

# GEORGIA

## Capital Clemency Information Memorandum

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## **Introduction**

Clemency in capital cases serves as a “fail-safe” in our criminal justice system, by acting to prevent unjust executions and to ensure that there is meaningful due process and review at every stage of a capital case. Prior to the execution of a death-sentenced prisoner, a clemency petition asks a governor, board of pardons and paroles, or both, to review the case and grant either a *reprieve* (a delay of execution for a set or undetermined period of time); a *pardon* (effectively ‘undoing’ the initial conviction); or a *commutation* of sentence (for example, reducing a sentence of death to a sentence of life in prison). In the capital clemency context, death row petitioners typically seek either a *reprieve* or a *commutation*.

Because the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a death row prisoner may seek executive commutation for a wide range of reasons that may not have been raised or adjudicated in earlier legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that govern an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—additional investigation into the prisoner’s case and a nuanced understanding of the state-specific issues that can be relevant to the decision maker(s).

While clemency has long been recognized as an essential component of our criminal justice system, access to clemency is not explicitly guaranteed by the federal Constitution or otherwise governed by traditional due process requirements. States, therefore, have wide latitude in defining the procedures that govern their capital clemency processes. As a result, these processes, the quality of capital clemency representation, and the receptivity of decision makers vary widely nationwide.

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

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

## **State Capital Clemency Information**

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

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

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

The Georgia Constitution vests the exclusive power to grant clemency (including in capital cases) with the State Board of Pardons and Paroles (“the Board”).<sup>1</sup>

“[T]he State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.”<sup>2</sup>

The Board has the power to commute a sentence of death to one of life imprisonment after an affirmative vote by a majority of Board members.<sup>3</sup> The General Assembly has the power to prohibit the Board from granting a pardon or parole to:

“(1) Any person incarcerated for a second or subsequent time for any offense for which such person could have been sentenced to life imprisonment; and (2) Any person who has received consecutive life sentences as a result of offenses occurring during the same series of acts.”<sup>4</sup>

The Constitution makes no mention of executive participation in the clemency process apart from appointing members to the Board.<sup>5</sup>

<sup>1</sup> Ga. Const. art. IV, § II, ¶ II.

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

<sup>3</sup> Ga. Code Ann. § 42-9-2 (2015).

<sup>4</sup> Ga. Const. art. IV, § II, ¶ II (c).

<sup>5</sup> Ga. Const. art. IV, § II, ¶ I.

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

The Board consists of five members appointed by the governor, subject to confirmation by the state Senate.<sup>6</sup> All members serve a staggered term of seven years.<sup>7</sup> The members must select one member to serve as chairperson.<sup>8</sup>

### **c. When to Bring a Petition**

The Board only considers granting a commutation if the petitioner appears to have exhausted all appeals and other judicial avenues of relief.<sup>9</sup> If necessary to fully review a petitioner's case, the Board can suspend an execution for up to 90 days, during which time the Board may determine whether additional relief (such as a commutation) should be granted.<sup>10</sup>

The Board typically sets a hearing date only once an execution warrant has been issued.<sup>11</sup> The petition and supporting materials must be received by the Board prior to the hearing date. The Board will notify the petitioner's counsel of the due date for the petition, supporting materials, and witness list. This due date may be very soon after notification, as the law provides that execution warrants must specify a window of time, starting 10 to 20 days from the date of the warrant, during which an execution may proceed.<sup>12</sup>

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

In Georgia, a clemency petition may be submitted in written form and must contain the grounds on which the request for commutation is based.<sup>13</sup> However, the Board may also consider the following information in reaching a decision:

1. A report or testimony reflecting the petitioner's conduct in prison;
2. Testimony, written or live, from family members, loved ones, friends, co-workers, former attorneys, religious authorities, or anyone else who may have helpful information;
3. Testimony, written or live, from expert witnesses, including mental health and forensic experts;
4. Letters from those who support clemency;
5. The results of any physical and mental examination(s);
6. The extent to which the person appears to have responded to the efforts made to improve his or her social attitude;
7. The educational programs in which the person has participated and the level of education which the person has attained;

<sup>6</sup> *Id.*; see also Ga. Code Ann. § 42-9-2 (2015).

<sup>7</sup> Ga. Const. art. IV, § II, ¶ I.

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

<sup>9</sup> Reprieves & Commutations, *Pardon/Parole Consideration and Guidelines*, State Board of Pardons and Paroles, <https://pap.georgia.gov/reprieves-commutations> (last visited Nov. 2, 2015).

<sup>10</sup> Ga. Code Ann. § 42-9-20 (2015).

<sup>11</sup> This information is not specified in the Board's policies or guidelines, but was confirmed through 2015 and 2016 interviews with practitioners who have represented petitioners in capital clemency in Georgia. Interview notes on file with the Capital Clemency Resource Initiative.

<sup>12</sup> Ga. Code Ann. § 17-10-40.

<sup>13</sup> Ga. Comp. R. & Regs. R. 475-3.10(2)(b).

8. Any written statements or oral testimony of the district attorney of the circuit in which the person was sentenced expressing views and making any recommendation as to a commutation of a death sentence; and
9. The written, oral, audiotaped, or videotaped testimony of the victim, the victim's family, or a witness having personal knowledge of the victim's personal characteristics, including any information prepared by the victim or any individual offering or preparing information on behalf of the victim, for the purpose of the Board's consideration of a pardon or commutation of a death sentence if the victim has provided such information to the Board.<sup>14</sup>

The Board is required to consider a death row petitioner's initial application for commutation, but has discretion over consideration of any subsequent applications by the same petitioner.<sup>15</sup>

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

Once a petition has been filed, the Board may interview the petitioner in person<sup>16</sup> or send one or more investigators on behalf of the Board to interview him or her in prison. Attorneys are permitted to be present during these interviews, which are video recorded and then played for Board members prior to the hearing. The prisoner's hearing is held a few days later, usually the day prior to the scheduled execution. This hearing is for the prisoner's counsel and witnesses only. The prisoner does not attend the hearing.<sup>17</sup> The Board may have follow-up questions for the petitioner's attorneys based on the recorded interview.<sup>18</sup> Representatives of the State do not attend the prisoner's session, but have their own private session before the Board.

Capital clemency hearings held by the Board are not open to the public.<sup>19</sup> However, the clemency petition itself is ordinarily declassified and released to the public shortly after submission. Counsel may request that the petition be redacted or remain classified in the interests of privacy.

Within 72 hours of receiving a request to commute a death sentence, the Board is required to provide written notification of the hearing date to the district attorney of the circuit in which the petitioner was sentenced.<sup>20</sup> The district attorney also has a separate opportunity to submit information for consideration by the Board and respond to the clemency request.<sup>21</sup>

<sup>14</sup> Ga. Code Ann. § 42-9-43 (2015).

<sup>15</sup> *McLendon v. Everett*, 55 S.E.2d 119, 123 (Ga. 1949).

<sup>16</sup> Ga. Code Ann. § 42-9-43.

<sup>17</sup> Interview on file with Capital Clemency Resource Initiative.

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

<sup>19</sup> American Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* ("Assessment") pp. 206-207 (Jan. 2006), available at <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf>.

<sup>20</sup> Ga. Code Ann. § 42-9-43 (2015).

