

TEXAS

Capital Clemency Information Memorandum

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Introduction

Clemency in capital cases serves a vital role in our American criminal justice system by acting as a “fail-safe” 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 parole, or both, to conduct a full review of 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*.

As the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a prisoner may seek executive commutation of a death sentence for a wide range of reasons that may not have been issues in his or her case at the time of legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that would govern bringing an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—a nuanced understanding of the relevant state-specific issues that can be brought to bear on the state decision-making entity.

While clemency has long been recognized as an essential component of our criminal justice system, it is not explicitly guaranteed by the federal Constitution. States, therefore, are given wide latitude in defining the procedures that govern their capital clemency process. As a result, this process—as well as the quality of representation and receptivity of decision makers—varies widely nationwide.

The following information about Texas was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding clemency in Texas. Some of the information contained within this memorandum does not relate directly to Texas’s capital clemency process or history but provides important context and background. Given capital clemency’s unique nature as a virtually unrestricted appeal to a state decision maker for mercy, it is vital that practitioners seeking clemency on behalf of a death-sentenced individual 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.

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**, but we hope that it will provide a valuable starting point for all stakeholders interested in this important issue.

State Capital Clemency Information

II. Basics of the State Capital Clemency Process

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

a. The Power Defined¹

Article IV, Section 11 of the Texas Constitution gives the governor the power to grant clemency in all criminal cases with a written signed recommendation from the Board of Pardons and Paroles (“Board”) except in cases of treason and impeachment. The governor cannot act to grant clemency without a recommendation from the Board; however, the governor may choose *not* to grant clemency even with such a recommendation. In a capital case, the governor may grant one 30-day reprieve without action from the Board.

b. The Decision Maker(s)

Article IV, section 11 of the Texas Constitution grants the Texas Legislature the power to establish the Board of Pardons and Paroles.² The Board has the responsibility of recommending and advising the governor on clemency issues.³ A majority of the Board must vote to recommend clemency in order for the governor to exercise his discretion in issuing a grant.⁴ One member is designated as the presiding officer, whose duties include reporting directly to the governor, developing and implementing Board policies, and serving as the administrative head of the Board.⁵

The seven Board members are appointed by the governor with the advice and consent of the Texas Senate for six-year terms,⁶ but persons are permitted to submit their names for consideration of appointment.⁷ This application process for a Board position is outlined on the governor’s website.⁸

¹ Tex. Const. art. IV, § 11(b), available at <http://www.tlc.state.tx.us/pubslegref/TxConst.pdf>.

² *Id.*

³ Tex. Const. art. IV, § 11; 37 Tex. Admin. Code § 143.43 (2019).

⁴ *Id.*

⁵ 37 Tex. Admin. Code § 141.1(a).

⁶ *Board Member Responsibilities*, Tex. Bd. of Pardons and Paroles, http://www.tdcj.state.tx.us/bpp/brd_members/brd_members.html (last visited June 5, 2019).

⁷ *Application Process*, Office of the Governor Greg Abbott, <http://gov.texas.gov/appointments/process> (last visited May 30, 2017).

⁸ *Id.*

Board members must represent the public and must have resided in Texas for at least two years prior to appointment.⁹ Further, at any time, no more than three Board members may be former employees of the Texas Department of Criminal Justice (though previous service as a Board member is not considered employment).¹⁰

After the submission of an application, the governor's Appointments Office reviews these statutory requirements and gathers information on professional or personal experience necessary or preferable for the position.¹¹ In an interview in 2000, a spokesman for the governor's office explained that the Appointments Office asks a variety of questions to Board applicants inquiring about their general views on crime and punishment and also seeks to ensure diverse ethnic and geographic representation.¹² However, potential appointees are not asked about their views on the death penalty or about their political party affiliation.¹³

