

ARIZONA

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

Under Article 5, Section 5 of the Arizona Constitution, the clemency power rests with the governor “to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law.”¹

b. The Decision Maker(s)

In Arizona, the governor has ultimate authority to grant clemency in capital cases.² The law, however, provides “restrictions and limitations” on the governor’s clemency authority through the creation of the Board of Executive Clemency (“Board”). The Board “shall have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons. *No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the Board.*”³ Any applications made directly to the governor are forwarded to the Board for its recommendation.⁴

The Board consists of five members appointed by the governor and confirmed by the Arizona Senate.⁵ Appointments must be made “on the basis of broad professional or educational experience;” appointees “shall have demonstrated an interest in the state’s correctional program;” and there cannot be “more than two members from the same professional discipline” on the Board at one time.⁶ Board appointees serve terms of five years and may be “removed by [the] Governor for cause.”⁷

Board members must undergo training. Appointees must complete a four-week course “relating to the activities of the Board,” “designed and administered by the chairman of the Board,” and “conducted by the

¹ Ariz. Const. art. 5, § 5 (Westlaw through First Reg. Sess. & First Special Sess. of the Fifty-Second Legis. (2015)).

² *Id.*

³ Ariz. Rev. Stat. Ann. § 31-402(A) (Westlaw through First Reg. Sess. & First Special Sess. of the Fifty-Second Legis. (2015)) (emphasis added).

⁴ *Id.* at § 31-402(B).

⁵ *Id.* at § 31-401(A); see also A.R.S. § 38-211(A)-(C)

⁶ Ariz. Rev. Stat. Ann. § 31-401(B).

⁷ *Id.* at § 31-401(D)-(E).

Office of the Board of Executive Clemency and the Office of the Attorney General.”⁸ The only specified content of the course is “training in all statutes that pertain to the Board and participation in a decision making workshop.”⁹ There are no other published requirements for materials that must be reviewed or how such training curricula must be developed. However, if the training requirements that are in place are not met, a temporary stay of execution may be granted until the appropriate training can take place.¹⁰

c. When to Bring a Petition

In death penalty cases, clemency is typically not sought, and a hearing date is typically not set, until an execution warrant is issued. Although prisoners may apply to the Board for pardon or commutation prior to an execution date being set, it is unlikely that the Board will hold a capital clemency hearing before an execution is imminent.

d. How to Bring a Petition

The Board of Executive Clemency processes all clemency requests. Applications should be sent to:

The Arizona Board of Executive Clemency
1645 West Jefferson, Suite 101
Phoenix, Arizona 85007

If a death row prisoner seeks commutation or a pardon prior to an execution warrant being issued, the application and submission requirements mirror those for non-capital prisoners.

Pardon Applications

Application for a pardon must include an application form,¹¹ fingerprints, pre-sentence reports and court sentencing documents, documentation of payment of court fees and any ordered restitution, certain court orders that may have been obtained, a minimum of three letters of support (only one of which may be from a family member), an affidavit of publication of the application in the county of conviction, green card return receipts from the certified mailing to the prosecutor in county of conviction, a current resume, and any other documentation the applicant wishes the Board to consider.¹² If denied a pardon, either because the Board did not make a recommendation to the governor or because the governor rejected the recommendation, the applicant must wait three years to apply again.¹³ The exception to the three-year reapplication period is if a warrant of execution is issued during that time frame.¹⁴

⁸ *Id.* at § 31-401(C).

⁹ *Id.*

¹⁰ Tim Gaynor, *Arizona top court stays execution over clemency hearing*, Chicago Tribune (May 15, 2012), http://articles.chicagotribune.com/2012-05-15/news/sns-rt-us-usa-execution-arizonabre84f02i-20120515_1_new-execution-date-clemency-hearing-lethal-injection.

¹¹ *Pardon Application*, Arizona Board of Executive Clemency, available at <https://boec.az.gov/sites/default/files/documents/files/Completed%20Pardon%20Application%20fillable%20rev.%20Jan.%209%202015.pdf> (last visited Aug. 31, 2016).

¹² *Id.*

¹³ Ariz. Admin. Code Art. 2 § R5-4-201(I) (2014).

¹⁴ Ariz. Rev. Stat. Ann. § 31-403(D)(2).

Commutation Applications

Commutation applications have different timing and submission requirements than pardon applications. Unless the Board Chairman approves otherwise, an application for commutation of sentence may not be made until a petitioner has served two years of a sentence with more than one year remaining.¹⁵ Exceptions occur when a judge issues a special “§ 13-603(L) order,” allowing the prisoner to bring a commutation application because he or she feels a required sentence is “clearly excessive”,¹⁶ a petitioner is “under imminent danger of death” (within three months as certified by the Department of Corrections (“DOC”)), or a petitioner has received a warrant of execution from the Supreme Court of Arizona.¹⁷ A judge’s § 13-603(L) order for the Board’s review must state the reason(s) why a sentence seems excessive.¹⁸ Applications for commutation¹⁹ are submitted to the DOC to review for eligibility, in which case the DOC forwards it to the Board.²⁰

Only the completed application form, which includes questions regarding the petitioner’s complete personal, family, and criminal history, needs to be submitted.²¹ Though Arizona law specifies that, following a denial of commutation, a petitioner may not reapply for clemency for at least five years,²² Board policy puts that reapplication period at only three years.²³ The same three exceptions noted above apply to the reapplication period and the initial application.²⁴ Furthermore, if the Board unanimously recommends commutation and the governor does not act within ninety days after receiving the recommendation, the recommendation automatically becomes effective.²⁵ Research has not revealed this ever having occurred in a death penalty case.

e. Hearing Practice

When the Board receives notice that an execution warrant has been issued, the chairman will schedule a clemency hearing.²⁶ According to Board policy, the hearing can encompass consideration of a pardon, commutation, or reprieve, depending on what relief the petitioner seeks. Hearings must take place between one day after the execution date is set, and seven days prior to the execution.²⁷ All Board hearings are

¹⁵ *Board Policy No. 114, Commutation of Sentence*, Arizona Board of Executive Clemency (Aug. 1, 2016), available at <https://boec.az.gov/sites/default/files/Commutation%20Policy%20Rev.%20Aug%201.pdf>.