<sup>21</sup> *Id.*

There are no rules governing the evidence submitted with the petition or presented during a Board hearing. Neither side is allowed to hear the other's argument, or object to the evidence presented.<sup>22</sup> However, State representatives may hear descriptions of the arguments or evidence presented at the petitioner's session.<sup>23</sup>

#### f. Responding to a Petition

As of May 2015, the Board is required to provide a written decision for public inspection relating to any commutation grant.<sup>24</sup> This includes the Board's findings that reflect consideration of the evidence offered which supports the Board's decision.<sup>25</sup> The bill requiring an increase in transparency was introduced shortly after a 2014 *Atlanta Journal Constitution* article regarding the Board's secret decision-making, indicating that grants of clemency were often made without even notifying victims of the decisions.<sup>26</sup> HB 71 passed in the state House of Representatives by 170-3,<sup>27</sup> and was signed by Governor Deal on May 1, 2015.<sup>28</sup>

Whether the statute also requires the Board to disclose the reasoning behind a denial of clemency remains unclear, but the Board's practice since its passage has been to leave denials unexplained.<sup>29</sup> The Board has not granted clemency since the law took effect in 2015. The Board's orders denying clemency for each of the twelve petitioners that have been executed since May 2015 can be found on the Board's website.<sup>30</sup> None of these orders contain reasoning behind the Board's decision to deny clemency.<sup>31</sup>

## II. State Political and Judicial Information

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

As noted above, the members of the Board are appointed by the governor and confirmed by the state Senate to serve seven-year staggered terms.<sup>32</sup> There are no required qualifications for appointees and no indication in the law that members are required to undergo any training once they are seated on the Board; however, the Board website indicates that members occasionally do take part in conferences and events related to criminal justice, law enforcement, and victim services.<sup>33</sup>

<sup>22</sup> Grant Blankenship, *How Does Death Row Clemency Work in Georgia?*, GPB News, (Aug. 26, 2014), <http://www.gpb.org/news/2014/08/26/how-does-death-row-clemency-work-georgia>.

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

<sup>24</sup> H.B. 71, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015).

<sup>25</sup> Ga. Code Ann. § 42-9-42 (2015).

<sup>26</sup> Aaron Gould Sheinin, *Bill Requiring Parole Board to Disclose More Gains Final Approval*, *Atlanta Journal Const.*, (Apr. 2, 2015), <http://www.ajc.com/news/news/state-regional-govt-politics/bill-requiring-parole-board-to-disclose-more-gains/nkk6Y/>.

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

<sup>28</sup> *Status History, 2015-2016 Regular Session – HB 71*, Georgia General Assembly, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/HB/71> (last visited July 28, 2016).

<sup>29</sup> Grant Blankenship, *How Transparent Will Death Row Clemency Be?*, GPB News, (May 4, 2015), <http://www.gpb.org/news/2015/05/04/how-transparent-will-death-row-clemency-be>.

<sup>30</sup> *Office of Communications; News, Publications, and Events*, State Board of Pardons and Paroles, <http://pap.georgia.gov/press-releases> (last visited December 19, 2016).

<sup>31</sup> See e.g., Marcus Ray Johnson, *Denial of Commutation of Sentence of Death*, State Board of Pardons and Paroles, (Nov. 18, 2015), <http://pap.georgia.gov/sites/pap.georgia.gov/files/PressReleases/Board%20Order%20Johnson.pdf>; Brian Keith Terrell, *Denial of Commutation of Sentence of Death*, State Board of Pardons and Paroles, (Dec. 7, 2015), <http://pap.georgia.gov/sites/pap.georgia.gov/files/PressReleases/Terrell%20Order.pdf>.

<sup>32</sup> Ga. Const. art. IV, § II, ¶ I.

<sup>33</sup> State Board of Pardons and Paroles, <https://pap.georgia.gov/> (last visited July 8, 2016).

Of the current Board, two members are former State Representatives.<sup>34</sup> The other three have experience in law enforcement. More detailed information about the current members and their biographies is available on the Georgia State Board of Pardons and Paroles website, but a brief description of their backgrounds is as follows:

**Terry E. Barnard** (chair): Prior to his position on the Board, Mr. Barnard served as a Georgia State Representative for more than fifteen years. He was appointed in 2010 and reappointed in 2015 to the State Commission on Family Violence. In addition, he serves on the Board of Community Supervision. While a State Representative, Mr. Barnard was instrumental in passing legislation concerning the creation of a sex offender registry and review board. He was appointed to the Parole Board in May 2010 and reappointed that December to serve a term through December 31, 2017.<sup>35</sup>

**James W. Mills** (vice chair): Mr. Mills was a Georgia State Representative for nearly twenty years prior to his appointment to the Board in 2011. While a legislator, he backed several conservative measures, including bills that placed the words “IN GOD WE TRUST” on the Georgia state flag; required proof of citizenship in order to determine voter eligibility; and mandated that state driver’s license tests be administered in English. He has also received awards including “Christian Coalition Legislator of the Year” as well as a “Pro-Life Hero.” His Board term runs through June 2017.<sup>36</sup>

**Jacqueline Bunn**: Ms. Bunn was appointed to the Board by Governor Nathan Deal and began serving on July 1, 2016. Ms. Bunn’s past service includes time as Assistant Attorney General in the Civil Rights Section for the Georgia Department of Law and Deputy Director in the Legal Services Unit of the Georgia Department of Public Safety. In 2013, she was appointed Executive Director of the Criminal Justice Coordinating Council, which “presents the culmination of the Georgia General Assembly’s vision to establish a statewide body designated to build consensus and unity among the state’s diverse and interdependent criminal justice and victim service system components.”<sup>37</sup>

**Braxton T. Cotton**: Mr. Cotton served as a police officer for several years before transitioning into positions in state government. In 2012, he served as Executive Director of the Criminal Justice Coordinating Council, as the “youngest African American agency head in Georgia history.” In June 2013 he was appointed Executive Director of the Governor’s Office of Transition, Support and Reentry. In November 2013, he was appointed to the Parole Board. Mr. Cotton is a Captain in the U.S. Army Reserves.<sup>38</sup>

**Brian Owens**: Mr. Owens was appointed to the Parole Board in February 2015. Prior to this appointment, he served as Commissioner of the Georgia Department of Corrections. Prior to his 2009 appointment as

<sup>34</sup> *Board Members*, State Board of Pardons and Paroles, <https://pap.georgia.gov/board-members> (last visited July 8, 2016).

<sup>35</sup> *Terry E. Barnard*, State Board of Pardons and Paroles, <https://pap.georgia.gov/terry-e-barnard> (last visited July 25, 2016).

<sup>36</sup> *James W. Mills*, State Board of Pardons and Paroles, <https://pap.georgia.gov/james-w-mills> (last visited July 25, 2016).

<sup>37</sup> *Jacqueline Bunn, Esq.*, State Board of Pardons and Paroles, <https://pap.georgia.gov/jacqueline-bunn-esq> (last visited July 25, 2016).

<sup>38</sup> *Braxton T. Cotton*, State Board of Pardons and Paroles <https://pap.georgia.gov/braxton-t-cotton> (last visited July 25, 2016).

