

# ALABAMA

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

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

## **State Capital Clemency Information**

### **I. Basics of the State Capital Clemency Process**

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

#### **a. The Power Defined**

Section 124 of Article V of the Alabama Constitution provides that “[t]he governor shall have power to grant reprieves and commutations to persons under sentence of death.” The constitutional provision also states that the legislature has the authority to provide and regulate the management of pardons, paroles, fines, and forfeitures.<sup>1</sup> According to a manual published by the Alabama Attorney General’s Office, the governor does *not* have the power to issue a pardon or grant parole to a death-sentenced individual:

The Alabama Constitution grants the governor the authority to grant reprieves to persons sentenced to death and to commute a death sentence to a sentence of life imprisonment. The governor does not have the power to grant a pardon or parole, or any other form of clemency, to a condemned person. If the governor were to commute a death sentence to life imprisonment, that person would not be eligible for parole until at least fifteen years of the life sentence had been served. A person whose death sentence had been commuted to life imprisonment would not be eligible for a pardon unless the Board of Pardons and Paroles was satisfied that evidence showed the person was innocent of the crime, the board voted unanimously to grant a pardon, and the governor concurred in and approved the granting of the pardon.<sup>2</sup>

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<sup>1</sup> Ala. Const. art. V, § 124.

<sup>2</sup>*Alabama’s Death Penalty Appeals Process*, Office of Alabama Attorney General Luther Strange at 10, available at <http://www.ago.state.al.us/File-Death-Penalty-Appeals-Process> (last visited July 6, 2016). However, it is important to note that in 2003, the Alabama legislature passed bill 15-22-27(b), which eliminated the possibility of parole for death row prisoners who have received commutations—regardless of the Governor’s order. See *supra*, note 119.

### b. The Decision Maker(s)

The power to grant **commutations** and **reprieves** in capital cases lies exclusively with the governor.<sup>3</sup> Alabama law does provide for an independent Board of Pardons and Paroles (“Board”) with members appointed by the governor under Ala. Code § 15-22-36(a) (2005). However, to date, the Board has not had a role in a *capital* clemency case, and its powers are generally limited to granting pardons and paroles in cases that do not involve treason, impeachment, or a sentence of death.<sup>4</sup>

### c. When to Bring a Petition

There is no statutorily required timeframe within which a capital clemency petition must be brought.<sup>5</sup> According to the American Bar Association’s Alabama Death Penalty Assessment Report (“ABA Report”), published in 2006, most clemency petitioners file petitions only after all appeals have been exhausted and an execution date has been set.<sup>6</sup>

### d. How to Bring a Petition

Alabama law does not provide a set procedure for filing a petition for clemency.<sup>7</sup> Rather, the governor has discretion to set the method of application and to determine what materials should be included for review in support of the petition.<sup>8</sup> As of the date that this memorandum was last updated, the governor’s office has not established any directives, executive orders, or other statements concerning the way in which capital clemency petitions will be processed. **Nevertheless, practitioners should always attempt to contact someone within the governor’s office prior to drafting a capital clemency petition to confirm that there have been no policy changes or amendments to the process.**

### e. Hearing Practice

The governor has discretion to grant a hearing on and/or an investigation into a petitioner’s application for clemency.<sup>9</sup> As part of the ABA Report, an interview was conducted in September 2005 with Vernon Barnett, who at the time served as legal counsel to former governor Bob Riley. According to Mr. Barnett, Governor Riley’s practice was to grant a hearing if requested by the petitioner.<sup>10</sup> However, there are no public records for hearings that took place during Governor Riley’s tenure. The ABA Report also indicates that “[t]he governor is not required to attend [the hearing], but Governor Riley [did] attend these hearings and [was] very much involved in all such reviews.”<sup>11</sup>

<sup>3</sup> See Ala. Const. art. V, § 124 (“The governor shall have power to grant reprieves and commutations to persons under sentence of death.”).

<sup>4</sup> Ala. Code § 15-22-36(a) (2005).

<sup>5</sup> American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 165 (June 2006).

<sup>6</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems*, *supra* note 5, at 165.

<sup>7</sup> *Id.*

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

<sup>9</sup> *Id.* at 165.

<sup>10</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems*, *supra* note 5, at 166.

<sup>11</sup> *Id.* at 166.

Alabama law requires a district attorney to be present at all clemency hearings before the governor.<sup>12</sup> At those hearings, the district attorney is also responsible for providing the governor with all of the relevant information in the state's possession concerning the petitioner.<sup>13</sup>

[The District Attorney] shall cooperate fully with the governor and with [the Board] with reference to any cases which have arisen in their respective circuits, counties, or division of a county and shall render all assistance possible in furnishing information needed by the governor or the Board of Pardons and Paroles, furnishing any information and making any investigation which may be needed in the proper handling of such pardon or parole and the investigation thereof.<sup>14</sup>

The hearings do not have a formal structure and are not considered judicial proceedings.<sup>15</sup> As a result, the rules of evidence do not apply, and the governor has discretion over what evidence may be introduced.<sup>16</sup> For example, Governor Riley generally closed the hearings to the public and the victim's family and only permitted the petitioner to present evidence and/or witnesses.<sup>17</sup>

#### f. Responding to a Petition

The statute governing clemency in Alabama does not require the governor to make public any information concerning either a grant or denial of clemency.<sup>18</sup> There is also "no required time limit for the governor to make his/her decision regarding the clemency petition, and the governor is constrained only by the date of the execution."<sup>19</sup>

## II. State Political and Judicial Information

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

Governor **Robert J. Bentley** is currently serving his second term after being reelected in 2014. Unlike many politicians in Alabama who come from legal backgrounds, Governor Bentley ran for office after a long career as a dermatologist.<sup>20</sup> Prior to being elected governor, Bentley began his political career by serving two terms as a representative in the Alabama House of Representatives.<sup>21</sup>

Politically, Governor Bentley is considered by some to be a "populist Republican."<sup>22</sup> An article in the *Anniston Star* described "Populist Republicans" as a "splinter branch of the Republican Party formed by refugees of the state's defunct populist movement, which once tried to organize farmers and industrial

<sup>12</sup> Ala. Code § 12-17-184(16) (1995).

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

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

<sup>15</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems*, *supra* note 5, at 166.

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

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

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

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

<sup>20</sup> Tim Lockette, *Which Doctor? Voters to choose 'populist Republican' or 'Alabama Democrat' Tuesday*, The Anniston Star (Nov. 1, 2014), [http://www.annistonstar.com/news/article\\_b96a9226-620d-11e4-b24e-27b476b97b54.html](http://www.annistonstar.com/news/article_b96a9226-620d-11e4-b24e-27b476b97b54.html).