¹⁶ Ariz. Rev. Stat. Ann. § 13-603(L) (Westlaw through First Reg. Sess. & First Special Sess. of the Fifty-Second Legis. (2015)).

¹⁷ *Board Policy No. 114*, *supra* note 15.

¹⁸ *State v. Garza*, 949 P.2d 980, 982-83 (Ariz. Ct. App. 1998).

¹⁹ *Commutation of Sentence Application*, Arizona Board of Executive Clemency, available at https://boec.az.gov/sites/default/files/documents/files/Revised%20Commutation%20App%20May%2025%202016_1.pdf (last visited Aug. 31, 2016).

²⁰ *Board Policy No. 114*, *supra* note 15.

²¹ *Id.*

²² Ariz. Rev. Stat. Ann. § 31-403(A)-(C).

²³ *Board Policy No. 114*, *supra* note 15.

²⁴ Ariz. Rev. Stat. Ann. § 31-403(D).

²⁵ Ariz. Rev. Stat. Ann. § 31-402(D).

²⁶ *Board Policy No. 107, Warrant of Execution Clemency Hearings*, Arizona Board of Executive Clemency (Feb. 26, 2014), available at <https://boec.az.gov/sites/default/files/documents/files/Board%20Policy%20-Warrant%20of%20Execution%20-%20Clemency%20Hearings%20-107.pdf>.

²⁷ *Id.*

required to be public.²⁸ Hearings are conducted “in an informal manner, without adherence to the rules of evidence required in a judicial proceeding.”²⁹ The following is taken directly from Board policy #107:

Procedure:

1. Upon receipt of a warrant of execution from the Arizona Supreme Court the Executive Director shall set the date for the inmate’s reprieve, commutation and/or pardon hearing. All hearings will be heard on the same date.
2. Written notification of the Clemency Hearing date shall be sent to the Governor of Arizona, Arizona State Supreme Court, Director of the Department of Corrections, assigned or designated defense and state attorney/s, the Correctional Institution Warden (where the hearing is scheduled), known victims, other interested persons or organizations and the inmate. A public notice of the Clemency Hearing/s shall also be posted on the Board’s website.
3. Clemency Hearings for an inmate who is subject to a Warrant of Execution shall be conducted at the correctional facility designated by the Director of the Department of Corrections unless specified by the Executive Director.
4. Clemency Hearings for an inmate subject to a Warrant of Execution will proceed in the following order: a. Pardon Hearing; b. Commutation Hearing; c. Reprieve Hearing.
5. The number and type of hearing held will be determined by the type of hearing requested.
6. All Clemency Hearings for an inmate who is subject to a Warrant of Execution will start at approximately 8:30 a.m. unless security or other concerns at the correctional institution delay the start of the hearing.
7. Upon the setting of a Clemency Hearing date, the Board’s website and posting sheets will be updated as soon as practicable.
8. Time limits on presentations to the Board may be set by the Chairman. If presentation time limits are established the limitations will be placed on all person’s or parties making statements or presentations to the Board. The Chairman shall declare at the start of the Clemency Hearing process what time limits are in place if any.
9. All Clemency Hearings for an inmate who is subject to a Warrant of Execution shall be recorded.
10. The Board shall conduct the Clemency Hearing/s using the guidelines delineated in Board Policy #101.³⁰

²⁸ Ariz. Admin. Code Art. 2 § R5-4-102(A).

²⁹ Ariz. Admin. Code Art.2 § R5-4-102(B).

³⁰ *Board Policy No. 101, Board Member Decorum*, Arizona Board of Executive Clemency (May 27, 2015), available at <https://boec.az.gov/sites/default/files/documents/files/Board%20Member%20Decorum%20101.pdf>.

11. Inmates shall not be required to be present or provide testimony at the hearing.
12. Inmates may be represented by legal counsel or other lawful representative at the hearing.
13. Inmate advocates and supporters may make statements or presentations to the Board.
14. Victims may make statements or presentations to the Board.
15. Victim advocates and supporters may make statements or presentations to the Board.
16. Prosecutorial or officials representing the interests of the State of Arizona may make statements or presentations to the Board.
17. Members of the general public may make statements or presentations to the Board.
18. All statements or presentations are to be addressed to the Board only.
19. The Board Chairman reserves the right to order the removal of any person from a Clemency Hearing who cause a disruption to a hearing or the Clemency Hearing process.
20. The Board may take breaks during any hearing as deemed reasonable by the Chairman.
21. All Clemency Hearings will be conducted and concluded on the date set for the hearing.
22. Upon conclusion of each Clemency Hearing the Chairman/Executive Director shall immediately contact the Governor's Office and advise them of the Board's decision. By no later than the next business day all related documents and forms related to the Board's determination will be forward to the Governor's Office. All other notifications will be made as soon as practical.
23. All members of the Board of Executive Clemency will remain available to reconvene up to the time of execution should it be determined by the Chairman that sufficient cause exists to reconvene the Board.³¹

In practice, capital clemency hearings for death row prisoners are typically not scheduled until a warrant of execution has been handed down and the execution date has been set.³² The hearing is automatically scheduled whether or not it is requested, and it takes place two to three days prior to the scheduled execution.³³ Though a formal application is not required, the death row prisoner and his or her supporters may submit letters for consideration to the Board prior to the hearing.³⁴ The hearing is a reprieve hearing

³¹ *Board Policy No. 107, supra* note 26.