Commissioner, he served as a parole officer, Director of the Office of Planning and Analysis, and Assistant Commissioner at the Georgia Department of Corrections.<sup>39</sup>

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

Under the Georgia Constitution, the State General Assembly consists of a Senate and a House of Representatives.<sup>40</sup> Each senator is elected from a single member district, with the total number of senators not to exceed 56.<sup>41</sup> The House of Representatives consists of 180 representatives that are apportioned among the districts.<sup>42</sup> The General Assembly has the power to reapportion the districts after each census.<sup>43</sup>

Currently in the State Senate, there are 18 Democratic and 38 Republican senators.<sup>44</sup> In the House of Representatives, there are 62 Democratic representatives and 118 Republican representatives. There is one Independent party representative in the House.<sup>45</sup>

Article V, Section I of the Georgia Constitution provides for the executive position of governor, who shall be elected to office for a term of four years until a qualified successor is chosen. The State Constitution also limits governors to two consecutive terms; however, they are re-eligible to run after four years out of office.<sup>46</sup> Republican Governor Nathan Deal, the current Georgia Governor, was first elected in 2011 and won his re-election campaign in 2014.<sup>47</sup> Before serving as governor, Deal was elected to the U.S. House of Representatives as a Democrat in 1992.<sup>48</sup> However, Governor Deal switched to the Republican Party in 1995,<sup>49</sup> and in March of 2010 resigned from Congress to run in the gubernatorial race.<sup>50</sup>

As a U.S. Congressman, Governor Deal voted alongside many other representatives in 1996 to pass the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which severely limited federal review of state court death sentences.<sup>51</sup>

Despite his position in favor of the death penalty, Governor Deal is also known for his prison and sentencing reform efforts. In February 2015, Governor Deal signed a “Ban the Box” executive order that prohibits employers from asking potential employees in Georgia if they have ever been convicted of a felony on job

<sup>39</sup> *Brian Owens*, State Board of Pardons and Paroles, <https://pap.georgia.gov/brian-owens> (last visited July 8, 2016).

<sup>40</sup> Ga. Const. art. III, § I.

<sup>41</sup> Ga. Const. art. III, § II, ¶ I.

<sup>42</sup> *Id.*

<sup>43</sup> Ga. Const. art. III, §II, ¶ II.

<sup>44</sup> *Georgia elections, 2016*, Ballotpedia, [https://ballotpedia.org/Georgia\\_elections\\_2016](https://ballotpedia.org/Georgia_elections_2016) (last visited Nov. 11, 2016).

<sup>45</sup> *Representatives (2015-2016 Regular Session)*, Georgia House of Representatives, <http://www.house.ga.gov/Representatives/en-US/HouseMembersList.aspx> (last visited May 20, 2016).

<sup>46</sup> Ga. Const. art. V, § I, ¶ I.

<sup>47</sup> *Nathan Deal*, Ballotpedia, [https://ballotpedia.org/Nathan\\_Deal](https://ballotpedia.org/Nathan_Deal) (last visited Dec. 21, 2016).

<sup>48</sup> *Georgia Rep. Nathan Deal Moves to GOP*, L.A. Times, (April 11, 1995), [http://articles.latimes.com/1995-04-11/news/mn-53466\\_1\\_nathan-deal](http://articles.latimes.com/1995-04-11/news/mn-53466_1_nathan-deal).

<sup>49</sup> *Id.*

<sup>50</sup> Charles Oliver, *Deal resigns from Congress to focus on gubernatorial race*, Dalton Daily Citizen, (Mar. 1, 2010), [http://www.daltondailycitizen.com/news/local\\_news/deal-resigns-from-congress-to-focus-on-gubernatorial-race/article\\_ecfd47db-1533-57f9-8aab-1354d449aee8.html](http://www.daltondailycitizen.com/news/local_news/deal-resigns-from-congress-to-focus-on-gubernatorial-race/article_ecfd47db-1533-57f9-8aab-1354d449aee8.html).

<sup>51</sup> GovTrack, “S. 735 (104th): Antiterrorism and Effective Death Penalty Act of 1996,” available at <https://www.govtrack.us/congress/votes/104-1996/h126> (last visited January 4, 2017).



applications.<sup>52</sup> In 2012, he also supported legislative measures that give judges more discretion in sentencing, putting an end to many of Georgia's prior mandatory minimum sentencing laws.<sup>53</sup>

### c. Judicial Review of State Clemency

In *Humphrey v. State*, the Georgia Supreme Court affirmed that the power to grant clemency lies solely with the State Board of Pardons and Paroles.<sup>54</sup> Jamel Humphrey pled guilty but mentally ill to a murder charge, and was sentenced to life with the possibility of parole after serving 25 years in prison.<sup>55</sup> Humphrey appealed, arguing that in Georgia, murder is punishable only by death, life imprisonment without possibility of parole, or life imprisonment with the possibility of parole at the earliest point allowed by statute, which—in Humphrey's case—was 14 years. The Georgia Supreme Court agreed with Humphrey's argument and remanded the case for further proceedings.<sup>56</sup> In its decision, the court recognized that the Georgia Constitution allows the General Assembly to limit the Board's sentencing discretion to some degree; however, the Constitution does not give the courts the same authority.<sup>57</sup> Therefore, the trial court had overstepped its sentencing authority and imposed a sentence on Humphrey that legally only the Board could impose.<sup>58</sup> “[A] judicial incursion upon the constitutional prerogative of the Board ‘violates the constitutional provision regarding the separation of powers.’”<sup>59</sup>

### III. Supplemental State Information

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

<sup>52</sup> Exec. Order No. 02.23.15.03 of the State of Georgia, (Feb. 23, 2015), available at [https://gov.georgia.gov/sites/gov.georgia.gov/files/related\\_files/document/02.23.15.03.pdf](https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.23.15.03.pdf).

<sup>53</sup> See e.g., H.R. 1176, 151<sup>st</sup> Gen. Assemb. Reg. Sess. (Ga. 2012), available at <http://www.legis.ga.gov/Legislation/en-US/display/20112012/HB/1176> (last visited Dec. 22, 2016).

<sup>54</sup> *Humphrey v. State*, 297 Ga. 349, 351 (2015).

<sup>55</sup> *Id.* at 349.

<sup>56</sup> *Id.* at 351.

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.* (quoting *Terry v. Hamrick*, 284 Ga. 24, 25(2)).

## a. State-wide Demographics

### i. General Population

In 2015, Georgia was estimated to have a population of 10,214,860 people.<sup>60</sup> At that time, the United States Census Bureau estimated that roughly 53.9% of Georgia's population was white.<sup>61</sup> African Americans and Hispanics or Latinos accounted for 31.7% and 9.4%, respectively.<sup>62</sup> The remaining population consists of citizens who identify as Native American, Asian, or Pacific Islander.

### ii. Political Breakdown

Of eligible Georgian voters, 43.7% identify as Republicans or lean Republican, while 39.8% identify as Democrats or lean Democrat.<sup>63</sup>

Nationally, 40.1% of voters identify as Republican or lean Republican, and 43.0% identify as Democrats or lean Democratic.<sup>64</sup> President Obama has a 44% approval rating in Georgia compared to the national average of 46%.<sup>65</sup> As previously mentioned, Governor Deal is a Republican.<sup>66</sup> His predecessor, former Governor Sonny Perdue, was also a Republican.<sup>67</sup> Governor Perdue was the first Republican governor elected since 1872.<sup>68</sup>

Both of Georgia's U.S. Senators are Republican.<sup>69</sup> Senior Senator Johnny Isakson recently won reelection in November of 2016. Four out of Georgia's 14 representatives in the U.S. House of Representatives are Democrats. All four Democrats are African American, while the remaining 10 Republican representatives are white. The four Democrats represent the 2nd, 4th, 5th and 13th congressional districts.<sup>70</sup> All four districts have a majority African American population at 51.49%, 57.2%, 58.12% and 56.68%, respectively.<sup>71</sup>

### iii. Religious Make-Up

According to a Pew Research Poll, 79% of Georgians consider themselves to be Christian.<sup>72</sup> Of that number, 38% consider themselves to be Evangelical Protestants. The largest single denomination is Southern Baptist, with 15% of Georgians identifying as such. Georgia has a higher than average percentage

<sup>60</sup> *QuickFacts (Georgia)*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/13.00> (last visited July 11, 2016).