<sup>21</sup> *The Office of the Governor*, <http://governor.alabama.gov/governor/> (last visited July 7, 2016).

<sup>22</sup> Lockette, *supra* note 20.

workers around their own interests.”<sup>23</sup> In that same article, Governor Bentley referred to the party as one powered by the people, calling himself a “Walmart Republican,” as opposed to a “country club Republican.”<sup>24</sup>

Throughout most of his tenure as chief executive, Governor Bentley has reportedly sought to make headway on reducing the state budget deficit, but faced resistance from legislators.<sup>25</sup> In addition, Governor Bentley has faced allegations and a potential impeachment action concerning an alleged extra-marital affair with a member of his staff.<sup>26</sup> On July 16, 2016, the Alabama House Judiciary Committee appointed a special prosecutor to investigate allegations that Governor Bentley improperly used state funds in pursuit of this relationship.<sup>27</sup>

Governor Bentley’s stance in favor of the imposition of the death penalty has remained consistent since

**"My people look at the trial, the evidence. They go over the crime looking for any evidence the person didn't do it and to make sure the process was carried out correctly...Then they come to me, and we review it. [...]"**

**I took an oath to uphold the law of the state and the law allows the death penalty in certain cases. [...] Ultimately a jury makes a decision to impose the death sentence and my duty is to carry out that sentence barring a case of extraordinary circumstances."**

before he ran for office. Governor Bentley stated in 1998 that he was in favor of expanding the use of the death penalty and was also in favor of limiting appeals in capital cases.<sup>28</sup> There have been six executions during his two terms, several of which were accompanied by unsuccessful public pleas for clemency.<sup>29</sup> When asked whether the executions he allowed to proceed weighed on him, Governor Bentley said, **"Yes they have. Very much so. And they should. We are talking about a human life in each case."**<sup>30</sup> Governor Bentley also claimed that he was so uncertain about his decision to grant or

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

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

<sup>25</sup> Associated Press, *Legislature’s Special Session Ends Without Budget*, Times Free Press (Aug. 11, 2015), <http://www.timesfreepress.com/news/local/story/2015/aug/11/legislatures-special-session-ends-without-budget/319384/>.

<sup>26</sup> Kelsey Davis, *Ex-Whitewater Counsel to Lead Bentley Impeachment Probe*, Montgomery Adviser (July 16, 2016), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2016/07/15/former-counsel-clinton-probe-lead-bentleys-impeachment-investigation/87129542/>.

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

<sup>28</sup> *Robert Bentley on Crime*, OnTheIssues (last updated Nov. 30, 2014), [http://www.ontheissues.org/Governor/Robert\\_Bentley\\_Crime.htm](http://www.ontheissues.org/Governor/Robert_Bentley_Crime.htm).

<sup>29</sup> See, e.g., Stephen A. Cooper, *The Death Penalty and Martin Luther King, Jr.: ‘The Time is Always Right to do What is Right’*, Huffington Post (Jan. 18, 2016), [http://www.huffingtonpost.com/stephen-a-cooper/the-death-penalty-and-mar\\_b\\_9005270.html](http://www.huffingtonpost.com/stephen-a-cooper/the-death-penalty-and-mar_b_9005270.html) (former Alabama public defender opines that executing Christopher Turner by lethal injection would be cruel and unusual); Letter from Esther Brown, Exec. Dir., Project Hope to Abolish the Death Penalty, to Gov. Robert Bentley (June 24, 2013) available at <http://www.phadp.org/?q=node/363> (Governor Bentley should prevent that state assisted suicide of Andrew Lackey); Keith Clines, *Retired Madison County Judge who Sentenced Convenience Store Killer to Death Changes His Mind*, AL.com (Sept. 8, 2011), [http://blog.al.com/breaking/2011/09/retired\\_madison\\_county\\_judge\\_w.html](http://blog.al.com/breaking/2011/09/retired_madison_county_judge_w.html) (sentencing judge wrote letter to Governor Bentley asking that Derrick Mason’s sentence be reduced to life imprisonment).

<sup>30</sup> Charles J. Dean, *Governors Almost Never Stop Executions*, AL.com (Jan. 21, 2016), [http://www.al.com/news/index.ssf/2016/01/governors\\_and\\_executions\\_they.html](http://www.al.com/news/index.ssf/2016/01/governors_and_executions_they.html).



withhold clemency in one unidentified case that he cried and prayed about it.<sup>31</sup> Ultimately, Governor Bentley denied clemency and the prisoner was executed.<sup>32</sup>

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

Under the Alabama Constitution, the legislature consists of a Senate and a House of Representatives.<sup>33</sup> State Senators represent districts of equal population that are created after each U.S. Census; however, the Alabama Constitution limits the number of senatorial districts to 35.<sup>34</sup> The 105 members of the State House of Representatives likewise represent equally sized districts.<sup>35</sup> Unlike representatives in many other states, however, Alabama State House members are elected to four-year, rather than two-year, terms.<sup>36</sup>

Alabama's House of Representatives is dominated by members of the Republican Party. Seventy-one (71) out of the total 105 representatives are Republicans, while 33 are Democrats.<sup>37</sup> In the State House, the Democrats primarily represent the districts with the highest African American populations. For example, Macon, Lowndes, Bullock, Wilcox, Hale, and Dallas Counties are six of the ten counties in Alabama where there is an African American majority population.<sup>38</sup> Each of the six counties is included in a district that is allotted only one representative.<sup>39</sup> All six districts are represented by a Democrat.<sup>40</sup> Republican dominance is even more prominent in the Senate, where Republicans hold 26 out of the total 35 seats.<sup>41</sup> Two of the Democratic senators are white, while the remaining seven are African American.<sup>42</sup>

### **c. Judicial Review of State Clemency**

The Alabama Supreme Court has repeatedly held that the power to grant clemency rests exclusively with the governor. In *Wilson v. State*, 105 So. 2d 66 (Ala. 1958), Wilson's defense counsel challenged his death sentence, arguing that the death penalty was an excessive punishment for Wilson's role in a robbery.<sup>43</sup> The Alabama Supreme Court noted in their opinion that "[i]f any clemency is to be extended to the appellant, it must come from executive action."<sup>44</sup> In expanding on their opinion on a motion for rehearing, the court again commented on clemency, saying that "[t]he trial court did not have, nor does this court have, authority to modify the punishment."<sup>45</sup> Roughly fifteen years later, in *Liddell v. State*, 251 So. 2d 601

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Ala. Const. art. IV, § 44.

