

SOUTH 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 South Carolina. Some of the information contained within this memorandum does not relate directly to South 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.

I. Basics of the State Capital Clemency Process

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

a. The Power Defined

Under Section 14 of Article IV of the South Carolina Constitution, the governor has limited clemency power. The Executive is empowered to grant reprieves or commute a death sentence to life imprisonment.¹ All other clemency actions, including pardons, are granted to the South Carolina Board of Probation, Parole, and Pardon Services.²

b. The Decision Maker(s)

The clemency power is split between the governor, who has the power to commute death sentences to life imprisonment and issue reprieves, and the South Carolina Board of Probation, Parole, and Pardons (“Board”), which may grant pardons or otherwise offer non-binding recommendations to the governor regarding commutation decisions.³ The Supreme Court of South Carolina has affirmed this distribution of authority.⁴ Moreover, the Supreme Court of South Carolina has held that clemency is an exercise of mercy reserved for the Executive.⁵

The governor’s commutation and reprieve powers are given wide discretion in both case law and statute.⁶ Section 24-21-50 of the South Carolina Codes sets out the procedures of the Board. That section states that “[t]he board shall grant hearings and permit arguments and appearances by counsel or any individual before it at any such hearing while considering a case for parole, pardon, or any other form of clemency provided for under law. No prisoner has a right of confrontation at the hearing.”⁷

While exclusive power to grant clemency rests with the governor, the Board’s Policy and Procedure Manual states that the governor may request that the Board submit a non-binding recommendation for the

¹ S.C. Const. art. IV, § 14.

² S.C. Code. Ann. § 24-21-13(B).

³ See S.C. Const. art. IV, § 14; S.C. Code. Ann. § 24-21-13(B).

⁴ *Bearden v. State*, 74 S.E.2d 912, 914 (S.C. 1953).

⁵ See *State v. Harvey*, 68 S.E.2d 409, 413 (S.C. 1951), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (S.C. 1991) (“Clemency to one to whom the jury has refused to extend mercy is a matter for the executive branch of the government. ‘We are not intrusted [sic], under the law, with the dispensation of mercy.’”) (quoting *State v. Williams*, 164 S.E. 415 (S.C. 1932)).

⁶ See S.C. Const. art. IV, § 14; see also *Harvey*, 68 S.E.2d at 914.

⁷ S.C. Code. Ann. § 24-21-50.

commutation of a death sentence.⁸ Though the governor may act without reference to the Board, if she seeks and subsequently rejects their recommendation, she must present her reasons for this decision to the General Assembly.⁹ The Policy and Procedure document also affirms that the governor's decision is not subject to judicial review.¹⁰

There is no official website for the governor's clemency function, though the Board of Probations, Parole, and Pardon Services does have a web presence.¹¹

c. When to Bring a Petition

There is no formal timeline for submitting a petition for commutation or reprieve in a capital case.

d. How to Bring a Petition

In South Carolina, the governor is the exclusive decision maker with respect to capital clemency. Although the governor can ask the Board for a nonbinding recommendation, counsel at the Board have stated that such a review has not been requested in recent memory.¹² Previous clemency petitions were addressed directly to the governor but did not include a specific mailing address where capital clemency applications are regularly to be brought. The current governor's public mailing address is:

The Honorable Henry McMaster
State House
1100 Gervais Street
Columbia, South Carolina 29201¹³

e. Hearing Practice

There is no information suggesting that a hearing typically takes place in reviewing a petition for capital clemency. No hearing is required by the statute governing the Board—and, indeed, this statute specifically provides that there is no right to a hearing or to otherwise confront witnesses in clemency. Nevertheless, there is nothing indicating that a hearing *cannot* take place if requested by the petitioner and/or petitioner's counsel.

f. Responding to a Petition

There is no indication in the clemency statute governing that the governor is required to make public any information concerning either a grant or denial of clemency. However, as stated prior, if the governor

⁸ South Carolina Board of Pardons and Paroles, Policy and Procedure, at 7 (Mar. 2016), available at <http://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Board of Probations, Parole, and Pardon Services, <http://www.dppps.sc.gov/> (last visited May 5, 2017).