³² This information comes from a December 2016 phone conversation with an Arizona Board of Executive Clemency staff member.

³³ *Id.*

³⁴ *Id.*

to determine if the execution should move forward.³⁵ If the Board decides to recommend a reprieve to the governor, it may also recommend commutation of sentence or a pardon at that time.³⁶

f. Responding to a Petition

The governor and the Board have different reporting requirements for clemency decisions. If the governor grants a commutation, pardon, or reprieve of a capital sentence, he or she must publish the reasons for the grant in a newspaper in the county of conviction and in the Arizona administrative register.³⁷ However, the governor is not required to give reasons for the *denial* of clemency in either a capital or a non-capital case. Board members may provide the governor with their reasons for voting for or against a clemency application, but are not required to do so.³⁸ Arizona's courts have explained there is no "constitutionally protectible [sic] interest such that parole boards are required to state their reasons for denying commutation."³⁹ The court stressed that "the legislature [in A.R.S. § 31-402(A)] has enumerated no criteria the board must apply in determining whether to recommend commutation," and therefore petitioners have no basis on which to expect clemency will be granted.⁴⁰

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

The Governor

Republican **Douglas "Doug" Ducey** is currently serving his first term as governor of Arizona; he was sworn in on January 5, 2015. He served as State Treasurer for four years prior to winning the gubernatorial election.⁴¹ Before his involvement with politics, Governor Ducey started Cold Stone Creamery, and acted as CEO until he sold the company in 2007.⁴²

Governor Ducey ran largely on a platform to heal Arizona's "broken economy."⁴³ He garnered support from the Arizona business community, as well as other Republicans across the country (namely, Governors Mike Pence and Scott Walker).⁴⁴ He also focused his campaign on education, 'securing' the border between Arizona and Mexico, and his opposition to the Affordable Care Act.⁴⁵

³⁵ *Id.*

³⁶ *Id.*

³⁷ Ariz. Rev. Stat. Ann. § 31-445.

³⁸ Ariz. Admin. Code Art. 2 § R5-4-201(G).

³⁹ *Arnold v. Ariz. Bd. of Pardons & Paroles*, 805 P.2d 388, 391 (Ariz. Ct. App. 1990).

⁴⁰ *Id.*

⁴¹ Associated Press, *Doug Ducey wins GOP primary for Ariz. Governor*, Chicago Tribune, (Aug. 27, 2014), <http://www.usatoday.com/story/news/politics/2014/08/26/arizona-gubernatorial-republican-primary/14666939/>.

⁴² *Id.*

⁴³ John Kartch, *Gov. Doug Ducey Aims to Make Arizona the Sharing Economy State*, Forbes, (Jan. 12, 2016), <http://www.forbes.com/sites/johnkartch/2016/01/12/gov-doug-ducey-aims-to-make-arizona-the-sharing-economy-state/#515e43dc335e>.

⁴⁴ Editorial Board, *Doug Ducey: Best Republican for Arizona Governor*, AZ Central, (Sept. 29, 2014), <http://www.azcentral.com/story/opinion/editorial/2014/07/25/doug-ducey-governor-endorsement/13194923/>.

⁴⁵ *Id.*

Governor Ducey supports the death penalty.⁴⁶ In 2015, when Attorney General Eric Holder called for states to halt all executions pending the Supreme Court's review of Oklahoma's lethal injection protocols, Governor Ducey refused to comply.⁴⁷ A spokesperson for Governor Ducey released a statement on the matter, saying, "Governor Ducey has no plans to do this - he will be following the law. His concern will always be for victims of crime first."⁴⁸

Governor Ducey has expressed some interest in reexamining death penalty processes. Regarding a botched execution in 2014,⁴⁹ he stated "we can certainly do better ... than taking two hours." He also said, "I would want to consult with medical experts for how to do that."⁵⁰

The Board

Ellen Kirschbaum was appointed by Governor Brewer in 2010 and became Chairwoman in 2014. Her current term expires in 2020. Ms. Kirschbaum worked for 31 years in the Arizona criminal justice system, 20 of those years in corrections. She has a B.S. in business administration.⁵¹

Brian Livingston was appointed by Governor Brewer in 2012 and is a past Chairman of the Board; his term expires in 2017. Mr. Livingston was a Phoenix police officer who was shot in the line of duty in 1999, after which he retired. He was also a two-term Executive Director of the Arizona Police Association and is a Vietnam veteran.⁵²

Laura Steele was appointed by Governor Brewer in 2014; her term expires in January 2019. Ms. Steele had a 27-year career with the Maricopa County Adult Probation Department. She specialized in substance abuse and mental health programming.⁵³

Sandra Lines was appointed to the Board by Governor Ducey in 2016; her term expires in 2021. Prior to her service on the Board, she worked as a patrol officer, detective, sergeant, and Special Agent for the Office of the Arizona Attorney General before becoming a forensic document examiner in 1996.⁵⁴ She worked as a Senior Document Analyst for the Bureau of Alcohol, Tobacco & Firearms, and upon her retirement in 2003, Ms. Lines continued her work as a forensic document examiner in both civil and criminal cases.⁵⁵

⁴⁶ Alia Beard Rau, *Candidates for Governor Weigh in on Botched Execution*, Arizona Central, (July 24, 2014), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/candidates-governor-weigh-botched-execution/13083071/>.