<sup>34</sup> See Ala. Const. art. IV, § 50; see also Ala. Const. art. IX, § 200.

<sup>35</sup> Ala. Const. art. IV, § 50.

<sup>36</sup> *Id.*

<sup>37</sup> *Members of the House*, Alabama State Legislature, <http://www.legislature.state.al.us/aliswww/Representatives.aspx> (last visited July 1, 2016).

<sup>38</sup> Center for Business and Economic Research, *Dimensions of Alabama's Black Population*, Univ. of Ala. <http://cber.cba.ua.edu/rbriefs/black.html> (last visited July 7, 2016).

<sup>39</sup> *Representatives by District*, Alabama State Legislature, <http://www.legislature.state.al.us/aliswww/ISD/House/ALRepsbyDistrict.aspx> (last visited July 7, 2016).

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

<sup>41</sup> *Members of the Senate by District*, Alabama State Legislature, <http://www.legislature.state.al.us/aliswww/Senators.aspx> (last visited July 1, 2016).

<sup>42</sup> *Senators by District*, Alabama State Legislature, <http://www.legislature.state.al.us/aliswww/ISD/Senate/ALSenatorsbyDistrict.aspx> (last visited July 7, 2016).

<sup>43</sup> *Id.* at 70.

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

<sup>45</sup> *Id.* at 71 (citing *Scott v. State*, 22 So. 2d 529 (Ala. 1945)).

(Ala. 1971), the Alabama Supreme Court remained consistent on the issue of executive clemency as the only means through which to modify an otherwise “properly” assessed sentence.<sup>46</sup> James Liddell, Jr. was convicted of rape and sentenced to death. Liddell’s defense counsel filed a motion for a new trial based on several grounds, including a claim that sentencing Liddell to death for rape violated his Eighth Amendment protection from cruel and unusual punishment.<sup>47</sup> The court held in *Liddell* that “[u]nder Alabama constitutional and statutory provisions . . . a court has no power to fix the punishment of one convicted of rape, nor to commute a death sentence imposed by a jury. Such matters are solely within the province of the jury or governor.”<sup>48</sup> To date, there is no indication that Alabama courts have deviated from the decisions in either *Wilson* or *Liddell* in concluding that the power to adjust a capital sentence downward rests solely with the governor.

### 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

In 2015, the U.S. Census Bureau estimated Alabama’s population to be 4,858,979.<sup>49</sup>

<sup>46</sup> *Liddell v. State*, 251 So. 2d 601 (Ala. 1971).

<sup>47</sup> *Id.* at 604.

<sup>48</sup> *Id.* at 606.

<sup>49</sup> Quick Facts, *Alabama*, United States Census Bureau, <https://www.census.gov/quickfacts/table/PST045215/01> (last visited July 8, 2016).



## ii. Political Breakdown

Alabama is a majority conservative state.<sup>50</sup> Polling companies often describe it as among the most “conservative” states in the country, based on voter self-identification.<sup>51</sup> In the 2016 General Election, more than 62% of votes were cast for Republican presidential candidate Donald J. Trump.<sup>52</sup> In the 2012 General Election, 60% of the 2,074,338 votes cast went to the Republican candidate for President, Mitt Romney.<sup>53</sup>

At the state level, members of the Republican Party dominate all three branches of the government. The Republicans hold a two-to-one majority in the State House,<sup>54</sup> and a three-to-one majority in the State Senate.<sup>55</sup>

Under Alabama’s Constitution, judges are elected by people within the territorial jurisdiction of their respective courts.<sup>56</sup> Thus, members of the Alabama Supreme Court and the criminal and civil courts of appeals are elected at-large.<sup>57</sup> One notable alumnus of the Alabama Supreme Court is former Chief Justice Roy S. Moore, who famously had a stone monument depicting the Ten Commandments erected in the rotunda of the State Supreme Court in 2001.<sup>58</sup>

Alabama is also almost universally represented by Republicans on the national stage. As of summer 2016, both of Alabama’s United States Senators are Republicans, and all but one member of the state’s seven-person congressional delegation are Republicans.<sup>59</sup>

## iii. Religious Make-Up

According to a Pew Research Poll, 80% of Alabamians consider themselves to be Christian.<sup>60</sup> Within that group, 49% consider themselves to be Evangelical Christians.<sup>61</sup> The largest single denomination is Southern Baptist, with 25% of Alabama’s Christians claiming membership. Alabama has the third highest weekly church attendance across the nation according to a Gallup poll.<sup>62</sup>

<sup>50</sup> See, e.g., Frank Newport, *Alabama, North Dakota, Wyoming Most Conservative States*, Gallup (Feb. 1, 2013), <http://www.gallup.com/poll/160196/alabama-north-dakota-wyoming-conservative-states.aspx>; Jeffrey M. Jones, *Ideology: Three Deep South States are the Most Conservative*, Gallup (Feb. 3, 2010), <http://www.gallup.com/poll/125480/ideology-three-deep-south-states-conservative.aspx>.

<sup>51</sup> Frank Newport, *supra* note 50.

<sup>52</sup> *Alabama Elections 2016*, Ballotpedia, [https://ballotpedia.org/Alabama\\_elections\\_2016](https://ballotpedia.org/Alabama_elections_2016) (last visited Nov. 11, 2016).

<sup>53</sup> *Amended Canvas of Results - General Election*, State of Alabama (2012), <http://www.alabamavotes.gov/ElectionInfo/ElectionInfo2012.aspx?a=voters>.

<sup>54</sup> *Members of the House*, *supra* note 37.

<sup>55</sup> *Members of the Senate by District*, *supra* note 41.

<sup>56</sup> Ala. Const. art. VI, § 152.

<sup>57</sup> See *id.*; see also Ala. Code § 12-3-2 (1975); see also Alabama Appellate Courts, *Qualifications of Judges*, Judicial Alabama, [http://judicial.alabama.gov/appl\\_qual\\_elect\\_appt.cfm](http://judicial.alabama.gov/appl_qual_elect_appt.cfm) (last visited Oct. 20, 2015).

<sup>58</sup> *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

<sup>59</sup> *Alabama*, GovTrack, <https://www.govtrack.us/congress/members/AL> (last visited July 1, 2016).

<sup>60</sup> *Religious Landscape Study: Alabama*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/alabama/> (last visited Oct. 20, 2015).

<sup>61</sup> *Id.*

<sup>62</sup> *Frequent Church Attendance Highest in Utah, Lowest in Vermont*, Gallup (Feb. 17, 2015), <http://www.gallup.com/poll/181601/frequent-church-attendance-highest-utah-lowest-vermont.aspx>.