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

<sup>62</sup> *Id.*

<sup>63</sup> *State of the States*, Gallup, <http://www.gallup.com/poll/125066/State-States.aspx> (last visited July 11, 2016).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Georgia Rep. Nathan Deal Moves to GOP*, supra note 48.

<sup>67</sup> *Georgia: Past Governors Bios: Sonny Perdue*, National Governors Association, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_georgia/col2-content/main-content-list/title\\_perdue\\_sonny.default.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_georgia/col2-content/main-content-list/title_perdue_sonny.default.html) (last visited July 11, 2016).

<sup>68</sup> *Id.*

<sup>69</sup> *Georgia*, GovTrack, <https://www.govtrack.us/congress/members/GA> (last visited July 11, 2016).

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

<sup>71</sup> *My Congressional District*, United States Census Bureau, <http://www.census.gov/mycd/> (last visited July 11, 2016).

<sup>72</sup> *Religious Composition of Adults in Georgia*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/georgia/> (last visited July 11, 2016).

of weekly church attendance among the other U.S. states, with 42% of Georgians reporting that they attend church weekly.<sup>73</sup> The national average of weekly church attendance among adults in 2014 was 36%.<sup>74</sup>

#### iv. Income/Socioeconomic Breakdown

The median household income in Georgia from 2010 to 2014 was \$49,342, compared to the national median of \$53,482.<sup>75</sup> With an overall poverty rate of 18.3%, compared to the national average at 14.8%<sup>76</sup>, Georgia had the 7th highest poverty rate in the country in 2014.<sup>77</sup> In 2015, 27% of those in poverty in Georgia were African Americans, and 29.5% were Latino.<sup>78</sup>

#### b. Criminal Justice

##### i. Overall Prison Population

Statistics are derived from the Georgia Department of Corrections (“DOC”) 2015 Fiscal Year Report unless otherwise noted.<sup>79</sup>

**Total Offender Population:** 53,870

- **Total Violent Offender Population:** 26,332
- **Total Non-Violent Population:** 27,538
- **Total Male Population:** 50,253
- **Total Female Population:** 3,617

<sup>73</sup> *Id.*

<sup>74</sup> *Attendance at Religious Services*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/attendance-at-religious-services/> (last visited July 13, 2016).

<sup>75</sup> *State and County Quick Facts, Georgia*, United States Census Bureau <http://www.census.gov/quickfacts/table/INC110214/13.00> (last visited July 11, 2016).

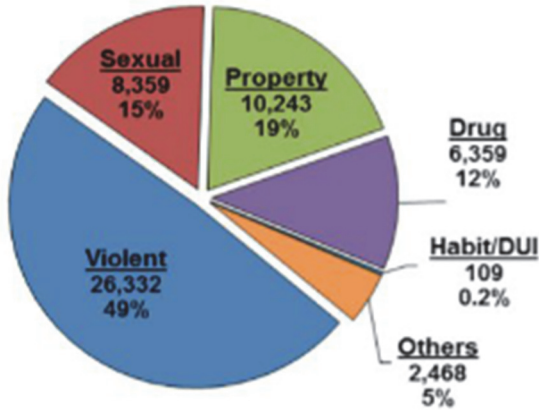
<sup>76</sup> *Id.*

<sup>77</sup> Tim Henderson, *Poverty Rate Drops in 34 States, DC*, The PEW Charitable Trusts, (Sept. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/18/poverty-rate-drops-in-34-states-dc>.

<sup>78</sup> *Georgia 2015*, talkpoverty.org, <http://talkpoverty.org/state-year-report/georgia-2015-report/> (last visited July 11, 2016).

<sup>79</sup> *2015 Fiscal Year Report*, Georgia Department of Corrections, <http://www.iomag.com/magazine/mag/0959351001458589032> (last visited July, 11, 2016).

### MAJOR OFFENSE TYPE



According to the Georgia DOC, the state prison population is disproportionately black and male. Black men make up more than half (61%) of the overall prison population. (As noted above, African Americans account for roughly 31% of the Georgia population, overall). There are more than 14,470 more black men in prison in Georgia than there are white men in prison. (White prisoners account for roughly 35% of the prison population).

**Most Common Crimes:** The graph to the left, taken from the DOC's 2015 Fiscal Year Report, shows the most common convictions among prisoners in 2015. Property crimes account for nearly half of all non-violent offenses in 2015 and 20% of overall convictions resulting in a prison sentence.<sup>80</sup>

#### ii. Death Row Population and Demographics<sup>81</sup>

**Total Number of Prisoners on Death Row: 71**

- **Number of Women on Death Row: 0**
- **Number of Black Prisoners on Death Row: 35 (48.61%)**
- **Number of White Prisoners on Death Row: 34 (50%)**
- **Number of Hispanic Prisoners on Death Row: 1 (1.39%).**

#### iii. Executions (Past and Pending)<sup>82</sup>

**Total Number of Executions since 1973: 65**

- **Most Recent Execution: December 6, 2016**
- **Number of Executions During 2015: 5**
- **Number of Executions Scheduled for 2016: 9 (9 already executed)**
- **Stays Issued in 2015: 3**

With nine executions, Georgia executed more people in 2016 than it has during any other 12-month period since the death penalty was reinstated in 1976.<sup>83</sup> However, “the last time a Georgia jury imposed a death

<sup>80</sup> 2015 Fiscal Year Report, Georgia Department of Corrections, <http://www.joomag.com/magazine/mag/0959351001458589032> (last visited July, 11, 2016).

<sup>81</sup> Changes to UDS Population During 2015, Office of Planning and Analysis, (Jan. 1, 2016), [http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Annual/Roster\\_death\\_row\\_Jan\\_2016.pdf](http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Annual/Roster_death_row_Jan_2016.pdf).

<sup>82</sup> Statistics are taken from the Death Penalty Information Center, unless otherwise noted. See [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state); <http://www.deathpenaltyinfo.org/upcoming-executions> (last visited July 27, 2016).