⁴⁷ KFYI News, *Ducey Won't Put Death Penalty on Hold Before SCOTUS Decision*, KFYI News, (2015), <http://kfyi.iheart.com/onair/arizona-news-55067/ducey-wont-put-death-penalty-on-13269694/>.

⁴⁸ *Id.*

⁴⁹ Tom Dart, *Arizona inmate Joseph Wood was injected 15 times with execution drugs*, Guardian (Aug. 2, 2014), <http://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood>.

⁵⁰ Alia Beard Rau, *supra* note 46.

⁵¹ *Annual Report – 2015*, Arizona Board of Executive Clemency 6 (2015), available at <https://boec.az.gov/sites/default/files/documents/files/Annual%20Report%20PDF%202015.pdf>.

⁵² *Id.*

⁵³ *Id.* at 7.

⁵⁴ *Board Members*, Arizona Board of Executive Clemency, <https://boec.az.gov/about/board-membersoject/> (last visited Oct. 21, 2016).

⁵⁵ *Id.*

C.T. Wright was appointed by Governor Brewer in 2014; his term expires in 2019. His background includes training law enforcement officers in other states, working as a day laborer in cotton fields, and teaching at the elementary and college levels. Dr. Wright has B.S., M.A., and Ph.D. degrees, and has sat on government and school advisory boards.⁵⁶

b. Legislative Structure and Political Make-Up

Under the Arizona Constitution, the state legislature consists of a senate and a house of representatives.⁵⁷ State senators represent districts of equal population that are to be created after each U.S. census; the constitution sets the maximum number of senatorial districts at 30, with two house members and one senator per district.⁵⁸ Members of the 60-member state house of representatives represent districts of equal population size.⁵⁹ Legislators in both houses are limited to eight consecutive years in office.⁶⁰

Arizona's state house is controlled by members of the Republican Party. Republicans hold 17 out of the 30 seats in the state senate, and hold 34 of the 60 seats in the state house of representatives.⁶¹

c. Judicial Review of State Clemency

Arizona's appellate courts do not have a frequent role in the clemency process and, as in many other states, both state and federal courts are reluctant to consider claims that the clemency process may violate due process.⁶² Of note, the Arizona Court of Appeals has stated, "Arizona's present commutation procedure requires [the Governor] neither to have reasons nor to express them *nor to treat applicants even-handedly*."⁶³ Unless statutes mandate parole or commutation, "there is no entitlement to reduction of a valid sentence" and therefore the "inmate's interest in commutation of his sentence does not by itself trigger due process protections."⁶⁴ The governor's commutation decision is thus "outside the adjudicatory process," because "if the official need not base its decision on objective criteria but can deny the requested relief for any constitutionally permissible reason—or no reason—the State has not created a constitutionally protected liberty interest."⁶⁵ In short, despite the comparably robust set of processes and procedures theoretically governing the actions of the Board, there are no state constitutional or statutory requirements that govern decision makers' approach to making the ultimate clemency decision.

⁵⁶ *Annual Report – 2015, supra* note 51 at 7.

⁵⁷ Ariz. Const. Art. IV. Part I § 1(15).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *Membership Roster*, Arizona State Legislature, available at <http://www.azleg.gov/MemberRoster.asp?Body=H> (last visited Aug. 5, 2016).

⁶² "The Supreme Court has never recognized a case in which clemency proceedings conducted pursuant to a state's executive powers have implicated due process. One opinion has suggested that due process concerns might be implicated in a situation in which the clemency proceeding's outcome is wholly arbitrary, as would be the case if clemency were determined by a coin toss." *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013); see also *Schad v. Brewer*, 2013 WL 5524547.

⁶³ *Wigglesworth v. Mauldin*, 990 P.2d 26, 32-33 (Ariz. Ct. App. 1999) (emphasis added).

⁶⁴ *Id.* at 29.

⁶⁵ *Id.* at 30.

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.*

d. Statewide Demographics

i. General Population

The U.S. Census Bureau estimates Arizona’s 2014 population at 6,731,484.⁶⁶

ii. Political Breakdown

Arizona’s registered voters are 28% Democratic, 34% Republican, 1% Libertarian, and 37% other.⁶⁷ The “others” are mostly Independents, but some have registered affiliations with various minority parties.⁶⁸ Republican candidate Donald J. Trump won Arizona in the 2016 presidential election.⁶⁹ Republican candidate Mitt Romney won Arizona in the 2012 presidential election by a margin of roughly 200,000 votes (or 10%).⁷⁰

Arizona is mainly represented by Republicans in the United States Congress. Both of Arizona’s current U.S. Senators are Republicans. Of the state’s nine representatives, there are five Republicans and four Democrats.⁷¹

⁶⁶ *State & County Quickfacts, Arizona*, U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/04000.html> (last updated Dec. 1, 2015, 4:11 PM).

