

NORTH CAROLINA

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

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

State Capital Clemency Information

I. Basics of the State Capital Clemency Process

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

a. The Power Defined

Under Section 5 of Article III of the North Carolina Constitution, the governor has the power to issue clemency in three different ways: he or she may grant a reprieve from a sentence to enable further fact finding; commute a death penalty to a sentence of life imprisonment; or issue a pardon, absolving a convicted person of criminal penalties.¹

b. The Decision Maker(s)

The clemency power lies exclusively with the governor.² The Supreme Court of North Carolina has held that the clemency power lies outside the scope of judicial review and is a non-justiciable political question.³

Two separate statutes detail parts of the clemency process. North Carolina General Statutes section 147-16(a)(1) requires the governor to retain a directory of all applications for pardons and commutations of sentences, while section 147-21 requires all pardon applications to be made in writing.⁴

While exclusive power to grant or deny clemency rests with the governor, section 143B-720 of the General Statutes sets up a Post-Release Supervision and Parole Commission⁵ that is tasked with assisting the governor “in exercising his authority in granting reprieves, commutations, and pardons,” while also performing any other “services as may be required by the governor in exercising his powers of executive clemency.”⁶

¹ N.C. Const. art. III, § 5(6).

² *Id.*

³ *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001).

⁴ See N.C. Gen. Stat. §§ 147-16(a)(1), 147-21 (2015); see also *News & Observer Publ’g Co. v. Easley*, 641 S.E.2d 698, 704 (N.C. Ct. App. 2007) (explaining how the constitutional clemency power is modified by these statutes).

⁵ *Governor’s Clemency Office*, North Carolina Department of Public Safety, <https://www.ncdps.gov/Adult-Corrections/Governors-Clemency-Office> (last visited Feb. 14, 2017).

⁶ N.C. Gen. Stat. § 143B-720 (2015).

c. When to Bring a Petition⁷

There are no specific timing requirements for submitting a clemency petition. The North Carolina Supreme Court has noted “the executive in North Carolina does not ordinarily consider clemency requests in capital cases until the applicant has exhausted all avenues of relief within the federal and state judiciary. We recognized this custom and practice of the executive . . . where we observed that . . . claims [challenging the clemency process] ‘will normally only be raised after finality has attached to the capital murder conviction in our criminal courts and the condemned inmate has made his [or her] final plea for mercy to the Governor.’”⁸ In instances where clemency has been granted, North Carolina governors typically did not announce the commutation until days or hours before the execution was scheduled to be carried out.

d. How to Bring a Petition⁹

The Governor’s Clemency Office processes all requests for clemency.¹⁰ No formal application or form is required; rather, a personal letter addressed to the Governor’s Office should be sent to this address:¹¹

Governor’s Clemency Office
4294 Mail Service Center
Raleigh, NC 27699-4294

According to a detailed guide on pardons (“Guide”) published by a third party researcher,¹² the individual seeking clemency should write a personal narrative letter addressed to the governor and sent to the Clemency Office at the address provided above. This letter should include personal information about the clemency seeker, including age, marital status, employment history, and citizenship, among other things.¹³ It should also explain why the petitioner is deserving of clemency, keeping in mind that clemency is only granted in exceptional cases.¹⁴ While there is no indication that an individual seeking commutation in a capital case is required to follow these same guidelines, this Guide nevertheless provides helpful insight into the basic information the Clemency Office takes into account in reviewing clemency application.

⁷ Unless otherwise noted, all of the information in this section comes from a February 7, 2017 telephone interview with staff in the Governor’s Clemency Office [hereinafter GCO Telephone Interview].

⁸ *Bacon*, 549 S.E.2d at 849 (alteration in original).

⁹ Current staff at the Governor’s Clemency Office suggested that the process for capital cases is determined on a governor-to-governor basis and may or may not conform to past procedure or statutory requirements concerning non-capital clemency determinations. GCO Telephone Interview, *supra* note 7. Because a new governor was elected in November 2016, however, and because there has been a de facto moratorium in place since January 2007, North Carolina’s current capital clemency process is as of yet untested. Given this, this section details the state’s statutory clemency process for *non-capital* cases—which the governor may or may not elect to follow if called on to consider clemency for a death-sentenced prisoner at some point during his term. **Practitioners reviewing this memorandum should be sure to contact the Governor’s Office if they are considering seeking clemency in a capital case to ensure that new policies or procedures have not been established since the publication of this memorandum.**

¹⁰ *Governor’s Clemency Office*, *supra* note 5.

¹¹ *Id.*

¹² *North Carolina Pardon Information*, Pardon 411, http://www.pardon411.com/wiki/North_Carolina_Pardon_Information (last visited Feb. 14, 2017).

¹³ *Id.*

¹⁴ *Id.*

The Guide specifies that the personal letter should be accompanied by a number of documents related to the conviction, including the original indictment, the plea agreement (if any), and the Judgment and Commitment papers.¹⁵ Clemency petitions do not have to be written by the individuals seeking clemency, and are normally prepared by their lawyers (although according to practitioners in the state, some requests have been authored by petitioners or petitioners' family members).