#### iv. Income/Socioeconomic Breakdown

Alabama is one of the poorest states in the country. Its 18.5% poverty rate is above the 13.5% national average, and the median household income of \$43,623 is more than \$10,000 below the national median income of \$53,889.<sup>63</sup> Alabama Possible, a nonprofit that tracks poverty statistics, reports that nearly one out of every five Alabamians is on food stamps and that more than one in four Alabama children are considered to be “food insecure.”<sup>64</sup> Additionally, Alabama’s poverty rate is higher among African Americans and Latinos than whites.<sup>65</sup> The majority African American, rural Sumter and Wilcox counties are the poorest counties in the state, with each having a near 50% poverty rate among their African American populations.<sup>66</sup>

Governor Bentley has attempted to implement reforms directed at addressing poverty.<sup>67</sup> In April 2015, Governor Bentley signed an executive order creating the Alabama Health Care Improvement Task Force.<sup>68</sup> The 38-member task force was designed to develop methods to improve access to health care by making it more affordable, including telemedicine and increasing resources in rural areas.<sup>69</sup> Also in 2015, Governor Bentley proposed legislation that would encourage two-year colleges in Alabama to work with low-income students in the seventh grade to “offer tutoring, academic advising and college entrance exam preparation, as well as workshops, summer programs, college visits and other efforts [to] prepare students to succeed.”<sup>70</sup> Governor Bentley addressed the issue of widespread childhood poverty in a 2014 speech, stating “[e]veryone in this room knows Alabama is one of the poorest states in America, where one in four children live in poverty.”<sup>71</sup>

#### b. Criminal Justice

##### i. Overall Prison Population

Statistics are derived from the 2015 Alabama Department of Corrections (ADOC) Annual Report,<sup>72</sup> unless otherwise noted.

- o **Total Offender Population:** 31,264

<sup>63</sup> State & County Quick Facts, *Alabama*, United States Census Bureau (Oct. 14, 2015), <http://www.census.gov/quickfacts/table/PST045215/01>. See also State & County Quick Facts, *United States*, United States Census Bureau (Oct. 14, 2015), <https://www.census.gov/quickfacts/table/PST045216/00>.

<sup>64</sup> *2015 Alabama Poverty Data Sheet*, Alabama Possible, <http://alabamapossible.org/datasheet/> (last visited Oct. 20, 2015).

<sup>65</sup> State & County Quick Facts, *supra* note 62.

<sup>66</sup> *2015 Alabama Poverty Data Sheet*, *supra* note 63.

<sup>67</sup> The Office of the Governor, *supra* note 21.

<sup>68</sup> Press Release, The Office of Alabama Governor Robert Bentley, Governor Bentley Unveils Alabama Health Care Improvement Task Force (Apr. 6, 2015), <http://governor.alabama.gov/newsroom/2015/04/governor-bentley-unveils-alabama-health-care-improvement-task-force/>.

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

<sup>70</sup> Charles J. Dean, *Gov. Bentley: “We Rank Dead Last in Some of the Things Dealing with People’s Lives”*, AL.com (Feb. 5, 2016), [http://www.al.com/news/index.ssf/2016/02/gov\\_bentley\\_we\\_rank\\_dead\\_last.html](http://www.al.com/news/index.ssf/2016/02/gov_bentley_we_rank_dead_last.html).

<sup>71</sup> Charles J. Dean, *Alabama: The Sixth Poorest State in America*, AL.com (Jan. 16, 2014), [http://blog.al.com/wire/2014/01/alabama\\_the\\_sixth\\_poorest\\_stat.html](http://blog.al.com/wire/2014/01/alabama_the_sixth_poorest_stat.html).

<sup>72</sup> Alabama Department of Corrections, *Annual Report Fiscal Year 2015*, <http://www.doc.state.al.us/docs/AnnualRpts/2015AnnualReport.pdf> (last visited July 7, 2016).

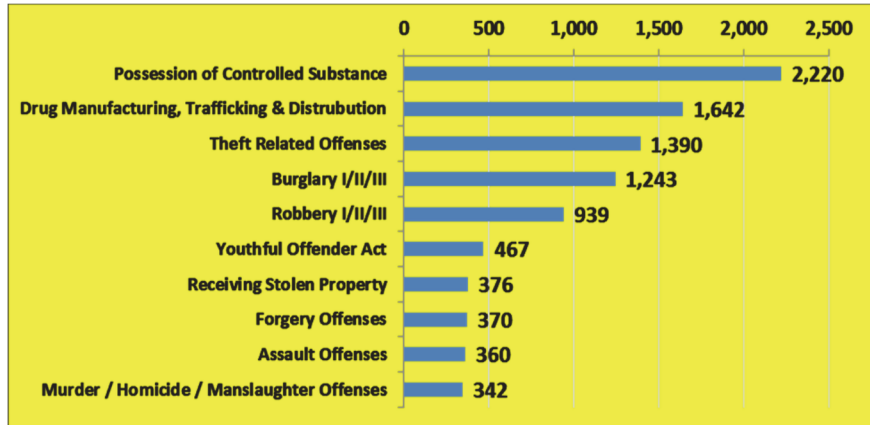
- **Total “In-House” Population:** 24,191 (“In-House” refers to prisoners currently housed in Alabama state correctional facilities.)

This figure has been cited in the media as well above the state’s carceral capacity. One article described the prison system as operating at “over 185 percent capacity with around 25,000 inmates, many of them non-violent offenders and probation violators.”<sup>73</sup>

- **Total Male Population:** 28,656
- **Total Female Population:** 2,608

**Penal Demographics:** There are roughly 4,000 more African American than white prisoners within ADOC’s jurisdiction. ADOC has 17,551 black prisoners in its jurisdiction, and 13,583 white prisoners. According to the United States Census Bureau, in 2015, black or African Americans were estimated to make up roughly 26% of the total Alabama population.<sup>74</sup> In contrast, black prisoners made up roughly 56% of the total offender population in 2015.<sup>75</sup>

**Most Common Crimes:** The graph to the right, taken from the Annual Report, shows the most common convictions of 9,349 people admitted into custody in 2015. The most common public order offenses were possession of a controlled substance and drug manufacturing, trafficking, and distribution.



## ii. Death Row Population and Demographics<sup>76</sup>

**Total No. of Prisoners on Death Row:** 184

- **No. of Women on Death Row:** 5
- **No. of Black Prisoners on Death Row:** 94 (93 men, 1 woman)
- **No. of White Prisoners on Death Row:** 87 (83 men, 4 women)
- **No. of Prisoners Whose Race Is Listed As “Other”:** 3

<sup>73</sup> Mary Troyan, *Bentley Brags About Prison Reform on Capitol Hill*, Montgomery Advisor (July 15, 2015), <http://www.montgomeryadvertiser.com/story/news/local/alabama/2015/07/14/bentley-brags-prison-reform-capitol-hill/30131219/>.

<sup>74</sup> *Population Demographics for Alabama 2016 and 2015*, Suburban Stats, <https://suburbanstats.org/population/how-many-people-live-in-alabama> (last visited July 8, 2016).

<sup>75</sup> Alabama Department of Corrections, *supra* note 72.

<sup>76</sup> Statistics are taken from Alabama Department of Corrections, unless otherwise noted. See *Alabama Inmates Currently on Death Row*, Alabama Department of Corrections (last updated Dec. 21, 2016), <http://www.doc.state.al.us/DeathRow.aspx>.

Alabama's death row population as compared to its total population gives the state the highest "Death Penalty Prisoner Per Capita" rate in the country.<sup>77</sup> Alabama has roughly 40 death row prisoners per million people, **well above the national average of roughly 12 death row prisoners per million people.**<sup>78</sup>

### iii. Executions (Past and Pending)

Statistics in this section are taken from the Death Penalty Information Center,<sup>79</sup> unless otherwise noted.

#### Total Number of Executions since 1973: 57

- **Most Recent Execution:** December 8, 2016
- **Number of Executions Scheduled for 2016:** 3
- **Number of Executions Scheduled for 2017:** 0
- **Stays Issued in 2016:** 2

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

The most recent death row exoneration in Alabama was in 2015.<sup>81</sup> **Anthony Hinton** spent nearly 30 years on death row before being released on April 3, 2015.<sup>82</sup> Hinton's trial lawyer failed to hire adequate experts to show Mr. Hinton's innocence.<sup>83</sup> Ultimately, the Alabama Supreme Court remanded Hinton's case to the Alabama courts based on inadequate representation, and prosecutors decided not to retry him after the State's firearms experts could not link the bullets used in the crime to Hinton's gun.<sup>84</sup>

**Daniel Wade Moore** was acquitted in 2009 after spending roughly seven years on death row.<sup>85</sup> Shortly after Moore's first trial, the prosecutor informed the judge that potentially exculpatory evidence was not turned over.<sup>86</sup> After the judge vacated Moore's sentence and released him from jail, an appeals court overturned the lower court's ruling and ordered a new trial.<sup>87</sup> Moore's second trial resulted in a mistrial after

<sup>77</sup> Brendan Kirby, *Death Penalty Capital: Alabama has Nations Most Death Row Inmates Per Capita*, AL.com (May 1, 2015), [http://www.al.com/news/index.ssf/2015/05/death\\_penalty\\_capital\\_alabama.html](http://www.al.com/news/index.ssf/2015/05/death_penalty_capital_alabama.html).

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

<sup>79</sup> *Death Penalty Information Center*, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org) (last visited July 7, 2016).

<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> *Innocence: List of Those Freed on Death Row*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited July 3, 2016).

<sup>82</sup> *Innocence Cases*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/node/4900#152> (last visited July 3, 2016).

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

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

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

<sup>86</sup> Alexandra Gross, *Daniel Wade Moore*, Univ. of Mich. Nat'l. Registry of Exonerations (June 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3488>.

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

the defense presented evidence that strongly implicated the victim's husband.<sup>88</sup> At his third trial in 2009, Moore was acquitted and released from prison on the same day.<sup>89</sup>

In 2003, **Wesley Quick** was acquitted of a double murder after it was determined that his friend actually committed the crime.<sup>90</sup> Quick's first trial resulted in mistrial due to juror misconduct.<sup>91</sup> Quick was convicted after a second trial and sentenced to death.<sup>92</sup> Quick's attorney successfully argued that Quick was denied a free copy of the transcript of his first trial, which he was entitled to as an indigent defendant, and the Alabama Court of Criminal Appeals vacated and remanded the case for a third trial.<sup>93</sup> During the third trial, Quick's friend testified about details of the crime scene that he seemingly could not have known had he not committed the murders himself, and Quick was acquitted of the charges by the jury.<sup>94</sup>

**Randal Padgett** was acquitted in 1997 after spending five years on death row for allegedly killing his wife.<sup>95</sup> During Padgett's first trial, the prosecution withheld exculpatory DNA evidence for several days.<sup>96</sup> Defense counsel requested a mistrial, but the judge denied the request and the jury convicted Padgett of murder with the recommendation of life imprisonment.<sup>97</sup> However, the judge overrode the recommendation and sentenced Padgett to death.<sup>98</sup> After the Alabama Court of Criminal Appeals overturned the conviction due to the prosecution's failure to turn over the DNA evidence, Padgett was acquitted during his second trial after the defense presented testimony indicating Padgett's innocence.<sup>99</sup>

Finally, **Walter McMillian** was the first death row prisoner known to have been exonerated in Alabama since the death penalty was reinstated was in 1993.<sup>100</sup> McMillian's conviction was overturned after the show *60 Minutes* revealed that prosecutors suppressed exculpatory evidence during trial and that their main witnesses lied while testifying.<sup>101</sup> The Alabama Court of Criminal Appeals overturned the conviction and ordered a new trial.<sup>102</sup> Before the trial could occur, the prosecution dismissed the charges and McMillian was freed.<sup>103</sup>

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

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

<sup>90</sup> *Innocence Cases*, *supra* note 81.

<sup>91</sup> Alexandra Gross, *Wesley Quick*, Univ. of Mich. Nat'l. Registry of Exonerations (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3556>.

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

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

<sup>94</sup> *Id.*

<sup>95</sup> *Innocence Cases*, *supra* note 81.

<sup>96</sup> Alexandra Gross, *Larry Randal Padgett*, Univ. of Mich. Nat'l. Registry of Exonerations (June 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3521>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

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

<sup>100</sup> *Innocence Cases*, *supra* note 81.

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

<sup>102</sup> Alexandra Gross, *Walter McMillian*, Univ. of Mich. Nat'l. Registry of Exonerations (June 2012), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3461>.

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



### c. Public Opinion Polling

There is no recent (within the last decade) conventional polling data publicly available regarding Alabaman perspectives about the death penalty and clemency.

The most recent national poll from October 2015 shows that 61% of Americans still support usage of the death penalty.<sup>104</sup> The website “I Side With” indicates that 79% of self-identified Alabamans who have taken the poll on the website indicated that they support the death penalty.<sup>105</sup> Based on the method through which the data is collected, however, it is important to note that this information may not be wholly reliable.