⁶⁷ *Voter Registration & Historical Election Data*, Arizona Secretary of State, <http://www.azsos.gov/elections/voter-registration-historical-election-data> (last visited Jan. 4, 2016).

⁶⁸ Mary Jo Pitzl, Independent voters biggest voting bloc in Arizona, *Arizona Republic* (Mar. 24, 2014), <http://www.azcentral.com/story/news/politics/2014/03/17/arizona-voter-registration-independents/6526385/>.

⁶⁹ *Arizona Elections 2016*, Ballotpedia, https://ballotpedia.org/Arizona_elections_2016 (last visited Nov. 10, 2016).

⁷⁰ See *2012 Arizona Election Results*, Politico, (Nov. 19, 2012), <http://www.politico.com/2012-election/results/president/arizona/>.

⁷¹ See *Arizona*, GovTrack, <https://www.govtrack.us/congress/members/AZ> (last visited Aug. 5, 2016).

iii. Religious Make-Up

A 2014 Pew study suggests that religion is very important to the people of Arizona. In that survey, 82% of respondents stated they believe in God with absolute or fair certainty and 75% said religion was either “very” or “somewhat” important in their lives.⁷²

Christians make up 67% of Arizona’s population, including significant numbers of Evangelicals (26%), Catholics (21%), “Mainline Protestants” (12%), and Mormons (5%); additionally, Jews account for 2% of the state population.⁷³ Atheists and agnostics make up 7%, and only 19% claim no religious affiliation.⁷⁴ Except for the higher-than-average Mormon population for a U.S. state, these numbers are roughly in line with the rest of the United States.⁷⁵

iv. Income/Socioeconomic Breakdown

The following compares Arizona’s population to the rest of the U.S. in several socioeconomic categories:⁷⁶

	Arizona	U.S.
Per capita income (2013 dollars)	\$25,358	\$28,155
Median household income (2009-2013)	\$49,774	\$53,046
Persons below poverty level	17.9%	15.4%
Language other than English spoken at home	26.8%	20.7%
Bachelor’s degree or higher	26.9%	28.8%
Unemployment rate	6% ⁷⁷	5% ⁷⁸

Even accounting for a 4% lower cost of living in Phoenix, Arizona, than the rest of the country, the median household income is still lower than the national average.⁷⁹ Thus, this data reflects that Arizona is poorer, less educated, and more non-English-speaking than the rest of the country overall.

⁷²*Adults in Arizona*, Pew Research Center 2014 Religious Landscape Study, <http://www.pewforum.org/religious-landscape-study/state/arizona/> (last visited Jan. 4, 2016).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Religions*, Pew Research Center 2014 Religious Landscape Study, <http://www.pewforum.org/religious-landscape-study/> (last visited Jan. 6, 2016).

⁷⁶ *State & County Quickfacts, Arizona*, *supra* note 66.

⁷⁷ *Unemployment Rates for States*, U.S. Bureau of Labor Statistics, <http://www.bls.gov/web/laus/laumstrk.htm> (last updated Dec. 18, 2015).

⁷⁸ *Employment Situation Summary*, U.S. Bureau of Labor Statistics, <http://www.bls.gov/news.release/empst.nr0.htm> (last updated Dec. 4, 2015).

⁷⁹ *Cost of Living Calculator*, PayScale, <http://www.payscale.com/cost-of-living-calculator/Arizona-Phoenix> (last visited Aug. 5, 2016).

e. Criminal Justice

v. Overall Prison Population

Arizona's total prison population as of November 2015 was 42,767.⁸⁰

Arizona classifies 51.7% of the offenses for which prisoners are currently incarcerated as violent crimes, though another 20.4% of prisoners are characterized as violent offenders according to their criminal histories.⁸¹ 21.3% of prisoners were incarcerated for drug possession or trafficking and another 4.1% for DUI.⁸²

vi. Death Row Population and Demographics

Total Number of Prisoners on Death Row: 120⁸³

- Number of Women on Death Row: 2
- Number of Black Prisoners on Death Row: 16
- Number of White Prisoners on Death Row: 68
- Number of Mexican American Prisoners on Death Row: 27
- Number of Mexican National Prisoners on Death Row: 1
- Number of Asian Prisoners on Death Row: 3
- Number of Prisoners Whose Race Is Listed As "Other": 2

Arizona has the **sixth-highest incarceration rate** among U.S. states, at 586 per 100,000 people.⁸⁴ The following table compares the ethnic distribution of the state's population with those of both its prison population generally and its death row population. Though Arizona's general prison population is proportionally less white and more black and Hispanic than the state population as a whole, its death row population is less Hispanic, more black, and proportionally white as compared with the overall state population.

⁸⁰ *Corrections at a Glance*, Arizona Department of Corrections at 1 (Nov. 2015), available at <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2015/cag-nov15.pdf>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Arizona Department of Corrections, <https://corrections.az.gov/node/431> (last visited Aug. 5, 2016).

⁸⁴ *Correction Statistics by State*, National Institute of Corrections (2013), <http://nicic.gov/statestats/?st=az>.