Note: *The Office of Executive Clemency has not received any capital clemency requests since an unofficial moratorium on the death penalty took effect in 2006. Thus, if and when North Carolina intends to resume executions, it is possible that the governor's office will issue new commutation request requirements or otherwise comment more specifically on the means through which to seek clemency in capital cases.*

e. Hearing Practice

No hearing is required under the relevant statutes.¹⁶

f. Responding to a Petition

The governor is not required to make any information concerning a denial of clemency public. The governor is required to keep records of all applications for pardons and commutations, but is not under an obligation to make this information, or the reasons underlying a decision not to grant clemency, public. In the case of a denial, however, the governor may "in his discretion" choose to return the materials submitted in favor the request to the applicant.¹⁷

However, if the governor elects to grant a commutation of any sentence, he or she is required to provide the following notice:

(b) The Governor shall, unless otherwise requested by any person listed in subdivisions (1) through (4) of this subsection, provide notice of the commutation of any sentence within 20 days after the commutation by first-class mail to the following at the last known address:

- (1) The victim or victims of the crime for which the sentence was imposed;
- (2) The victims' spouse, children, and parents;
- (3) Any other members of the victims' family who request in writing to be notified;
and
- (4) The Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety.¹⁸

¹⁵ *Id.*

¹⁶ See N.C. Gen. Stat. §§ 147-16(a)(1), 147-21.

¹⁷ N.C. Gen. Stat. § 147-16. The statute refers to "commutations of any sentence" and therefore ostensibly would apply in capital cases.

¹⁸ N.C. Gen. Stat. §§ 147-16(b).

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Democrat **Roy Cooper** was elected governor in 2016 after the nation's longest-running gubernatorial race.¹⁹ In his campaign, Mr. Cooper focused significantly on expanding educational opportunities and improving economic conditions for the middle class.²⁰

Mr. Cooper previously served four consecutive terms as North Carolina Attorney General (2001–2017).²¹ He was also elected to both the North Carolina House (1987–1991) and the North Carolina Senate (1991–2000), and served as State Senate Majority Leader (1997–2001).²²

As Attorney General of North Carolina, Mr. Cooper focused on several criminal justice initiatives: increasing funds for DNA testing of crime evidence to identify the guilty and clear the innocent²³ advocating tougher laws for sex offenders, including limitations on social media,²⁴ and numerous others.

b. Legislative Structure and Political Make-Up

Under the North Carolina Constitution, the state General Assembly consists of a Senate and a House of Representatives.²⁵ State Senators represent districts of equal population that are to be created after each U.S. census; the state constitution sets the maximum number of senatorial districts at 50.²⁶ Members of the 120-member state House of Representatives represent districts of equal population size.²⁷ Legislators in both houses serve two-year terms.²⁸

North Carolina's General Assembly is dominated by members of the Republican Party. Republicans hold 35 out of the 50 seats in the state Senate, and hold 74 of the 120 seats in the state House of Representatives.²⁹

¹⁹ David A. Graham, *The North Carolina Governor's Race is Finally Over*, The Atlantic, (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/north-carolina-governor-pat-mccrory-concedes-to-roy-cooper/509603/>.

²⁰ Gary D. Robertson, *AG Roy Cooper kicks off run for NC governor*, Citizen-Times, (Oct. 13, 2015), <http://www.citizen-times.com/story/news/2015/10/13/ag-roy-cooper-kicks-run-nc-governor/73855462/>.

²¹ Erik Spanberg, *Roy Cooper is next NC governor. Now what?*, Triangle Business Journal, (Dec. 7, 2016), <http://www.bizjournals.com/triangle/news/2016/12/07/roy-cooper-is-next-nc-governor-now-what.html>.

²² Roy Cooper, Ballotpedia, https://ballotpedia.org/Roy_Cooper (last visited Feb. 14, 2017).

²³ Christopher D. Kirkpatrick, *Charlotte's DNA backlog slows effort to solve crimes*, The Charlotte Observer (Nov. 16, 2008), <http://www.charlotteobserver.com/news/article9024485.html>.

²⁴ *High court: Social media ban for NC sex offenders still in effect*, WRAL.com, (Aug. 30, 2013), <http://www.wral.com/high-court-social-media-ban-for-nc-sex-offenders-still-in-effect/12836427/>.

²⁵ N.C. Const. art. II, § 1.

²⁶ See N.C. Const. art. II, §§ 2, 3.

²⁷ N.C. Const. art. II, §§ 4, 5.

²⁸ N.C. Const. art. XI, § 8.

²⁹ North Carolina General Assembly, *North Carolina Representatives 2017-2018 Session*, <http://www.ncleg.net/gascripts/members/memberList.pl?sChamber=House>; North Carolina General Assembly, *North Carolina Senators 2017-2018 Session*, <http://www.ncleg.net/gascripts/members/memberList.pl?sChamber=senate>.

c. Judicial Review of State Clemency

As noted earlier, the Supreme Court of North Carolina held in *Bacon v. Lee* that aside from cases where clear evidence that a defendant's minimal due process rights were violated, the governor's executive clemency power falls outside the scope of judicial review.³⁰ In that case, several death row inmates brought a constitutional challenge to North Carolina's clemency process alleging that then-Governor Michael Easley could not be impartial in rendering clemency decisions, as he had played a role in litigating these cases as attorney general. The court disagreed, finding that there was no evidence that Easley's prior role as attorney general would render him more partial or less capable of rendering a clemency decision than any other decision maker whose unique background would necessarily influence their decision making. Furthermore, the court found this challenge non-justiciable, as the plaintiffs sought an outcome that would require the court to divest the governor of his authority under the North Carolina constitution.³¹

III. Supplemental State Information

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

a. State-wide Demographics

i. General Population

In 2016, North Carolina was estimated to have a population of 10,146,788 people.³²

ii. Political Breakdown

According to 2016 polling, North Carolina is roughly evenly split between individuals who lean Democrat and those who lean Republican: 42% for Republicans and 43% for Democrats.³³ Going into the 2014

³⁰ 549 S.E.2d. at 854.