## IV. Additional Information for Consideration in Clemency

### a. Past Capital Clemency Decisions

#### i. Grants

Since 1976, clemency has been granted in an Alabama capital case only once.<sup>106</sup> In 1999, Governor Forest H. (“Fob”) James, Jr. granted clemency to **Judith Ann Neelley**.<sup>107</sup> A white woman originally from Murfreesboro, Tennessee, Neelley was accused and convicted of the murder of a 13-year-old girl who was kidnapped and raped by Neelley’s then-husband.<sup>108</sup> Testimony further revealed that Neelley injected the child with drain cleaner, shot her, and shoved her into Little River Canyon in northeast Alabama.<sup>109</sup> At the time they were arrested, the Neelleys had also murdered at least one other person, a woman named Janice Hancock, who was similarly tortured before being killed. The details of their crimes gained national media attention.<sup>110</sup> After she was convicted, the jury recommended by a 10-2 vote that Neelley be sentenced to life imprisonment without parole.<sup>111</sup> However, the trial judge overrode the sentencing recommendation and sentenced Neelley to death.<sup>112</sup>

<sup>104</sup> *Death Penalty*, Gallup, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited July 7, 2016).

<sup>105</sup> *Polls: Do You Support the Death Penalty*, I Side With (last updated July 3, 2016), <https://www.isidewith.com/poll/49841143/9333299>.

<sup>106</sup> *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited July 3, 2016); see also *Neelley v. Walker*, 67 F. Supp. 3d 1319, 1322 (M.D. Ala. 2014) (plaintiff represents that no Alabama governor had commuted a death sentence since 1962).

<sup>107</sup> *Clemency*, *supra* note 105.

<sup>108</sup> *Id.*

<sup>109</sup> Mike Cason, *Judith Ann Neelley Files Federal Lawsuit Seeking Opportunity for Parole*, AL.com (Apr. 18, 2014), [http://blog.al.com/wire/2014/04/judith\\_ann\\_neelley\\_files\\_feder.html](http://blog.al.com/wire/2014/04/judith_ann_neelley_files_feder.html).

<sup>110</sup> David J. Krajicek, *Ala. Couple Kidnap, Rape and Kill Teenager Lisa Ann Milliken and Janice Chatman in Sick 1982 Crime Spree* (Aug. 2, 2014), <http://www.nydailynews.com/news/crime/ala-couple-twisted-rapes-killings-article-1.1889899>.

<sup>111</sup> *Neelley v. Walker*, 67 F. Supp. 3d 1319, 1322 (M.D. Ala. 2014).

<sup>112</sup> *Id.*



When Neelley was granted clemency in 1999, Governor James initially did not give a reason as to why he commuted Neelley's sentence.<sup>113</sup> However, in 2002, Governor James indicated in an interview with the *Birmingham Post-Herald* that he began investigating the possibility of commutation after he determined that the judge's decision to override the jury was unjust.<sup>114</sup> Outside commentators have suggested that his decision may have partially been motivated by the more culpable nature of Neelley's husband, as well as a possible paternalistic attitude towards female offenders.<sup>115</sup>

**“[T]hat DeKalb County jury, which heard all of the facts [of] that heinous crime in the months right after the events took place, convicted her to life in prison . . . [t]hen, the judge changed the sentence to death.”**

- Former Governor Fob James (July 22, 2002)

After her clemency grant, Neelley filed a federal law suit in an attempt to secure parole.<sup>116</sup> At the time Governor James commuted Neelley's sentence, the law in Alabama provided that “[a]ny person whose sentence to death has been commuted by the governor to life imprisonment shall not be eligible for a parole from the Board of Pardons and Paroles until he shall have served at least [fifteen] years of such life sentence, and any parole granted contrary to the provisions of the section shall be void.”<sup>117</sup> However, Alabama law also provided that a person convicted of a capital offense must be sentenced to either “life imprisonment without parole or to death.”<sup>118</sup>

In 2003, the Alabama Legislature passed a law that altered section 15-22-27(b) so that “[a]ny person whose sentence to death has been commuted by the governor shall not be eligible for a parole.”<sup>119</sup> The amended law was made retroactive back to September 1998.<sup>120</sup> Neelley's federal lawsuit contended that the 2003 amendment was an *ex post facto* law passed specifically to bar her from pardon or parole. Additionally, Neelley argued that she was the only one that the law could apply to, and the amendment was passed with the intention of applying specifically to Governor James' clemency grant. On March 25, 2016, a federal judge ruled that Neelley had surpassed the statute of limitations on her claim that the 2003 amendment was an impermissible *ex post facto* law, without addressing the merits of the claim.<sup>121</sup> Neelley's attorney has indicated a plan to appeal the decision.<sup>122</sup>

<sup>113</sup> *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited July 5, 2016).

<sup>114</sup> Scott Wright, *Fob James Discusses Neelley Sentence Commutation*, *The Post* (July 22, 2002), <http://www.postpaper.com/jamesneelley.htm>.

<sup>115</sup> Norman L. Greene, *Sparing Cain: Executive Clemency in Capital Cases*, 28 *Cap. U. L. Rev.* 557, 577 (2000).

<sup>116</sup> See generally *Neelley*, 67 *F. Supp.* 3d 1319.

<sup>117</sup> Ala. Code § 15-22-27(b) (1975).

<sup>118</sup> Ala. Code § 13A-5-39 (1975).

<sup>119</sup> Ala. Code § 15-22-27(b).

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

<sup>121</sup> Mike Cason, *Judge Rules Judith Ann Neelley Waited too Late to Challenge State Law*, *AL.com* (Mar. 25, 2016), [http://www.al.com/news/index.ssf/2016/03/judge\\_rules\\_judith\\_ann\\_neelley.html](http://www.al.com/news/index.ssf/2016/03/judge_rules_judith_ann_neelley.html).

<sup>122</sup> *Id.*

## ii. Denials (Where Newsworthy or Controversial)

On January 21, 2016, **Christopher Brooks** was executed after his petition for writ of certiorari was denied by the Supreme Court of the United States.<sup>123</sup> Justice Breyer dissented from the denial, questioning the constitutionality of Alabama's death sentencing scheme that allows a judge to override a jury's sentencing recommendation.<sup>124</sup> Justices Ginsburg and Sotomayor joined in the Court's decision not to grant the stay, but authored a separate concurrence questioning the constitutionality of Alabama's death penalty statute in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016). As time was running out, Brooks' attorneys unsuccessfully argued that Alabama's statutory scheme was unconstitutional under *Hurst*.<sup>125</sup> Brooks' only remaining avenue to avoid execution was a grant of clemency by Governor Bentley.<sup>126</sup> A Catholic Bishop from Birmingham wrote to Governor Bentley asking him to commute Mr. Brooks' sentence.<sup>127</sup> However, Governor Bentley did not disclose publicly his reason for denying clemency.