Ethnicity	Arizona, total population ⁸⁵	Arizona, prison population ⁸⁶	Arizona, death row population ⁸⁷
White (not Hispanic or Latino)	56.2%	39.4%	59%
Black	4.7%	13.7%	13%
Native American	5.3%	5.1%	3%
Asian	3.3%	[no available information]	2%
Hispanic or Latino	30.5%	39.9%	22%
Other		1.9%	2%

vii. Executions (Past and Pending)

Total Number of Executions since 1910: 100⁸⁸

- o Most Recent Execution: July 23, 2014
- o Number of Executions Scheduled for 2015: 0
- o Number of Executions Scheduled for 2016: 0
- o Stays Issued in 2015: 0

From 1910–1963, Arizona executed 61 prisoners by hanging or lethal gas. Since reinstating the death penalty in 1992, Arizona has executed 2 prisoners with lethal gas and 37 prisoners by lethal injection.⁸⁹ Since 1992, 74% of the executed prisoners have been white, 3% black, 8% Native American, and 13% Hispanic.⁹⁰

⁸⁵ *State & County Quickfacts, Arizona, supra* note 66.

⁸⁶ *Corrections at a Glance, supra* note 80, at 2.

⁸⁷ *Death Row*, Arizona Department of Corrections, <https://corrections.az.gov/node/431> (last visited Jan. 10, 2016).

⁸⁸ *Executions Prior to 1992 & Execution Methods*, Arizona Department of Corrections, <https://corrections.az.gov/public-resources/death-row/executions-prior-1992-execution-methods> (last visited Jan. 4, 2016).

⁸⁹ *Id.*

⁹⁰ *Id.*

viii. Exonerations/Innocence⁹¹

There have been nine death row exonerations in Arizona since 1978.⁹²

- **Jonathon Treadaway** was convicted and sentenced to death in 1975. In 1978, he was acquitted of all charges at retrial by the jury after 5 pathologists testified that the victim likely died of natural causes. *State v. Treadaway*, 568 P.2d 1061 (1977).
- **James Mathers** was convicted and sentenced to death in 1987. In 1990, the Arizona Supreme Court entered a judgment of acquittal, finding a complete absence of probative facts implicating Mathers. *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).
- **James Robison** was convicted and sentenced to death in 1977 in the death of a reporter by car bomb. His conviction was overturned in 1980, but he was recharged with the offense in 1990. The jury presented a not guilty verdict at Robison's retrial in 1993.⁹³
- **Robert Cruz** was convicted and sentenced to death in 1981 for a 1980 contract killing of a Phoenix print-shop owner and his mother-in-law. In 1995, on retrial, the jury returned a not guilty verdict, acquitting Cruz of murder and all other charges. This was his fifth trial, with the four prior trials resulting in two convictions and two mistrials.⁹⁴
- **David Grannis** was convicted and sentenced to death in 1991. His charges were dismissed on retrial in 1995 based on insufficient evidence after the Arizona Supreme Court reversed his conviction and remanded for a new trial due to irrelevant admitted evidence (photographs of homosexual activity found in Grannis's room unrelated to the crime).⁹⁵
- **Christopher McCrimmon** was convicted and sentenced to death in 1993 for a triple murder that occurred in Tucson's El Grande Market in 1992. The Arizona Supreme Court overturned his conviction in 1996, finding that the trial judge pressured a juror to make a decision rather than declaring a mistrial. *Arizona v. McCrimmon/Minnitt*, 927 P.2d 1298 (1996). Additionally, the lead

⁹¹ 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).

⁹² *Innocence Database*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=1&race=All&dna=All&Apply (last visited Dec. 16, 2016).

⁹³ Richard Ruelas, *James Robison, accused of bombing Republic reporter Don Bolles in 1976, dead at 90*, AZ Central (July 6, 2016), <http://www.azcentral.com/story/news/local/phoenix/2016/07/06/james-robison-accused-bombing-republic-reporter-don-bolles-1976-dead-90/86001272/>.

⁹⁴ *Innocence Database*, *supra* note 92.

⁹⁵ *Id.*

prosecutor in the case had presented false evidence, resulting in an acquittal on retrial for McCrimmon.⁹⁶ He remained in prison on other charges.

- **Ray Krone's** 1992 conviction was overturned in 2002 following a DNA test that proved his innocence in the murder and assault of a woman in Phoenix.⁹⁷
- **Lemuel Prion** was convicted and sentenced to death in 1999. In August 2002, the Arizona Supreme Court unanimously overturned his conviction and dismissed all charges, stating that the trial court committed reversible error by excluding evidence of another suspect.⁹⁸
- **Debra Milke** was convicted and sentenced to death in 1990 for allegedly arranging for two men to kill her 4-year-old son so she could collect an insurance payout. In 2014, the Arizona Court of Appeals barred prosecutors from retrying Milke. A trial court formally dismissed the charges in 2015 citing prosecutorial misconduct, insufficient evidence, and a discredited "confession" as having tainted her initial prosecution.⁹⁹

f. Public Opinion Polling

Based on polling, there is strong public support for the death penalty in Arizona. The 2015 Morrison-Cronkite Poll, a joint effort of ASU's public policy and journalism schools, found that 71% of the 904 voters surveyed supported the death penalty.¹⁰⁰

Notably, according to a poll by the Behavior Research Center, an independent public opinion research firm, these numbers drop when certain factors are introduced:¹⁰¹

- 71% oppose the death penalty for those with intellectual disability; only 11% favor the death penalty in this instance.
- 42% oppose the death penalty for juvenile offenders; only 37% favor the death penalty in this instance.
- 49% favor a two-year moratorium on the use of the death penalty while the legislature studies whether it is being properly used; 41% oppose this moratorium; 10% remain unsure.
- 46% favor the sentencing option of life in prison with no possibility of parole; 46% still favor the death penalty when offered this sentencing option.