<sup>83</sup> Associated Press, Georgia set to Execute Sixth Inmate this Year, U.S. News, (July 9, 2016), <http://www.usnews.com/news/us/articles/2016-07-09/georgia-set-to-execute-sixth-inmate-this-year>.

sentence was in March 2014.<sup>84</sup> Georgia prosecutors sought the death penalty only once in 2016 in a case that has yet to go to trial.<sup>85</sup> Some defense attorneys and prosecutors have both expressed beliefs that the drop may be a result of the “expense, the years of appeals and the length of the process.”<sup>86</sup>

#### iv. Exonerations/Innocence<sup>87</sup>

- **James Creamer** was the first post-*Furman* exoneration in 1975.<sup>88</sup> Creamer was convicted of murder along with six other individuals; however, the other six defendants received a sentence of life imprisonment, while Creamer was sentenced to death.<sup>89</sup> A federal judge overturned all seven sentences after finding that the prosecution suppressed and destroyed evidence and after one of the witnesses admitted to lying under oath.<sup>90</sup> Subsequently, the charges were dismissed prior to retrial and Creamer was released in 1975.<sup>91</sup>
- **Earl Charles** was convicted of two counts of murder in 1975.<sup>92</sup> After exculpatory evidence was found, Charles’ sentence was overturned.<sup>93</sup> Before the new trial began, the prosecution dropped the charges against Charles for lack of evidence. Charles was released in 1978.<sup>94</sup>
- **Jerry Banks** was convicted of murdering two people in 1974.<sup>95</sup> The Georgia Supreme Court overturned Banks’ conviction on appeal after discovering “questions about evidence.”<sup>96</sup> On appeal, Banks’ attorneys called witnesses who testified that they heard rapid gunfire around the time the murders occurred.<sup>97</sup> The gun that was used to implicate Banks could not be fired rapidly.<sup>98</sup> The State dropped all charges against Banks after the testimony of a former detective on the case was

<sup>84</sup> Bill Rankin, *Georgia Executions rise, while Death Sentences Plummet*, Atlanta Journal Const., (June 18, 2016), <http://www.myajc.com/news/local/georgia-executions-rise-while-death-sentences-plummet/atGjGmB9aNVsRiBnaviSYO/>.

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

<sup>86</sup> *Id.*

<sup>87</sup> For inclusion in this section, an individual must have been convicted, sentenced to death, and subsequently either been acquitted of all charges related to the crime that placed them on death row, had all charges related to the crime that placed them on death row dismissed by the prosecution, or been granted a complete pardon based on evidence of innocence. This characterization mirrors the language used by national entities tracking death row exonerations, such as the National Registry of Exoneration and the Death Penalty Information Center. See *Glossary*, The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 19, 2016); *Innocence: List of those freed from death row*, Death Penalty Information Center, <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Dec. 19, 2016).

<sup>88</sup> *Innocence Cases*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/node/4900#5> (last visited December 19, 2016).

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

<sup>90</sup> *Id.*

<sup>91</sup> Hans Sherrer, *Wrongly Convicted Database Record: James Edward Creamer*, <http://forejustice.org/db/Creamer--James-Edward-.html> (last visited Dec. 22, 2016).

<sup>92</sup> *Innocence Cases*, *supra* note 88.

<sup>93</sup> Hans Sherrer, *Wrongly Convicted Database Record: Earl Patrick Charles*, <http://forejustice.org/db/Charles--Earl-Patrick-.htm> (last visited Dec. 22, 2016).

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

<sup>95</sup> *Around the Nation; Ex-Inmate Shoots Wife, Kills Himself*, N.Y. Times, (Mar. 31, 1981), <http://www.nytimes.com/1981/03/31/us/around-the-nation-ex-inmate-on-death-row-shoots-wife-kills-himself.html>.

<sup>96</sup> *Id.*

<sup>97</sup> *Jerry Banks, Who Spent Six Years on Death Row*, UPI, (Mar. 30, 1981), <http://www.upi.com/Archives/1981/03/30/Jerry-Banks-who-spent-six-years-on-death-row/6498354776400/>.

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

discredited.<sup>99</sup> However, a few months after his release in December 1980, Banks shot and killed his wife before turning the gun on himself.<sup>100</sup>

- **Robert Wallace** was convicted of killing a police officer in 1980 and sentenced to death.<sup>101</sup> The 11th Circuit Court of Appeals ordered a new trial in 1985, finding that Wallace was not competent to stand trial. At retrial, Wallace was acquitted after the jury found that Wallace did not intend to kill the officer.<sup>102</sup>
- **Gary Nelson** was convicted in 1980 of raping and murdering a 6-year-old girl.<sup>103</sup> After an unsuccessful appeal to the Georgia Supreme Court, a new defense team uncovered exculpatory evidence that the prosecution had suppressed during trial.<sup>104</sup> In light of the new evidence, the Georgia Supreme Court re-reviewed Nelson's case and ultimately overturned his conviction.<sup>105</sup> The State decided to drop the charges against Nelson in 1991.<sup>106</sup>
- **Lawrence William Lee** is the most recent death row exoneree in Georgia.<sup>107</sup> Lee was convicted of a triple homicide in 1987 and sentenced to death. Lee was granted a new trial in 2008 after a state superior court found that prosecutors had engaged in a wide range of misconduct at trial. In 2015, the State dropped the charges against Lee after the court blocked introduction of the prior testimony of two deceased witnesses.<sup>108</sup>

### c. Public Opinion Polling

There is little polling data available regarding support for the death penalty among Georgia voters. An informal, ongoing online poll indicates that 76% of the 453,851 votes cast by those identified as "Georgia voters" are in favor of the death penalty.<sup>109</sup> 24% of the votes were in the negative.<sup>110</sup>

Compared to certain national polls suggesting that nationwide death penalty support still stands as high as 61%,<sup>111</sup> Georgia appears to have a higher statewide rate of approval. However, online polls such as the one mentioned above are not as reliable as other methods of data collection, particularly given that those statistics are based on active visitation of the website.

<sup>99</sup> *Around the Nation; Ex-Inmate Shoots Wife, Kills Himself*, *supra* note 95.

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

<sup>101</sup> *See Innocence Cases*, *supra* note 88.

<sup>102</sup> *Id.*

<sup>103</sup> Alexandra Gross, *Gary Nelson*, Univ. of Mich. Law Sch. Nat'l. Registry of Exonerations, (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3501>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Innocence Cases*, *supra* note 88.

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

<sup>109</sup> *Do You Support the Death Penalty: Georgia Voters*, isidewith.com, <https://www.isidewith.com/poll/49841143/9333310> (last visited July 11, 2016).

<sup>110</sup> *Id.*

<sup>111</sup> Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, Gallup, (Oct. 15, 2015), <http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx>.

## V. Additional Information for Consideration in Clemency

### a. Past Capital Clemency Decisions

#### i. Grants

Since 1976, nine death row prisoners in Georgia have been granted commutations, making Georgia the second highest state for *individual* capital commutations in the country.<sup>112</sup> Note that the race of the prisoner is indicated after his name as either (B) for Black or African American or (W) for white.

**Charles Harris Hill (B):** Charles Hill and two other men were involved in a burglary that resulted in a murder.<sup>113</sup> The defendant who actually committed the murder pled guilty and received life in prison, while Hill was sentenced to death.<sup>114</sup> In his petition for clemency, Hill argued that his **sentence was disproportionate** to the sentence given to the more culpable co-defendant.<sup>115</sup> The Board granted Hill clemency in 1977.<sup>116</sup>

**Freddie Davis (W):** Freddie Davis and another man were convicted of raping and murdering a woman. Davis' co-defendant first testified against Davis in exchange for a life sentence; however, the co-defendant later recanted his testimony, saying that Davis was not in the room when the woman was murdered.<sup>117</sup> Like Hill, Davis petitioned for clemency stating that his **sentence was disproportionate** to the sentence given to his more culpable co-defendant.<sup>118</sup> The Board granted clemency in 1988.<sup>119</sup>

**William Moore (B):** William Moore was convicted of killing an elderly man during the course of a robbery.<sup>120</sup> Moore's impending execution attracted the attention of Mother Teresa and Reverend Jesse Jackson, who publicly supported Moore's petition for clemency.<sup>121</sup> The victim's family also asked the Board to grant clemency based on the belief that Moore's friend who participated in the murder (who also happened to be the nephew of the victim) was more culpable.<sup>122</sup> The Board granted clemency in 1990 citing "**his exemplary prison record, remorse, religious conversion, and the pleas for clemency from the victim's family.**"<sup>123</sup>

**Harold Williams (W):** Harold Williams and his uncle were arrested in connection with the murder of Williams' grandfather.<sup>124</sup> Williams' uncle pled guilty to voluntary manslaughter and was sentenced to 10

<sup>112</sup> *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited July 11, 2016).

<sup>113</sup> Victoria Loe Hicks, *Who Wins Clemency in Georgia?*, Atlanta Journal Const., (Mar. 28, 2015), <http://www.ajc.com/news/news/state-regional/who-wins-clemency-in-georgia/nkgxJ/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Clemency*, *supra* note 112.

<sup>117</sup> Victoria Loe Hicks, *supra* note 113.

<sup>118</sup> *Id.*

<sup>119</sup> *Clemency*, *supra* note 112.

<sup>120</sup> Victoria Loe Hicks, *supra* note 113.

<sup>121</sup> Ronald Smothers, *A Day Short of Death, a Georgia Killer is Given Life*, N.Y. Times, (Aug. 21, 1990), <http://www.nytimes.com/1990/08/22/us/a-day-short-of-death-a-georgia-killer-is-given-life.html>.

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

<sup>123</sup> *Clemency*, *supra* note 112. (Emphasis added.)

<sup>124</sup> Victoria Loe Hicks, *supra* note 113.

years in prison. Williams was convicted of capital murder and sentenced to death.<sup>125</sup> The Board granted clemency in 1991 **finding that Williams' sentence was disproportionate** to that of his co-defendant, who took full responsibility for the crime.<sup>126</sup>

**Alexander Williams (B):** Alexander Williams was found guilty of the rape and murder of a 16-year-old girl in 1986.<sup>127</sup> Williams would have been the first prisoner in the U.S. to have to be forcibly medicated due to his schizophrenia to render him sane enough to be executed. Williams' case drew lots of attention, including from former First Lady Rosalynn Carter, who sent a letter to the Board calling for clemency.<sup>128</sup> The Board granted Williams' petition for clemency in 2002, citing his history of mental illness and the fact that Williams was a juvenile at the time of the crime.<sup>129</sup> Williams was found dead in his prison cell due to apparent suicide later that year.<sup>130</sup>

**Willie James Hall (B):** Willie Hall was convicted and sentenced to death for fatally stabbing his estranged wife.<sup>131</sup> The Board granted clemency to Hall in 2004 after **six jurors testified that they would have recommended life imprisonment without parole had it been offered at trial.**<sup>132</sup> The Board also considered Hall's **exemplary prison behavior and lack of a criminal record** prior to his arrest for the murder in their decision to grant clemency.<sup>133</sup>

**Samuel David Crowe (W):** Samuel Crowe admitted to killing a manager of a lumber company in 1988, and was sentenced to death.<sup>134</sup> At his clemency hearing, Crowe's counsel presented evidence demonstrating Crowe's remorse and good behavior behind bars.<sup>135</sup> **The Board granted clemency hours before Crowe was set to die in 2008 without providing a reason.**<sup>136</sup>

**Daniel Greene (B):** In 1991, Daniel Greene killed his former classmate and attacked an elderly couple and store clerk in pursuit of money for cocaine.<sup>137</sup> In 2012, the Board granted Greene's petition for clemency after hearing **testimony from the prosecutor indicating that he would have pursued a life sentence if life without parole had existed at the time of Greene's trial.**<sup>138</sup> The Board also heard testimony from members of the community and prison staff regarding Greene's overall upstanding character, aside from one incident of violence instigated by intoxication.<sup>139</sup>

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

<sup>126</sup> *Clemency*, *supra* note 112.

<sup>127</sup> *Convicted Killer Alexander Williams Dies in Jail; Suicide Suspected*, Savannah Morning News, (Nov. 27, 2002), <http://savannahnow.com/stories/112702/LOCPrisonerSuicide.shtml#.V4RTjFfIPm4>.

<sup>128</sup> *Id.*

<sup>129</sup> *Clemency*, *supra* note 112.

<sup>130</sup> *Convicted Killer Alexander Williams Dies in Jail; Suicide Suspected*, *supra* note 127.

<sup>131</sup> Victoria Loe Hicks, *supra* note 113.

<sup>132</sup> *Clemency*, *supra* note 112.

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

<sup>134</sup> Ashley Fantz, *Georgia Man's Death Sentence Changed to Life in Prison*, CNN, (May 22, 2008)

[http://www.cnn.com/2008/CRIME/05/22/georgia.execution/index.html?eref=rss\\_us](http://www.cnn.com/2008/CRIME/05/22/georgia.execution/index.html?eref=rss_us).

<sup>135</sup> Matthew Bigg, *Killer Spared from Death Hours before Execution*, Reuters, (May 22, 2008),

<http://www.reuters.com/article/us-usa-execution-idUSN2250765020080523>.

<sup>136</sup> *Clemency*, *supra* note 112.

<sup>137</sup> Greg Bluestein, *Ex-High School Football Star to be Executed*, Online Athens., (Apr. 2, 2012), <http://onlineathens.com/local-news/2012-04-02/ex-high-school-football-star-georgia-be-executed>.

<sup>138</sup> *Clemency*, *supra* note 112.

<sup>139</sup> *Id.*



**Tommy Waldrip (W):** Tommy Waldrip was found guilty of the 1991 murder of a college student who was preparing to testify against Waldrip's son in the re-trial of an armed robbery case against him.<sup>140</sup> In 2014, the Board granted clemency to Waldrip without explanation; however, Waldrip's lawyers had presented evidence that Waldrip's sentence was not proportionate to the life sentences that his accomplices received.<sup>141</sup>

## ii. Denials (where newsworthy or controversial)

In September 2015, the Board was presented with a petition for clemency from the only woman on Georgia's death row.<sup>142</sup> **Kelly Gissendaner (W)** was convicted of convincing her boyfriend Gregory Owen to kill her husband.<sup>143</sup> Owen stabbed Gissendaner's husband to death in 1997 and accepted a life sentence with the possibility of parole in exchange for his testimony against Gissendaner.<sup>144</sup> Gissendaner refused a similar deal and was found guilty of the murder and sentenced to death in 1998.<sup>145</sup>

Gissendaner's execution was stayed twice due to concerns over the "cloudy" condition of the drug used in Georgia executions.<sup>146</sup> While Gissendaner continued to await execution, her children and various public figures called for a commutation of her sentence.<sup>147</sup> **In support of the second petition, Gissendaner's children submitted a video to the Board asking for mercy, and State Corrections Deputy Director Vanessa O'Donnell and former Chief Justice of the Georgia Supreme Court Norman Fletcher wrote to the Board asking for clemency.**<sup>148</sup> Director O'Donnell had been one of her wardens, and testified regarding Gissendaner's good behavior and compassion for other prisoners. Chief Justice Fletcher wrote that he was wrong in ruling that Gissendaner's sentence was proportionate to her role in her husband's death.<sup>149</sup> Pope Francis also joined in the call for clemency.<sup>150</sup> The Pope wrote in his letter to the Board, "[w]hile not wishing to minimize the gravity of the crime for which Ms. Gissendander [sic] has been convicted, and while sympathizing with the victims, I nonetheless implore you, in consideration of the reasons that have been expressed to your board, to commute the sentence to one that would better express both justice and mercy."<sup>151</sup>

The Board agreed to hear additional evidence in support of Gissendaner's petition a few hours before her scheduled execution.<sup>152</sup> However, ultimately the Board denied her request, stating that "[it] ha[d] reviewed and considered all of the facts and circumstances of the offender and her offense, as well as supplemental

<sup>140</sup> Rhonda Cook, *Waldrip's Death Sentence Commuted to Life without Parole*, Atlanta Journal Const., (July 8, 2014), <http://www.ajc.com/news/news/breaking-waldrips-death-sentence-commuted-to-life-/ngcRm/>.

<sup>141</sup> *Clemency*, *supra* note 112.

<sup>142</sup> Associated Press, *Officials Seek Clemency for Ga. Mother on Death Row*, USA Today, (Sept. 27, 2015), <http://www.usatoday.com/story/news/nation/2015/09/27/officials-seek-clemency-ga-mother-death-row/72937996/>.

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

<sup>144</sup> *Id.*

<sup>145</sup> Rhonda Cook, *UPDATE: Parole Board will Reconsider Gissendaner's Clemency Request*, Atlanta Journal Const., (Sept. 28, 2015), <http://www.ajc.com/news/news/crime-law/federal-judge-monday-declines-to-postpone-gissenda/nnp34/>.

<sup>146</sup> Associated Press, *supra* note 142.

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

<sup>148</sup> Associated Press, *supra* note 142.

<sup>149</sup> *Id.*

<sup>150</sup> Rhonda Cook & Mark Davis, *Pope: Spare Kelly Gissendaner's Life*, Atlanta Journal Const., (Sept. 29, 2015), <http://www.ajc.com/news/news/pope-spare-kelly-gissendaners-life/nnqnj/>.

<sup>151</sup> *Id.*

<sup>152</sup> Rhonda Cook, *UPDATE*, *supra* note 145.

information presented to the Board,” including three clemency applications in the case.<sup>153</sup> The Board supported its decision by citing to the fact that Gissendaner’s conviction was upheld through her numerous appeals, including the U.S. Supreme Court’s refusal to hear her case in 2014.<sup>154</sup> Gissendaner was executed on September 30, 2015.<sup>155</sup>

**Warren Hill (B)** petitioned the Board for clemency in early 2015.<sup>156</sup> Hill was sentenced to death for the killing of his cellmate after Hill had already been imprisoned for the death of his girlfriend. Hill had an IQ of 70, and his counsel urged the Board to consider his mental impairment and likely intellectual disability.<sup>157</sup> Hill previously petitioned for clemency in 2012, but that request was denied despite pleas for mercy from former President Jimmy Carter and wife Rosalynn Carter.<sup>158</sup> The Board denied Hill’s request in January of 2015 without explanation.<sup>159</sup> Hill was executed on January 27, 2015.<sup>160</sup>

The September 21, 2011 execution of **Troy Davis (B)** “sparked angry reactions and protests” nationally and globally.<sup>161</sup> Davis was convicted and sentenced to death for the 1989 killing of an off-duty police officer.<sup>162</sup> **Davis maintained his innocence until his death, telling the members of the victim’s family present at his execution, “I did not personally kill your son, father, brother.”**<sup>163</sup> Although seven out of the nine key witnesses who testified against him at trial recanted at least part, if not all, of their testimony, Davis was denied a new trial by both state and federal judges.<sup>164</sup> Aside from these eyewitness statements, there was no physical evidence linking Davis to the crime. World figures, including former President Jimmy Carter, Pope Benedict XVI, and the French foreign ministry, publicly pushed for clemency.<sup>165</sup> Davis’ execution was put on hold for three hours while the U.S. Supreme Court considered, but ultimately denied,

<sup>153</sup> *Denial of Request to Reconsider Board Decision Denying Commutation of Death Sentence*, Georgia State Board of Pardons and Paroles, (Sept. 29, 2015), [http://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Board Order denying request for reconsideration.pdf](http://pap.georgia.gov/sites/pap.georgia.gov/files/ParoleConsideration/Board%20Order%20denying%20request%20for%20reconsideration.pdf).

<sup>154</sup> *Parole Board Votes to Let Gissendaner Decision Stand*, Georgia State Board of Pardons and Paroles, (Sept. 29, 2015), <http://pap.georgia.gov/press-releases/2015-09-29/parole-board-votes-let-gissendaner-decision-stand>.

<sup>155</sup> Holly Yan, Catherine E. Shoichet & Moni Basu, *Georgia Inmate Kelly Gissendaner Executed After Failed Appeals*, CNN, (Sept. 30, 2015), <http://www.cnn.com/2015/09/29/us/georgia-execution-kelly-gissendaner/>.

<sup>156</sup> Rhonda Cook, *Parole Board Denies Clemency for Hill*, Atlanta Journal Const., (Jan. 27, 2015), <http://www.ajc.com/news/news/breaking-news/federal-appeals-court-denies-hills-request-for-sta/njxpg/>.

<sup>157</sup> *Id.*

<sup>158</sup> Ashley Portero, *Mentally Retarded Inmate Faces Monday Execution After Georgia Rejects Clemency*, International Business Times, (July 23, 2012), <http://www.ibtimes.com/mentally-retarded-inmate-faces-monday-execution-after-georgia-rejects-clemency-730153>.

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

<sup>160</sup> Stephanie Gallman, *‘Intellectually Disabled’ Man Set for Execution*, CNN, (Jan. 27, 2015), <http://www.cnn.com/2015/01/26/us/georgia-inmate-tuesday-execution/>.

<sup>161</sup> Peter Wilkinson, *World Shocked by U.S. Execution of Troy Davis*, CNN, (Sept. 22, 2011), <http://www.cnn.com/2011/09/22/world/davis-world-reaction/>.

<sup>162</sup> *Id.*

<sup>163</sup> *Georgia Executes Troy Davis after his Last Pleas Fail*, NBC News, (Sept. 22, 2011), [http://www.nbcnews.com/id/44592285/ns/us-news-crime\\_and\\_courts/t/georgia-executes-troy-davis-after-his-last-pleas-fail/#.V5oTiO8UXDc](http://www.nbcnews.com/id/44592285/ns/us-news-crime_and_courts/t/georgia-executes-troy-davis-after-his-last-pleas-fail/#.V5oTiO8UXDc).

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

<sup>165</sup> Peter Wilkinson, *supra* note 161.

a last minute stay.<sup>166</sup> Due to what many considered to be strong evidence of innocence, Davis' execution prompted international outrage and a renewed call for a global moratorium on the death penalty.<sup>167</sup>

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

The U.S. Supreme Court's 2016 decision in *Foster v. Chatman* received significant public attention.<sup>168</sup> **Timothy Foster** was convicted of killing an elderly woman when he was 18 years old.<sup>169</sup> During jury selection, the prosecution removed all four black potential jurors, and Foster's attorneys immediately challenged the strikes under *Batson v. Kentucky*.<sup>170</sup> The trial court denied Foster's challenge to the strikes and empaneled a jury.<sup>171</sup> While his state petition for habeas corpus was pending, Foster filed "a series of requests under the Georgia Open Records Act," and obtained documents from the state relating to jury selection at trial.<sup>172</sup> The documents contained handwritten notes made by the prosecution that indicated that racial bias prompted the elimination of black veniremembers.<sup>173</sup> However, Foster's appeals in state courts failed.<sup>174</sup>

Ultimately, the U.S. Supreme Court ruled that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."<sup>175</sup> The state argued that their use of peremptory strikes was done so in a "color-blind" manner; however, the Court disagreed and ruled that "[t]he State's new argument today does not dissuade us from the conclusion that its prosecutors were motivated in substantial part by race . . . two peremptory strikes on the basis of race are two more than the Constitution allows."<sup>176</sup> The Georgia Supreme Court's ruling was overturned, and the case was remanded.<sup>177</sup>

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

Since his first term, Governor Nathan Deal has been actively involved in criminal justice reform in Georgia.<sup>178</sup> Most recently, in April 2016, the Senate, with the Governor's support, passed Bill 367 that implemented reforms such as expanding a court accountability network; instituting charter schools in prisons; and sealing criminal records for eligible first-time offenders.<sup>179</sup> The law also allows some offenders to maintain their driver's licenses, in addition to allowing some drug offenders who have served long sentences to seek parole. Previously, Governor Deal successfully pushed for changes to Georgia law that

<sup>166</sup> *Georgia Executes Troy Davis after his Last Pleas Fail*, *supra* note 163.

<sup>167</sup> Peter Wilkinson, *supra* note 161.

<sup>168</sup> Lawrence Hurley, *Supreme Court Rules for Black Georgia Death Row Inmate*, Reuters, (May 23, 2016), <http://www.reuters.com/article/us-usa-court-deathpenalty-idUSKCN0YE1W0>.

<sup>169</sup> *Id.*

<sup>170</sup> *Foster v. Chatman*, 136 S.Ct. 1737, 1743 (2016).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1743.

<sup>173</sup> *Id.* at 1744.

<sup>174</sup> *Id.* at 1745.

<sup>175</sup> *Id.* at 1755.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Greg Bluestein, *Georgia to Embark on New Phase of Criminal Justice Reform*, Atlanta Journal Const., (Apr. 27, 2016), <http://politics.blog.ajc.com/2016/04/27/georgia-to-embark-on-new-phase-of-criminal-justice-reform/>.

<sup>179</sup> *Id.*

moved more nonviolent offenders into alternative programs rather than into prison.<sup>180</sup> Measures were also put into place aimed at preventing juvenile offenders from entering correctional institutions after being convicted of drug offenses and other nonviolent crimes. Governor Deal has stated that since these reforms have been implemented, the Georgia prison population had shrunk to 53,800 prisoners as of April 2016.<sup>181</sup> The new policies have mostly been met with little opposition; however, some groups and employers have voiced concerns about access to information since first-time offenders can ask a judge to seal their records.<sup>182</sup>

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

Historically, Georgia has been an important source of death penalty law since 1972, when the U.S. Supreme Court decided *Furman v. Georgia* and held that Georgia's death penalty system violated the Constitution by giving "uncontrolled discretion" to judges and juries as to "whether defendants committing [capital] crimes should die or be imprisoned."<sup>183</sup> The decision also overturned and commuted death sentences across the country.<sup>184</sup>

The Georgia legislature quickly drafted new death penalty legislation in response to *Furman*, and the U.S. Supreme Court reinstated capital punishment in 1976 in *Gregg v. Georgia*.<sup>185</sup> The Court found that Georgia's new sentencing law and procedure was constitutionally sound and adequately addressed the problems it had identified in *Furman*.<sup>186</sup> In that decision, the Court also required states to use objective criteria when sentencing capital defendants.<sup>187</sup>

In 2012, Georgia went to a single drug protocol after the U.S. manufacturer it had previously been using stopped producing one of the drugs originally used in the three-drug protocol.<sup>188</sup> After the single replacement drug also has become increasingly difficult to obtain, Georgia has turned to compounding pharmacies and unlicensed companies to fulfill the orders.<sup>189</sup> Additionally, Georgia has faced recent scrutiny for its secrecy policy and refusal to disclose the source of the drug it uses in lethal injections.<sup>190</sup> In 2013, officials noted that they were having difficulty securing enough pentobarbital to carry out executions.<sup>191</sup> However, when the state has been able to obtain a sufficient quantity, the source of the

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Alan Judd, *Second chance for criminals, closed files for public*, Atlanta Journal Const., (Mar. 9, 2016), <http://www.myajc.com/news/news/state-regional-govt-politics/second-chance-for-criminals-closed-files-for-publi/nqg2D/>.

<sup>183</sup> *Furman v. Georgia*, 408 U.S. 238, 253 (1972).

<sup>184</sup> *U.S. Supreme Court: June 29 Marks 40th Anniversary of Furman v. Georgia*, Death Penalty Information Center, (June 26, 2012), <http://www.deathpenaltyinfo.org/us-supreme-court-june-29-marks-40th-anniversary-furman-v-georgia>.

<sup>185</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>186</sup> *Gregg*, 428 U.S. at 206.

<sup>187</sup> *Cases of Race*, PBS, <http://www.pbs.org/independentlens/racetoexecution/casesofrace.html> (last visited July 12, 2016).

<sup>188</sup> Ed Pilkington, *Georgia Rushes Through Executions Before Lethal Injection Drugs Expire*, The Guardian, (February 22, 2013), <https://www.theguardian.com/world/2013/feb/21/georgia-executions-lethal-injection-drug-pentobarbital>.

<sup>189</sup> Ed Pilkington, *Georgia Scrambles for Fresh Supply of Drugs to Execute Death Row Inmate*, The Guardian, (July 12, 2013), <https://www.theguardian.com/world/2013/jul/12/georgia-drugs-execute-death-row-inmate>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

supply has not been publicized.<sup>192</sup> In March 2013, the Georgia legislature passed a law that “classifies the identity of any person or company providing drugs for use in lethal injections as a ‘state secret,’” which protects the State from having to disclose the information to the public.<sup>193</sup>

Finally, Georgia has a uniquely strict standard for proving intellectual disability in death penalty cases.<sup>194</sup> Individual states are permitted to put forth their own definitions of intellectual disability, either legislatively or by case law, and in Georgia, defense attorneys must show mental impairment “beyond a reasonable doubt.”<sup>195</sup> Georgia is the only state which applies a “beyond a reasonable doubt” standard to intellectual disability claims.<sup>196</sup> This strict standard drew media attention in 2015 when Georgia executed Warren Hill, a man with a 70 IQ and the “emotional capacity of a young boy.”<sup>197</sup>

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<sup>192</sup> Ed Pilkington, *Georgia Court Blocks Warren Hill Execution as State Acquires New Drugs*, The Guardian, (July 18, 2013), <https://www.theguardian.com/world/2013/jul/18/georgia-blocks-warren-hill-execution-new-drugs>

<sup>193</sup> Pilkington, *supra* note 189.

<sup>194</sup> Gallman, *supra* note 160.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*