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

One of the most divisive issues in the state includes the budgetary crisis that has continued through Governor Bentley's two terms. In early 2016, Governor Bentley vetoed the Alabama Legislature's General Fund Budget saying that the budget left Medicaid underfunded by more than \$80 million.<sup>128</sup> The legislature overrode the governor's veto. One representative, who is also involved in the impending impeachment proceedings against Governor Bentley, stated that the governor has "essentially betrayed the trust of the people of Alabama through actions and lies that have caused us to have some doubt about his leadership."<sup>129</sup> Governor Bentley has faced budgetary backlash from fellow Republicans in the state House and Senate before. During his second term, Governor Bentley has continued to push for higher taxes and vetoed budgets that did not include tax hikes, calling special sessions to attempt to push a revised budget through the legislature.<sup>130</sup> Only a few of the tax increases were implemented, and Alabama continues to lag in education, employment, income, and corrections.<sup>131</sup>

In 2015, Governor Bentley also made headlines for closing 31 DMVs, all of which were located in majority black counties.<sup>132</sup> The closures sparked some critics to accuse the governor of racism and "Jim Crow style

<sup>123</sup> *Executions in Alabama*, Equal Justice Initiative <http://eji.org/alabama-executions> (last visited December 21, 2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Kent Faulk, *Alabama Executes Christopher Eugene Brooks for 1992 Murder of Jo Deann Campbell*, AL.com (January 21, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/01/christopher\\_brooks\\_execution\\_s.html](http://www.al.com/news/birmingham/index.ssf/2016/01/christopher_brooks_execution_s.html).

<sup>127</sup> *Id.*

<sup>128</sup> CNN Wire, *Gov. Bentley Says Legislature's Override of His Budget Veto Will Have Severe Impact on Medicaid*, WHNT (April 6, 2016), <http://whnt.com/2016/04/06/watch-live-governor-bentley-to-discuss-legislatures-override-of-his-veto-on-general-fund-budget/>.

<sup>129</sup> *Id.*

<sup>130</sup> Margaret Newkirk, *Torrid Tape Imperils Alabama Governor, \$800 Million Prison Plan*, Bloomberg Politics (Apr. 5, 2016), <http://www.bloomberg.com/politics/articles/2016-04-05/torrid-tape-imperils-alabama-governor-800-million-prison-plan>.

<sup>131</sup> *Id.*

<sup>132</sup> Charles J. Dean, *Gov. Bentley Says Decision to Close Driver's License Offices Not Race-Based*, AL.com (Oct. 6, 2015), [http://www.al.com/news/index.ssf/2015/10/gov\\_bentley\\_says\\_decision\\_to\\_c.html](http://www.al.com/news/index.ssf/2015/10/gov_bentley_says_decision_to_c.html).

electioneering.”<sup>133</sup> Governor Bentley denied the accusations, arguing that the closures were merely a way to help reduce the state’s budget deficit.<sup>134</sup>

State lawmakers passed a criminal justice reform bill that aimed to reduce overcrowding by reducing the penalties for nonviolent drug offenses.<sup>135</sup> The bill called for expansion of parole and other methods of supervision to reduce the number of offenders entering prisons.<sup>136</sup> However, the bill was signed with the caveat that it would take effect on January 30, 2016, only if the estimated \$26 million was available to fund the reforms.<sup>137</sup> After the bill was signed into law by Governor Bentley, Alabama State Senator Ward said, “[t]his is the first step in a long road we have ahead to fixing our corrections system.”<sup>138</sup>

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

#### i. Current Events

Since May 2016, the Supreme Court of the United States has asked the Alabama Court of Criminal Appeals to reconsider **three death penalty cases** in light of its January 2016 ruling in *Hurst v. Florida*.<sup>139</sup>

At issue is Alabama’s sentencing statute, which allows a judge to override a jury’s sentencing recommendation for life imprisonment without parole in favor of a death sentence.<sup>140</sup> Prior to the Supreme Court vacating and remanding three Alabama sentences, a circuit court judge ruled that in light of *Hurst*, the State could not seek the death penalty against four defendants charged with capital murder.<sup>141</sup> On June 17, 2016, the Court of Criminal Appeals overruled the trial court’s opinion and found that the Alabama sentencing statute remains constitutional.<sup>142</sup> As of the publication of this memorandum, it is still unclear how the June 17, 2016, ruling will affect the three cases that were remanded to the Court of Criminal Appeals by the Supreme Court of the United States.<sup>143</sup>

In December 2016, 101 Alabaman lawyers and law professors asked Governor Bentley to commute the death sentences of 34 Alabama death row prisoners who were sentenced in violation of *Hurst*, i.e., by judicial override of a jury life recommendation.<sup>144</sup> The petition states that Governor Bentley can “use his

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Mike Cason, *Bentley Signs Prison Reform Bill; Ward Says It Will Be Funded*, AL.com (May 21, 2015), [http://www.al.com/news/index.ssf/2015/05/bentley\\_signs\\_prison\\_reform\\_bi.html](http://www.al.com/news/index.ssf/2015/05/bentley_signs_prison_reform_bi.html).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> David Reuter, *Alabama Forced to Confront Criminal Justice Reform*, Prison Legal News (May 5, 2016), <https://www.prisonlegalnews.org/news/2016/may/5/alabama-forced-confront-criminal-justice-reform/>.

<sup>139</sup> Kent Faulk, *For Third Time in 5 Weeks, Supreme Court tells Alabama to Reconsider Death Row Case*, AL.com (June 7, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/06/us\\_supreme\\_court\\_sends\\_third\\_a.html](http://www.al.com/news/birmingham/index.ssf/2016/06/us_supreme_court_sends_third_a.html).

<sup>140</sup> *Id.*

<sup>141</sup> Kent Faulk, *Alabama Appeals Court: Death Sentence Law Constitutional*, AL.com (June 17, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/06/alabama\\_appeals\\_court\\_death\\_se.html](http://www.al.com/news/birmingham/index.ssf/2016/06/alabama_appeals_court_death_se.html).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Kent Faulk, *101 lawyers ask Alabama governor to remove 34 inmates from death row*, AL.com (Dec. 8, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/12/petition\\_seeks\\_removal\\_of\\_inma.html](http://www.al.com/news/birmingham/index.ssf/2016/12/petition_seeks_removal_of_inma.html).

voice to encourage the state legislature to right this wrong, by drafting a new statute.<sup>145</sup> At publication of this memorandum, Governor Bentley's office had yet to comment on the petition.

## ii. History of Race

Since the last slave ship docked in Mobile, Alabama, on July 8, 1860, the state has had a well-documented struggle with racism, discrimination, and violence against people of color.<sup>146</sup> In the 19th century, the Alabama Legislature passed a series of laws that banned free African American people from living in the state. Freed slaves that were discovered in the state were given 30 days to leave before being subject to lashings.<sup>147</sup>

On January 29, 1883, in *Pace v. Alabama*, the Supreme Court of the United States upheld Alabama's anti-miscegenation laws that criminalized interracial relationships.<sup>148</sup> State courts all over the South used the *Pace* decision to support their own anti-miscegenation laws until 1967, when the Supreme Court's opinion in *Loving v. Virginia* invalidated all remaining such laws.<sup>149</sup>

The turn of the century in Alabama was marked by the adoption of a new constitution on September 3, 1901.<sup>150</sup> The new Alabama Constitution openly prohibited interracial marriage and required the institution of separate schools for whites and African Americans.<sup>151</sup> The Constitution also implemented employment and familial restrictions on voting, such as a minimum requirement of employment for the previous 12 months, which reduced the black electorate from roughly 75,000 voters to fewer than 30,000 voters. The Constitution was amended in 2000 to repeal the ban on interracial marriage, but the state has not created a new body of laws addressing this issue.<sup>152</sup> An ill-fated effort was made in 2004 to amend the Constitution to remove the language requiring schools to be segregated based on race and to remove references to poll taxes.<sup>153</sup> Nearly ten years after the first attempt, on November 6, 2012, another proposal to amend the Constitution to remove the same language was voted down.<sup>154</sup> Even though the state is barred from applying discriminatory provisions that are preempted by federal law, the controversial language remains in the Alabama Constitution.

<sup>145</sup> *Id.*

<sup>146</sup> *A History of Racial Injustice: 1860s*, Equal Justice Initiative, <http://racialinjustice.eji.org/timeline/1860s/> (last visited July 8, 2016).

<sup>147</sup> *Id.*

<sup>148</sup> *Pace v. Alabama*, 106 U.S. 583 (1883).

<sup>149</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>150</sup> William H. Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 Ala. L. Rev. 295 (2001).

<sup>151</sup> *A History of Racial Injustice: 1900s*, Equal Justice Initiative, <http://racialinjustice.eji.org/timeline/1860s/> (last visited July 8, 2016).

<sup>152</sup> Aaron Blake, *Alabama was a Final Holdout on Desegregation and Interracial Marriage. It Could Happen Again on Gay Marriage*, Washington Post (Feb. 9, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/>.

<sup>153</sup> Manuel Roig-Franzia, *Alabama Vote Opens Old Racial Wounds*, Washington Post (Nov. 28, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A16443-2004Nov27.html>.

<sup>154</sup> Zachary L. Guyse, Note, *Alabama's Original Sin: Property Taxes, Racism, and Constitutional Reform in Alabama*, 65 Ala. L. Rev. 519 (2013).

Many of the major events of the civil rights movement in the 1950s and 1960s took place in Alabama. The state was the setting of the Montgomery Bus Boycott,<sup>155</sup> the forced desegregation of the University of Alabama,<sup>156</sup> and police violence in Selma on “Bloody Sunday,”<sup>157</sup> among many other important events of that era. The death penalty also played a direct role in the civil rights movement in Alabama. In 1958, the state of Alabama executed Jeremiah Reeves, a black man accused of raping a white woman.<sup>158</sup> Despite the fact that Reeves was only 16 at the time of the alleged rape, Reeves was convicted and sentenced to death in two different trials. Reeves’ trial and execution became a focal point of the ongoing civil rights movement in Montgomery.<sup>159</sup>

The history of lynching in Alabama provides critical context for understanding modern issues with race and the death penalty. Between 1877 and 1950, 363 African Americans were lynched in Alabama.<sup>160</sup> The state ranks fifth among all states in number of lynchings during this time, and two Alabama counties rank among the top 10 highest number of lynchings per county nationwide.<sup>161</sup> Alabama was also the location of the “last recorded lynching in the United States.”<sup>162</sup> A little over 35 years ago, Michael Donald was walking home when two white men affiliated with the United Klans of America forced him into their car at gunpoint.<sup>163</sup> The men drove Donald to another county and bludgeoned him with a tree branch, hitting him over 100 times before slitting his throat. The two men returned to a Klansmen party in Mobile and hung Donald’s body in a nearby tree. It took years and two FBI investigations to convict the two men for their involvement in Donald’s death. In 1986, Donald’s mother won a \$7 million wrongful death lawsuit against United Klans of America.<sup>164</sup>

<sup>155</sup> *A History of Racial Injustice: 1950s*, Equal Justice Initiative, <http://racialinjustice.eji.org/timeline/1860s/> (last visited July 8, 2016).

<sup>156</sup> *Id.*

<sup>157</sup> Trymaine Lee, *Revisiting Selma, Alabama, 50 years after Bloody Sunday*, msnbc.com (Mar. 7, 2015), <http://www.msnbc.com/msnbc/revisiting-selma-alabama-50-years-after-bloody-sunday>.

<sup>158</sup> Jeremy Gray, *The Execution of Jeremiah Reeves: Alabama Teen’s Death Sentence helped drive Civil Rights Movement*, AL.com (Feb. 4, 2016), [http://www.al.com/news/index.ssf/2015/02/the\\_execution\\_of\\_jeremiah\\_reev.html](http://www.al.com/news/index.ssf/2015/02/the_execution_of_jeremiah_reev.html).

<sup>159</sup> *Id.*

<sup>160</sup> *Lynching in America: Confronting the Legacy of Racial Terror*, Equal Justice Initiative, <http://ejl.org/sites/default/files/lynching-in-america-second-edition-summary.pdf>.

<sup>161</sup> *Id.*

<sup>162</sup> Daniel M. Gold, *In the Bad Old Days, Not So Very Long Ago*, N.Y. Times, (Oct. 12, 2008), [http://www.nytimes.com/2008/10/13/arts/television/13lynch.html?\\_r=0](http://www.nytimes.com/2008/10/13/arts/television/13lynch.html?_r=0).

<sup>163</sup> Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. Times (Nov. 1, 1987), <http://www.nytimes.com/1987/11/01/magazine/the-woman-who-beat-the-klan.html?pagewanted=all>.

<sup>164</sup> *Id.*