³¹ *Id.* at 855.

³² QuickFacts, *North Carolina*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045216/37> (last visited Feb. 15, 2017).

³³ *State of the States: North Carolina*, Gallup, http://www.gallup.com/poll/125066/State-States.aspx?q_source=POLITICS&q_medium=topic&q_campaign=tiles (last visited Feb. 21, 2017).

midterm elections, Gallup described the political makeup of the state as an “effective draw.”³⁴ Ultimately, the 2014 Republican candidate would win the midterm Senate election by a margin of roughly 50,000 votes (or a little bit more than 1.5%).³⁵ Republican candidate Mitt Romney won North Carolina in the 2012 presidential election by a larger margin of roughly 100,000 votes, or 2%.³⁶ It is worth noting, however, that in 2008 Barack Obama was the first Democratic presidential candidate to win North Carolina’s electoral votes since Jimmy Carter in 1976.³⁷

Despite polling showing a roughly equal distribution of Democrat and Republican voters within the state, members of the Republican Party dominate both houses of the state legislature. Republicans hold 35 out of the 50 seats in the state Senate, and hold 74 of the 120 seats in the state House of Representatives.³⁸

Under the North Carolina Constitution, members of the state supreme court and the state court of appeals are elected at large in statewide elections.³⁹ These elections are officially nonpartisan.⁴⁰ However, the judges campaign on ideological grounds, and commentators have described the conservative justices as Republicans and the more liberal justices as Democrats.⁴¹ Commentators have drawn attention to significant money being spent by out-of-state interest groups on Republican-leaning judicial candidates.⁴²

North Carolina is mainly represented by Republicans in the United States Congress. As of February 2017, both of North Carolina’s U.S. Senators are Republicans. Three of the state’s 13 Representatives are Democrats, and the remainder are Republicans.⁴³

iii. Religious Make-Up

According to a Pew Research Poll, 77% of North Carolinians consider themselves to be Christian.⁴⁴ Of that number, 35% consider themselves to be Evangelical Protestants.⁴⁵ The largest single denomination is Southern Baptist, with 12% of North Carolina adults claiming membership.⁴⁶

³⁴ Andrew Dugan, *North Carolina’s Political and Economic Environment in 2014*, Gallup, (Aug. 27, 2014), <http://www.gallup.com/poll/175505/north-carolina-political-economic-environment-2014.aspx>.

³⁵ See *United States Senate elections in North Carolina, 2014*, Ballotpedia, https://ballotpedia.org/United_States_Senate_elections_in_North_Carolina,_2014 (last visited Feb. 15, 2017).

³⁶ See State of North Carolina, *Official General Elections Results Statewide-President of the United States* (2012), <http://results.enr.clarityelections.com/NC/42923/123365/Web01/en/summary.html>.

³⁷ Peter Eisler, *N.C. goes for Obama; Dems unseat governor, senator*, USA Today, (Nov. 6, 2008), <http://usatoday30.usatoday.com/news/politics/election2008/NC.htm>.

³⁸ See North Carolina General Assembly, *supra* note 29.

³⁹ N.C. Const. art. IV, § 16.

⁴⁰ See, e.g., *Morgan defeats Edmunds in N.C. Supreme Court race*, The News & Observer, (Nov. 8, 2016), <http://www.newsobserver.com/news/politics-government/election/article113447263.html>.

⁴¹ See, e.g., Sharon McCloskey, *Kicking off the state Supreme Court elections*, N.C. Policy Watch, (Feb. 5, 2014), <http://www.ncpolicywatch.com/2014/02/05/kicking-off-the-state-supreme-court-elections/>.

⁴² *Id.*

⁴³ See *North Carolina*, GovTrack, <https://www.govtrack.us/congress/members/NC> (last visited Feb. 15, 2016).

⁴⁴ Religious Landscape Study, *North Carolina*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/north-carolina/> (last visited Feb. 14, 2017).

