, <https://news.gallup.com/poll/125066/state-states.aspx> (last visited June 22, 2020).

⁶⁷ *Social and Political Views*, Pew Research Center: Religious Landscape Study, Adults in Tennessee, <http://www.pewforum.org/religious-landscape-study/state/tennessee/#social-and-political-views> (last visited Oct. 6, 2020).

⁶⁸ *Id.*

⁶⁹ *State of the States: Tennessee*, *supra* note 66.

⁷⁰ *Social and Political Views*, *supra* note 67.

In addition, in 2014, 46% of those surveyed identified themselves as conservative, stable from 2007. Also in 2014, 27% identified themselves as moderate down from 33% in 2007. Those identifying as liberal rose from 14% in 2007 to 19% percent in 2014.⁷¹

iii. Religious Make-Up

As of 2014, 81% of Tennesseans identified themselves as Christians.⁷² Of that number, 52% reported themselves to be Evangelical Protestant and 13% reported themselves to be Mainline Protestant.⁷³ Also in 2014, 51% of Tennesseans reported that they attend some sort of religious service weekly.⁷⁴

iv. Income/Socioeconomic Breakdown

The per capita income in 2018 in Tennessee was \$28,511, compared to \$32,621 nationally.⁷⁵ The median household income was \$50,972, which is less than the national median of \$60,293.⁷⁶ The poverty rate in 2019 was 13.9%.⁷⁷

26.6% of Tennesseans over the age of 25 years hold a bachelor's degree or higher, and 87% hold at least a high school diploma.⁷⁸

As of December 2019, the state's unemployment rate was 3.3%.⁷⁹ In May 2020 and subsequent months, the unemployment rate has hovered between eight percent and 15%, likely due to COVID-19.⁸⁰

b. Criminal Justice

i. Overall Prison Population

As of June 2019, the total incarcerated felon population was 21,806.⁸¹ The felon prisoner population consists mostly of Caucasian and black men. Of incarcerated men in Tennessee's prison system, Caucasian men make up 56% of the population, while Black men make up 42% of the prison population.⁸²

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *QuickFacts: Tennessee*, *supra* note 64.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Economy at a Glance: Tennessee*, U.S. Bureau of Labor Statistics, <https://www.bls.gov/eag/eag.tn.htm> (last visited Oct. 6, 2020).

⁸⁰ *Id.*

⁸¹ *Tennessee Annual Report FY 2019*, Tenn. Dep't of Correction, (Sept. 17, 2019), <https://www.tn.gov/content/dam/tn/correction/documents/AnnualReport2019.pdf> at 6. Note, the data relied on for this report indicates that the actual incarcerated population in Tennessee is 30,625 as of July, 2019. *Tennessee Felon Population Update: July 2019*, Tenn. Dep't of Correction, (July 2019), <https://www.tn.gov/content/dam/tn/correction/documents/FelonJuly2019.pdf> at 5.

⁸² *Id.*

These statistics are notable, given that only 17% of the Tennessee population is black or African American.⁸³ Ninety-one percent of the prison population is male and 9% is female.⁸⁴

The most common felonies recorded for those incarcerated include drug offenses, homicide, property crimes, and assault, which represented 19%, 18.2%, 13.3%, and 13.2% of the overall felony admissions, respectively.⁸⁵

ii. Death Row Population and Demographics

There are 50 prisoners currently on death row.⁸⁶ Of that number, one prisoner is female. There are 22 Caucasian, 26 African-American, 1 Hispanic and 1 Asian prisoners currently sitting on Tennessee's death row.⁸⁷ Although African-Americans represent more than 50% of the population on Tennessee's death row, they only represent 17% of the Tennessee population.⁸⁸

iii. Executions (Past and Pending)

Tennessee has conducted thirteen executions since 2000.⁸⁹ The last execution before then occurred in 1960.⁹⁰

In 2018, Tennessee executed its first prisoner in nearly ten years, Billy Ray Irick.⁹¹ Irick's execution followed a lengthy court battle in which 32 Tennessee death row prisoners, including Irick, argued that Tennessee's three-drug lethal injection protocol qualified as torture.⁹² However, in October 2018, the Tennessee Supreme Court determined that the three-drug protocol could and would continue in the absence of a viable alternative method of execution.⁹³ Since then, seven prisoners have been executed, five opting to be put to death by electrocution and two by lethal injection.⁹⁴

⁸³ *QuickFacts: Tennessee*, *supra* note 64.

⁸⁴ *Tennessee Annual Report FY 2019* at 6, *supra* note 81.

⁸⁵ *Id.*

⁸⁶ *Death Row Facts*, Tenn. Dep't of Correction, <https://www.tn.gov/correction/statistics-and-information/death-row-facts.html> (last visited October 6, 2020).

⁸⁷ *Id.*

⁸⁸ See *QuickFacts*, *supra* note 64.

⁸⁹ *Tennessee Executions*, Tenn. Dep't of Correction, <https://www.tn.gov/correction/statistics-and-information/executions/tennessee-executions.html> (last visited Oct. 6, 2020).

⁹⁰ *Id.*

⁹¹ David Boucher, Jamie Satterfield and Natalie Allison, *Tennessee executes Billy Ray Irick, first lethal injection in state since 2009*, Nashville Tennessean, (Aug. 10, 2018), <https://www.tennessean.com/story/news/crime/2018/08/09/billy-ray-irick-tennessee-execution-lethal-injection/830253002/>.

⁹² *Id.*

⁹³ *Tennessee Supreme Court Upholds Current Lethal Injection Protocol As Constitutional*, TNCourts.gov, (Oct. 8, 2018), <https://www.tncourts.gov/press/2018/10/08/tennessee-supreme-court-upholds-current-lethal-injection-protocol-constitutional>.

⁹⁴ Jonathan Mattise, *Tennessee inmates ask court to stop execution scheduling*, Associated Press, (Jan. 4, 2020), <https://apnews.com/e4dc087739dd76cc3c768681b38a4ece>; see also Travis Loller, *Tennessee man gets electric*

iv. Exonerations/Innocence⁹⁵

Michael L. McCormick became the first prisoner to be exonerated from Tennessee's death row in 2007, twenty years after his initial conviction for the murder of a young woman in Chattanooga.⁹⁶ In 1985, shortly after the victim's body was discovered, McCormick, a friend of the victim's brother, called his ex-wife and told her that he had been dating the victim and had been with her shortly before she died. He also falsely claimed to have already been interviewed by police.⁹⁷ When police did interview McCormick, he told them that he had not been in recent contact with the victim and that the story he had told his ex-wife was made up to garner sympathy or jealousy. He consented to a search of his house and car, and allowed police to collect hair, blood, and saliva samples, none of which revealed a connection to the crime itself, though an analyzed hair from the victim's car did resemble McCormick's.⁹⁸ Regardless, McCormick was not charged for the murder until 1987, when he confessed to an undercover police officer.⁹⁹ At trial, McCormick was convicted and sentenced to death, primarily based on his confession and the testimony of the undercover officer, although the defense argued that McCormick was a chronic liar and that he had only confessed in order to impress the officer, who McCormick believed to be a career criminal.¹⁰⁰ Although his conviction was initially upheld, McCormick's confession was suppressed during post-conviction proceedings.¹⁰¹ DNA testing also later disproved the theory that the hair found in the victim's car was McCormick's.¹⁰² Therefore, when McCormick was retried in 2007, the prosecution had little to no evidence against him, and he was acquitted that December.¹⁰³

Paul G. House was exonerated in 2009 after serving 22 years behind bars. House was sentenced to death in 1986 for murdering and raping Carolyn Muncey, a neighbor.¹⁰⁴ House, a newcomer to the neighborhood with a criminal record, quickly became a suspect and accusations were later bolstered by two witnesses who testified they had seen House near the crime scene the night of the murder wiping his hands.¹⁰⁵ A pair

chair for killing fellow inmate, Associated Press, (Feb. 21, 2020),
<https://apnews.com/7121e608498fe4c24359035853801ff3>.

⁹⁵ 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 Info. Ctr. See *Glossary*, The Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Oct. 6, 2020); *Innocence: List of those freed from death row*, Death Penalty Info. Ctr., <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Oct. 6, 2020).

⁹⁶ *Michael Lee McCormick*, The Nat'l Registry of Exonerations,
<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3422> (last visited Oct. 6, 2020).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Description of Innocence Cases: 124. Michael L. McCormick*, Death Penalty Info. Ctr.,
<https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases> (last visited Oct. 6, 2020).

¹⁰³ *Id.*

¹⁰⁴ *Paul G. House*, The Nat'l Registry of Exonerations,
<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3307> (last visited Oct. 6, 2020).

¹⁰⁵ *Id.*

of jeans collected from House's home tested positive for the victim's blood.¹⁰⁶ However, subsequent testing of the blood on House's jeans was consistent with improperly stored blood samples and supported the theory that the blood had been spilled on House's jeans while both were being stored as evidence.¹⁰⁷ In addition, several witnesses later came forward to testify that the victim's abusive husband had likely committed the crime.¹⁰⁸ Finally, in the late 1990s, advanced DNA testing on semen found on the victim's clothing matched her husband—contrary to testimony given by an FBI expert at House's trial.¹⁰⁹ In June 2006, the U.S. Supreme Court ruled that any "reasonable juror" would have been unlikely to convict House had new evidence been available during his original trial.¹¹⁰ On remand, the United States District Court for the Eastern District of Tennessee overturned House's conviction and ordered the state to either release House or to retry him within 180 days. Prosecutors dropped all charges against House on May 12, 2009.¹¹¹

Gussie Vann was released from death row in 2011, 17 years after being convicted for the murder of his daughter.¹¹² At his original trial, the state medical examiner testified that not only had the eight-year-old victim been strangled to death, but her body also bore evidence of recent sexual abuse. At Vann's post-conviction hearing in 2007, a deputy medical examiner testified that her review of the autopsy report did not indicate any evidence of strangulation and that the death was accidental. Furthermore, she testified that what the original medical examiner mistook for evidence of sexual abuse was the result of normal post-mortem bodily reactions, a finding confirmed by a second medical expert retained by the defense.¹¹³ In response to this new testimony, the court set aside Vann's conviction, holding he was entitled to a new trial because his defense attorneys failed to hire forensic experts to challenge the state's allegations of sexual abuse and described the failure as "not only prejudicial, but disastrous."¹¹⁴ The state dropped the charges on September 29, 2011 rather than retry Vann.¹¹⁵ Vann remained in prison, serving a 50-year sentence on an unrelated 1994 rape conviction, until his release in 2015.¹¹⁶ He later filed a federal civil rights lawsuit alleging he was coerced by police into giving his initial confession and that he was later denied access to

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Gussie Vann*, Nat'l Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3879> (last visited Oct. 6, 2020).

¹¹³ *Id.*

¹¹⁴ *Description of Innocence Cases: 140. Gussie Vann*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases> (last visited Oct. 6, 2020).

¹¹⁵ *Id.*

¹¹⁶ *Gussie Vann*, *supra* note 112.

counsel, both of which he said contributed to his conviction, but the action was dismissed because it was filed too late.¹¹⁷

c. Public Opinion Polling

In a June 2011 Vanderbilt Poll, 55.4% of respondents favored the death penalty as the “better punishment” for murder over life without possibility of parole.¹¹⁸ Thirty-five percent of the respondents chose life imprisonment without possibility of parole, and 7.8% indicated they did not know.¹¹⁹ A Nashville news station conducted a similar poll in 2018 to which nearly 2,900 individuals responded. Eighty-six percent of respondents supported the death penalty for people convicted of murder, while 14% did not.¹²⁰

Fifty-six percent of respondents to a Vanderbilt University poll conducted in 2014 supported legislation that allowed the use of the electric chair in executions where lethal injection was not available.¹²¹ Thirty-seven percent of respondents opposed the measure, and 5% indicated they did not know.¹²² Of those polled, 66% of Republicans, 61% of Independents, and 40% of Democrats supported the use of the electric chair.¹²³

In spring 2019, 72% of Nashville respondents indicated that reducing crime should be a top priority in the state, second only to improving public education.¹²⁴

V. Additional Information for Consideration in Clemency

a. Significant Past Capital Clemency Decisions

i. Grants

In 1965, Governor Frank Clement commuted the sentences of every death row prisoner, five at the time.¹²⁵ Governor Clement’s mass clemency grant directly followed the Tennessee Senate’s vote to abolish the death penalty, although the bill failed in the House by a single vote.¹²⁶ Since the death penalty was

¹¹⁷ Todd South, *Court affirms dismissal of McMinn County lawsuit*, Chattanooga Times Free Press, (Dec. 12, 2013), <https://www.timesfreepress.com/news/local/story/2013/dec/12/court-affirms-dismissal-of-mcminn-suit/126371/>.

¹¹⁸ *Vanderbilt University Poll June 2011*, Vanderbilt U. Ctr. for the Study of Democratic Institutions, (June 2011), http://www.vanderbilt.edu/csdi/JUNE_RESULTS.pdf.

¹¹⁹ *Id.*

¹²⁰ *Do you support the death penalty for people convicted of murder?*, WKRN, (Oct. 10, 2018), <https://www.wkrn.com/news/poll-do-you-support-the-death-penalty-for-people-convicted-of-murder/>.

¹²¹ *Vanderbilt University Poll April 28-May 13, 2014*, Vanderbilt U. Ctr. for the Study of Democratic Institutions, (May 2014), http://www.vanderbilt.edu/csdi/May_2014_VUPoll_Slides.pdf.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Joshua D. Clinton & John G. Geer, *Vanderbilt University Poll: 2019 Nashville Edition*, Vanderbilt U. Ctr. for the Study of Democratic Institutions, (Apr. 2019), https://www.vanderbilt.edu/csdi/Nashville_2019_slides_final.pdf.

¹²⁵ *A View Looking Back at Capital Punishment and Clemency in Tennessee*, The StandDown Texas Project, (Mar. 31, 2010), <https://standdown.typepad.com/weblog/2010/03/a-view-looking-back-at-capital-punishment-and-clemency-in-tennessee.html>.

¹²⁶ *Tennessee*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/tennessee> (last visited Oct. 6, 2020).

reinstated in 1976, there have been three commutations in capital cases, all issued by Governor Phil Bredesen.¹²⁷

1. Michael Boyd (2007)

In September 2007, Governor Bredesen commuted the death sentence of Michael Joe Boyd, whose execution was scheduled for October 24, 2007, to life in prison without parole, citing ineffective legal counsel at his sentencing and procedural limitations on his appeals.¹²⁸ Boyd had been convicted of a murder committed in the course of a 1986 Memphis robbery. He claimed the shooting had been an accident.¹²⁹ According to Governor Bredesen, he commuted Boyd's sentence because the claims were never comprehensively reviewed due to ineffective post-conviction counsel.¹³⁰ Governor Bredesen released a statement at the time that said: "his appears to me an extraordinary death penalty case where the grossly inadequate legal representation received by the defendant at his post-conviction hearing, combined with procedural limitations, has prevented the judicial system from ever comprehensively reviewing his legitimate claims of having received ineffective assistance of counsel at the sentencing phase of his trial . . . this combination of inadequate representation and procedural limitations within the judicial system raises in my mind a substantial and unresolved doubt that the trial jury would have imposed the death penalty had the defendant received competent legal representation."¹³¹

3. Gaile Owens (2010)

Gaile Owens was convicted and sentenced to death for hiring a man to kill her husband in 1986.¹³² Governor Bredesen commuted her sentence to life in prison on July 14, 2010.¹³³ She had been scheduled to be executed in September of that year.¹³⁴ Owens originally agreed to plead guilty in exchange for life in prison, but the plea deal was withdrawn when the hitman, with whom she was being tried jointly, refused the same offer.¹³⁵ Additionally, though Owens claimed to have been abused by her husband, and the forensic

¹²⁷ Tyler Whetstone, *A phone call can save him: Tennessee governors recount death row decisions*, Knoxville News Sentinel, (May 14, 2019), <https://www.knoxnews.com/story/news/politics/2019/05/15/tennessee-governors-recall-death-penalty-decisions/1189187001/>; See also *List of Clemencies since 1976*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> (last visited Oct. 6, 2020).

¹²⁸ *List of Clemencies since 1976*, *supra* note 127.

¹²⁹ Milt Capps, *Governor commutes prisoner's death sentence*, Nashville Post, (Sept. 14, 2007), <https://www.nashvillepost.com/politics/article/20401248/governor-commutes-prisoners-death-sentence>; *Background on Recent Commutation: "Grossly Inadequate" Representation in a System that "Broke Down"*, Death Penalty Info. Ctr., (Sept. 18, 2007), <https://deathpenaltyinfo.org/news/background-on-recent-commutation-grossly-inadequate-representation-in-a-system-that-broke-down>.

¹³⁰ *Background on Recent Commutation: "Grossly Inadequate" Representation in a System that "Broke Down"*, *supra* note 129.

¹³¹ Capps, *supra* note 129.

¹³² *Tennessee Governor Commutes Death Sentence of Gaile Owens*, Death Penalty Info. Ctr., (July 14, 2010), <https://deathpenaltyinfo.org/news/tennessee-governor-commutes-death-sentence-of-gaile-owens>.

¹³³ *Id.*

¹³⁴ Brantley Hargrove, *Gaile Owens has been on Tennessee's death row for 25 years for setting her husband's murder in motion, but a jury never heard the whole story*, Nashville Scene, (Apr. 29, 2010), <https://www.nashvillescene.com/news/article/13033738/gaile-owens-has-been-on-tennessees-death-row-for-25-years-for-setting-her-husbands-murder-in-motion-but-a-jury-never-heard-the-whole-story>.

¹³⁵ *Id.*

coordinator at the local jail said that Owens demonstrated clear signs of battered woman syndrome, the defense was never raised at trial.¹³⁶ Owens' son Stephen, a witness against her at her trial, later reconciled with his mother and advocated for the governor to grant clemency.¹³⁷ In commuting Owens' sentence, Governor Bredesen cited both the rescinded plea deal and possible abuse, as well as the desire to bring Owens' sentence in line with similar crimes, as reasons for granting clemency.¹³⁸ A year after her commutation, Owens was released based on good conduct during the 26 years she spent in prison.¹³⁹

3. Edward Jerome Harbison (2011)

Edward Jerome Harbison was convicted of murdering Edith Russell in 1983.¹⁴⁰ Governor Bredesen commuted his sentence to life in prison without parole on January 11, 2011.¹⁴¹ Harbison was found by the courts to be borderline intellectually disabled and had a history of childhood trauma.¹⁴² Governor Bredesen's commutation of Harbison was accompanied by 22 non-capital pardons, all done in the final days before Bredesen exited office.¹⁴³ Bredesen said he spoke with then-governor-elect Bill Haslam before commuting Harbison's sentence since Harbison's execution was scheduled to occur under Haslam's governorship.¹⁴⁴ Governor Bredesen explained the commutation by saying: "It's obviously a heinous crime, but when I compare it to others I don't think it rose to the level of a death penalty crime, so I knocked it down one notch to life without parole."¹⁴⁵ Before his commutation, Harbison's case was heard by the U.S. Supreme Court, which held that indigent death row prisoners have a right to federally appointed counsel in their clemency proceedings.¹⁴⁶

Recent Reprieve: Harold Wayne Nichols (2020)

On July 17, 2020, Governor Lee granted Harold Wayne Nichols—due to be executed on August 4, 2020, amid the global COVID-19 pandemic—a reprieve of execution for the remainder of 2020. This was the first time Governor Lee has used his clemency authority to substantively delay the execution of a prisoner scheduled to be put to death during his term. In granting the reprieve, Governor Lee noted that moving forward with the execution during the pandemic was "not the right thing to do," and also stated that it would not be fair to move forward with the execution given that the attorneys' ability to prepare and present the

¹³⁶ *Id.*

¹³⁷ *Son says long journey to forgive mother who had father killed released heavy burden of anger*, Fox News (last updated Nov. 20, 2015), <https://www.foxnews.com/us/son-says-long-journey-to-forgive-mother-who-had-father-killed-released-heavy-burden-of-anger>.

¹³⁸ *Tennessee Governor Commutes Death Sentence of Gaile Owens*, *supra* note 132.

¹³⁹ *Tennessee woman Gaile Owens freed from prison after 26 years on death row*, The Guardian, (Oct. 7, 2011), <https://www.theguardian.com/world/2011/oct/07/tennessee-gaile-owens-freed-prison>.

¹⁴⁰ *Bredesen commutes death sentence, pardons 22*, The Kingsport Times-News, (Jan. 12, 2011), <http://www.timesnews.net/News/2011/01/12/Bredesen-commutes-death-sentence-pardons-22>.

¹⁴¹ *Id.*

¹⁴² Joan Garrett McClane, *Family recalls Harbison victim*, Chattanooga Times Free Press, (Jan. 13, 2011), <https://www.timesfreepress.com/news/news/story/2011/jan/13/family-recalls-harbison-victim/39249/>.

¹⁴³ *Bredesen commutes death sentence, pardons 22*, *supra* note 140.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Harbison v. Bell*, 556 U.S. 180, 194 (2009).

case for clemency was so hampered by COVID-19 restrictions.¹⁴⁷ Lee stated, “That individual, the inmate there, is allowed due process in order to get to a place where they can present a clemency request and they did not believe they had the appropriate environment to provide a clemency request. [...] And it’s important that we look at every single case completely and their clemency requests completely and because that couldn’t be done, it didn’t make sense to move forward there.”¹⁴⁸ Lee also mentioned that his clemency decision was influenced by the fact that the state’s prisons were almost entirely closed due to the threat of COVID-19, which compromised Nichols’ ability to visit or communicate with his religious advisor while he remained under execution warrant. Before Governor Lee announced the reprieve, attorneys for Mr. Nichols had filed a federal civil rights lawsuit in a Tennessee district court alleging that, among other things, proceeding with Mr. Nichols’ execution during the pandemic was a violation of his constitutional rights because of the limitations the pandemic placed on consultation with counsel and visitation with his spiritual advisor. Governor Lee issued the reprieve as the lawsuit was still pending.

ii. Denials (where newsworthy or controversial)

• David Earl Miller (2018)

David Earl Miller was sentenced to death in 1982.¹⁴⁹ Though Miller chose to be executed by the electric chair after the Tennessee Supreme Court denied challenges to the state’s three-drug injection protocol, he argued that his choice of electrocution instead of lethal injection was coerced and that both methods were unconstitutionally cruel and unusual.¹⁵⁰ Miller had a long history of mental illness and suffered extensive sexual and physical abuse throughout his childhood, which was detailed in an expansive 89-page clemency petition to Governor Bill Haslam.¹⁵¹ Governor Haslam rejected the petition with a single sentence: “After careful consideration of David Earl Miller’s clemency request, I am declining to intervene in this case.”¹⁵²

• Don Johnson (2019)

Donnie Edward Johnson killed his wife, Connie Johnson, in 1984.¹⁵³ Johnson never contested his guilt and refused any final appeals as his execution date approached.¹⁵⁴ Instead, the month before his scheduled execution, Johnson petitioned for clemency from Governor Bill Lee based on Johnson’s religious

¹⁴⁷ Kimberlee Kruesi, “Lee: Execution not ‘right thing to do’ due to resource toll,” *Associated Press*, (July 23, 2020), <https://apnews.com/a18aacfc524dc78b76e7c9395558bd28>.

¹⁴⁸ *Id.*

¹⁴⁹ Steven Hale, *With the Electric Chair Awaiting Him, David Miller Asks for Mercy*, *Nashville Scene*, (Dec. 4, 2018), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21035157/with-the-electric-chair-awaiting-him-david-miller-asks-for-mercy>.

¹⁵⁰ *Tennessee Executes Mentally Ill and Sexually Abused Prisoner by Electrocution*, *Death Penalty Info. Ctr.*, (Dec. 7, 2018), <https://deathpenaltyinfo.org/news/tennessee-executes-mentally-ill-and-sexually-abused-prisoner-by-electrocution>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Nathalie Baptiste, *The Cruel Durability of Capital Punishment*, *Mother Jones*, (July 3, 2019), <https://www.motherjones.com/crime-justice/2019/07/the-cruel-durability-of-capital-punishment/>.

¹⁵⁴ *Id.*

conversion while in prison and the positive impact he had on his fellow prisoners.¹⁵⁵ During the decades he spent on death row, Johnson rose to the rank of Ordained Elder in the Seventh Day Adventist Church.¹⁵⁶ Johnson's clemency appeal was bolstered by the support of prison ministers, volunteers, and, in particular, his stepdaughter, the daughter of his victim.¹⁵⁷ Connie Johnson's daughter reconciled with Don Johnson in 2012 and spoke out against his execution, going so far as to request a meeting with Governor Bill Lee to share her story of "Christian forgiveness."¹⁵⁸ Governor Lee chose not to intervene in Johnson's execution, stating: "After a prayerful and deliberate consideration of Don Johnson's request for clemency, and after a thorough review of the case, I am upholding the sentence of the state of Tennessee and will not be intervening."¹⁵⁹ Johnson was executed by lethal injection on May 16, 2019.¹⁶⁰

- **Charles Walton Wright (2019)**

Charles Walton Wright was sentenced to death in 1985.¹⁶¹ His execution was scheduled for October 10, 2019, but he was later diagnosed with cancer and expected to die before he could be executed by the state.¹⁶² Wright's legal team quickly petitioned for the governor to either reduce his sentence to time served or to life without parole, either of which would have allowed Wright to receive a medical furlough to spend his remaining days with his family.¹⁶³ Death row prisoners are not eligible for medical furlough.¹⁶⁴

Although his clemency petition was bolstered by a letter of support from Bob Clement, a former U.S. Representative and son of a former Tennessee governor, Wright was not one of the 23 prisoners granted clemency by Governor Bill Haslam on his final day in office. Haslam's successor, Governor Bill Lee, never formally issued a statement regarding Wright's clemency petition.¹⁶⁵ Wright died of natural causes in May 2019, hours after Wright's friend and fellow death row prisoner, Don Johnson, was executed.¹⁶⁶

¹⁵⁵ *In Act of 'Christian Forgiveness,' Tennessee Victim's Daughter Asks Governor for Mercy for Her Mother's Killer*, Death Penalty Info. Ctr., (Apr. 8, 2019), <https://deathpenaltyinfo.org/news/in-act-of-christian-forgiveness-tennessee-victims-daughter-asks-governor-for-mercy-for-her-mothers-killer>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; Nathalie Baptiste, *supra* note 153.

¹⁵⁹ *Tennessee governor won't intervene in execution*, Associated Press, (May 14, 2019), <https://www.apnews.com/a7db21421cef438b9d03b5892e9faf51>.

¹⁶⁰ Adam Tamburin, et al., *Tennessee executes Donnie Edward Johnson by lethal injection*, The Tennessean, (May 16, 2019), <https://www.tennessean.com/story/news/crime/2019/05/16/execution-donnie-johnson-tennessee-lethal-injection/3668943002/>.

¹⁶¹ Adam Tamburin, *Few options for dying inmate Charles Wright, who is facing Oct. 10 execution date*, The Tennessean (last updated Feb. 6, 2019), <https://www.tennessean.com/story/news/2019/01/16/execution-tennessee-charles-wright-death-row-inmate-terminally-ill/2546832002/>.

¹⁶² *Id.*

¹⁶³ *Lawyers Seek Clemency for Tennessee Death-Row Prisoner Dying of End-Stage Cancer*, Death Penalty Info. Ctr., (Jan. 25, 2019), <https://deathpenaltyinfo.org/news/lawyers-seek-clemency-for-tennessee-death-row-prisoner-dying-of-end-stage-cancer>.

¹⁶⁴ *Id.*

¹⁶⁵ Adam Tamburin, *Death row inmate Charles Walton Wright dies in prison months before execution date*, Nashville Tennessean, (May 17, 2019), <https://www.tennessean.com/story/news/2019/05/17/death-row-inmate-charles-walton-wright-dies-prison/3708892002/>.

¹⁶⁶ *Id.*

- **Stephen Michael West (2019)**

Stephen Michael West was sentenced to death in 1987.¹⁶⁷ West was convicted for the kidnapping and murder of Wanda Romines and the kidnapping, rape, and murder of her daughter, Sheila Romines.¹⁶⁸ In his clemency plea to Governor Bill Lee, West wrote that his accomplice, Ronnie Martin, was the person that actually killed both victims, and, during trial, West's defense attorney decided not to play the recording of Martin admitting as much.¹⁶⁹ West also argued that the jury never heard about his abusive upbringing, and West further petitioned that he had been treating a previously existing mental illness while in prison.¹⁷⁰ Finally, West wrote to the governor that, while in prison, he had become involved with the prison ministries organization, Men of Valor.¹⁷¹ Prior to becoming governor, Lee had been a mentor and board member for Men of Valor for many years, and he participated in the organization's all-day criminal justice reform conference as the keynote speaker on September 20, 2019.¹⁷² Lee decided not to intervene in West's execution, stating that, "The criminal justice process made a determination years and years ago about this case and I trust that system and that process, and that's what I rely on as I go through this process."¹⁷³ West was executed by electrocution on August 15, 2019.¹⁷⁴

- **Lee Hall (Leroy Hall Jr.) (2019)**

Leroy Hall Jr. was sentenced to death in 1992.¹⁷⁵ During Hall's time in prison, his attorneys say that he became functionally blind as a result of improperly treated glaucoma.¹⁷⁶ After becoming blind, Hall's lawyers argued that executing a blind prisoner would be a "spectacle" that would "offend humanity."¹⁷⁷ In Hall's petition to Governor Bill Lee, his attorneys argued that one of the jurors had been a victim of sexual and

¹⁶⁷ Jim Matheny, 'There was a time when I thought it would never happen' | Steve West set to be executed by electrocution Thursday, WBIR (last updated August 16, 2019), <https://www.wbir.com/article/news/local/there-was-a-time-when-i-thought-it-would-never-happen-steve-west-set-to-be-executed-by-electrocution-thursday/51-582493295>.

¹⁶⁸ Jonathan Mattise, *No clemency for Tennessee man set to be executed Thursday*, Associated Press, (August 13, 2019), <https://apnews.com/db38861d2deb4f3da7fb281384384367>.

¹⁶⁹ *Id.* (Tennessee is one of 27 states that allows execution of "non-triggermen" in felony murders).

¹⁷⁰ *Id.* (West argued that the jury did not hear about his abusive upbringing because his parents paid for his defense).

¹⁷¹ *Id.*

¹⁷² Laura Baigert, *Men of Valor Holds All-Day Criminal Justice Reform and Addiction Conference, Featuring Governor Bill Lee as the Keynote Speaker*, The Tenn. Star, (Sept. 20, 2019), <https://tennesseestar.com/2019/09/20/men-of-valor-holds-all-day-criminal-justice-reform-and-addiction-conference-featuring-governor-bill-lee-as-the-keynote-speaker/>.

¹⁷³ Jonathan Mattise, *supra* note 168.

¹⁷⁴ Jim Matheny, *supra* note 167.

¹⁷⁵ Mariah Timms, *Lee Hall moved to death watch ahead of Thursday's scheduled execution*, The Tennessean, (last updated Dec. 3, 2019), <https://www.tennessean.com/story/news/crime/2019/12/03/lee-hall-execution-death-watch/4232322002/>.

¹⁷⁶ Mariah Timms, *Who is Lee Hall? What to know about the next man scheduled for execution in Tennessee*, The Tennessean, (last updated Dec. 5, 2019), <https://www.tennessean.com/story/news/crime/2019/11/16/lee-hall-execution-traci-crozier-chattanooga-hamilton-county/4206825002/>.

¹⁷⁷ Brittany Shammis, *A murderer went blind in prison. His imminent execution would 'offend humanity,' his lawyers argue.*, The Wash. Post, (Dec. 5, 2019), <https://www.washingtonpost.com/crime-law/2019/12/04/murderer-went-blind-prison-his-imminent-execution-would-offend-humanity-his-lawyers-argue/>.

domestic abuse before the trial, and the juror had not disclosed it during jury selection.¹⁷⁸ In her 2019 declaration, the juror conceded that she was biased against Hall, and she admitted that she hated Hall because he reminded her of her abusive husband.¹⁷⁹ Hall's petition argued that this juror's undisclosed bias made it impossible for him to have received a fair trial.¹⁸⁰ However, Governor Bill Lee denied Hall's petition, stating that, "The justice system has extensively reviewed Lee Hall's case over the course of almost 30 years, including additional review and rulings by the Tennessee Supreme Court yesterday and today. The judgement and sentence stand based on these rulings, and I will not intervene in this case."¹⁸¹ Hall was executed by electrocution on December 5, 2019.¹⁸²

- **Nicholas Sutton (2020)**

Nicholas Sutton was sentenced to death in 1986 after killing another prisoner.¹⁸³ Prior to receiving this sentence, Sutton was already serving life in prison for the murder of three people.¹⁸⁴ Former federal judge Kevin Sharp represented Mr. Sutton in his petition for executive clemency before Governor Lee, and he stated that Sutton was "a once-in-a-lifetime case for clemency."¹⁸⁵ In his petition to Governor Bill Lee, Sutton presented affidavits affirming that Sutton had saved the lives of three corrections officers and two prisoners while on death row and that both correctional staff and prisoners would be safer with Sutton in prison.¹⁸⁶ Additionally, Sutton's petition included numerous accounts in support of his clemency from family members of some of his victims, as well as some of the jurors that sentenced Sutton to death.¹⁸⁷ Further, his petition argued that the jury did not see evidence that, as a child, Sutton had suffered severe abuse from his father and had even become addicted to drugs after using them with his father at age 12.¹⁸⁸ Sutton's petition stated that, while on death row, he was able to use the stable environment to overcome his addiction and become a reformed prisoner.¹⁸⁹ In denying Sutton's petition, Lee said, "After careful consideration of Nicholas Sutton's request for clemency and a thorough review of the case, I am upholding the sentence of

¹⁷⁸ Sydney Edwards, *Update: Attorneys for Hamilton Co. death row inmate asks for execution reprieve*, News Channel 9, (Nov. 14, 2019), <https://newschannel9.com/news/local/death-row-inmate-from-hamilton-county-points-to-biased-juror-as-execution-nears>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Mariah Timms, *supra* note 176.

¹⁸² Kimberlee Kruesi, *Blind inmate executed in Tennessee for woman's 1991 killing*, Associated Press, (Dec. 5, 2019), <https://apnews.com/26aeccbe75b0ce300ef9f5b622f8435b>.

¹⁸³ Pamela Ortega & Emily Smith, *3 corrections officers say Nicholas Sutton protected them. He was executed Thursday night*, CNN, (Feb. 21, 2020), <https://www.cnn.com/2020/02/20/us/nick-sutton-execution/index.html>.

¹⁸⁴ *Id.*

¹⁸⁵ Khaleda Rahman, *Attorney for Tennessee Death Row Inmate Says He'll Continue to 'Seek Every Available Avenue of Relief'*, Newsweek, (Feb. 20, 2020), <https://www.newsweek.com/attorney-tennessee-death-row-inmate-responds-governor-denies-petition-clemency-1488186>.

¹⁸⁶ Samantha Max, *'He Saved My Life': Prison Guards, Jurors And Victims' Families Defend Death Row Inmate Nicholas Sutton*, WPLN News, (Feb. 20, 2020), <https://wpln.org/post/he-saved-my-life-prison-guards-jurors-and-victims-families-defend-death-row-inmate-nicholas-sutton/>.

¹⁸⁷ *Id.*

¹⁸⁸ *Man Who Saved Three Prison Guards Executed by Tennessee*, Equal Justice Initiative (Feb. 21, 2020), <https://eji.org/news/man-who-saved-three-prison-guards-executed-by-tennessee/>.

¹⁸⁹ Crystal Bonvillian, *Tennessee executes convicted killer despite pleas of victims' families, jurors and prison guards*, Boston 25 News, (last updated Feb. 21, 2020), <https://www.boston25news.com/news/trending/tennessee-executes-convicted-killer-despite-pleas-victims-families-jurors-prison-guards/L6MYUWKLQ5AOPJ2P42G23ADCYA/>.

the State of Tennessee and will not be intervening.”¹⁹⁰ Sutton was executed by electric chair on February 20, 2020.¹⁹¹

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

State v. Godsey (2001)

Bobby G. Godsey was convicted of aggravated felony murder during the perpetration of aggravated child abuse for killing his girlfriend’s infant son.¹⁹² Although Godsey was originally sentenced to death, the Tennessee Court of Criminal Appeals modified the sentence to life imprisonment without possibility of parole, finding the death penalty was disproportionate to the crime in this case.¹⁹³ On appeal to the Tennessee Supreme Court, the State argued that the Court of Criminal Appeals had invaded the province of the jury in several respects when it held the defendant’s sentence comparatively disproportionate.¹⁹⁴

Under Tennessee statute, appellate courts reviewing capital cases should determine whether “[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.”¹⁹⁵ The Tennessee Supreme Court held that in conducting a comparative proportionality review, only Tennessee cases in which the death penalty was sought should be used for comparison; neither out-of-state cases nor first-degree murder cases in which lesser sentences were sought can be used as precedent.¹⁹⁶ The Tennessee Supreme Court held that, in this case, the Court of Criminal Appeals had properly conducted the proportionality review and upheld its decision to modify Godsey’s death sentence to life in prison, although they reversed the decision to set aside Godsey’s aggravated child abuse conviction.¹⁹⁷

West v. Schofield (2017)

Stephen Michael West, along with Billy Ray Irick, Nicholas Todd Sutton, and David Earl Miller filed for declaratory judgment against Tennessee’s then-existing lethal injection protocol involving a single drug, pentobarbital.¹⁹⁸ After losing at the trial court, Plaintiffs contended in the Tennessee Supreme Court that the use of this injection protocol was unconstitutional because it created a substantial risk of serious harm and lingering death.¹⁹⁹ The court first analyzed the claims under the Supreme Court’s test that constitutional challenges to an execution method must show 1) the execution method is “sure or likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers,” and 2) there are alternative

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *State v. Godsey*, 60 S.W.3d 759, 764-765 (Tenn. 2001).

¹⁹³ *Id.* at 770.

¹⁹⁴ *Id.* at 781.

¹⁹⁵ Tenn. Code Ann. § 39-13-206(c)(1)(D) (West).

¹⁹⁶ *Godsey*, 60 S.W.3d at 786.

¹⁹⁷ *Id.* at 793.

¹⁹⁸ *West v. Schofield*, 519 S.W.3d 550, 552-53 (Tenn. 2017).

¹⁹⁹ *Id.* at 553 (Plaintiffs also contended that the trial court had erred in dismissing their earlier contentions that use of the drug caused the State to violate state law, federal law, and the Supremacy Clause, and use of the drug ultimately caused the State to engage in common-law civil conspiracy).

methods that can be feasibly and readily implemented that would significantly reduce this risk of harm.²⁰⁰ In applying this test, the court concluded that Plaintiffs had not established that the protocol exposes them to a substantial risk of severe pain because Plaintiffs' only proof was what would happen *if* there was an error in administering the pentobarbital, and Plaintiffs additionally did not establish an alternative method that entails a lesser risk of pain.²⁰¹ Second, the court found that Plaintiffs' lingering death arguments failed because the drug rendered the prisoner unconscious within seconds, so the prisoner would not be subject to cruel and unusual punishment even if the execution took anywhere from 34 minutes to an hour.²⁰² The court further held that the Tennessee Constitution was not violated by the fact that prisoners were not given the identity of the pharmacist who compounded the lethal injection drug.²⁰³ Finally, the court held that the state could use pentobarbital in its lethal injection protocol even though it was obtained in violation of the Controlled Substances Act.²⁰⁴

State v. Irick (2018)

After the State adopted its three-drug lethal injection protocol in 2018, Billy Ray Irick and 32 other prisoners filed suit in the Chancery Court, challenging the constitutionality of this newly adopted protocol.²⁰⁵ After a ten-day trial, the Chancery Court dismissed the claims, and Plaintiffs appealed that decision shortly after.²⁰⁶ Upon reaching the Tennessee Supreme Court, the court applied the two-part test observed in *West v. Schofield* (2017) to determine that Plaintiffs had not demonstrated a likelihood of success in proving an alternative, single-drug method was readily available to the Tennessee Department of Corrections.²⁰⁷ The court held that since Plaintiffs needed to establish *both* elements of the test, its analysis did not need to go further.²⁰⁸ However, given the seriousness of the proceedings, the court went on to note that both the Supreme Court and the Tennessee Supreme Court had found similar execution methods constitutional in previous cases.²⁰⁹ Another important practice note from this case is that the court held that it would only stay an execution pending resolution of a state court's collateral litigation if the prisoner could prove a likelihood of success on the merits in the collateral litigation.²¹⁰

Abdur'Rahman v. Parker (2018)

Similar to *State v. Irick (2018)*, Plaintiffs in this case challenged the use of the three-drug protocol now used for executions in Tennessee.²¹¹ Additionally, similar to *Irick*, the Tennessee Supreme Court found that Plaintiffs failed to satisfy the Supreme Court's two-part test by failing to prove that an alternative execution

²⁰⁰ *Id.* at 563-64 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)) (emphasis excluded).

²⁰¹ *Id.* at 564.

²⁰² *Id.* at 566-67.

²⁰³ *Id.* at 567-68.

²⁰⁴ *Id.* at 568-72.

²⁰⁵ *State v. Irick*, 556 S.W.3d 686, 688 (Tenn. 2018).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 689.

²⁰⁸ *Id.* at 690.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 689-90.

²¹¹ See *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 610 (Tenn. 2018).

method was readily available.²¹² However, in this case, the court addressed alternative arguments of availability raised by Plaintiffs.²¹³ The court held that evidence that one state was able to procure the proposed alternative method of execution was insufficient to prove that the alternative method was available for Tennessee.²¹⁴ Additionally, the government was able to provide credible evidence that it was unable to obtain the alternative method proposed by Plaintiffs, and Plaintiffs were unable to provide evidence that the alternative method was available *now*.²¹⁵

c. Divisive/Important Political Issues in the State

Like many states which continue to use lethal injection as a method of execution, Tennessee has faced considerable backlash in recent years over the drugs used to execute prisoners on death row.²¹⁶ Due to difficulties in obtaining the state's previous lethal injection drug of choice, pentobarbital, last year, Tennessee instituted a new three-drug protocol which includes Midazolam, a drug associated with botched executions in various states.²¹⁷ Midazolam has been known to induce pulmonary edemas—fluid in the lungs.²¹⁸

Although prisoners on Tennessee's death row filed suit against the state for violating the Eighth Amendment's prohibition against cruel and unusual punishment with the three-drug protocol, the Tennessee Supreme Court eventually ruled that executions may proceed using the new drugs.²¹⁹ Two executions have since proceeded using lethal injection.²²⁰

In dissenting from the Supreme Court's decision denying Tennessee prisoner Edmund Zagorski a stay of execution, Justice Sotomayor wrote: "The longer we stand silent amid growing evidence of inhumanity in execution methods like Tennessee's, the longer we extend our own complicity in state-sponsored brutality."²²¹

d. Other Relevant Legal, Historical, or Social Issues

In 2018, Governor Bill Haslam granted 30-year-old Cyntoia Brown clemency after 15 years in prison.²²² Brown had murdered Johnny Mitchell Allen when she was sixteen. Allen, an adult, had solicited Brown for

²¹² *Id.* at 626.

²¹³ *See id.* at 623-25.

²¹⁴ *Id.* at 623.

²¹⁵ *Id.* at 623-25.

²¹⁶ Steven Hale, *Tennessee's Lethal Injection Experiment*, Nashville Scene (July 5, 2018), <https://www.nashvillescene.com/news/features/article/21011917/tennessees-lethal-injection-experiment>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Tennessee Supreme Court Upholds Current Lethal Injection Protocol as Constitutional*, *supra* note 93.

²²⁰ *Tennessee man executed for 1984 murder of wife and Alabama man executed for 1997 quadruple killing*, CBS News, (May 16, 2019), <https://www.cbsnews.com/news/don-johnson-executed-tennessee-michael-brandon-samra-executed-alabama-today-2019-05-16/>.

²²¹ *Zagorski v. Parker*, 139 S. Ct. 11, 14 (2018).

²²² Mallory Gafas & Tina Burnside, *Cyntoia Brown is granted clemency after serving 15 years in prison for killing man who bought her for sex*, CNN, (last updated Jan. 8, 2019), <https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html>.

sex and taken her to his home shortly before the murder. Brown's life sentence attracted national outrage due to perceived injustice in Brown being tried as an adult and the court's classification of Brown as a "teen prostitute" rather than a sex-trafficking victim. A 2011 documentary about Brown's case led to Tennessee's reformation of juvenile sentencing guidelines and treatment of sex trafficking victims in the courtroom.²²³ Brown was released on August 7, 2019.²²⁴

Additionally, the electric chair has recently reemerged as an execution method in Tennessee.²²⁵ In 2014, Tennessee became the first state to make execution by the electric chair the mandatory alternative when lethal injection drugs are unavailable.²²⁶ Since Tennessee restarted executions in 2018, four prisoners have been executed by the electric chair.²²⁷ Tennessee's increased use of electrocution bucks national trends, as the electric chair has not been used in any other state since 2013 and has even been deemed unconstitutional in some states.²²⁸ Lethal injection remains the primary method of execution in the state, but prisoners convicted of a capital crime prior to 1999 can choose electrocution instead.²²⁹ Tennessee prisoners have elected electrocution over lethal injection amid concerns that lethal injection is even more painful, causing feelings of chemical burning and suffocation.²³⁰ Pharmaceutical companies have worked to keep their drugs away from executions, and challengers argue that the replacement sedative does not prevent prisoners from feeling pain.²³¹ However, court cases challenging lethal injection as cruel and unusual have been unsuccessful, and courts have refused to hear arguments about electrocution since prisoners are able to choose it voluntarily.²³²

²²³ *Id.*

²²⁴ Bobby Allyn, *Cyntoia Brown Released After 15 Years In Prison For Murder*, Nat'l Pub. Radio, (Aug. 7, 2019) <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder>.

²²⁵ Hunter Moyler, *In Tennessee, the Electric Chair Reemerges as an Option for Death Row Inmates*, Newsweek, (Dec. 5, 2019), <https://www.newsweek.com/tennessee-electric-chair-reemerges-option-death-row-inmates-1475762>.

²²⁶ *Id.*

²²⁷ Travis Loller, *supra* note 94.

²²⁸ Travis Loller, *In Tennessee, inmates opt for electric chair over injection*, Associated Press, (Oct. 25, 2019), <https://apnews.com/d837753cdd954bab86a9fa59ab640d25>.

²²⁹ Steve Almasy, *Tennessee murderer Lee Hall put to death by electric chair*, CNN, (Dec. 5, 2019), <https://www.cnn.com/2019/12/05/us/tennessee-death-row-lee-hall-electric-chair/index.html>.

²³⁰ Travis Loller, *supra* note 228.

²³¹ *Id.*

²³² *Id.*