⁹⁶ *Id.*

⁹⁷ Hans Sherrer, *Twice Wrongly Convicted of Murder – Ray Krone is Set Free After 10 Years*, 2 Justice Denied Magazine 9, available at http://www.forejustice.org/wc/ray_krone_JD_vol2_i9.htm (last visited Nov. 17, 2016).

⁹⁸ *Innocence Database*, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ *Morrison-Cronkite Poll: Arizona voters split on most social issues*, Morrison Institute for Public Policy (Dec. 1, 2015), <https://morrisoninstitute.asu.edu/news/morrison-cronkite-poll-arizona-voters-split-most-social-issues>.

¹⁰¹ *State Polls and Studies*, Death Penalty Information Center (citing Behavioral Research Center, 2000), <http://www.deathpenaltyinfo.org/state-polls-and-studies> (last visited Oct. 21, 2016).

IV. Additional Information for Consideration in Clemency

a. Significant Past Capital Clemency Decisions

i. Grants

There have been no grants of capital clemency in Arizona. The Board has never issued a recommendation to pardon or commute the sentence of a death row petitioner. At times, individual “board members have voted to recommend that an inmate’s sentence be commuted to life in prison, but they have been in the minority and the executions proceeded.”¹⁰²

ii. Denials (where newsworthy or controversial)

Jeffrey Landrigan’s case garnered national attention in 2010 when his sentencing judge, Judge Cheryl Hendrix, publicly stated, “Had the trial counsel presented any of the mitigating information I have received [since the sentencing trial] – which was available at the time of sentencing – Mr. Landrigan would not have been sentenced to death.”¹⁰³ Landrigan’s attorneys petitioned the Board for clemency, citing his trial counsel’s failure to present mitigating evidence and conflicting DNA evidence.¹⁰⁴ A four member board considered a motion for a commutation and voted 2-2 to recommend clemency.¹⁰⁵ However, by statute, a tie vote operates as a denial.¹⁰⁶ Landrigan was executed on October 26, 2010.

Walter LaGrand’s case made international headlines in 1999. The German-born LaGrand brothers were convicted of fatally stabbing a bank manager during a botched robbery.¹⁰⁷ The German government appealed to Arizona’s then-Governor Jane Hull (1997–2003), a Republican, on behalf of the brothers, who had never been naturalized as Americans and were therefore entitled to consular assistance under the Vienna Convention on Consular Relations. Governor Hull did not follow the Board’s recommendation of a 60-day reprieve and allowed Walter LaGrand’s execution to proceed.¹⁰⁸

In February 2012, the Board voted 4-1 against recommending that Governor Jan Brewer reduce **Robert Henry Moormann’s** death sentence to life in prison for the murder and dismemberment of his 74-year old adoptive mother, Roberta. Several psychologists diagnosed Moormann as mentally impaired, and evidence showed that he had a history of being sexually abused by the victim. His attorneys argued that because of his mental impairment, it was unconstitutional to execute him. The prosecutor argued that Moorman did not meet Arizona’s standard for intellectual disability to be exempt from execution, and argued also that

¹⁰² *Governor Overhauls Arizona’s Clemency Board*, YourWestValley.com (Apr. 24, 2012), http://www.yourwestvalley.com/valleyandstate/article_37fa3000-8d8c-11e1-b082-001a4bcf887a.html.

¹⁰³ *Sentencing Judge Second-Guesses Death Sentence in Light of New Evidence*, Death Penalty Information Center (Oct. 22, 2010), <http://www.deathpenaltyinfo.org/sentencing-judge-second-guesses-death-sentence-light-new-evidence>.

¹⁰⁴ *Id.*

¹⁰⁵ Paul Davenport, *Arizona panel balks at recommending commutation*, USA Today (Oct. 22, 2010), http://usatoday30.usatoday.com/news/nation/states/arizona/2010-10-21-3215770724_x.htm,

¹⁰⁶ 31-403(C)(1).

¹⁰⁷ Julian Borger, *Bonn angry at execution go-ahead*, Guardian (Mar. 3, 1999), <http://www.theguardian.com/world/1999/mar/04/julianborger>.

¹⁰⁸ Matthias Lehmpful, 1999: *Walter LaGrand, a German gassed in America*, ExecutedToday.com (Mar. 3, 2008), <http://www.executedtoday.com/2008/03/03/1999-walter-lagrand/>.

evidence suggesting he planned the murder showed that he had the requisite mental capacity to be executed.¹⁰⁹

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

At least two Arizona capital cases have resulted in important U.S. Supreme Court decisions. In *Tison v. Arizona*, 481 U.S. 137 (1986), the Court ruled that a participant in a felony, even if not the actual killer, is eligible for the death penalty; in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court ruled that jurors, not a judge, must find facts that make a defendant eligible for the death penalty.¹¹⁰

c. Divisive/Important Political Issues in the State

Arizona requires that 85% of a sentence be served before a prisoner is eligible for parole (a process separate from pardon or commutation), even for nonviolent offenses—one of only three states with such rules. This rule contributes to the fact that the DOC's budget accounts for 11% of the state's general fund, up 40% in seven years.¹¹¹