⁴⁵ *Id.*

⁴⁶ *Id.*

North Carolina has a higher than average rate of weekly church attendance as compared to other U.S. states, with 40% of North Carolinians reporting that they attend church weekly.⁴⁷

iv. Income/Socioeconomic Breakdown

North Carolina is a poorer-than-average state.⁴⁸ Its poverty rate of 16.4% is above the national average of 13.5%, and its median household income of \$46,868 is roughly \$7,000 below the national average of \$53,889.⁴⁹ The North Carolina Justice Center reports that some 1.7 million North Carolinians live in poverty, and reports that poverty is highest among Hispanic/Latinos and American Indians, particularly those living in rural areas.⁵⁰

b. Criminal Justice

i. Overall Prison Population

Statistics are derived from the 2013–2014 North Carolina Department of Public Safety (formerly known as the Department of Corrections) Annual Report, unless otherwise noted.⁵¹

- **Total Offender Population:** 37,665
- **Total Misdemeanor Population:** 1,085
- **Total Felony Population:** 36,371
- **Total Male Population:** 34,995
- **Total Female Population:** 2,670

The North Carolina prison population is predominantly male, and black men make up more than half (52%) of the population. There are more than 7,000 more black men in prison in North Carolina than white men, who make up roughly 33% of the prison population. Among the female prison population, however, there are more white women than black women incarcerated. These demographics do not track state demographics as a whole, which is estimated to be 71% white and 22% black.⁵²

⁴⁷ *Frequent Church Attendance Highest in Utah, Lowest in Vermont*, Gallup, (Feb. 17, 2015), <http://www.gallup.com/poll/181601/frequent-church-attendance-highest-utah-lowest-vermont.aspx>

⁴⁸ See QuickFacts, *supra* note 32; see also QuickFacts, *United States*, United States Census Bureau, (Jan. 4, 2017), <https://www.census.gov/quickfacts/table/PST045216/00>.

⁴⁹ *Id.*

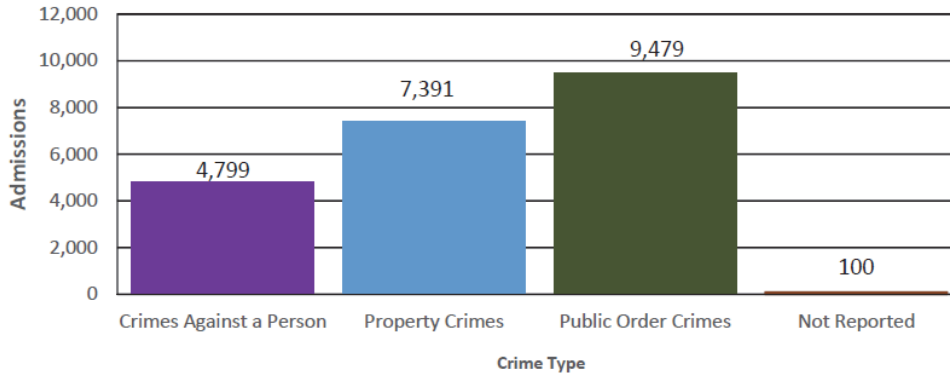
⁵⁰ See Tazra Mitchell, *Poverty and People in North Carolina*, N.C. Justice Center, (Nov. 2013), <http://www.ncjustice.org/?q=budget-and-tax/infographic-poverty-and-people-north-carolina>.

⁵¹ See North Carolina Department of Safety, *Fiscal Year 2013-2014 Annual Statistic Report*, available at <http://randp.doc.state.nc.us/pubdocs/0007073.PDF>.

⁵² See QuickFacts, *supra* note 32.

Most Common Crimes: The following graph, taken from the North Carolina Department of Safety’s Annual Report,⁵³ shows the most common convictions of 22,759 people admitted into custody between 2013 and 2014. The most common public order offenses were drug trafficking and drunk driving; the most common property crime was breaking and entering. As reflected in the graph, crimes against a person account for the lowest number of admissions into the prison system over this two-year period.

Figure I.3: Crime Type of Prison Admissions in FY 2013-2014



ii. Death Row Population and Demographics⁵⁴

Total Number of Prisoners on Death Row: 148

- **Number of Women on Death Row: 3**
- **Number of Black Prisoners on Death Row: 79 (78 men, 1 woman)**
- **Number of White Prisoners on Death Row: 57 (56 men, 1 woman)**
- **Number of Prisoners Whose Race Is Listed As “Other”: 5**

iii. Executions (Past and Pending)

No one has been executed in North Carolina since August 2006.⁵⁵ Shortly afterward, concerns about the lethal injection process and racial bias have led to a de facto moratorium.⁵⁶ There is currently extensive litigation pending regarding the death penalty in North Carolina, on such issues as lethal injection procedures and administration, the retroactivity of the Racial Justice Act, and questions over costs of lethal

⁵³ North Carolina Department of Safety, *supra* note 51.

⁵⁴ *Death Row Roster*, North Carolina Department of Public Safety, <https://www.ncdps.gov/Index2.cfm?a=000003.002240.002327.002328> (last visited Feb. 21, 2017).

⁵⁵ See Paul Woolverton, *Executions won’t resume in North Carolina anytime soon*, *Fay Observer*, (Sept. 17, 2016), http://www.fayobserver.com/news/local/executions-won-t-resume-in-north-carolina-any-time-soon/article_1a0f8247-5b58-5468-ac55-1c1941dadedc.html; Paul Woolverton, *Whether North Carolina will resume executions remains unclear*, *Fay Observer*, (Dec. 26, 2015), http://www.fayobserver.com/news/local/whether-north-carolina-will-resume-executions-remains-unclear/article_bb2745d3-8574-581c-8353-c2856428f044.html.

⁵⁶ *Id.*

injection drugs and where to obtain these drugs.⁵⁷ Executions remain on hold indefinitely until all of the litigation is resolved, and local observers believe the “Gordian knot” of litigation will take years to undo.⁵⁸

Total Number of Executions since 1973: 43⁵⁹

- **Most Recent Execution:** August 18, 2006
- **Number of Executions Scheduled for 2015:** 0
- **Number of Executions Scheduled for 2016:** 0
- **Stays Issued in 2015:** 0

iv. Exonerations/Innocence⁶⁰

There have been nine death row prisoners exonerated in North Carolina: two acquittals on retrial and seven cases in which the State declined pursue charges after post-conviction relief was granted. The majority of these cases were dismissed based on new evidence or lack of substantial evidence.⁶¹

The most recent North Carolina exonerations involved half-brothers **Henry McCollum** and **Leon Brown**, who were convicted of the rape and murder of an eleven-year old girl and sentenced to death in 1984.⁶² In 2014, a North Carolina judge overturned their convictions because of new DNA evidence in the case linking another man to the crime (a man already serving a life sentence for a similar rape and murder).⁶³ Notably, the late Justice Antonin Scalia once famously wrote in a court opinion that the crime for which the McCollum and Brown brothers were convicted was so heinous, that it was in itself an argument in favor of capital punishment.⁶⁴

⁵⁷ Sharon McCloskey, *North Carolina adopts a new death penalty protocol*, N.C. Policy Watch, (Nov. 5, 2013), <http://www.ncpolicywatch.com/2013/11/05/north-carolina-adopts-a-new-death-penalty-protocol/>.

⁵⁸ See Paul Woolverton, *Executions won't resume in North Carolina anytime soon*, Fay Observer, (Sept. 17, 2016), http://www.fayobserver.com/news/local/executions-won-t-resume-in-north-carolina-any-time-soon/article_1a0f8247-5b58-5468-ac55-1c1941dadedc.html; Paul Woolverton, *Whether North Carolina will resume executions remains unclear*, Fay Observer, (Dec. 26, 2015), http://www.fayobserver.com/news/local/whether-north-carolina-will-resume-executions-remains-unclear/article_bb2745d3-8574-581c-8353-c2856428f044.html.

⁵⁹ *Searchable Execution Database*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&sex=All&state%5B%5D=NC&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited Feb. 23, 2017).

⁶⁰ 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 Feb. 14, 2017); *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).

⁶¹ *Innocence Database*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence?inno_name=&exonerated=&state_innocence=36&race=All&dna=All (last visited Dec. 9, 2016).

⁶² Michael Biesecker, *NC half brothers freed after 3 decades in prison*, The News & Observer, (Sept. 3, 2014), <http://www.newsobserver.com/latest-news/article10048688.html>.

⁶³ *Id.*

⁶⁴ Daniel Bier, *Scalia's Defense of the Death Penalty is in Tatters*, Newsweek, (June 14, 2015), <http://www.newsweek.com/scalias-defense-death-penalty-tatters-342329>.

In 2015, then-**Governor Pat McCrory** granted pardons to both McCollum and Brown, stating: “This has been a very comprehensive and thoughtful process during the past nine months. Based upon the available evidence that I have personally reviewed, I am granting pardons of innocence to Henry McCollum and Leon Brown. It is the right thing to do.”⁶⁵ The pardons have also allowed the state to compensate the brothers for their wrongful imprisonment.⁶⁶

c. Public Opinion Polling

A February 2013 Public Policy Polling poll found support for the death penalty declining in North Carolina as compared to past years.⁶⁷ Roughly 75% of those polled identified themselves as conservative or moderate, and more than 60% “strongly” or “somewhat” supported ending the death penalty if the offender had to work and pay restitution to the families of victims.⁶⁸

In response to the question “would you support or oppose replacing the death penalty with life without the possibility of parole if the millions of dollars that would be saved were spent to solve unsolved crimes and assist victims?” nearly 60% of the respondents strongly supported or somewhat supported this proposition.⁶⁹

IV. Additional Information for Consideration in Clemency

a. Past Capital Clemency Decisions

i. Grants

Since 1976, there have been five grants of capital clemency in North Carolina.⁷⁰

1. Anson Avery Maynard

The first clemency granted in a capital case since the reinstatement of the death penalty in North Carolina occurred in 1992, when Governor James G. Martin granted clemency to **Anson Avery Maynard**. Maynard received clemency due to questions remaining regarding his guilt.⁷¹

Maynard was convicted of murdering a fellow burglar who had made a deal to testify against Maynard in exchange for a reduced sentence.⁷² However, there was no physical evidence linking Maynard to the crime, and additional evidence suggesting his innocence came to light while Maynard was imprisoned on death row. A woman who testified against him at trial subsequently admitted that she had lied, and several alibi

⁶⁵ Bryan Mims, *McCrory pardons former death row inmates cleared in 1983 murder*, WRAL.com, (June 4, 2015), <http://www.wral.com/mccrory-pardons-former-death-row-inmates-cleared-in-1983-murder/14689475/>.

⁶⁶ *Id.*

⁶⁷ See Declining Public Support, NC Coalition for Alternatives to the Death Penalty, <http://nccadp.org/death-penalty-issue/declining-public-support/> (last visited Feb. 15, 2016).

⁶⁸ See Public Policy Polling, *North Carolina Survey Results* (Feb. 7-10, 2013), available at <http://www.publicpolicypolling.com/pdf/2011/DeathPenaltyResults.pdf>.

⁶⁹ *Id.*

⁷⁰ See *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited Feb. 14, 2017).

⁷¹ *Id.*

⁷² See Christopher Sullivan, *Unraveling of Case May Have Spared Innocent Man*, Los Angeles Times, (Aug. 29, 1993), http://articles.latimes.com/1993-08-29/news/mn-29132_1_innocent-man.

witnesses who had not previously testified came forward on Maynard's behalf.⁷³ After this information was presented to Governor Martin, he commuted Maynard's sentence to life imprisonment one week before his scheduled execution. Clemency was granted via an order issued by the Governor's office.⁷⁴

Maynard's case was cited by two former governors of North Carolina, Democrat Jim Hunt and Republican Jim Martin (who granted Maynard clemency in 1999), in an *amicus* brief they filed alongside many other state governors in support of using federal funds to pay for representation during clemency proceedings in the Supreme Court case *Harbison v. Bell*.⁷⁵ In the brief, the former governors praised the strenuous efforts of post-conviction defense counsel in securing clemency for their client.⁷⁶ In particular, they praised their decision to pursue "every shred of evidence" in order to get their client off death row. It is worth noting that in *Harbison*, the Supreme Court upheld the right of death row prisoners to receive federally appointed defense counsel in post-conviction clemency proceedings under 18 U.S.C § 3599.⁷⁷

2. Wendell Flowers

Wendell Flowers was granted clemency by Governor Jim Hunt on December 15, 1999, two days before his scheduled execution.⁷⁸ Clemency was granted on the grounds that Flowers was no more culpable than his codefendants in a conspiracy to commit murder case, where the other conspirators had not received death sentences.⁷⁹

Flowers received the death penalty for his participation in the murder of another prisoner while Flowers was already serving a life sentence for a different murder. Flowers had not participated in the physical attack on the prisoner, instead serving as a lookout while three fellow prisoners carried out the killing. Governor Hunt explained his decision in a brief statement: "I am convinced from all that I have learned about this case that several inmates were involved in this murder. From the testimony of the eyewitness it is not clear exactly what role Flowers actually carried out ... [b]ut it is clear as a bell that Flowers did not kill Rufus Watson alone."⁸⁰

3. Marcus Carter

Marcus Carter received clemency from Governor Hunt on November 22, 2000,⁸¹ the day he was scheduled to be executed.⁸² Carter had been convicted of rape and murder in December 1989. However, Governor

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Brief for Current and Former Governors as Amici Curiae in Support of Petitioner, *Harbison v. Bell*, 556 U.S. 180 (2009) (No. 07-8521), 2008 WL 4264488.

⁷⁶ *Id.* at 17.

⁷⁷ See *Harbison*, 556 U.S. at 184.

⁷⁸ Amanda Lamb, *Hunt Commutes First Death Row Sentence*, WRAL.com, (Dec. 14, 1999), <http://www.wral.com/news/local/story/144577/>.

⁷⁹ See Estes Thompson, *Hunt commutes his first death sentence*, Herald Journal, (Dec. 16, 1999), https://news.google.com/newspapers?nid=1876&dat=19991216&id=AkEfAAAAIbAJ&sjid=zM8EAAAAIbAJ&pg=6753_56237&hl=en.

⁸⁰ See Lamb *supra* note 78.

⁸¹ See Death Penalty Information Center, *supra* note 70.

⁸² See *Hunt eyeing clemency for Carter*, Lexington Dispatch, (Nov. 21, 2000), https://news.google.com/newspapers?nid=1734&dat=20001121&id=VmqgAAAAIbAJ&sjid=5FIEAAAAIbAJ&pg=6630_2191461&hl=en.

Hunt concluded that a commutation was appropriate because of infirmities in Carter's trial.⁸³ First, Carter chose to represent himself after his first trial ended in a hung jury, which the governor found to have led to an unfair result. Second, Governor Hunt found that racial bias and pro-death penalty bias had tainted the jury selection process, leading to a death penalty conviction for Carter, who is African American. These arguments, and others, were made by Carter's lawyers in their clemency petition.⁸⁴

While there was no question of innocence in Carter's case, Governor Hunt did not appear to suffer a backlash as a result of his decision to commute the sentence. Hunt's popularity remained high within the state after granting clemency twice.⁸⁵ Hunt was the first North Carolina governor to twice be elected to serve two consecutive terms as governor, and in the 2000 election he was succeeded by another Democrat.⁸⁶

4. Robert Bacon, Jr.

Governor Michael Easley commuted the sentence of **Robert Bacon, Jr.** on October 2, 2001, three days before his October 5, 2001 execution date.⁸⁷ Unlike Governor Hunt, Governor Easley did not offer an extensive explanation of his decision, stating only that his "review of the matter in its totality" led him to conclude that a death sentence was inappropriate.⁸⁸

A letter authored by the ACLU in support of clemency for Bacon points to racially charged components of the case, including the fact that Bacon, a black man, had conspired with Bonnie Clark, a white woman, to murder her (white) husband and collect insurance money.⁸⁹ The ACLU letter also argued that the prosecution had made two seemingly diametrically opposed arguments at the trial and punishment stages; it had argued at trial that Ms. Clark was the "mastermind" of the scheme with Bacon as her "pawn," and had switched tactics at Bacon's punishment stage by arguing that he was the primary architect of the murder and therefore deserved the death penalty. Ms. Clark received life without parole. Mr. Bacon's clemency petition made similar arguments based on both the prosecution's inconsistent arguments and potential racial biases that led to his death sentence.⁹⁰

⁸³ Associated Press, *N.C. Gov. Commutes Death Sentence*, Corrections.com, (Dec. 4, 2000), <http://www.corrections.com/articles/7144-n-c-gov-commutes-death-sentence>.

⁸⁴ Mr. Carter's Clemency Petition, authored by his appointed defense counsel, is available at http://deathpenaltyusa.org/usa/images/clemency/carter_marcus.pdf.

⁸⁵ See *Clemency and Consequences*, American Bar Association at 7, (July 2002), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_idpclem_effect02.pdf.

⁸⁶ *Id.*

⁸⁷ See *N.C. governor commutes sentence of death-row inmate to life*, CNN, (Oct. 3, 2001), <http://edition.cnn.com/2001/LAW/10/03/nc.death.row/index.html>.

⁸⁸ *Id.*

⁸⁹ Letter from Diann Rust-Tierney et. al., ACLU Capital Punishment Project, to Michael F. Easley, Governor of North Carolina, (Oct. 2001), <https://www.aclu.org/legal-document/robert-bacon-jrs-clemency-letter-clemency-granted>.

⁹⁰ Mr. Bacon's clemency petition is available at http://deathpenaltyusa.org/usa/images/clemency/bacon_robertjr.pdf.

5. Charlie Mason Alston

Charlie Mason Alston was granted clemency by Governor Michael Easley on January 10, 2002, only hours before he was scheduled to be executed.⁹¹ As before, Governor Easley did not offer a detailed explanation for his clemency grant, which resulted in a commutation to life without parole.

Alston had been convicted of the murder of his former girlfriend, and no physical evidence connected him to the crime. Alston's attorneys had strenuously argued that there was potentially exculpatory DNA evidence in fingernail scrapings from the victim, but this evidence had been lost. An ACLU letter filed prior to Alston's clemency grant argued for clemency based on the lack of evidence supporting guilt together with claims of ineffective assistance of counsel.⁹² Alston's efforts to prove his innocence continued after his commutation, and in 2014 his attorneys secured a release order for North Carolina Innocence Inquiry Commission records related to his case.⁹³

b. Divisive/Important Political Issues in the State

In August 2015, the North Carolina General Assembly passed a controversial death penalty statute which was signed into law by then-Governor McCrory.⁹⁴ The law allows the state to keep secret the manufacturer of lethal injection drugs used in executions and eliminates the requirement that a doctor be present at an execution.⁹⁵

Two years earlier in 2013, Governor McCrory signed into law a repeal of the 2009 Racial Justice Act ("RJA"), which allowed for the commutation of death sentences to sentences of life without parole in cases where racial bias served as a "significant factor" in seeking or imposing the death penalty.⁹⁶ Prior to the RJA's repeal, four death row prisoners had their death sentences commuted to life in prison because of evidence of racial bias.⁹⁷ In December 2015, the North Carolina Supreme Court vacated the underlying decisions that had allowed the commutation of those prisoners' death sentences and ordered new hearings.⁹⁸

⁹¹ Lance Martin, *Alston misses death penalty by nine hours*, Roanoke Rapids Daily Herald, (Jan. 14, 2002), http://www.rrdailyherald.com/alston-misses-death-sentence-by-nine-hours/article_9ec5c350-3ff0-528a-8775-512a45f98415.html.

⁹² Letter from Diann Rust-Tierney et. al., ACLU Capital Punishment Project, to Michael F. Easley, Governor of North Carolina, (Jan. 2002), <https://www.aclu.org/legal-document/charlie-alston-clemency-letter-clemency-granted-january-2002>.

⁹³ Luci Weldon, *Judge releases files in murder case*, The Warren Record, (Feb. 5, 2014), http://www.warrenrecord.com/news/article_12cae9ac-8e69-11e3-bd45-001a4bcf887a.html.

⁹⁴ See Restoring Proper Justice Act, 2015 NC H.B. 774, 2015 Sess. Laws 198, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H774&submitButton=Go>.

⁹⁵ See *id.*; see also Billy Ball, *North Carolina kickstarts its machinery of death*, IndyWeek, (Aug. 5, 2015), <http://www.indyweek.com/indyweek/north-carolina-kickstarts-its-machinery-of-death/Content?oid=4627746>.

⁹⁶ See N.C. Gen. Stat. Ann. §§ 15A-2010, 15A-2011, *repealed by* 2013 N.C. Sess. Laws 154, § 5(a); see also Amanda Lamb & Kelly Gardner, *NC death penalty cases in limbo after Racial Justice Act's repeal*, WRAL.com, (June 20, 2013), <http://www.wral.com/nc-death-penalty-cases-in-limbo-after-racial-justice-act-s-repeal/12574813/>.

⁹⁷ See Lamb & Gardner, *supra* note 96.

⁹⁸ *North Carolina v. Robinson*, 778 S.E.2d 278 (N.C. 2015) (mem.); see also Sharon McCloskey, *State Supreme Court sends Racial Justice Act Cases back to trial court*, ProgressivePulse, (Dec. 18, 2015), <http://pulse.ncpolicywatch.org/2015/12/18/state-supreme-court-sends-racial-justice-act-cases-back-to-trial-court/>.

c. Other Relevant Legal, Historical, or Social Issues

2016 Election Controversies

In 2013, the North Carolina legislature passed voting restrictions (ostensibly to prevent voter fraud), which were criticized as being designed to intentionally disenfranchise black voters.⁹⁹ The law eliminated same-day voter registration, rolled back a week of early voting, ended out-of-precinct voting, and imposed strict voter-ID requirements.¹⁰⁰ In July 2016, the U.S. Court of Appeals for the Fourth Circuit overturned the law in *North Carolina State Conference of the NAACP v. McCrory*, holding that the law was passed with “racially discriminatory intent.”¹⁰¹ The court’s opinion said, “because of race, the legislature enacted one of the largest restrictions of the franchise in North Carolina history.”¹⁰²

In response to the Fourth Circuit’s decision, Governor Pat McCrory, who was at that time running for reelection, stated “Photo IDs are required to purchase Sudafed, cash a check, board an airplane or enter a federal courtroom Yet three Democratic judges are undermining the integrity of our elections while also maligning our state.”¹⁰³ As noted, the 2016 North Carolina gubernatorial race was the nation’s longest-running election.¹⁰⁴ For nearly a month, former Governor Pat McCrory called for vote recounts throughout the state based on alleged voter fraud and misconduct by election officials before ultimately conceding the election to Democrat Roy Cooper.¹⁰⁵

LGBTQ Issues: House Bill 2

In March 2016, the state legislature passed House Bill 2, a controversial law that gives state law precedence over any local ordinances about employment, wages, and public accommodations.¹⁰⁶ The state does not have a law barring discrimination against LGBTQ persons, and House Bill 2 effectively prevents local municipalities from creating their own rules prohibiting such discrimination.¹⁰⁷ The legislature held a special session to create and pass the law in order to prevent a Charlotte municipal ordinance from going into effect, which would have prohibited LGBTQ discrimination in housing and public accommodations, such as

⁹⁹ Voter Information Verification Act, 2013 NC H.B. 589; see also Robert Barnes & Ann E. Marimow, *Appeals court strikes down North Carolina’s voter-ID law*, The Washington Post, (July 29, 2016), https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html?utm_term=.e9ec1c079350.

¹⁰⁰ *Id.*

¹⁰¹ 831 F.3d 204, 219 (2016).

¹⁰² *Id.* at 242. See also Editorial, *Voter Suppression in North Carolina*, N.Y. Times, (Sept. 8, 2016), <http://www.nytimes.com/2016/09/08/opinion/voter-suppression-in-north-carolina.html>.

¹⁰³ Michael Wines and Alan Blinder, *Federal Appeals Court Strikes Down North Carolina Voter ID Requirement*, N.Y. Times, (July 29, 2016), <http://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html>.

¹⁰⁴ David A. Graham, *supra* note 19.

¹⁰⁵ *Id.*

¹⁰⁶ Avianne Tan, *North Carolina’s Controversial Anti-LGBT Bill Explained*, ABC News, (Mar. 24, 2016), <http://abcnews.go.com/US/north-carolinas-controversial-anti-lgbt-bill-explained/story?id=37898153>; see Public Facilities Privacy and Security Act, 2016 NC H.B. 2, available at <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf>.

¹⁰⁷ *Id.*

requiring a transgendered person to use the bathroom of his or her biological sex at birth.¹⁰⁸ The bathroom issue was met with such heated debate that some dubbed House Bill 2 the “bathroom bill.”¹⁰⁹ Despite the surrounding controversy, the bill passed with a vote of 82-26 in the House, and 32-0 in the Senate.¹¹⁰ Governor-elect **Roy Cooper** referenced House Bill 2 in his campaign, promising to repeal the law if he were elected, and called it “one of the most discriminatory laws in the country.”¹¹¹ However, on December 21, 2016, the North Carolina Senate voted down a repeal of House Bill 2.¹¹²

¹⁰⁸ Camila Domonoske, *North Carolina Passes Law Blocking Measures to Protect LGBT People*, NPR, (Mar. 24, 2016), <http://www.npr.org/sections/thetwo-way/2016/03/24/471700323/north-carolina-passes-law-blocking-measures-to-protect-lgbt-people>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Avianne Tan and Veronica Stracqualursi, *North Carolina’s ‘Anti-LGBT’ Bill Likely to Remain Despite Election of Democratic Governor, Experts Say*, ABC News, (Dec. 7, 2016), <http://abcnews.go.com/US/north-carolinas-anti-lgbt-bill-remain-election-democratic/story?id=43467585>. See also Nico Lang, *North Carolina’s season of hate is over: It’s time to repeal the state’s anti-LGBT law*, Salon, (Dec. 12, 2016), <http://www.salon.com/2016/12/12/north-carolinas-season-of-hate-is-over-it-is-time-to-repeal-the-states-anti-lgbt-law/>.

¹¹² Michael Gordon, Mark S. Price, and Katie Peralta, *Understanding HB2: North Carolina’s newest law solidifies state’s role in defining discrimination*, The Charlotte Observer, (Mar. 26, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>.