¹² This information comes from a 2016 conversation with a South Carolina capital practitioner. Notes of this interview are on file with the author.

¹³ *Contact the Governor's Office*, South Carolina Office of the Governor, <http://governor.sc.gov/Contact/Pages/default.aspx> (last visited Apr. 26, 2017).

requests that the Board review a clemency petition and rejects the Board's recommendation, she must give reasons for her decision to the General Assembly.¹⁴

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Governor Henry McMaster is currently serving in his first term as South Carolina Governor.¹⁵ He was sworn in on January 24, 2017, after former governor Nikki Haley was appointed to serve as U.S. Ambassador to the United Nations.¹⁶ Prior to becoming governor, McMaster was elected Lieutenant Governor on November 4, 2014.¹⁷ McMaster has also served as South Carolina Attorney General (2003-2011), served on the South Carolina State Ports Authority (2011-2016), and was co-chair of the South Carolina Ethics Reform Commission (2012-2013).¹⁸

Notably, Governor McMaster was a very early supporter of President Donald J. Trump, endorsing him in January 2016.¹⁹ On Trump, McMaster said, "You know, we've got a saying in the South that says it's not the dog in the fight that's important, it's the fight in the dog that's important. Well this dog's got plenty of fight — and it's gonna take some fighting."²⁰ McMaster delivered the nominating speech for Trump at the Republican National Convention.²¹

b. Legislative Structure and Political Make-Up

The South Carolina Constitution divides the legislative power between the House of Representatives and the Senate.²² The House of Representatives is divided into 124 districts, assigned to each county based upon its population.²³ The Senate is composed of one member from each of the state's 46 counties.²⁴ State representatives are elected for terms of two years, while senators serve four year terms.²⁵

¹⁴ Policy and Procedure, *supra* note 8, at 7.

¹⁵ *Who is South Carolina Governor Henry McMaster?*, WRDW-TV, (Jan. 25, 2017), <http://www.wrdw.com/content/news/Who-is-Lt-Governor-and-presumptive-Governor-Henry-McMaster-402618735.html>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Daniel S. Levine, *Henry McMaster: 5 Facts You Need to Know*, Heavy, (Jan. 25, 2017), <http://heavy.com/news/2016/11/henry-mcmaster-nikki-haley-new-south-carolina-governor-donald-trump-who-replaces-is-republican-bio-family-wife-age/>.

²⁰ *Id.*

²¹ *Id.*

²² S.C. Const. art. III, § 1.

²³ *Id.* at § 3.

²⁴ *Id.* at § 4.

²⁵ *Id.* at §§ 2, 6.

South Carolina's state legislature is majority Republican, though there are a significant number of Democrats in both chambers. Republicans hold 78 out of the 124 seats in the state house,²⁶ and 27 of the 46 seats in the state senate.²⁷ There is currently one vacancy in the Senate.²⁸

c. Judicial Review of State Clemency

As in most states, in South Carolina the governor's power to commute a death sentence or grant a reprieve is a discretionary act not typically subject to judicial review. Interestingly, however, research shows that the majority of states have seen at least some capital-clemency-related litigation in state courts. A review of South Carolina's judicial treatment of clemency, however, has turned up no such cases in the state. While the outcome of such cases is typically to reaffirm the principle stated above—that clemency decisions are generally deemed beyond the purview of the judiciary to review—it is nevertheless interesting that no recent opinions on such cases appear to exist in the state.

III. Supplemental State Information

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

a. State-wide Demographics

i. General Population

In 2016, South Carolina was estimated to have a population of 4,961,119 people.²⁹

²⁶ See *South Carolina State Legislature*, Ballotpedia, https://ballotpedia.org/South_Carolina_State_Legislature#House_of_Representatives (last visited May 5, 2017).

²⁷ See *South Carolina State Legislature*, Ballotpedia, https://ballotpedia.org/South_Carolina_State_Legislature#Senate (last visited May 5, 2017).

²⁸ *Id.*

²⁹ See State & County Quick Facts, *South Carolina*, United States Census Bureau (July 1, 2016), <http://www.census.gov/quickfacts/table/PST045215/45,00>.

ii. Political Breakdown

According to Gallup polling conducted in advance of the 2014 midterm elections, South Carolinians lean slightly Republican, but the margin is close. Roughly 43% of the state identifies as Republican, while 39% identify as Democrats.³⁰ Polls since 2016 have given Republicans a larger advantage, however, with nearly 48% statewide support.³¹ Republican candidate Donald J. Trump won South Carolina in the 2016 presidential election.³² Republican candidate Mitt Romney won South Carolina in the 2012 presidential election, garnering 54.6% of the vote.³³ In 2008, Republican nominee John McCain also carried the state, winning 53.8% of the vote.³⁴

The South Carolina Constitution establishes the five-member State Supreme Court.³⁵ State Supreme Court justices, court of appeals judges, and circuit judges are chosen through a public election in the General Assembly.³⁶ The South Carolina Judicial Merit Selection Commission recommends candidates for judgeships and then submits these names to the Assembly, which either chooses one of the three candidates or rejects the entire slate.³⁷ The Commission is composed of ten members, five appointed by the Speaker of the House and five appointed by the President of the Senate.³⁸ Four of the members of the commission are lay persons (frequently private attorneys), while the remainder are state legislators.³⁹

Republicans comprise nearly all of South Carolina's congressional delegation. Both of the state's United States Senators are Republican, as are six of the seven Representatives.⁴⁰

iii. Religious Make-Up

According to a Pew Research poll, 78% of South Carolinians consider themselves to be Christian.⁴¹ Of that number, 35% consider themselves to be Evangelical Christians. The largest single denomination of Evangelical Christians is Baptist, with 22% of South Carolina's Christians claiming membership in that

³⁰ *South Carolina Scorecard*, Gallup, <http://www.gallup.com/poll/174749/south-carolina-scorecard.aspx> (last visited May 5, 2017).

³¹ *State of the States: South Carolina*, Gallup, <http://www.gallup.com/poll/125066/state-states.aspx> (last visited May 5, 2017).

³² *Presidential voting trends in South Carolina*, Ballotpedia, https://ballotpedia.org/Presidential_voting_trends_in_South_Carolina (last visited May 5, 2017).

³³ *Id.*; see also *2012 South Carolina Presidential Results*, Politico, (Nov. 19, 2012), <http://www.politico.com/2012-election/results/president/south-carolina/>.

³⁴ See *Election Results 2008*, N.Y. Times, (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/south-carolina.html>.

³⁵ S.C. Const. Art. V, § 2.

³⁶ *Id.* at art. V, § 3.

³⁷ *Judicial Selection in South Carolina*, Ballotpedia, https://ballotpedia.org/Judicial_selection_in_South_Carolina (last visited May 5, 2017).

³⁸ *Judicial Merit Selection Commission Members*, South Carolina State House, (Jan. 12, 2017), <http://www.scstatehouse.gov/JudicialMeritPage/JMSCMembers.pdf>.

³⁹ *Id.*

⁴⁰ *Congressional Delegation*, SC.Gov, <http://www.sc.gov/government/pages/congressionalDelegation.aspx> (last visited May 5, 2017).

⁴¹ *Religious Landscape Study, South Carolina*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/south-carolina/> (last visited May 5, 2017).

group.⁴² There is also a significant historically black Protestant contingent, representing 15% of the Christians in the state.⁴³

Compared to the rest of the country, South Carolina is a highly religious state. Sixty-nine percent of its residents claim that religion is very important in their lives, one of the highest figures in the nation.⁴⁴

iv. Income/Socioeconomic Breakdown

South Carolina is poorer than the average state, with a current poverty rate of 16.6%, as compared to the overall national poverty rate of 13.5%. The median household income of \$45,483 is roughly \$8,500 below the national average of \$53,889.⁴⁵ The non-profit “talk poverty” reports that, as of 2016, more than 790,715 South Carolinians live in poverty.⁴⁶

b. Criminal Justice

i. Overall Prison Population

The total prisoner population in South Carolina as of end of fiscal year 2016 was 20,671.⁴⁷

- Total Male Population: 19,491
- Total Female Population: 1,460⁴⁸

The South Carolina Prison Population is mostly black and male; as of July 2016, black men made up considerably more than half (63%) of the prison population.⁴⁹ There are more than 5,000 more black men in prison in South Carolina than there are white men in prison (by comparison, white men make up roughly 34% of the prison population).⁵⁰ There are more white women than black women in prison, however, with the latest report showing white women comprise 65% of the current prison population, as compared to black women (only 33%).⁵¹ These demographics do not align with state demographics on the whole, which estimates the population to be roughly 69% white and 27% black.⁵²

Most Serious Crimes: The most serious offenses for which individuals were incarcerated as of end of fiscal year 2016 were homicide, dangerous drugs, burglary, robbery, and sexual assault.⁵³

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ State & County Quick Facts, *supra* note 29.

⁴⁶ South Carolina 2016, talk poverty, <https://talkpoverty.org/state-year-report/south-carolina-2016-report/> (last visited May 5, 2017).

⁴⁷ Division of Resource Information Management, South Carolina Dept. of Corrections, *Average Daily Inmate Population Fiscal Years 1970-2016*, (Nov. 16, 2016), http://www.doc.sc.gov/research/SystemOverview/AvgPop_FY1970-2016_3.pdf.

⁴⁸ South Carolina Dept. of Corrections, *Profile of Inmates in Institutional Count*, (June 30, 2016), http://www.doc.sc.gov/research/InmatePopulationStats/ASOF_InstitutionalCountProfile_FY16.pdf.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² State & County Quick Facts, *supra* note 29.

⁵³ South Carolina Department of Corrections, *Most Serious Offense Distribution as of June 30, 2016*, <http://www.doc.sc.gov/research/InmatePopulationStatsTrend/ASOFTrendMSOFY12-16.pdf>.

ii. Death Row Population and Demographics⁵⁴

Total Number of Prisoners on Death Row: 41

- Number of Women on Death Row: 0
- Number of Black Prisoners on Death Row: 22
- Number of White Prisoners on Death Row: 18
- Number of Latino Prisoners on Death Row: 1

iii. Executions (Past and Pending)⁵⁵

Total Number of Executions since 1973: 43

- Most Recent Execution: May 6, 2011⁵⁶
- Number of Executions Scheduled for 2016: 0
- Number of Executions Scheduled for 2017: 0
- Stays Issued in 2016: 0

iv. Exonerations/Innocence⁵⁷

There have been several noteworthy exonerations in South Carolina. **Michael Linder** was convicted of killing a state highway patrolman in 1979 and sentenced to death.⁵⁸ The state supreme court ordered a retrial after finding that the circuit judge refused to instruct the jury that Linder could be convicted of involuntary manslaughter and had failed to poll jurors on their willingness to impose a death sentence. During the second trial, Linder successfully argued that the shooting was in self-defense after the patrolman ran Linder's motorcycle down and then fired at him.⁵⁹ Linder presented new evidence in the form of ballistics tests proving that the six spent rounds in the patrolman's revolver had been fired from the patrolman's weapon, and not Linder's.⁶⁰

⁵⁴ See Death Penalty Information Center, *South Carolina*, http://www.deathpenaltyinfo.org/state_by_state (last visited May 5, 2017); see also Death Row U.S.A. Fall 2016, NAACP Legal Defense and Educational Fund, Inc., <https://deathpenaltyinfo.org/documents/DRUSAFall2016.pdf>.

⁵⁵ Statistics are taken from the Death Penalty Information Center, unless otherwise noted. See http://www.deathpenaltyinfo.org/state_by_state; <http://www.deathpenaltyinfo.org/upcoming-executions>.

⁵⁶ Clark County Prosecuting Attorney, *Jeffrey Motts Case Information*, <http://www.clarkprosecutor.org/html/death/US/motts1248.htm> (last visited July 14, 2016).

⁵⁷ 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).

⁵⁸ Associated Press, *Convicted Slayer in Carolina Wins Acquittal After Retrial*, N.Y. Times, (Nov. 15, 1981), <http://www.nytimes.com/1981/11/15/us/convicted-slayer-in-carolina-wins-acquittal-after-retrial.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

Warren Douglas Manning was exonerated for the killing of state trooper George Radford. Radford pulled Manning over for a broken headlight and arrested him for driving under a suspended license.⁶¹ Later, Radford was found shot to death in his police cruiser, which had been submerged in a lake. Manning was tried five times for the crime. He was finally acquitted in the fifth trial in 1999, after spending ten years incarcerated for the offense. His acquittal was based in large part on the circumstantial nature of the state's evidence, and the fact that no direct evidence—other than the fact that he had been pulled over by the officer prior to the crime—linked him to the murder.⁶²

Also noteworthy is South Carolina's recent posthumous exoneration of **George Stinney, Jr.**, the youngest person put to death in the last century.⁶³ An all-white jury convicted Stinney—who, like 72% of the county in which the crime occurred, was black—of the murder of two young white girls.⁶⁴ In addition to problems with the jury composition, Stinney's attorney did not call family members to testify who could have provided an alibi, and did not file an appeal on behalf of his client.⁶⁵ On December 17, 2014, Judge Carmen Mullen of South Carolina's 14th Judicial Circuit issued an order vacating Stinney's conviction following a two-day hearing, referring to Stinney's conviction and execution as "a truly unfortunate episode in our history."⁶⁶

Lastly, there are two cases in which a death-sentenced prisoner was not exonerated but did have his sentence reduced after retrial. **Joseph Ard** spent 11 years on South Carolina's death row for the 1993 shooting death of his girlfriend, Madalyn Coffey, and their unborn child.⁶⁷ Ard was granted a new trial after evidence came to light that Coffey had gun powder residue on her hands, which supported Ard's contention that the gun was fired accidentally during a struggle.⁶⁸ At the retrial, Ard presented testimony from a social worker who spoke to Coffey's instability prior to the shooting, bolstering Ard's claim that he was attempting to wrestle the gun away from a suicidal Coffey when it discharged. Ard also presented bullet trajectory and gunshot residue data supporting this claim. Ultimately, the jury did not acquit Ard, but found him guilty of involuntary manslaughter, for which he received a sentence of time served.⁶⁹

Edward Lee Elmore spent nearly 30 years on South Carolina's death row after being convicted of the murder of a wealthy widow for whom he performed handyman services.⁷⁰ Elmore raised several issues on appeal. First, he brought forth evidence that he was convicted on the basis of planted physical evidence and the coerced testimony of a jailhouse informant.⁷¹ Second, he claimed that prosecutors suppressed evidence that implicated a white male—Elmore is black—in the murder.⁷² Lastly, Elmore's mental disability

⁶¹ Death Penalty Information Center, *Innocence Cases*, <https://deathpenaltyinfo.org/innocence-cases> (last visited May 8, 2017).

⁶² *Id.*

⁶³ Death Penalty Information Center, *South Carolina Vacates Conviction of 14-year-old executed in 1944*, <http://www.deathpenaltyinfo.org/node/5712> (last visited July 14, 2016).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Tony Santaella, *Judge throws out black teen's conviction from 1944*, USA Today, (Dec. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/12/17/sc-stinney-executed-teen/20533431/>.

⁶⁷ John Monk, *From Death Row, freedom awaits*, The Post and Courier, (July 31, 2012), <http://www.postandcourier.com/article/20120731/PC16/120739886/1005/inmate-goes-from-death-row-to-freedom>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Death Row Lawyer: "If I throw in the towel, a client dies,"* CNN, (Mar. 7, 2014), <http://www.cnn.com/2014/03/07/us/death-row-stories-elmore/>.

⁷¹ *Id.*

⁷² *Id.*

might have precluded him from being constitutionally eligible for a death sentence altogether. Ultimately, Elmore, who consistently maintained his innocence, accepted a plea agreement in which he was required to admit to the murder, but the state allowed his sentence to be reduced to time served.⁷³

c. Public Opinion Polling

Recent polling data shows a racial divide between those who support and those who oppose capital punishment, at least in the recent case of Dylann Roof. In 2016, the University of South Carolina conducted a poll regarding the proper punishment for Charleston church shooter Dylann Roof. While nearly 65% of black South Carolinians answered that Roof should be sentenced to life in prison, almost the same percentage of white residents responded that he should be executed.⁷⁴

IV. Additional Information for Consideration in Clemency

a. Past Capital Clemency Decisions

i. Grants

There have not been any clemency grants since 1976.⁷⁵

ii. Denials (where newsworthy or controversial)

There have been two somewhat recent denials of capital clemency in South Carolina. **Richard Charles Johnson** was convicted of killing two people, a motorist who had picked up Johnson, and a state trooper who stopped the vehicle. Johnson was initially convicted and sentenced to death in 1986. The South Carolina Supreme Court overturned his conviction on appeal, in part due to statements by the prosecutor at closing which touched on Johnson's lack of remorse and failure to admit guilt.⁷⁶ The court also found error in that significant evidence of prior bad acts was introduced during the guilt phase of trial, that had no bearing on Johnson's culpability for the crime at issue.⁷⁷ Johnson was retried and again convicted and sentenced to death, a sentence that was upheld on appeal, although similar errors regarding the admissibility of prior bad acts were raised.⁷⁸

Johnson's clemency petition was largely premised on his claimed innocence of Smalls' murder.⁷⁹ The petition maintained that the sole evidence the jury heard was the inconsistent testimony of Johnson's co-defendants. Both were offered immunity in exchange for their testimony and Johnson's attorneys contended that either was equally likely to be responsible for the death of both the motorist, Swanson, and of Officer Smalls.⁸⁰ Johnson also submitted that he was intoxicated at the time of Smalls' shooting and had no

⁷³ *Id.*

⁷⁴ Cassie Cope, *Most SC blacks say Dylann Roof should get life without parole*, The Herald, (June 12, 2016), <http://www.heraldonline.com/news/local/article83311012.html>.

⁷⁵ See *State-by-State Database*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/state_by_state (last visited July 14, 2016).

⁷⁶ *State v. Johnson*, 360 S.E.2d 317, 324 (S.C. 1987).

⁷⁷ *Id.* at 326.

⁷⁸ See *State v. Johnson*, 410 S.E.2d 547 (S.C. 1991).

⁷⁹ Application for Executive Clemency Submitted on Behalf of Richard Charles Johnson to Jim Hodges, Governor (Apr. 23, 2002), available at http://library.albany.edu/speccoll/findaids/apap214/johnson_richardcharles.pdf.

⁸⁰ *Id.* at 4.

memory of the incident.⁸¹ His clemency campaign also attracted broad support, including national coalitions such as the ACLU.⁸²

Despite public pressure in favor of a commutation, Governor Jim Hodges denied Johnson's clemency petition, and Johnson was executed on May 3, 2002.

The other notable clemency denial in South Carolina was that of **Joseph Ernest Atkins**. Atkins was a Vietnam veteran who was convicted of killing his father and a young neighbor while he was out on parole for killing his brother.⁸³ Atkins' clemency petition relied on several factors. Most prominent was his post-traumatic stress disorder, stemming from his military service during the Vietnam War.⁸⁴ Atkins also cited the physical and emotional abuse he suffered at the hands of his father and brother.⁸⁵ Atkins did not deny that he committed the crimes, but rather sought mercy based on his mental illness and history of childhood trauma. Governor Jim Hodges denied clemency alongside a statement issued by his spokesman affirming his general support for the death penalty and reluctance to overturn a jury verdict.⁸⁶

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

South Carolina has repeatedly dealt with how the state's fraught racial history impacts the imposition of capital punishment. In *State v. Patterson*, the state Supreme Court denied the defendant's motion to overturn his death sentence on the basis of racially disproportionate death sentencing in Lexington County.⁸⁷ The court reasoned that mere statistical evidence of racial imbalance was not sufficient to show prejudice absent more details about the other cases.⁸⁸ Similarly, the court rejected the claim that negative pretrial publicity was prejudicial. The burden was on the defendant, the court held, to demonstrate that the publicity had precluded the jury from rendering an impartial assessment of the facts.⁸⁹

In *Singleton v. State*, the South Carolina Supreme Court addressed how competency interacts with the death penalty.⁹⁰ *Singleton* was the state's first effort to define how to competency should be assessed, in line with the Supreme Court decision on the subject, *Ford v. Wainwright*.⁹¹ The court adopted a modified version of the American Bar Association's competency standards in stating a two-prong test for competency for execution:

[t]he first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can

⁸¹ *Id.* at 6.

⁸² See *Richard Charles Johnson Clemency Letter*, American Civil Liberties Union, (April 26, 2002), <https://www.aclu.org/legal-document/richard-charles-johnson-clemency-letter>.

⁸³ Application for Executive Clemency Submitted on Behalf of Joseph Ernest Atkins to Jim Hodges, Governor, available at http://library.albany.edu/speccoll/findaids/apap214/atkins_josephernest.pdf.

⁸⁴ *Id.* at 10-14.

⁸⁵ *Id.* at 5-7.

⁸⁶ Jesse Holland, *Three-time murderer slated to die*, Augusta Chronicle, (Jan. 17, 1999), http://old.chronicle.augusta.com/stories/1999/01/17/met_250466.shtml.

⁸⁷ 482 S.E.2d 760, 767 (S.C. 1997).

⁸⁸ *Id.* at 764.

⁸⁹ *Id.*

⁹⁰ 437 S.E.2d 53 (S.C. 1993).

⁹¹ 477 U.S. 399 (1986).

be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel.⁹²

After announcing this standard, the court upheld the lower court's decision to spare Singleton from execution.⁹³

c. Divisive/Important Political Issues in the State

South Carolina has struggled with divisive racial issues, especially related to policing and criminal justice. In April 2015 Michael Slager, a white police officer, shot Walter Scott, a black man, in the back as Scott fled a routine traffic stop. Slager maintained that he feared for his life because Scott had taken a stun gun from Slager in a scuffle. Citizen video, however, contradicted Slager's claims, showing the officer shooting Scott eight times in the back and then appearing to plant a Taser next to Scott's body.⁹⁴ The shooting stirred racial tensions in the state and led to nationwide calls for police reform.⁹⁵ The Scott case is noteworthy for the fact that Slager has been charged with murder.⁹⁶ Though the Scott incident garnered more attention, it was similar to the death of Levar Jones, another black man shot by a white police officer, Sean Groubert, during a routine traffic stop.⁹⁷ On May 2, 2017, Slager pleaded guilty to violating Scott's civil rights after his murder trial ended in a hung jury.⁹⁸ The state will not file new criminal charges as part of Slager's plea deal.⁹⁹ Amid this renewed attention to police shootings in South Carolina, one of the state's most prominent black politicians, Republican Senator Tim Scott, recently offered his own experiences with racial profiling and called for changes in police procedures to bridge the "trust gap" between law enforcement and the black community.¹⁰⁰

South Carolina once again confronted its complex racial history when Dylann Roof, a young white supremacist, opened fired at the historically black Emanuel African Methodist Episcopal Church in

⁹² *Id.* at 55-56.

⁹³ *Id.* at 60.

⁹⁴ Michael Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. Times (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

⁹⁵ See, e.g., Tierney Sneed, *Why Body Cameras Could Cause More Problems Than they Solve*, U.S. News and World Report, (Apr. 10, 2015), <http://www.usnews.com/news/articles/2015/04/10/walter-scott-shooting-stirs-support-for-body-cameras-with-some-disagreement>; Jillian Jorgensen, *Al Sharpton Calls for Federal Police Laws After South Carolina Killing*, New York Observer, (Apr. 8, 2015), <http://observer.com/2015/04/al-sharpton-calls-for-federal-police-laws-after-south-carolina-killing/>.

⁹⁶ Andrew Knapp, *Group won't pay Slager's legal fees*, (July 15, 2016), <http://www.postandcourier.com/20160715/160719620/police-group-refuses-to-pay-slagers-legal-fees-says-walter-scott-shooting-and-lies-not-part-of-officers-duty>.

⁹⁷ John Monk, *One Year Later: Case of SC Trooper Shooting of African-American Motorist Unresolved, Video Part of National Conversation*, (Sept. 2, 2015), <http://www.thestate.com/news/local/crime/article33417255.html>.

⁹⁸ Pete Williams, Craig Melvin, & Daniel Arkin, *Michael Slager, Ex-Cop Who Shot Walter Scott, Pleads Guilty in Civil Rights Case*, NBC News, (May 2, 2017), <http://www.nbcnews.com/storyline/walter-scott-shooting/michael-slager-ex-cop-who-shot-walter-scott-plead-guilty-n753786>.

⁹⁹ *Id.*

¹⁰⁰ Emmarie Huetteman, *Tim Scott, Black Republican Senator, Recounts Run-Ins with Police*, N.Y. Times, (July 14, 2016), http://www.nytimes.com/2016/07/15/us/politics/tim-scott-black-republican-senator-recounts-run-ins-with-police.html?_r=0.

Charleston.¹⁰¹ Roof had been known to harbor racist views and was photographed wearing the flags of various apartheid regimes.¹⁰² Roof's trial also implicated important issues regarding capital punishment, as both state and federal prosecutors brought charges against him and sought the death penalty as a consequence of the mass shooting. State officials argued that their case should proceed first, because the federal investigation into the adequacy of lethal injection procedures meant that the state was more likely to be able to carry out a death sentence if one were handed down.¹⁰³ The shooting also prompted state officials to reexamine the presence of the Confederate flag at the statehouse and other official buildings. Ultimately, Governor Nikki Haley asked the state legislature to pass a law removing the flag from the statehouse, which was subsequently approved.¹⁰⁴

d. Other Relevant Legal, Historical, or Social Issues

In 2001, the United States Supreme Court held that the state violated the Constitution when it cooperated with prosecutors to surreptitiously administer drug tests to obstetrics patients during pregnancy to uncover whether the baby tested positive for cocaine. If a test was positive, the mothers would be arrested, sometimes only days or hours after delivery.¹⁰⁵ The tests were targeted towards a hospital that served a predominantly black and poor population.¹⁰⁶ The Supreme Court held that South Carolina's program was a violation of the Fourth Amendment prohibition on unreasonable searches and seizures.¹⁰⁷

¹⁰¹ Lizette Alvarez & Alan Blinder, *Recalling Nine Spiritual Mentors, Gunned Down During Night of Devotion*, N.Y. Times, (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/nine-victims-of-charleston-church-shooting-remembered.html>.

¹⁰² Frances Robles, Jason Horowitz, & Shaila Dewan, *Dylann Roof, Suspect in Charleston Shooting, Flew the Flags of White Power*, N.Y. Times, (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/on-facebook-dylann-roof-charleston-suspect-wears-symbols-of-white-supremacy.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

¹⁰³ Christopher Matthews, *Death Penalty Freeze Puts Charleston Church Shooting Trials in Conflict*, Wall Street Journal, (July 9, 2016), <http://www.wsj.com/articles/death-penalty-freeze-puts-charleston-church-shooting-trials-in-conflict-1468056604>.

¹⁰⁴ Richard Fausset & Alan Blinder, *Era Ends as South Carolina Lowers Confederate Flag*, N.Y. Times, (July 10, 2015), <http://www.nytimes.com/2015/07/11/us/south-carolina-confederate-flag.html>.

¹⁰⁵ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)

¹⁰⁶ Hernandez Stroud, *Our Opioid Crisis Reveals Deep Racial Bias in Addiction Treatment*, Time, (July 15, 2016), <http://time.com/4385588/crack-babies-heroin-crisis/>.

¹⁰⁷ *Ferguson*, 532 U.S. at 86.