In recent years, Arizona has seen several controversial issues arise: SB 1070 allowed police to ask for documents at any time from anyone suspected of being undocumented¹¹²; restrictive abortion laws banned abortions after 18 weeks and abortions based on the gender or race of the fetus;¹¹³ and Arizona's "Marriage Protection Amendment" passed as a 2008 ballot measure with 56% of the vote, defining marriage as between one man and one woman.¹¹⁴

d. Other Relevant Legal, Historical, or Social Issues

One of the most recent political controversies to directly impact the clemency process in Arizona came in the form of a standoff between former members of the Board and former Governor Jan Brewer. In 2012, former Governor Brewer "overhauled" the Board, declining to reappoint several members who had served in that position for years prior.¹¹⁵ According to the outgoing chairman, Duane Belcher, the overhaul was the result of the Governor's Office wanting to "go in a different direction."¹¹⁶

In 2013, however, lawyers for death row prisoner Edward Schad filed a motion for stay of execution based

¹⁰⁹ Amanda Lee Meyers, *Board denies clemency for Arizona death-row inmate*, Arizona Capitol Times, (Feb. 24, 2012), <http://azcapitoltimes.com/news/2012/02/24/arizona-death-row-inmate-to-get-chance-at-clemency/>.

¹¹⁰ Arizona, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/arizona-1> (last visited Jan. 4, 2016).

¹¹¹ Patty Machelor, *On prisons, Arizona stays tough*, Arizona Daily Star (June 27, 2015), http://tucson.com/news/local/on-prisons-arizona-stays-tough/article_04fd2d3e-08ed-50aa-b82c-8cdb749df27a.html.

¹¹² Randal C. Archibold, *Arizona Enacts Stringent Immigration Law*, The New York Times (Apr. 23, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=0.

¹¹³ Kate Sheppard, *Arizona Outdoes Everyone with New Anti-Abortion Bill*, Mother Jones (Mar. 29, 2012), <http://www.motherjones.com/mojo/2012/03/arizona-outdoes-everyone-new-anti-abortion-bill>.

¹¹⁴ Judy Hedding, *Arizona Ballot Propositions- 2008*, About.com: Phoenix, <http://phoenix.about.com/od/govtoff/tp/Arizona-Ballot-Propositions-2008.htm> (last visited Oct. 24, 2016).

¹¹⁵ "AZ Governor Overhauls Clemency Board; Longtime Chairman is Bounced," The Crime Report (Apr. 27, 2012), <http://thecrimereport.org/2012/04/27/2012-04-az-governor-overhauls-clemency-board/>.

¹¹⁶ *Id.*

on allegations that the Governor had directed members of the Board to deny petitions for commutation.¹¹⁷ According to the testimony of five former members of the Board, they were “pressured by a top aide to Gov. Jan Brewer to deny requests for relief from those in high-profile cases.”¹¹⁸ Some questioned whether the Board overhaul resulted from frustration within the Governor’s Office about the Board’s decision to recommend reprieves in the LaGrand and Landrigan capital cases, which required Governor Brewer to actively deny the petitions.¹¹⁹ Lawyers for Schad argued that the pressure exerted on the Board to deny petitions rendered the state’s clemency process essentially meaningless, but a U.S. District Court found that there was no evidence that the Governor’s Office had explicitly told members to vote against commutation.¹²⁰ The opinion questioned the veracity of the former Board members’ claims, speculating that their testimony could have been motivated by anger about being removed from the Board.¹²¹ The U.S. Court of Appeals for the Ninth Circuit upheld the District Court’s findings that there was no impermissible interference in the clemency process by the Governor’s Office.¹²²

Two other recent developments may affect the application of the death penalty in Arizona. On July 23, 2014, Arizona gained national attention when the state administered 15 times the prescribed amount of lethal drugs during the execution of Joseph Wood. Mr. Wood’s execution took two hours to complete, and during this time he was observed “gasping and gulping.” A subsequent investigation found no explanation for the difficult circumstances of the execution, but the Department of Corrections decided nevertheless to alter the drugs used in future executions.¹²³ Since then, Arizona has had difficulty importing the drugs. A \$27,000 shipment of sodium thiopental, paid for by the Arizona Department of Corrections, was seized by federal officials in July 2015.¹²⁴ As a result, Mr. Wood was the only prisoner Arizona executed in 2014, and no other prisoners have been executed since. A federal court order is in place prohibiting the state from requesting execution dates until a pending challenge to Arizona’s execution protocol is final.

Additionally, in a December 29, 2015 decision, the U.S. Court of Appeals for the Ninth Circuit remanded the case of death row prisoner James McKinney, finding that the Supreme Court of Arizona applied an unconstitutional causal nexus test and that evidence of childhood abuse and related post-traumatic stress disorder should have been given appropriate weight as mitigating evidence during his sentencing.¹²⁵

¹¹⁷ “Brewer takes heat in clemency board suit,” *Arizona Daily Sun* (Sept. 27, 2013), http://azdailysun.com/news/local/state-and-regional/brewer-takes-heat-in-clemency-board-suit/article_9226bd54-273d-11e3-99df-001a4bcf887a.html.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Schad v. Brewer*, *supra* note 62.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Michael Kiefer, *Arizona to change drugs used for executions*, Arizona Republic (Dec. 23, 2014), <http://www.usatoday.com/story/news/nation/2014/12/23/report-arizona-execution-change-drugs/20796903/>.

¹²⁴ Michael Kiefer, *Arizona again tries to illegally import execution drug*, Arizona Republic (Oct. 23, 2015), <http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-corrections-import-thiopental-illegal-execution-drug/74406580/>.

¹²⁵ *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc).