

FLORIDA

Capital Clemency Information Memorandum

Contents

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

I. Introduction

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

II. Basics of the State Capital Clemency Process

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

a. The Power Defined

Under Article IV, Section 8(a) of the Florida Constitution,

[T]he governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, *with the approval of two members of the cabinet*, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.¹

The governor may, at his or her sole discretion, deny clemency at any time, for any reason.² The governor and the members of his cabinet collectively constitute the Board of Executive Clemency (“the Board”). Pursuant to Florida statute,³ the Board also has the power to appoint private counsel to a death row prisoner when the Board determines that the case is appropriate for executive clemency consideration.

b. The Decision Maker(s)

The Board is led by the governor and is composed of the members of his cabinet. Under Article IV, Section 4 of the Florida Constitution, the cabinet is composed of the Attorney General, the Commissioner of Agriculture and Consumer Services, and the Chief Financial Officer.⁴

c. When to Bring a Petition

Under the current Florida death penalty system, the clemency process is initiated when the death-sentenced prisoner receives a letter informing him that a clemency investigation has been initiated by the Florida Commission on Offender Review (FCOR). At this time, the prisoner has the right to accept the appointment of clemency counsel from the state’s own registry. According to practitioners who have been through this process in recent years, the registry attorney then has a discrete amount of time in which to

¹ Fla. Const. art. IV, § 8(a) (emphasis added).

² *Rules of Executive Clemency* at 3, available at https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last visited Mar. 19, 2020).

³ Clemency counsel when sentence of death imposed, Fla. Stat. Ann. § 940.031, available at http://www.leg.state.fl.us/Statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=clemency+board&URL=0900-0999/0940/Sections/0940.031.html.

⁴ Fla. Const. art. IV, § 4(a).

meet with the client and prepare and submit the petition for executive clemency. Typically, when the petition is “due” is mandated by the employment contract that the FCOR provides the clemency registry attorney.⁵ There is no evidence that the FCOR will review or consider an application for executive clemency that is submitted outside of this timetable.

d. How to Bring a Petition

Current Florida practice for submission of clemency petitions follows specific guidelines laid out in individual contracts signed between FCOR and the clemency registry attorney.⁶ Instructions for how to submit a clemency petition and/or what to include are not made available to the general public. The current edition of the FCOR Rules for Executive Clemency (“Rules”),⁷ however, discuss the procedure FCOR uses when it initiates clemency review in a death penalty case.

In all cases where the death penalty has been imposed, FCOR may conduct a thorough and detailed investigation into all relevant clemency factors and provide a final report to the Board. The investigations performed by FCOR shall include, but are not limited to:

- (1) an interview with the petitioner, who may have clemency counsel present;
- (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the petitioner;
- (3) an interview, if possible, with the presiding judge over the petitioner’s trial; and
- (4) an interview, if possible, with the petitioner’s family.⁸

Once an investigation into clemency has been opened, FCOR must notify the Office of the Attorney General (“O.A.G.”) and Bureau of Advocacy and Grants, and the O.A.G. must then notify the victim(s)’ families that an investigation has been initiated.⁹ The O.A.G. must collect written statements from the victim(s)’ families to be included in the final report that FCOR provides to the Board.¹⁰

FCOR’s investigation will begin either at a time designated by the governor or, if the governor has not made a designation that a clemency investigation shall commence, it will begin “immediately after the defendant’s initial petition for writ of habeas corpus, filed in the appropriate federal district court, has been denied by the 11th Circuit Court of Appeals, so long as all post-conviction pleadings, both state and federal, have been filed in a timely manner as determined by the Governor.”¹¹ The rules make specific note that “failure to complete the investigation according to the specified rules is not a sufficient ground for relief in a death penalty case.”¹²

⁵ This information comes from conversations with experienced Florida capital practitioners.

⁶ This information comes from conversations with experienced Florida capital practitioners.

⁷ *Rules of Executive Clemency*, *supra* note 2.

⁸ *Id.* at 18.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 19.

¹² *Id.*

After FCOR completes its investigation, the commissioners who personally interviewed the petitioner must compile a final report detailing their findings and conclusions. The report must include (1) any statements made by the petitioner and petitioner's counsel during the interview; (2) a detailed summary completed by each Commissioner who interviewed the petitioner; and (3) any information gathered during the investigation. The final report must be sent to the Board within 120 days after the opening of the investigation unless the governor allows for an extension of time.¹³

All of the information gathered during the course of the clemency investigation, including the petition, are required to remain confidential and available only to FCOR members, the Board, and their staff. Only the governor has discretion to allow the records collected during the investigation to be inspected and copied to any person outside of FCOR and the Board.¹⁴

e. Hearing Practice

After the Board receives the final investigatory report from FCOR, any member of the Board can request a hearing within 20 days of receiving the report.¹⁵ If a hearing is requested, the case is placed on the agenda for the next scheduled meeting or at a specially called meeting of the Board. The O.A.G. is responsible for notifying the victim(s) of record that a hearing has been set. The governor can request a hearing at any time in any case in which a death sentence has been imposed.¹⁶

At the hearing, both the petitioner's counsel and the state attorneys are permitted to make oral presentations no longer than 15 minutes. The victim(s)' family and their representatives may make oral statements that do not exceed 5 minutes collectively. The governor is permitted to extend these time limits at his or her discretion.¹⁷

f. Responding to a Petition

"If a commutation of a death sentence is ordered by the Governor with the approval of at least two members of the Clemency Board, the original order shall be filed with the custodian of state records, and a copy of the order shall be sent to the inmate, the attorneys representing the state, the inmate's clemency counsel, a representative of the victim's family, the Secretary of the Department of Corrections, and the chief judge of the circuit where the inmate was sentenced."¹⁸ The O.A.G. has 24 hours to communicate the decision to grant clemency to the victim(s)' family.¹⁹ In the case of a negative ruling, the Board is not required to make that ruling public. The Board is also not required to provide its reasoning for a clemency grant or denial in any case. In practice, attorneys have learned that their client's clemency cases have been denied via the setting of an execution date.²⁰

¹³ *Id.*

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 20.

¹⁶ *Id.*

¹⁷ *Id.* at 20–21.

¹⁸ *Id.* at 21.

¹⁹ *Id.*

²⁰ This information comes from conversations with experienced Florida capital practitioners.

III. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Governor Ron DeSantis: Republican Ronald Dion DeSantis was elected to the governor's office in 2018 after a narrow victory over Democratic Tallahassee Mayor Andrew Gillum.²¹ The general election was hard fought and drew national attention, with one of President Donald Trump's "most unabashed allies" squaring off against an "outspoken progressive who would be Florida's first black governor."²² Representative DeSantis was leading by about one percentage point and fewer than 80,000 votes when Mayor Gillum conceded.²³

Governor DeSantis was born on September 14, 1978, making him, at 41, the youngest incumbent governor in the United States.²⁴ He was raised in Dunedin, Florida, before attending Yale University and Harvard Law School.²⁵ After graduation, he became an attorney and prosecutor in the Judge Advocate General's Corps, U.S. Navy, and served in Iraq and at Guantanamo Bay.²⁶

DeSantis received an honorable discharge from active duty in February 2010. He published a book in 2011 titled *Dreams From Our Founding Fathers: First Principles in the Age of Obama*, before announcing that he would be running for the House of Representatives for Florida's 6th District in 2012.²⁷ DeSantis was victorious and was reelected two more times in 2014 and 2016.²⁸ While in the House of Representatives, he was one of the founding members of the Freedom Caucus, the "ultra-conservative group" that pushed Speaker John Boehner into early retirement.²⁹ He became a regular on Fox News and made a name for himself in the early years of President Trump's administration by attacking special counsel Robert Mueller's investigation.³⁰ In January 2018, DeSantis announced that he was running for governor of Florida.³¹

After winning the election, Governor DeSantis showed a bipartisan streak during his first months in office.³² He came out in support of medical marijuana and proposed investments for protecting the Everglades and

²¹ Brendan Farrington & Gary Fineout, *GOP's DeSantis defeats Gillum in Florida governor's race*, AP News, (Nov. 6, 2018), <https://apnews.com/263896e7421946b09d7dcf670a15c606>.

²² Patricia Mazzei & Jonathan Martin, *A Black Progressive and a Trump Acolyte Win Florida Governor Primaries*, N.Y. Times, (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/politics/florida-arizona-election-results.html>.

²³ Brendan Farrington & Gary Fineout, *supra* note 21.

²⁴ *Fast Facts about American Governors*, Rutgers University – Center on the American Governor, (updated May 2019), <http://governors.rutgers.edu/on-governors/us-governors/fast-facts-about-american-governors/>.

²⁵ Emily L. Mahoney, *Florida governor candidate Ron DeSantis carved aggressive path from Dunedin to D.C.*, Miami Herald, (Oct. 20, 2018), <https://www.miamiherald.com/latest-news/article220303490.html>.

²⁶ *Id.*

²⁷ Mitch Perry, *Ron DeSantis takes on Obama*, Fla. Phoenix, (Sep. 11, 2018), <https://www.floridaphoenix.com/2018/09/11/ron-desantis-takes-on-obama/>.

²⁸ Ron DeSantis, Ballotpedia, https://ballotpedia.org/Ron_DeSantis (last visited Mar. 19, 2020).

²⁹ Emily L. Mahoney, *supra* note 25; Eliza Collins, *What is the House Freedom Caucus and why is Trump attacking its members*, USA TODAY, (Mar. 30, 2017),

<https://www.usatoday.com/story/news/politics/onpolitics/2017/03/30/what-is-the-house-freedom-caucus/99831230/>.

³⁰ Lawrence Mower, *Rep. Ron DeSantis declares run for Florida governor*, Tampa Bay Times, (Jan. 5, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/01/05/rep-ron-desantis-declares-run-for-florida-governor/>.

³¹ *Id.*

³² Richard Luscombe, *Will Florida's new Republican governor keep his vow of bipartisanship?*, The Guardian, (Jan. 8, 2019), <https://www.theguardian.com/us-news/2019/jan/07/florida-governor-ron-desantis-republican>.

the environment.³³ Governor DeSantis and the Board also unanimously granted posthumous pardons to the “Groveland Four,” four African-American men falsely accused of raping a young white woman in 1949. After the false accusations of rape, a racist hysteria followed that resulted in white mobs burning down black residences, a massive white mob lynching a black suspect, an all-white jury condemning two innocent men to death, and a racist sheriff murdering one of the black suspects and attempting to kill the other.³⁴ The state legislature issued a formal apology for the events in 2017, but former governor and current Florida Senator Rick Scott had taken no action on a pardon.³⁵ At the same time, Governor DeSantis has also continued supporting conservative causes such as school vouchers and the banning of sanctuary cities.³⁶ He has also appointed three conservative justices to the Florida Supreme Court, transforming the court.³⁷

A major issue during the 2018 Florida elections was Florida Amendment 4, a constitutional amendment that restored voting rights for most felons that had completed their sentences.³⁸ Florida has remained one of the few states in the country, along with Kentucky and Iowa, that has barred people from voting even after their sentences have been served.³⁹ That changed when Amendment 4 passed with 64% of the vote, restoring rights to more than one million people in the state.⁴⁰

Backed by a conservative state legislature, Governor DeSantis has resisted implementation of Amendment 4, initially asserting that the legislature needed to enact “implementing language” for the ballot initiative to take effect, even though Amendment 4 is arguably self-executing.⁴¹ The Florida legislature responded by passing SB 7066, which required that people with felony records pay any financial obligations arising from the felony conviction before their rights could be restored.⁴² Critics have attacked SB 7066, calling it an unconstitutional poll tax that violates the will of voters who overwhelmingly approved Amendment 4 in 2018.⁴³ At least four lawsuits were filed attacking SB 7066, and in one case, *Jones v. DeSantis*, a federal judge in October 2019 preliminarily enjoined SB 7066 from taking effect. Governor DeSantis appealed that

³³ Zac Anderson, *Republican Ron DeSantis off to fast start as governor*, The Daytona Beach News-Journal, (Jan. 20, 2019), <https://www.news-journalonline.com/news/20190120/republican-ron-desantis-off-to-fast-start-as-governor>.

³⁴ *With Backing of New Governor, Florida Clemency Board Posthumously Pardons the “Groveland Four”*, Death Penalty Info. Ctr., (Jan. 14, 2019), <https://deathpenaltyinfo.org/news/with-backing-of-new-governor-florida-clemency-board-posthumously-pardons-the-groveland-four>.

³⁵ *Id.*

³⁶ Greg Allen, *Florida’s New Governor Redefines What It Means To Be a Trump Republican*, NPR, (Mar. 4, 2019), <https://www.npr.org/2019/03/04/700046936/floridas-new-governor-redefines-what-it-means-to-be-a-trump-republican>.

³⁷ *Florida Attorney General Ashley Moody Weighs In On Death Penalty Charges*, CBS Miami, (June 4, 2019), <https://miami.cbslocal.com/2019/06/04/florida-attorney-general-ashley-moody-weighs-in-on-death-penalty-changes/>.

³⁸ German Lopez, *Florida votes to restore ex-felon voting rights with Amendment 4*, Vox, (Nov. 7, 2018), <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results>.

³⁹ *Id.*

⁴⁰ Alejandro De La Garza, *‘Our Voice Will Count.’ Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 million people*, TIME, (Nov. 7, 2018), <https://time.com/5447051/florida-amendment-4-felon-voting/>.

⁴¹ Micah Kubic, *Gov. Ron DeSantis hostility to Amendment 4 is even more concerning than it sounds*, Fla. Today, (Nov. 22, 2019), <https://www.floridatoday.com/story/opinion/2019/11/22/gov-ron-desantis-hostility-amendment-4-even-more-concerning-than-sounds/4271965002/>.

⁴² P.R. Lockhart, *A controversial Florida law stops some former felons from voting. A judge just blocked part of it.*, Vox, (Oct. 19, 2019), <https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-injunction-lawsuits-fines-fees>.

⁴³ *Id.*

injunction to the U.S. Court of Appeals for the Eleventh Circuit,⁴⁴ and in February 2020, a three-member panel of the Eleventh Circuit unanimously upheld the district court's ruling. **See Section V.c.ii, infra.** Governor DeSantis has granted clemency to 20 felons during his first year of office.⁴⁵

Despite the controversy over implementation of Amendment 4, Governor DeSantis is “universally popular” one year into his governorship with a job approval rating of 72 percent.⁴⁶

Attorney General Ashley Moody: Republican Ashley Moody was elected as Florida's 38th Attorney General in 2018, defeating Democrat Sean Shaw. Before her run for attorney general, Ms. Moody served as a judge for the 13th Judicial Circuit Court in Florida from 2007 to 2017.⁴⁷ She has also served as a federal prosecutor and adjunct professor at Stetson University College of Law. Attorney General Moody is a triple graduate of the University of Florida, where she received a bachelor's and master's degree in accounting as well as her law degree.⁴⁸ She also holds a Master of Laws (L.L.M.) in International Law from Stetson University.

In June 2019, Attorney General Moody's office filed a brief in the Florida Supreme Court in the death penalty case of Mark Anthony Poole asking the court to reconsider a 2016 ruling, *Hurst v. State*, which had drastically changed Florida's capital sentencing system. On January 23, 2020, in *State v. Poole*, a five-member Florida Supreme Court sided with Attorney General Moody and repealed significant portions of its earlier decision, finding that it had been “wrongly decided.”⁴⁹ For further discussion of *Hurst v. State* and *State v. Poole*, see **Section V.b. infra.**

Commissioner of Agriculture and Consumer Services Nikki Fried: Democrat Nicole “Nikki” Heather Fried was elected as Florida's Commissioner of Agriculture and Consumer Services in 2018, defeating Republican Matt Caldwell.⁵⁰ Before her election as Commissioner, Ms. Fried had stints as a commercial litigator and public defender before becoming a prominent lobbyist for the medical marijuana industry.⁵¹ Like Attorney General Moody, Commissioner Fried is also triple graduate of the University of Florida where she received a bachelor's degree in political science, a master's degree in political campaigning, and a law degree.⁵²

⁴⁴ Lawrence Mower, *Gov. DeSantis appeals judge's order in Amendment 4 lawsuit*, Tampa Bay Times, (Nov. 15, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/11/15/gov-desantis-appeals-judges-order-in-amendment-4-lawsuit/>.

⁴⁵ Blaise Gainey, *Commissioner Fried Says Clemency Process Harder Than Before*, WUSF News, (Dec. 6, 2019), <https://wusfnews.wusf.usf.edu/post/commissioner-fried-says-clemency-process-harder>.

⁴⁶ Scott Powers, *Ron DeSantis' approval ratings riding high in a new poll*, FLAPOL, (Oct. 24, 2019), <https://floridapolitics.com/archives/309426-ron-desantis-approval-ratings-riding-high-in-new-poll>.

⁴⁷ Ashley B. Moody, Ballotpedia, https://ballotpedia.org/Ashley_B._Moody (last visited Mar. 19, 2020).

⁴⁸ *Attorney General Ashley Moody*, Florida Office of the Attorney General, <http://www.myfloridalegal.com/pages.nsf/Main/1515CE372E59D1E885256CC60071B1C4> (last visited Mar. 19, 2020).

⁴⁹ *State v. Poole*, No. SC18-456, 2020 WL 370302, at *1 (Fla. Jan. 23, 2020).

⁵⁰ Nikki Fried, Ballotpedia, https://ballotpedia.org/Nikki_Fried (last visited Mar. 19, 2020).

⁵¹ Jason Garcia, *Nikki Fried: Florida's new agriculture commissioner*, Fla. Trend, (Feb. 25, 2019), <https://www.floridatrend.com/article/26392/nikki-fried-floridas-new-agriculture-commissioner>.

⁵² *Id.*

Commissioner Fried has expressed her support for the clemency process and has stated that one of her priorities is to remain a “constant thorn in the Clemency Board’s side” when pushing for pardons for former felons, in particular.⁵³ In September 2019, Commissioner Fried wrote a public letter to her fellow Board members calling on Governor DeSantis to amend the Rules of Executive Clemency to restore civil rights as outlined by Amendment 4.⁵⁴ Commissioner Fried has also spoken out publicly against SB 7066, stating that Governor DeSantis has made it even more difficult to obtain voting rights restoration by requiring that all outstanding fines and fees tied to the offense must first be paid.⁵⁵ Commissioner Fried has pushed for a return to the rules approved under former governor Charlie Crist in 2007, which made it easier for certain felons to restore their civil rights.⁵⁶ Commissioner Fried has urged the Board to move forward with changes to ease the process of voter rights restoration through the clemency process, regardless of the pending litigation concerning Amendment 4 and SB 7066.⁵⁷

Commissioner Fried has stated that she’s torn on the death penalty but would support mandatory review by the Board in all death cases, saying “there is no harm in making sure that there’s more eyes on these cases and reviewing of all of the facts underlining it.”⁵⁸

Chief Financial Officer Jimmy Patronis: Republican Jimmy Patronis was elected as Florida’s Chief Financial Officer (CFO) in 2018, defeating Democrat Jeremy Ring.⁵⁹ He had previously been appointed to serve as Florida’s CFO by then-governor Rick Scott following the resignation of Jeffrey Atwater.⁶⁰ Governor Scott had also previously appointed Mr. Patronis to serve on the Public Service Commission and appointed Mr. Patronis to his “dream job” on the Constitutional Revision Committee.⁶¹

Before being appointed to various positions under Governor Scott, Mr. Patronis represented District 6 in the Florida House of Representatives from 2006 to 2014.⁶² Mr. Patronis was born into a well-known Panama City family that owns the Captain Anderson’s restaurant. Mr. Patronis earned his associate’s degree in restaurant management from Gulf Coast Community College and his bachelor’s degree in political science from Florida State University.⁶³

⁵³ Nada Hassanein, *Agriculture Commissioner Nikki Fried talks voting rights in Tallahassee town hall*, Tallahassee Democrat, (Dec. 4, 2019), <https://www.tallahassee.com/story/news/2019/12/04/nikki-fried-talks-voting-rights-tallahassee-town-hall/2596185001/>.

⁵⁴ Ana Ceballos, *Nikki Fried calls on Florida’s Republican-dominated cabinet to ‘do our jobs’ and restore felons’ civil rights*, (Sep. 28, 2019), <https://www.orlandoweekly.com/Blogs/archives/2019/09/28/nikki-fried-calls-on-floridas-republican-dominated-cabinet-to-do-our-jobs-and-restore-felons-civil-rights>.

⁵⁵ Blaise Gainey, *Commissioner Fried Says Clemency Process Harder Than Before*, WUSF News, (Dec. 6, 2019), <https://wusfnews.wusf.usf.edu/post/commissioner-fried-says-clemency-process-harder>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Jake Stofan, *Clemency board may consider reviewing death penalty cases*, WCTV, (Oct. 29, 2019), <https://www.wctv.tv/content/news/Clemency-board-may-consider-reviewing-death-penalty-cases-564056901.html>.

⁵⁹ Jimmy Patronis, Ballotpedia, https://ballotpedia.org/Jimmy_Patronis (last visited Mar. 19, 2020).

⁶⁰ Samantha J. Gross, *The man appointed to be Florida’s CFO wants to keep the job. Meet Jimmy Patronis.*, (Oct. 4, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article219301665.html>.

⁶¹ *Id.*

⁶² Jimmy Patronis, Ballotpedia, *supra* note 59.

⁶³ Samantha J. Gross, *supra* note 60.

Mr. Patronis was criticized in 2018 for questions he asked during a Clemency Board meeting. He had asked an African-American man seeking restoration of his civil rights how many children the man had before asking how many different mothers the children had. Mr. Patronis denied charges of racism, noting that the questions were relevant as he was inquiring about child support.⁶⁴

b. Legislative Structure and Political Make-Up

Pursuant to the Florida Constitution, legislative power is vested in a legislature consisting of a Senate and a House of Representatives.⁶⁵ The Senate is composed of one senator from each senatorial district, and the House of Representatives is composed of one member from each representative district.⁶⁶ Each senator is limited to two terms of four years, and each representative is limited to four terms of two years.⁶⁷ Elections for half the Florida State Senate and the entire Florida House of Representatives are set to take place in 2020.⁶⁸

Currently, Republicans have a majority in both the state Senate and House of Representatives.⁶⁹ In the Senate, Republicans hold 23 out of the 40 seats, while Democrats hold the remaining 17.⁷⁰ In the House of Representatives, 73 out of the 120 seats are occupied by Republicans.⁷¹ The remaining 47 seats are occupied by Democrats.⁷²

c. Judicial Review of State Clemency

The Supreme Court of Florida has consistently ruled that “the people of the State of Florida have vested ‘sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of [clemency].’”⁷³ In challenges to decisions made in the clemency process, particularly in death penalty cases, the court often cites the Florida Rules of Executive Clemency which provide “the Governor with *unfettered discretion* to deny clemency at any time, for any reason.”⁷⁴

In *Pardo v. State*, for example, the court denied the defendant’s claim that he did not receive a full and fair clemency hearing because he was not allowed to present witnesses and evidence.⁷⁵ As part of its decision, the court acknowledged precedent “recognizing that clemency is an executive function and that, in accordance with the doctrine of separation of powers, [the court] will not generally second-guess the

⁶⁴ Adam C. Smith, *Jeremy Ring: Jimmy Patronis clemency question ‘smacks of racism’*, Tampa Bay Times, (Jul. 6, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/07/06/jeremy-ring-jimmy-patronis-clemency-questions-smacks-of-racism/>.

⁶⁵ Fla. Const. art. III, § 1.

⁶⁶ *Id.*

⁶⁷ *Florida State Legislature*, Ballotpedia, https://ballotpedia.org/Florida_State_Legislature (last visited Mar. 19, 2020).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Florida State Senate*, Ballotpedia, https://ballotpedia.org/Florida_State_Senate (last visited Mar. 19, 2020).

⁷¹ *Florida House of Representatives*, Ballotpedia, https://ballotpedia.org/Florida_House_of_Representatives (last visited Mar. 19, 2020).

⁷² *Id.*

⁷³ *Carroll v. State*, 114 So.3d 883, 888 (Fla. 2013) (quoting *Sullivan v. Askew*, 348 So.2d 312, 315 (Fla. 1977)).

⁷⁴ *Davis v. State*, 142 So.3d 867, 877 (Fla. 2014).

⁷⁵ *Pardo v. State*, 108 So.3d 558, 568 (Fla. 2012).

executive's determination that clemency is not warranted."⁷⁶ The court cited to the 2010 case *Johnston v. State*, where the defendant, like Pardo, challenged his clemency hearing as inadequate.⁷⁷ In its ruling on that matter, the Supreme Court of Florida refused to question the executive on capital clemency matters, and denied Johnston's request for a new clemency hearing.⁷⁸ The court also recognized in *Johnston* that Florida does not mandate "specific procedures" in the clemency process, and that further, the defendant was not denied his rights when a clemency hearing was in fact held.⁷⁹

In 2019, two federal decisions addressed whether appointed federal counsel are entitled to continue representing petitioners during clemency proceedings instead of, or in addition to, state registry counsel. In *Long v. DeSantis*, petitioner filed suit under 42 U.S.C. § 1983, alleging that the state deprived him of a constitutional and federal statutory right to representation provided in 18 U.S.C. § 3599 by precluding his federally appointed counsel from the federal defender office's Capital Habeas Unit ("CHU") from participating as clemency co-counsel in proceedings before FCOR.⁸⁰ The district court denied petitioner's motion for a stay of execution, holding that § 3599 does not confer "an enforceable federal right in clemency proceedings to have federally appointed counsel appear in conflict with a state's process, and especially not where the state process provides counsel."⁸¹ The court further noted that even if it had found § 3599 to confer an enforceable federal right, that right would not have been violated given that Florida's clemency process authorizes that state counsel be appointed to represent death row defendants in the proceedings.⁸² The court also held that state clemency procedures do not rise to the level of a "critical stage" in criminal proceedings to which the Sixth Amendment right to counsel attaches.⁸³

Similarly, in *Bowles v. DeSantis*, the petitioner sought a stay of execution in order to pursue a 42 U.S.C. § 1983 claim where he argued that his right to representation in state clemency proceedings under 18 U.S.C. § 3599 had been violated by the Board's refusal to allow his federally appointed counsel from the CHU to participate more fully in the clemency process.⁸⁴ CHU counsel was appointed to represent petitioner in federal habeas proceedings and served as co-counsel in state collateral proceedings, but the Clemency Commission appointed state registry counsel to represent petitioner in clemency proceedings.⁸⁵ The CHU attorneys were thus denied the ability to appear as co-counsel in the clemency proceedings initiated by the state. Like in *Long*, the appellate court affirmed the district court's denial of Bowles' motion for a stay, holding that Congress did not intend for persons who had been sentenced to death to have a right enforceable under § 1983 to have federally appointed counsel appear at a state clemency interview where the State had independently appointed another attorney to do so.⁸⁶

⁷⁶ *Id.*

⁷⁷ *Johnston v. State*, 27 So.3d 11, 25 (Fla. 2010).

⁷⁸ *Id.* at 26.

⁷⁹ *Id.*

⁸⁰ *Long v. DeSantis*, No. 4:19cv213-MCR-MJF, slip op. at 1 (N.D. Fla. May 16, 2019).

⁸¹ *Id.* at 14.

⁸² *Id.* at 14.

⁸³ *Id.* at 20. See generally *Gardner v. Garner* 383 F. App'x 722, 728-29 (10th Cir. 2010) (noting that a constitutional right to counsel does not exist in postconviction proceedings nor does it extend to clemency based on a state-created interest).

⁸⁴ *Bowles v. DeSantis*, 934 F.3d 1230, 1237-38 (2019).

⁸⁵ *Id.* at 1233.

⁸⁶ *Id.* at 1248.

IV. Supplemental State Information

*In thinking about clemency, it is vital to remember that this oftentimes last stage of the death penalty process takes place outside of a courtroom and is typically directed at a non-legal (or at the very least, non-judicial) audience. Depending on where the petitioner has been convicted and sentenced, a clemency petition will be considered either by the governor, a Board of Pardons and Paroles, or both. Regardless of the individual or entity responsible for the ultimate clemency decision, **politics and public opinion will almost always come into play as this critical decision is made.** For governors, clemency decisions are often perceived (rightly or wrongly) as political ‘hot potatoes,’ that can be used against them if the public is not in support. Even in states where clemency authority rests solely with a Board, members are almost always appointed by the governor, and, therefore, also frequently feel constrained by the inherently political nature of their roles. As such, it is crucial to remember that local politics, history, demographics, culture, and ethos are always in some sense at play when a plea for clemency is being considered. In recognition of the fact that a truly compelling clemency petition cannot be brought without first considering how the issues raised will play out in the state at issue, the remainder of this memorandum is dedicated to providing some generalized information to better understand the culture and politics generally in the jurisdiction where clemency is being sought.*

a. State-wide Demographics

i. General Population

In 2018, Florida was estimated to have a population of 21,299,325 people.⁸⁷

At that time, 53.5% of the population was estimated to be “White alone, not Hispanic or Latino,” and 16.9% were estimated to be “Black or African American alone.”⁸⁸ The Hispanic or Latino population was estimated to make up 26.1% of the overall population.⁸⁹

20.5% of Florida’s population is aged 65 or older, making it one of the “oldest” states in the country.⁹⁰ In this regard Florida only trails Maine, with 20.6% of its residents aged 65 or older, but which also only boasts a tiny fraction of Florida’s population.⁹¹

⁸⁷ U.S. Census Bureau QuickFacts: Florida, United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/FL/PST045218> (last visited Mar. 19, 2020).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Christine L. Himes & Lillian Kilduff, *Which U.S. States Are the “Oldest”*, Population Reference Bureau, (Dec. 13, 2019), <https://www.prb.org/which-us-states-are-the-oldest/>.

ii. Political Breakdown

As of September 30, 2019, 35% of registered voters identified as Republican, 37% of registered voters identified as Democratic, and 27% of registered voters did not affiliate with any party.⁹²

As previously mentioned, the Republican party currently controls the governor's office and holds majorities in both state legislative chambers.⁹³ According to a Quinnipiac University poll, 44% of Florida voters approve of the Trump administration, while 51% disapprove of the administration.⁹⁴

iii. Religious Make-Up

According to a Pew Research Poll taken in 2014, 70% of Floridians consider themselves to be Christian.⁹⁵ Of that number, 24% consider themselves to be Evangelical Christians and 21% identify as Catholics.⁹⁶

Florida has a slightly lower-than-average weekly church attendance as compared to other U.S. states, with 35% of Floridians claiming to attend church at least once a week,⁹⁷ compared to only 36% nationally.⁹⁸

iv. Income/Socioeconomic Breakdown

In 2019, Florida recorded 2,840,977 people, or 13.6% of the population, living in poverty.⁹⁹ African Americans had the highest poverty rate among racial and ethnic groups in Florida, accounting for 21.2% of the population in poverty.¹⁰⁰

b. Criminal Justice

i. Overall Prison Population

Statistics are derived from the Fiscal Year 2017-2018 Florida Department of Corrections Annual Report, unless otherwise noted.¹⁰¹

⁹² See *Voter Registration – By Party Affiliation*, Fla. Dep't of State – Division of Elections, (Sep. 30, 2019), <https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-monthly-reports/voter-registration-by-party-affiliation/> (percentages were calculated based on 13,507,074 total registered voters with 4,741,804 Republicans, 4,986,626 Democrats, and 3,638,583 Independents).

⁹³ *Florida State Legislature*, Ballotpedia, *supra* note 67.

⁹⁴ *Biden, Sanders Lead Trump In Florida, Quinnipiac University Poll Finds; Most Sunshine State Voters Say They're Doing Better*, Quinnipiac University Poll, (June 18, 2019), <https://poll.qu.edu/florida/release-detail?ReleaseID=2629>.

⁹⁵ Religious Landscape Study, *Florida*, Pew Research Ctr., <http://www.pewforum.org/religious-landscape-study/state/florida/> (last visited Mar. 19, 2020).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Religious Landscape Study, *Attendance at Religious Services*, Pew Research Ctr., <http://www.pewforum.org/religious-landscape-study/attendance-at-religious-services/> (last visited Mar. 19, 2020).

⁹⁹ State Year Report, *Florida 2019*, talkpoverty.org, <https://talkpoverty.org/state-year-report/florida-2019-report/> (last visited Mar. 19, 2020).

¹⁰⁰ *Id.*

¹⁰¹ *Annual Report 2017-2018*, Fla. Dep't of Corr., available at: http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf. As of the writing of this memo, the 2018-2019 Annual Report was not yet available.

- **Total Offender Population:** 96,253
- **Total Male Population:** 89,595
- **Total Female Population:** 6,658

As of the end of the 2017–2018 fiscal year, the general population consisted of 40.1% white prisoners, 47% black prisoners, and 12.4% Hispanic prisoners.

Most Common Crimes: The graph to the right, taken from the Annual Report, displays the most common crimes reported for incarcerated prisoners. More than half (55.8%) of incarcerated prisoners committed violent crimes, which include murder, manslaughter, violent personal offenses, and other crimes, like sexual offenses and robberies, where violence was used or threatened.

Property crimes accounted for 20.5% of population, and drug offenses accounted for 14.4%.

GENERAL CHARACTERISTICS BY OFFENSE TYPE

Type of Offense	Number	Percent	Avg. Sentence Length in Years*	Avg. Age
Murder, Manslaughter	15,127	15.7%	36.4	43.7
Sexual Offenses	12,526	13.0%	24.7	46.2
Robbery	12,002	12.5%	21.1	37.0
Violent Personal Offenses	12,154	12.6%	13.2	38.0
Burglary	15,204	15.8%	13.7	36.9
Theft/Forgery/Fraud	6,792	7.1%	5.4	40.1
Drug Offenses	13,818	14.4%	7.8	39.8
Weapons	4,276	4.4%	7.4	34.6
Other	4,354	4.5%	6.8	40.2

* Sentence Lengths of 50 years or longer are coded as 50 years for calculation of averages.



ii. Death Row Population and Demographics¹⁰²

Florida was the first state to reintroduce the death penalty after *Furman v. Georgia* struck down all state death penalty schemes in 1972. Florida allows prisoners to choose whether they will be executed by electrocution or lethal injection, although all recent executions have been carried out by lethal injection.¹⁰³

Total Number of Prisoners on Death Row: 339

- **Number of Women on Death Row:** 3
- **Number of African-American Prisoners on Death Row:** 125 (123 men, 2 women)
- **Number of White Prisoners on Death Row:** 205 (204 men, 1 woman)
- **Number of Prisoners Whose Race Is Listed As “Other”:** 9

¹⁰² *Death Row Roster*, Fla. Dep’t of Corr., <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx>, (last updated Mar. 19, 2020).

¹⁰³ *Florida*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> (last visited Mar. 19, 2020).

iii. Executions (Past and Pending)¹⁰⁴

Total Number of Executions since 1973: 99

- **Most Recent Execution:** August 22, 2019 (Gary Ray Bowles)
- **Number of Executions During 2018:** 2
- **Number of Executions During 2019:** 1
- **Stays Issued in 2018:** 1
- **Stays Issued in 2019:** 1

Jose Antonio Jimenez's execution was stayed on August 10, 2018, by the Florida Supreme Court as Mr. Jimenez's defense lawyers claimed that North Miami police had not turned over key police records and protested the addition of the drug etomidate to the lethal cocktail injected during execution.¹⁰⁵ Mr. Jimenez was ultimately executed on December 13, 2018, after the Florida Supreme Court rejected his claims.¹⁰⁶

James Dailey's execution was stayed on October 23, 2019, by the United States District Court for the Middle District of Florida after the lawyers representing Mr. Dailey in his state-level appeals withdrew from representing him in federal court, and a unit of the federal public defender's office was appointed.¹⁰⁷ The stay gave the federal public defender's office until December 30, 2019, to review and make filings in the case.¹⁰⁸ Advocates for Mr. Dailey argue that codefendant Jack Pearcy admitted sole responsibility for the murder and cleared Dailey of any involvement.¹⁰⁹ Mr. Dailey's attorneys also argue that his death sentence was based almost entirely on unreliable testimony from jailhouse informants, including Paul Skalnik, who provided testimony in dozens of cases, including in four that led to death sentences, in exchange for consideration in his own criminal proceedings.¹¹⁰

Since the stay of execution expired on December 30, 2019, no new execution date has been set. In late January, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit denied Mr. Dailey's application file a second or successive habeas petition in order to raise an actual innocence claim.¹¹¹ The court held that any new evidence Mr. Dailey submitted was merely supportive of the innocence claim he asserted in 2007, and therefore no new claim was asserted.¹¹² On March 5, 2020, an evidentiary hearing was held regarding Mr. Pearcy's claims of sole responsibility. However, Mr. Pearcy declined to answer any

¹⁰⁴ Statistics are taken from the Death Penalty Information Center, unless otherwise noted. See

http://www.deathpenaltyinfo.org/state_by_state; <http://www.deathpenaltyinfo.org/upcoming-executions>.

¹⁰⁵ David Ovalle, *Florida executes Jose Antonio Jimenez, who brutally murdered Miami court clerk in 1992*, Miami Herald, (Dec. 13, 2018), <https://www.miamiherald.com/news/local/crime/article222989565.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Dan Sullivan, *Federal judge grants James Dailey temporary stay of execution*, Tampa Bay Times, (Oct. 23, 2019), <https://www.tampabay.com/news/crime/2019/10/23/federal-judge-grants-james-dailey-temporary-stay-of-execution/>.

¹⁰⁸ *Id.*

¹⁰⁹ News Service of Florida, *Judge Delays Execution of Convicted Pinellas Killer James Dailey*, WUSF News, (Oct. 23, 2019), <https://wusfnews.wusf.usf.edu/post/judge-delays-execution-convicted-pinellas-killer-james-dailey>.

¹¹⁰ Debra Cassens Weiss, *Meet Paul Skalnik, one of the most prolific jailhouse informants in American History*, ABA Journal, (Dec. 6, 2019), <http://www.abajournal.com/news/article/meet-paul-skalnik-one-of-the-most-prolific-jailhouse-informants-in-american-history>.

¹¹¹ *In re: James Dailey*, No. 19-15145-P, slip op. at 5-8 (11th Cir. Jan. 30, 2020).

¹¹² *Id.*

questions regarding the affidavit he signed taking sole responsibility in the crime, and in a deposition submitted prior to the hearing, retracted his statements exonerating Mr. Dailey.¹¹³

iv. Exonerations/Innocence¹¹⁴

Total Number of Exonerations since 1973: 29¹¹⁵

- **Most Recent Exoneration:** March 28, 2019¹¹⁶
- **Number of African-American Exonerated Inmates:** 17
- **Number of White Exonerated Inmates:** 5
- **Number of Latino Exonerated Inmates:** 7

Since 1973, Florida has had 29 exonerations from death row, more than any other state.¹¹⁷ During that same period, Florida has executed 99 people, resulting in nearly one exoneration for every three executions.¹¹⁸

Dave Roby Keaton was the first death row prisoner exonerated in the United States after *Furman v. Georgia*.¹¹⁹ Keaton and four other young black men were convicted of murder for the death of an off-duty police officer who was killed during the course of a robbery at a Tallahassee convenience store.¹²⁰ Police coerced the five men into confessing to the crimes, and the surviving victims identified the men multiple times as the robbers. Three months after Keaton was convicted and sentenced to death, three other men were identified as the actual perpetrators of the convenience store robbery. After the three men who had actually committed the crime were tried and found guilty, the state dropped the charges against the original five men accused of the murder. Keaton was not fully released from prison until 1979 due to a conviction for an unrelated robbery.¹²¹

¹¹³ Chelsea Tatham, *Florida death row inmate appears in court; co-defendant refuses to testify about alleged confession*, WTSP News, (March 5, 2020), <https://www.wtsp.com/article/news/james-dailey-jack-pearcy-court-hearing/67-8d0a3d1d-8a5e-48a7-9ebc-15d93cbc031b>.

¹¹⁴ 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 Nat. Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Mar. 19, 2020); *Innocence Database*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/policy-issues/innocence-database?filters%5Bstate%5D=Florida> (last visited Mar. 19, 2020).

¹¹⁵ See *Florida*, Death Penalty Info. Ctr., *supra* note 103; see also *Innocence Database*, Death Penalty Info. Ctr., *supra* note 114.

¹¹⁶ Jim Piggott & Tarik Minor, *Wrongly convicted of murder: 2 men freed after 42 years in prison*, News4Jax, (Mar. 29, 2019), <https://www.news4jax.com/news/2019/03/29/wrongly-convicted-of-murder-2-men-freed-after-42-years-in-prison/>.

¹¹⁷ *Florida*, Death Penalty Info. Ctr., *supra* note 103.

¹¹⁸ See *Execution Database*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bstate%5D=Florida> (last visited Mar. 19, 2020).

¹¹⁹ 408 U.S. 238 (1972).

¹²⁰ Gerald Ensley, *Quincy Five's Keaton, Exonerated from Death Row, dies*, Tallahassee Democrat, (July 8, 2015), <http://www.tallahassee.com/story/news/2015/07/07/quincy-fives-keaton-exonerated-death-row-dies/29835733/>.

¹²¹ *Id.*

In 1982, a jury found **Juan Ramos** guilty of murdering his friend based largely on evidence from a scent-tracking dog. There was no physical evidence tying Ramos to the crime. The jury recommended a life sentence, but the judge overruled the recommendation and sentenced Ramos to death. Three years later, the television show *20/20* uncovered the unreliability of scent-tracking evidence (sometimes called “dog-sniff” evidence). In 1986, the Florida Supreme Court vacated Ramos’s death sentence based on the questionable scent-tracking evidence, and Ramos was found not guilty by the jury at retrial in 1987.¹²²

Seth Penalver spent 13 years on death row for three 1994 murders before he was found not guilty by a jury in 2012.¹²³ Penalver and his co-defendant were charged with killing a nightclub owner and two aspiring models after witnesses identified the two men from a grainy surveillance video. Penalver’s first trial ended in a mistrial after the jury deadlocked at 10-2 in favor of guilt. Penalver was convicted of murder and sentenced to death at his second trial; however, the Florida Supreme Court overturned the verdict after finding a series of evidentiary and constitutional errors regarding witness testimony.¹²⁴ After the third trial was completed in 2012, jurors found Penalver not guilty after 10 days of deliberation.¹²⁵ Jurors concluded that there was not enough evidence to be certain that Penalver was one of the gunmen who committed the triple murder.¹²⁶ Penalver made headlines again in 2015, speaking out about his struggle to rejoin society and against Florida’s Victims of Wrongful Incarceration Compensation Act.¹²⁷ Under the “clean-hands provision,” Penalver was not able to receive compensation for the 13 years that he spent on death row before his exoneration due to two prior nonviolent felonies on his record that were unrelated to the triple murder in 1994. According to experts, Penalver’s struggles with reintegration are common among death row exonerees or prisoners found to be wrongly convicted because the collateral consequences of their incarceration tend to impact them long after their names are cleared on paper.¹²⁸

Derral W. Hodgkins was released from prison on October 12, 2015, making him the 26th person to be exonerated from Florida’s death row.¹²⁹ Hodgkins was convicted and sentenced to death for the 2006 murder of his ex-girlfriend. Hodgkins’ first trial ended in a mistrial when one of the State’s witnesses inadvertently mentioned Hodgkins’ prior conviction for another crime during testimony. The second trial resulted in a conviction and death sentence when the State introduced DNA evidence showing Hodgkins’ skin cells under the victim’s fingernails. The trial judge imposed a death sentence for the conviction following a 7-5 vote by the jury to recommend death.¹³⁰ No eyewitnesses placed Hodgkins in the vicinity at or around the time of the murder and the evidence against him was completely circumstantial. On appeal, the Florida Supreme Court overturned Hodgkins’ conviction, ruling that the “jury had insufficient evidence to hold him

¹²² Florida: Notable Exonerations, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida> (last visited Mar. 19, 2019).

¹²³ Emanuella Grinberg, *How Some States Limit Compensation in Wrongful Convictions*, CNN, (Aug. 1, 2015), <http://www.cnn.com/2015/07/31/us/death-row-stories-exoneration-seth-penalver/>.

¹²⁴ *Id.*

¹²⁵ Associated Press, *Seth Penalver Acquitted in 1994 Miramar Triple Murder*, NBC 6 South Fla., (Dec. 21, 2012), <http://www.nbcmiami.com/news/local/Seth-Penalver-Acquitted-in-1994-Miramar-Triple-Murder-184509851.html>.

¹²⁶ *Id.*

¹²⁷ Emanuella Grinberg, *How Some States Limit Compensation in Wrongful Convictions*, CNN, (Aug. 1, 2015), <http://www.cnn.com/2015/07/31/us/death-row-stories-exoneration-seth-penalver/>.

¹²⁸ *Id.*

¹²⁹ Anna M. Phillips, *Freed by Supreme Court, Pasco man Walks off Death Row*, Tampa Bay Times, (Oct. 12, 2015), <http://www.tampabay.com/news/courts/criminal/freed-by-supreme-court-pasco-man-walks-off-death-row/2249441>.

¹³⁰ Florida: Notable Exonerations, *supra* note 122.

responsible” for the murder. The court found that the State had only shown that Hodgkins had contact with the victim, not that he had actually killed her.¹³¹

On October 12, 2015, **Clifford Williams, Jr.** who spent nearly 43 years behind bars was released from death row in Florida.¹³² Williams and his nephew were convicted and sentenced to death for murdering Jeanette Williams and injuring her girlfriend, Nina Marshall. Marshall testified that two men entered their bedroom at night and fired shots from the foot of the bed. Williams’ defense counsel, however, never presented physical evidence that indicated the shots were fired from outside the room and ignored nearly 40 alibi witnesses who could testify that Williams and his nephew were at a birthday party next door at the time of the shootings.¹³³ The pair maintained their innocence throughout their nearly four decades behind bars before petitioning Florida’s Conviction Integrity Review unit, which had been created in 2017 by State Attorney Melissa Nelson, for review.¹³⁴ The Florida Conviction Integrity Review unit noted that no physical evidenced linked the men to the shooting and that another man had confessed to several people that he was responsible. The Florida Conviction Integrity Review unit’s report was submitted by Duval County prosecutors when they requested the dismissal of all charges against Williams.¹³⁵

c. Public Opinion Polling

An early 2016 poll by Public Policy Polling found that support for the death penalty is eroding in Florida.¹³⁶ Roughly two-thirds of those polled (62%) indicated that they prefer some form of life in prison instead of the death penalty for convicted murderers, while 35% expressed support for the death penalty.¹³⁷

In 2017, a poll that focused on the counties of Orange and Osceola found waning support for capital punishment, at least in comparison to life imprisonment, for first-degree murder.¹³⁸ That poll found that most of those surveyed preferred some sort of life sentence over the death penalty. 33% of respondents preferred a life sentence without the possibility of parole, as well as required restitution to the victim’s family. 17% preferred a life sentence without the possibility of parole, and 12% preferred a life sentence with a chance of parole after at least 40 years. Only 31% of those surveyed preferred the death penalty over life imprisonment.¹³⁹

¹³¹ Anna M. Phillips, *supra* note 129.

¹³² *Description of Innocence Cases*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases#156> (last visited Mar. 19, 2020).

¹³³ *Id.*

¹³⁴ Andrew Pantazi, *In a Florida first, Jacksonville’s state attorney hired someone to exonerate inmates*, The Fla. Times-Union, (Mar. 1, 2018), <https://www.jacksonville.com/news/20180129/in-florida-first-jacksonvilles-state-attorney-hired-someone-to-exonerate-inmates>.

¹³⁵ *Description of Innocence Cases*, Death Penalty Info. Ctr., *supra* note 132.

¹³⁶ *See Majority of Floridians Prefer Life Sentence to Death Penalty, 73% Would Require Unanimous Jury Vote for Death*, Death Penalty Info. Ctr., (Feb. 9, 2016) <https://deathpenaltyinfo.org/news/majority-of-floridians-prefer-life-sentence-to-death-penalty-73-would-require-unanimous-jury-vote-for-death>.

¹³⁷ *Id.*

¹³⁸ Scott Powers, *PPP poll finds Orange, Osceola counties prefer life punishment to death sentence*, FLAPOL, (Apr. 10, 2017), <https://floridapolitics.com/archives/235802-ppp-poll-finds-orange-osceola-counties-prefer-life-punishment-death-sentence>.

¹³⁹ *Id.*

In 2018, a similar poll was taken for residents of Miami-Dade County and Pinellas County.¹⁴⁰ The poll again found strong support for some sort of life imprisonment instead of the death penalty. In Miami-Dade, 40% preferred life imprisonment without parole, plus restitution; 17% preferred life imprisonment without parole; and 18% preferred life imprisonment with the possibility of parole after 40 years. Only 21% of Miami-Dade County residents preferred the use of the death penalty over life imprisonment. Pinellas County boasted similar results with 48% preferring life imprisonment without parole, plus restitution; 12% preferred life imprisonment without parole; and 8% chose life imprisonment with the possibility of parole after 40 years. 30% of surveyed Pinellas County residents preferred the death penalty over life imprisonment.¹⁴¹

V. Additional Information for Consideration in Clemency

a. Past Capital Clemency Decisions

i. Grants

Capital clemency has been granted six times in Florida since 1976, in each case by Governor Bob Graham.¹⁴² Out of the six grants, three of the clemency recipients were white and three were black.¹⁴³

Learie Leo Alford's death sentence was commuted in 1979 after Governor Bob Graham recommended to the Board that his sentence be reduced to life in prison.¹⁴⁴ Alford was convicted of the rape and murder of a 13-year-old girl in 1973.¹⁴⁵ Alford's direct appeals were unsuccessful and the Supreme Court denied certiorari in 1976.¹⁴⁶ In 1977, an eyewitness from trial recanted his testimony, saying that the actual murderer was larger in size than Alford.¹⁴⁷ At Alford's clemency hearing, the main argument made by Alford's attorney was "Learie Alford did not commit the murder he was convicted of."¹⁴⁸

Clifford Hallman was also granted clemency in 1979.¹⁴⁹ Hallman was found guilty of killing a bartender with a broken drinking glass, putting her in the hospital for four days prior to her death.¹⁵⁰ There was some

¹⁴⁰ *New Polls in Two Florida Counties that Heavily Use the Death Penalty Find Voters Prefer Life Sentences Instead*, Death Penalty Info. Ctr., (Mar. 2, 2018), <https://deathpenaltyinfo.org/news/new-polls-in-two-florida-counties-that-heavily-use-the-death-penalty-find-voters-prefer-life-sentences-instead>.

¹⁴¹ *Id.*

¹⁴² *List of Clemencies Since 1976*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> (last visited Mar. 19, 2020).

¹⁴³ *Humanitarian Grants of Clemency by Race of Defendant*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/clemency/humanitarian-grants-of-clemency-by-race-of-defendant> (last visited Mar. 19, 2020).

¹⁴⁴ Jane Baumann, *Clemency Vote Scheduled for two on Death Row*, *The Evening Indep.*, (June 23, 1979), available at <https://news.google.com/newspapers?nid=950&dat=19790623&id=TtBaAAAAIBAJ&sjid=Tn0DAAAAIBAJ&pg=4199,1701687&hl=en>.

¹⁴⁵ *Alford v. State*, 307 So.2d 433 (Fla. 1975).

¹⁴⁶ Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 Mich. L. Rev. 1, 36 (2014).

¹⁴⁷ *Id.*

¹⁴⁸ Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 306 (1993).

¹⁴⁹ *List of Clemencies Since 1976*, Death Penalty Info. Ctr., *supra* note 142.

¹⁵⁰ Patrick McMahon, *Clemency Board Hears Unusual Death Sentence Appeals*, *St. Petersburg Times*, (May 18, 1979), available at <https://news.google.com/newspapers?nid=888&dat=19790518&id=kk1SAAAAIBAJ&sjid=Q3wDAAAAIBAJ&pg=6711,1949166&hl=en>.

indication, however, that the victim's death actually resulted from bleeding that went unattended at the hospital. The hospital did not admit fault but settled a civil lawsuit with the victim's family. The United States Supreme Court and the Florida Supreme Court both upheld Hallman's conviction.¹⁵¹ Governor Graham recommended to the Board that Hallman's sentence be commuted to life in prison,¹⁵² and the Board approved the grant.

Darrell Edwin Hoy was convicted of the murder of a teenage couple in 1975.¹⁵³ Hoy's accomplice was originally also sentenced to death but was retried and sentenced to life imprisonment.¹⁵⁴ At the clemency hearing, defense counsel argued that Hoy was a "pathetic, childlike young man with the mentality of a 14-year-old" at the time of the crime and was manipulated by his accomplice who received a lesser sentence.¹⁵⁵ In 1980, Governor Graham recommended commuting Hoy's sentence due to lack of proportionality between Hoy's sentence and the equally or more culpable co-defendant who actually pulled the trigger.¹⁵⁶

Richard Henry Gibson was granted clemency on May 6, 1980.¹⁵⁷ Four men including Gibson were accused of robbing and killing a Brazilian sailor on leave in 1975. Gibson's trial lawyer did not present any evidence, and Gibson was found guilty and sentenced to death. One of the other perpetrators was sentenced to life in prison, and the other two perpetrators were never punished. Governor Graham recommended clemency apparently based on the discrepancies in punishment among the perpetrators.¹⁵⁸

Michael Salvatore was convicted, along with two companions, of the 1975 murder of a Miami man.¹⁵⁹ Salvatore's counsel argued at the clemency hearing that the petitioner had nothing to do with the crime.¹⁶⁰ In commuting the death sentence, Governor Graham again cited the disparity between his sentence and those of two others involved in the crime.¹⁶¹ Salvatore's sentence was commuted roughly 18 months after the conclusion of his direct appeal.¹⁶²

¹⁵¹ *Id.*

¹⁵² Jane Baumann, *Clemency Vote Scheduled for two on Death Row*, The Evening Indep., (June 23, 1979), available at <https://news.google.com/newspapers?nid=950&dat=19790623&id=TtBaAAAAIBAJ&sjid=Tn0DAAAAIBAJ&pg=4199,1701687&hl=en>.

¹⁵³ Nancy Kalwary, *'I Didn't Kill': Condemned Pinellas Murderer Darrell Hoy Tells his Story from Death Row*, The Evening Indep., (Jan. 1, 1980), available at <https://news.google.com/newspapers?nid=950&dat=19800101&id=8OULAAAAIBAJ&sjid=v1gDAAAAIBAJ&pg=1814,85936&hl=en>.

¹⁵⁴ Michael L. Radelet & Barbara A. Zsembik, *supra* note 148, at 310.

¹⁵⁵ Nancy Kalwary, *Decision May Affect Hoy Case*, The Evening Indep., (Dec. 21, 1979), available at <https://news.google.com/newspapers?nid=950&dat=19791221&id=wFpQAAAAIBAJ&sjid=qlgDAAAAIBAJ&pg=4669,1321046&hl=en>.

¹⁵⁶ Chris King, *Clemons Files for Clemency, Nixon Freed from Procedural Protocol to View all Facts*, St. Louis Am., (June 18, 2009), http://www.stlamerican.com/news/local_news/article_8b42b48d-1b7e-5bee-9283-b8cb5c02ed4e.html.

¹⁵⁷ Michael L. Radelet & Barbara A. Zsembik, *supra* note 148, at 308.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 313.

¹⁶⁰ *Id.*

¹⁶¹ Chris King, *supra* note 156.

¹⁶² Adam M. Gershowitz, *supra* note 146.

Jesse Rutledge was the last petitioner to be granted commutation of a death sentence in Florida.¹⁶³ Rutledge was convicted in 1974 of breaking and entering a home, where he allegedly stabbed a woman and her three children. The mother and one of the children died. Rutledge maintained his innocence throughout trial, and there was evidence implicating another man.¹⁶⁴ At a clemency hearing, Rutledge's attorney told the Board that someone else was guilty of the crime, claiming that the police involved in the case were in a rush to hold someone responsible.¹⁶⁵ Governor Graham recommended that Rutledge's sentence be reduced to life in prison,¹⁶⁶ and the Board approved the recommendation on April 19, 1983.¹⁶⁷ There is some indication that Governor Graham commuted the sentence due to the possibility that another man "more closely matched the description of the suspect."¹⁶⁸

ii. Denials (where newsworthy or controversial)

In 2000, the *Florida Times Union* published an article discussing the seeming disappearance of capital clemency grants in the state.¹⁶⁹ Between Governor Graham's last grant of clemency in 1983 and when the article was published 17 years later, 161 death row prisoners had petitioned various governors and the Board for clemency. No petitions were granted. When questioned about the departure from granting clemency after Governor Graham left office, then-governor Jeb Bush said that clemency is rarely used in Florida due to the success of the court appeals process. "So when it gets to the clemency area, while it's another safeguard, it is seldom used because the process works pretty well," Bush said.¹⁷⁰

However, a death penalty scholar from the University of Florida disagreed with Governor Bush's assertion, saying that governors stopped granting clemency because of political reasons and not because the legal process had become so robust.¹⁷¹ Professor Michael Radelet predicted that governors might start to grant clemency again due to increased attention given to "flaws in the judicial and criminal systems."¹⁷²

Other scholars have noted how since Governor Graham's commutations, the death penalty has become "a dominant political issue in Florida."¹⁷³ Even Governor Graham reportedly stated that "nothing sells on the campaign trail like promises to speed up the death penalty," and Graham increased the number of death warrants he signed while running for reelection in 1982 and for the Senate in 1986.¹⁷⁴ When Jeb Bush was running for governor, he ran an ad where the mother of a murder victim criticized Governor Lawton Chiles

¹⁶³ *List of Clemencies Since 1976*, Death Penalty Info. Ctr., supra note 142.

¹⁶⁴ Michael L. Radelet & Barbara A. Zsembik, supra note 148, at 313.

¹⁶⁵ *Hawthorne Killer may get Sentence Reduced*, Gainesville Sun, (Apr. 7, 1983), available at, <https://news.google.com/newspapers?nid=1320&dat=19830407&id=OpcRAAAAIBAJ&sjid=mOkDAAAIBAJ&pg=2262,2284254&hl=en>.

¹⁶⁶ *Id.*

¹⁶⁷ Michael L. Radelet & Barbara A. Zsembik, supra note 148, at 313.

¹⁶⁸ Adam M. Gershowitz, supra note 146.

¹⁶⁹ Randolph Pendleton, *Clemency Rarely Given in Florida*, The Fla. Times Union, (June 24, 2000), http://jacksonville.com/tu-online/stories/062400/met_3389283.html#.V6C2Qe8UXDc.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 772 (1995).

¹⁷⁴ *Id.* at 772-776.

for allowing the convicted killer to remain on death row for thirteen years prior to execution. Governor Bush also criticized Chiles for not overseeing enough executions as governor.¹⁷⁵ In the years since these political campaigns, however, political support for the death penalty has undergone a decline as violent crime and murder rates have also dropped.¹⁷⁶ Even though public support for the death penalty in Florida has diminished, however, the fact remains that no Florida governor has granted clemency in a capital case since 1984.

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

Hurst v. Florida and Hurst v. State

On January 12, 2016, the U.S. Supreme Court issued its opinion in *Hurst v. Florida*¹⁷⁷, striking down Florida's death penalty sentencing scheme. Timothy Hurst was convicted in 1998 of the murder of his co-worker and was sentenced to death.¹⁷⁸ Under Florida law "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment."¹⁷⁹ The statute permitted judges to sentence capital felons to death if the court found reason to impose such punishment during a separate sentencing proceeding. Under the law, the jury's sentence rendered after the verdict was merely advisory and not binding on the judge, and in deciding the ultimate sentence, the judge was allowed to independently find aggravating and mitigating factors apart from what the jury had found.¹⁸⁰

In Timothy Hurst's case, the jury recommended a sentence of death by a vote of 7-5, and the judge independently agreed with the recommendation and sentenced Hurst to death. On appeal, the Florida Supreme Court affirmed Hurst's conviction 4-3, and rejected the defense's argument that Florida's sentencing scheme violated the Sixth Amendment and the precedent established by the U.S. Supreme Court in a separate case, *Ring v. Arizona*¹⁸¹, Hurst argued that allowing a judge to find aggravating factors sufficient to impose the death penalty constituted fact-finding and that *Ring* required all fact-finding be made by the jury.¹⁸²

In 2016 the U.S. Supreme Court agreed with Hurst's argument and found that the Florida death penalty statute was unconstitutional under the Sixth Amendment.¹⁸³ The Court wrote, "As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."¹⁸⁴

¹⁷⁵ *Id.* at 774.

¹⁷⁶ Alan Greenblatt, *Death Penalty Fades As Hot-Button Issue*, (Mar. 2, 2014), <https://www.npr.org/sections/itsallpolitics/2014/05/02/308710317/death-penalty-fades-as-hot-button-issue>.

¹⁷⁷ 136 S.Ct. 616 (2016).

¹⁷⁸ *Id.* at 619.

¹⁷⁹ *Id.* at 620. See also Fla. Stat. § 782.04(1)(a) (2010),

¹⁸⁰ *Hurst*, 136 S.Ct. at 620.

¹⁸¹ 122 S.Ct. 2428 (2002).

¹⁸² *Hurst*, 136 S.Ct. at 620.

¹⁸³ *Id.* at 621.

¹⁸⁴ *Id.* at 622.

After the *Hurst* decision was rendered, the Florida legislature adopted a new sentencing procedure aimed at fixing the problems identified by the Court, while maintaining the death penalty in Florida.¹⁸⁵ Until the revisions to the existing statute were approved, executions in Florida were put on hold. One circuit judge prevented prosecutors from seeking the death penalty because, at the time, the ability of the state to constitutionally sentence someone to death was unknown. The new scheme approved by the legislature in April 2016 required jurors to unanimously agree on the existence of at least one aggravating circumstance and render a vote of at least 10-2 in favor of the death penalty for the defendant to be eligible for execution.¹⁸⁶

On May 9, 2016, a judge in Miami-Dade County found that Florida's revised statute was unconstitutional because the law still did not require jury unanimity when voting to impose the death penalty.¹⁸⁷ "Arithmetically the difference between twelve and ten is slight," the judge wrote. "But the question before me is not a question of arithmetic. It is a question of constitutional law. It is a question of justice."¹⁸⁸ The state appealed the decision. On October 14, 2016, the Florida Supreme Court agreed with the lower court and struck down the revamped death penalty law because it did not require unanimous juries, something that was required for criminal convictions in Florida in all other cases.¹⁸⁹ In *Hurst v. State*, the Florida Supreme Court declared that juries "must be the finder of every fact" and that "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge."¹⁹⁰ On March 13, 2017, then-governor Rick Scott signed SB 280 into law, requiring a unanimous jury to sentence someone to death in the state of Florida.¹⁹¹

With nearly 400 people sentenced to death under the law deemed unconstitutional by *Hurst*, the Florida Supreme Court was then faced with the question of whether the *Hurst* decision applied retroactively to existing death sentences.¹⁹² The Florida Supreme Court in *Asay v. State* held that the *Hurst* decision would be retroactive for all death sentences that became effective after the issuance of the Supreme Court's decision in *Ring* in 2002.¹⁹³ Critics asserted that the *Asay* decision arguably drew an arbitrary "life or death distinction between functionally identical cases," and a prisoner argued that executing him simply because

¹⁸⁵ Mark Berman, *Florida Death Penalty Officially Revamped After Supreme Court Struck it Down*, Wash. Post, (Mar. 7, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/07/florida-death-penalty-officially-revamped-after-supreme-court-struck-it-down/?tid=a_inl&utm_term=.47a3598aba82.

¹⁸⁶ *Id.*

¹⁸⁷ David Ovalle, *Judge says State Death-Penalty Law is Unconstitutional*, Miami Herald, (May 9, 2016), <http://www.miamiherald.com/news/local/community/miami-dade/article76520707.html>.

¹⁸⁸ *State v. Gaiter*, No. F12-8535, 2016 WL 2626005, at *9 (Fla. Cir. Ct. May 09, 2016).

¹⁸⁹ Mark Berman, *Florida Supreme Court says state's new death penalty law is unconstitutional*, The Wash. Post, (Oct. 14, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/10/14/florida-supreme-court-says-states-new-death-penalty-law-is-unconstitutional/>.

¹⁹⁰ *Hurst v. State*, 202 So. 3d 40, 53–54 (Fla. 2016).

¹⁹¹ Michael Ausle, *Unanimous jury standard for death penalty is now the law in Florida*, Miami Herald, (Mar. 13, 2017), <https://www.miamiherald.com/news/politics-government/state-politics/article138311218.html>.

¹⁹² Mark Berman, *Florida has Nearly 400 Death-Row Inmates. Will the State Overturn all of their Death Sentences?*, The Wash. Post, (May 4, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/04/florida-has-nearly-400-death-row-inmates-will-the-state-overturn-all-of-their-death-sentences/>.

¹⁹³ *Asay v. State*, 210 So. 3d 1, 15 (Fla. 2016).

his case was decided before *Ring* violated his Eighth Amendment and due process rights.¹⁹⁴ The Florida Supreme Court, in *Hitchcock v. State*, affirmed the holding in *Asay* and confirmed that *Hurst* would be retroactively applied only to cases that were not yet final as of 2002.¹⁹⁵

State v. Poole

The fallout from *Hurst* did not end there, however. In 2019, the ideological composition of the Florida Supreme Court changed dramatically when three justices were forced to retire due to reaching maximum age requirements. After Governor DeSantis appointed three new, more conservative justices, the newly right-leaning court issued an order seeking arguments on whether the court should recede from the decisions in *Hurst*.¹⁹⁶ Attorney General Moody filed a brief in support of recession, arguing that the earlier decisions ignored longstanding precedent and thus did not deserve the benefit of *stare decisis*. Opponents of reconsidering the decision in *Hurst* argued that reversing the state's retroactive consideration of death penalty cases would amount to "the most egregious judicial activism in the history of Florida."¹⁹⁷

In January 2020, the Florida Supreme Court receded from its decision in *Hurst*. In *State v. Poole*, the court held that based on the U.S. Supreme Court decision in *Hurst* and under relevant Florida law, juror unanimity in the recommendation in favor of death was *not* constitutionally required for a death sentence to be imposed, as it had previously held.¹⁹⁸

In 2011, a jury had convicted Mark Anthony Poole of capital murder and recommended death by a vote of 11-1.¹⁹⁹ The judge then imposed the death sentence. Because the jury's recommendation for death was not unanimous, Poole's death sentence was vacated under *Hurst v. State*²⁰⁰ in 2016 and a new sentencing hearing was ordered. In 2020 when the Florida Supreme Court looked at its rulings under *Hurst* anew, however, it determined that its earlier decisions were wrongly decided. Thus, in *State v. Poole*, the court held that *Hurst v. Florida* only mandated a jury to unanimously find the existence of **one** statutory aggravating factor sufficient to expose the defendant to death. The court therefore held that its decision in *Hurst v. State*, which found that a jury must unanimously recommend a defendant be sentenced to death, must unanimously find the presence of the aggravating factors, and must unanimously determine that the aggravating factors outweigh the mitigating factors, was incorrect, and Mr. Poole's death sentence could be reinstated because the jury had found the existence of one aggravating factor unanimously.²⁰¹ The court in *Poole* found that its decision in *Hurst* conflated two critical components of a death penalty decision: the "eligibility" component—rendering a defendant **capable** of receiving a death sentence—and the "selection"

¹⁹⁴ Florida Supreme Court Reaffirms Decision to Deny Relief for Unconstitutional Sentences Issued Prior to 2002, Am. Bar Ass'n, (Dec. 1, 2017), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2017/year-end/florida-supreme-court-reaffirms-decision-to-deny-relief-for-unco/.

¹⁹⁵ *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017).

¹⁹⁶ Jim Saunders, Florida Attorney General Ashley Moody wants state Supreme Court to reconsider death penalty decisions, Orlando Weekly, (June 4, 2019), <https://www.orlandoweekly.com/Blogs/archives/2019/06/04/florida-attorney-general-ashley-moody-wants-state-supreme-court-to-reconsider-death-penalty-decisions>.

¹⁹⁷ Dara Kam, Attorney Raises 'Judicial Activism' in Key Death Penalty Case, Law.com (June 26, 2019), <https://www.law.com/dailybusinessreview/2019/06/26/attorney-raises-judicial-activism-in-key-death-penalty-case/>.

¹⁹⁸ *State v. Poole*, No. SC18-245, 2020 WL 370302, at *1 (Fla. Jan. 23, 2020).

¹⁹⁹ *Id.* at *20.

²⁰⁰ *Id.* at *2.

²⁰¹ *Id.* at *13.

component—actually determining that based on a weighing of factors, the defendant **should** be sentenced to death. Overruling its decision in *Hurst v. State*, the court in *Poole* held that the only decision requiring unanimous fact-finding by the jury under Supreme Court precedent was the eligibility determination, meaning that so long as one aggravating factor sufficient to expose the defendant to the death penalty was found unanimously by the jury, there was no constitutional violation under *Hurst v. Florida*.

In his dissent in *Poole*, Justice Jorge Labarga criticized the majority decision as “remov[ing] a significant safeguard to the application of the death penalty”²⁰² by failing to require a unanimous recommendation that the defendant be sentenced to death. But while the *Poole* decision suggests that the legislative amendments made to Florida’s death penalty law in light of *Hurst v. State* requiring unanimity in the recommendation to sentence a defendant to death went further than constitutionally required, they remain the law for new death sentences going forward. Nevertheless, the decision in *Poole* has created widespread uncertainty in the cases that were in the process of undergoing resentencing subsequent to *Hurst v. State*. Only days following the decision in *Poole*, state attorneys began to seek reinstatement of death sentences that had been vacated pursuant to *Hurst*.²⁰³ The decision has also caused considerable confusion for the 38 prisoners who have already been resentenced to life in prison after their death sentences were overturned on account of *Hurst*.²⁰⁴

c. Divisive/Important Political Issues in the State

i. Timely Justice Act of 2013 (SB 1750)

In 2013, the Florida Legislature passed Senate Bill 1750, commonly known as the “Timely Justice Act of 2013” (SB 1750). SB 1750 removed the right to appointed counsel in capital clemency proceedings after July 1, 2013; limited post-conviction or collateral actions in capital cases; required capital collateral counsel to comply with statutory requirements rather than rules of the court; and set performance standards for post-conviction counsel, among other changes.²⁰⁵ The bill also required that the governor sign a convicted prisoner’s death warrant within 30 days of the conclusion of the prisoner’s federal appeal and schedule the execution within 180 days from the date of the warrant after executive clemency was exhausted.²⁰⁶

One senator who voted against the bill questioned whether swift justice would promote fair justice.²⁰⁷ Senator Arthenia Joyner, a Democrat and Tampa attorney said, “We have seen cases where, years later, convicted people were exonerated.”²⁰⁸ The Greater Miami Chapter of the ACLU echoed Senator Joyner’s concerns and pointed out that “experience in the Florida system teaches that it often takes years, and

²⁰² *Id.* at *20.

²⁰³ Jessica De Leon, *After court ruling, prosecutors want Carlie Brucia’s killer’s death sentence reinstated*, Bradenton Herald, (Jan. 29, 2020), <https://www.bradenton.com/news/local/crime/article239724263.html>.

²⁰⁴ *Florida Prisoners Sentenced to Death After Non-Unanimous Jury Recommendations, Whose Convictions Became Final After Ring*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring> (last visited Mar. 19, 2020).

²⁰⁵ S.B. 1750, 2013 Leg., Reg. Sess. (Fla. 2013).

²⁰⁶ *Id.*

²⁰⁷ Bill Cotterell, *Florida Legislators Approve Measure to Speed up Executions*, Reuters, (Apr. 29, 2013), <http://www.reuters.com/article/us-usa-florida-deathpenalty-idUSBRE93S0UT20130429>.

²⁰⁸ *Id.*

several appeals, before an inmate can establish his or her innocence of the crime or can discover facts that establish that he or she is legally exempt from execution.”²⁰⁹ Critics argued that had the Act been in effect in years prior, Florida would not have as many death row exonerations as it does currently.²¹⁰ These prisoners would have been executed.

On June 12, 2014, the Florida Supreme Court upheld the Act as constitutional. Opponents argued that the Act “directly intrudes on the constitutional authority of [the Florida Supreme Court] to regulate the practice and procedure of courts in [Florida] by creating specific time requirements that automatically require the issuance of a warrant of execution upon the completion of the statutorily designated post-conviction proceedings, and do not account for the pendency of other capital proceedings, such as successive post-conviction litigation.”²¹¹ The court explained through detailed analysis that each provision of the Act challenged by petitioners did “not facially violate the constitution,” and that none of the provisions modified or altered any of the court’s powers in capital proceedings.²¹²

ii. 2018 Voting Restoration for Felons Initiative (Florida Amendment 4)

In 2018, a ballot initiative to amend Article VI, Section 4 of the Florida Constitution was introduced to restore voting rights to citizens convicted of certain felonies after they had served their sentences.²¹³ This was after a 2016 report found that an estimated 6.1 million people across the United States were disenfranchised due to a felony conviction, and that in Florida alone, the total number of disenfranchised individuals both in and out of prison accounted for over a quarter of the disenfranchised population nationally.²¹⁴ Among individuals still ineligible to vote after serving their sentence, in 2016 Florida’s nearly 1.5 million individuals who remain disenfranchised after being released from prison accounted for nearly half of this population nationally. The report also found that over 1 in 5 (21%) of African Americans in Florida were disenfranchised.²¹⁵

The amendment, known as Amendment 4 or the Voting Rights Restoration for Felons Initiative, passed by a vote of 64.55%, surpassing the 60% supermajority required for approval.²¹⁶ Amendment 4, if implemented, is expected to have major impacts in future elections in the swing state, which is known for its tight elections in national contests.²¹⁷ Governor DeSantis and the Republican-controlled legislature have resisted implementation of Amendment 4 and with the passage of SB 7066, moved to limit voting eligibility for former offenders by requiring them to pay outstanding restitution and fines to have their sentences

²⁰⁹ Todd Scher, *Death Penalty: Florida’s new Timely Justice Act Moves in Wrong Direction*, Am. Civil Liberties Union of Fla., (June 24, 2013), <https://miami.aclufi.org/2013/06/24/floridas-timely-justice-act-moves-in-wrong-direction/>.

²¹⁰ *Id.*

²¹¹ *Abdool v. State*, 141 So.3d 529, 538 (Fla. 2014).

²¹² *Id.* at 538-555.

²¹³ Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, NPR, (Nov. 7, 2018),

<https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4>.

²¹⁴ Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, The Sentencing Project, (Oct. 6, 2016), <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

²¹⁵ *Id.*

²¹⁶ Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018), Ballotpedia, [https://ballotpedia.org/Florida-Amendment-4_Voting-Rights-Restoration-for-Felons-Initiative-\(2018\)](https://ballotpedia.org/Florida-Amendment-4_Voting-Rights-Restoration-for-Felons-Initiative-(2018)) (last visited Mar. 19, 2020).

²¹⁷ Tim Mak, *supra* note 213.

considered completed.²¹⁸ Amendment 4 did not specifically mention restitution or fines, instead using the phrase “completion of all terms of sentence” to mark the point at which a person’s voting rights were to be restored.²¹⁹ SB 7066, by contrast, interprets “completion of all terms of sentence” to include outstanding restitution and fines.²²⁰ Opponents to SB 7066 argue that the law discriminates against felons on the basis of indigence given that two people convicted of the same crime may have different voting eligibility solely based on their ability to pay outstanding fines. Determining eligibility to vote based on SB 7066 also poses challenges because the state has yet to figure out how to track the data necessary to implement the law. Currently, data tracking financial obligations is housed in different places across state and local governments.²²¹ Likewise, no local or state entity currently tracks restitution.²²²

Cases are ongoing regarding the constitutionality of SB 7066, and a federal judge has criticized lawyers representing Governor DeSantis for trying to “run out the clock” to keep felons from voting in the 2020 elections.²²³ In October 2019, civil liberty groups representing impoverished former felons sought and received a temporary injunction against the state seeking to implement SB 7066.²²⁴ While this challenge was pending, the Board of Executive Clemency unanimously approved revising the clemency rule related to rights restoration. Unlike the previous rule, which required restitution to be paid in full before felons could even apply to have their rights restored, the revised rule will allow felons who owe restitution to request a clemency hearing before the Board if it has been at least *seven years* since they completed their prison sentence and they have fulfilled the other requirements of their sentence.²²⁵

While the suit challenging the constitutionality of SB 7066 was still pending in the district court, Governor DeSantis sought an advisory opinion from the Florida Supreme Court on the same question. The court issued an advisory opinion siding with the State’s interpretation of “terms of sentence” to include outstanding financial obligations.²²⁶ While the advisory opinion is not binding, it is an indication of how such arguments might fair in the conservative state court.

On February 19, 2020, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the district court’s injunction against SB 7066, issuing a 78-page opinion finding it unconstitutional

²¹⁸ Gary Fineout, *Florida governor seeks delay in landmark voting rights case*, Politico, (Sep. 11, 2019), <https://www.politico.com/states/florida/story/2019/09/11/florida-governor-seeks-delay-in-landmark-voting-rights-case-1183570>

²¹⁹ Florida Amendment 4, *supra* note 216.

²²⁰ *Id.*

²²¹ Lawrence Mower, *U.S. judges cast doubt on Florida law requiring ex-felons to pay before they can vote*, Los Angeles Times, (Jan. 28, 2020), <https://www.latimes.com/world-nation/story/2020-01-28/florida-felons-voting-poll-tax>.

²²² *Id.*

²²³ Dara Kam, *Federal Judge Scolds DeSantis For Stalling On Felon Voting Rights*, WUSF News, (Dec. 4, 2019), <https://wusfnews.wusf.usf.edu/post/federal-judge-scolds-desantis-stalling-felon-voting-rights>.

²²⁴ Lawrence Mower, *supra* note 221.

²²⁵ Dara Kam, *Florida cabinet updates clemency rules following Amendment 4 opinion*, Orlando Sentinel (Jan. 21, 2020), <http://www.orlandosentinel.com/politics/os-ne-desantis-clemency-rule-20200121-j6wz2dm6evgfnkx15b3rlwjsm-story.html>.

²²⁶ Zuri Davis, *In Advisory Opinion, Florida Supreme Court Says State Can Require Ex-Felons to Pay Fines Before Having Their Voter Rights Restored*, Reason (Jan. 21, 2020), <https://reason.com/2020/01/21/in-advisory-opinion-florida-supreme-court-says-state-can-require-ex-felons-to-pay-fines-before-having-their-voting-rights-restored>.

to condition voting rights on felons' ability to pay the fines and fees associated with their sentence. The court found that

Because the LFO requirement punishes those who cannot pay more harshly than those who can—and does so by continuing to deny them access to the ballot box—Supreme Court precedent leads us to apply heightened scrutiny in asking whether the requirement violates the Equal Protection Clause of the Fourteenth Amendment as applied to these plaintiffs. When measured against this standard, we hold that it does and affirm the preliminary injunction entered by the district court.²²⁷

According to reports,²²⁸ Governor DeSantis is now seeking review of the matter before the full court of appeals and arguing in addition that the ruling in this case applies only to the specific plaintiffs that were parties to the suit. A decision by the 11th Circuit whether to hear the case *en banc* has not yet been issued.

d. Other Relevant Legal, Historical, or Social Issues

Through the 1980s, executive clemency proceedings generally took place shortly after the denial of certiorari from direct appeal.²²⁹ During that time, “the only institutionalized mechanism for locating pro bono lawyers for Florida death row inmates was a small, non-profit community organization called the Florida Clearinghouse on Criminal Justice.”²³⁰ The Clearinghouse was not funded by the government, and was staffed by only two or three non-attorneys at a time. However, “the number of death warrants increased dramatically at the same time that the pool of available volunteer counsel decreased. Between 1979 . . . and December 1983, the Florida Governor signed sixty-five warrants. Fifty-one (78%) of those cases required volunteer counsel.”²³¹ Not all of those prisoners in need of counsel received volunteer representation. Twenty-three death warrants were signed in 1982 alone. Fifteen, or 65%, were unrepresented at the time the warrants were signed.²³²

Three systemic efforts, two in the form of litigation and one in the form of legislation, have been mounted to deal with the counsel problem in Florida. In 1985 these efforts culminated in the creation of a state agency, the Office of the Capital Collateral Representative (CCR), to provide direct representation to Florida's condemned.²³³

Now called the Capital Collateral Regional Counsel (“CCRC”), the agency is charged with representing “each person convicted and sentenced to death in [Florida] for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person” in state and federal court post-conviction proceedings.²³⁴ In 2005, then-Florida Supreme Court

²²⁷ *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020).

²²⁸ Jonathan Diaz, *What Is Next in Florida's Amendment 4 Case?*, Campaign Legal Ctr., (Feb. 28, 2020), <https://campaignlegal.org/update/what-next-floridas-amendment-4-case>.

²²⁹ Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513, 520 n.31 (1988).

²³⁰ *Id.* at 568.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 585-86.

²³⁴ Fla. Stat. Ann. § 27.702.

Justice Raoul Cantero praised the work of the CCRC, saying, “I will tell you the representation from the CCRC is consistently average or above average to excellent.”²³⁵ Justice Cantero’s remarks are credited with aiding in the push to prevent Governor Jeb Bush and the Florida Legislature from privatizing capital post-conviction counsel and eliminating the CCRC altogether.²³⁶ Under the “Timely Justice Act of 2013,” the state retains the right, however, to appoint counsel for clemency proceedings that are not employed by CCRC.²³⁷

²³⁵ Jan Pudlow, *Judge Rips Shoddy Work of Private Capital Case Lawyers*, The Fla. Bar News, (Mar. 1, 2005), <https://www.floridabar.org/divcom/jn/jnnews01.nsf/Articles/6D34A7C218AE74C385256FB0004F3311>.

²³⁶ *Id.*

²³⁷ S.B. 1750, 2013 Leg., Reg. Sess. (Fla. 2013).