The potential nominee must be approved by his or her state senator prior to formal appointment by the governor.¹⁴ The nomination must be confirmed by the Texas Senate, which considers the confirmation when it is in session or when the governor calls a Special Session.¹⁵ All newly appointed Board members must complete at least one course of a training program before being allowed to vote, deliberate, or be counted as a member in attendance at a meeting of the Board.¹⁶

c. When to Bring a Petition

A clemency application in a capital case must be delivered to the Board at least 21 days prior to the execution date, and any supplemental information must be delivered 15 days prior to the execution date.¹⁷ **Counsel should note that, as of 2019, board members have indicated their desire for the initial application to comprise the substantially complete filing rather than a "shell" petition, and that the addition of material in the supplemental filing aside from exhibits is looked upon unfavorably. The initial application is reviewed by Board members alongside any supplemental filing.** Importantly, if an execution date is suspended or postponed after a clemency petition has been submitted, the Board process will "reset," and a new clemency application will have to be submitted if a new execution date is set. This is true even in cases where an execution date has been moved for administrative reasons and not due to any underlying legal issues.

⁹ Tex. Gov't Code Ann. § 508.032 (West 2019).

¹⁰ *Id.*

¹¹ *Application Process*, *supra* note 7.

¹² Sara Rimer and Jim Yardley, *Pending Execution in Texas Spotlights a Powerful Board*, N.Y. Times, (June 21, 2000), <https://partners.nytimes.com/library/national/062100texas-bd-execute.html>.

¹³ *Id.*

¹⁴ *Application Process*, *supra* note 7.

¹⁵ *Id.*

¹⁶ Tex. Gov't Code Ann. § 508.0362 (West 2019).

¹⁷ 37 Tex. Admin. Code §143.43(a)-(b).

d. How to Bring a Petition

There are four options under the Texas Administrative Code and the Texas Constitution for capital clemency in Texas: a 30-day reprieve request directly to the governor;¹⁸ a request to the Board for recommendation of commutation of sentence;¹⁹ a request to the Board for recommendation of reprieve from execution;²⁰ and a request made by the governor to the Board to investigate a case and recommend a lesser sentence (a commutation).²¹ All but the last—the governor’s request to the Board for investigation and recommendation of commutation to a lesser sentence—must be brought by the death-row prisoner or on his behalf by counsel. Typically, in death penalty cases, a death-sentenced prisoner will seek all three available forms of relief even if he only provides one set of supplementary materials or briefing to support the applications.

- *Governor’s 30-Day Reprieve*

The governor can grant one reprieve for a period not to exceed thirty days in any capital case without a recommendation from the Board.

- *Commutation of Sentence*

The Board will consider recommending commutation of a death sentence to life imprisonment or another appropriate penalty by way of: 1) a request from the majority of the trial officials of the court of conviction; or 2) a written request from or on behalf of the prisoner, giving reasons for commutation and stating the full name of the offender, county of conviction, and the execution date.

- *Reprieve from Execution*

The Board will consider recommending a reprieve of execution to the governor on receipt of a written request on behalf of the petitioner. The same supplementary materials that are used in support of the commutation of sentence request are also used in support of a request for a reprieve; clemency applications usually ask the board to consider granting a reprieve as an alternative to a commutation. Petitions may request a reprieve in increments of 30 days.

¹⁸ Tex. Const. art. IV, § 11.

¹⁹ 37 Tex. Admin. Code §143.57.

²⁰ 37 Tex. Admin. Code §143.43.

²¹ 37 Tex. Admin. Code §143.58.

- *Request of Governor for Commutation*

The governor can, by written request, ask the Board to investigate and recommend a commutation of sentence in *any* case. This power has been used rarely, if ever.

Process for Bringing a Petition

Prior to submitting a clemency petition, counsel must register with the Board by faxing in an attorney registration form.²² This form must be re-submitted annually, and best practice is to do it at the beginning of each year. **Note that any attorney filing a capital clemency petition in Texas must be licensed in Texas.** Counsel must also fax a notarized fee affidavit,²³ with sections to be completed certifying whether counsel is acting pro bono or for compensation (including counsel that will seek reimbursement under the Criminal Justice Act). The fee affidavit must then be attached to the top of the clemency petition.

The application itself consists of the following²⁴:

- **Documentation:** Attach the fee affidavit to the top of the clemency petition. Additionally, **certified** copies of documents must also be obtained from the petitioner's trial county and attached as exhibits (see below).
- **Petition:** Counsel's contact information, including email address, should be on the front page of the petition, as well as the relief sought (i.e., commutation and/or reprieve). As discussed below, the body of the petition will then contain a narrative account of the petitioner's plea for clemency; the format and content of this is up to the petitioner or their counsel.
- **Exhibits:** All clemency petitions must include the following certified documents from the trial county: (1) indictment, (2) judgment, (3) jury verdict, (4) sentence, and (5) execution warrant. These documents can be submitted altogether as one exhibit or separately as separate exhibits. Beyond that, exhibits are left to counsel's discretion. Clemency petitions often include letters of support from the prisoner's pen-pals, family, friends, and other supporters as one exhibit.

All aspects of the prisoner's clemency request that the applicant wishes the Board to consider must be contained in a single application packet.²⁵ There are no limitations on how the argument for clemency must be made. In an interview with the ABA in 2013,²⁶ the Board's General Counsel listed some of the arguments in favor of clemency that the Board may consider, including:

²² Registration Form for Representation of Offender, <https://www.tdcj.texas.gov/bpp/forms/Attorney%20Registration.pdf>

²³ Fee Affidavit Form, <https://www.tdcj.texas.gov/bpp/forms/FEE%20AFFIDAVIT%20FORM.pdf>

²⁴ This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

²⁵ *Interview of Bettie L. Wells, General Counsel, Texas Board of Pardon and Paroles*, American Bar Association, (Jan. 22, 2013), available at

http://www.americanbar.org/content/dam/aba/administrative/individual_rights/aba_texas_clemency_survey.authcheckdam.pdf.

²⁶ *Id.*

- patterns of racial or geographic disparity in carrying out the death penalty;
- the petitioner's age at the time of offense, possible intellectual disability, mental illness, or incompetency to be executed;
- whether courts have reached the merits on all issues bearing on the death sentence;
- evidence of the petitioner's innocence not raised at trial or lingering doubts surrounding guilt;
- all mitigating evidence, whether or not it was presented at trial;
- the petitioner's possible rehabilitation or evidence of good behavior while on death row; and
- any constitutional claims whose merits the federal courts did not reach because they gave deference to possibly erroneous but not "unreasonable" state court decisions.²⁷

In addition to the types of arguments typically raised, General Counsel Bettie Wells offered the following description of the Board's work in reviewing a clemency application:

The Board reviews and considers the clemency application and attachments and/or exhibits; all documents received from the county of conviction, e.g., judgment, sentence, police report, autopsy report, etc.; prison records which includes demographic, criminal history, medical, etc.; internal staff and legal memos; letters from trial officials, family members of the victim and death penalty opponents; other information provided by the offender during the interview, e.g., personal history (residence, education, employment, military), substance abuse, physical/mental history, social history and marital and family history and institutional adjustments; and if a hearing is held, all information, evidence and arguments presented during the hearing.²⁸

It is important to note that the Board likely will receive a comment on the clemency petition from the trial officials. The Board will not share those comments with the applicant's attorney. However, that attorney may directly ask the trial officials for a copy of what they have filed with the Board, and sometimes the trial officials are willing to share this with the petitioner's attorney. The attorney then may include a reply to the trial officials' comment(s) in the supplemental filing due within 15 days of the execution date.²⁹

The petition and all supporting materials must be sent or hand-delivered to³⁰:

Texas Board of Pardons and Paroles
ATTN: Clemency Section
8610 Shoal Creek Boulevard
Austin, Texas 78757

Note that the Board requires petitioners to print a complete copy of the clemency application (the clemency petition, required exhibits, and any additional information) for each individual Board

²⁷ *Id.*

²⁸ *Id.*

²⁹ This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

³⁰ *Contacting the Clemency Section*, Tex. Bd. of Pardons and Paroles, http://www.tdcj.state.tx.us/bpp/exec_clem/Contacting_Clemency.html (last visited June 13, 2017).

member.³¹ Thus, counsel should be prepared to print and mail or hand-deliver **at least twelve copies of the whole clemency application packet to the Board.** The Board sends some of these copies on to the governor's office. This is a significant clerical endeavor, so counsel should leave ample time for printing, organizing, and mailing to ensure that the Board receives the application prior to the deadline. **The application must be received and file-stamped prior to or by the deadline, not just mailed by the deadline.** For that reason, counsel should mail the application package with a service that provides a tracking number.³²

There are many logistical details that may change from year to year, such as whether the application and copies should be bound, hole-punched, or stapled; whether the petition should be printed double-sided; and whether there is a specific number of copies the Board prefers. **Best practice dictates calling the clemency administrator for current logistical preferences and to ensure there are no last-minute surprises.**³³

e. Hearing Practice

Both an interview with a Board representative and/or a hearing before the full Board can be requested as a part of the clemency petition.³⁴ Although, in the opinion of experienced attorneys, a request for a live hearing should be considered, in the history of the modern death penalty in Texas, only one has been granted, in the case of Johnny Frank Garrett in 1992.³⁵

Interviews

Interviews with Board members are guaranteed if requested.³⁶ The interview request should be included in the written application or any supplement filed in accordance with the Texas Administrative Code.³⁷ When an interview is requested, the Board's presiding officer shall designate at least one member of the Board to conduct the interview.³⁸ Attendance at the interview is limited to the prisoner, the designated member(s) of the Board, Board staff, and TDCJ Correctional Institutions Division staff.³⁹ Experienced attorneys point out that, if they are going to make a request for a Board member interview, they should help their client

³¹ 37 Tex. Admin. Code § 143.57(d) ("Any information filed with the application, including but not limited to amendments, addenda, supplements, or exhibits, must be provided by the applicant in an amount sufficient to allow review by all members of the board. An amount sufficient shall mean not less than 12 and not more than 20 copies of the duplicate item.").

³² This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

³³ This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

³⁴ 37 Tex. Admin. Code § 143.43.

³⁵ *Texas Executes Killer of a Nun*, N.Y. Times, (Feb. 12, 1992), <http://www.nytimes.com/1992/02/12/us/texas-executes-killer-of-a-nun.html>. See *infra* IV(a)(ii).

³⁶ *Interview of Bettie L. Wells*, *supra* note 25.

³⁷ 37 Tex. Admin. Code § 143.43(e).

³⁸ *Id.*

³⁹ *Id.*

prepare a presentation for that interview. The Board member will likely expect the prisoner to make a plea for mercy rather than asking the prisoner many questions.⁴⁰

Interviews are conducted at the Polunsky Unit, in Huntsville, Texas.⁴¹

Hearing

A clemency hearing may be held at the Board's discretion to occur as soon as practicable after the request is made and at a location convenient to the Board and the parties before it.⁴² Invitations to attend the hearing and/or to present relevant information at the hearing are sent to the clemency petitioner, trial officials of the county of conviction, the attorney general of Texas, and any representative of victim's family who have previously requested to be notified.⁴³ The victim's family will be informed of their right to submit written comments for Board review at the hearing.⁴⁴

All hearings are considered open sessions pursuant to the requirements of the Texas Open Meetings Act (the "Act").⁴⁵ For the limited purpose of discussing matters deemed confidential by statute or by the Act, the proceedings may be conducted in an executive session closed to members of the public. Only those persons whose privacy interests and rights to confidentiality may be abridged if the hearing is held open may meet with the Board in such a session.⁴⁶ Otherwise, the public may attend all hearings.⁴⁷

f. Responding to a Petition

A Board decision on a clemency application is made by majority vote. If the Board holds a hearing on a clemency application, it will vote in open session under Texas' open meeting laws. If a hearing is not held, however—which is the norm in capital clemency cases—the Board typically votes electronically by completing and sending the E-Voting Sheet to the BPP-Clemency Votes mailbox as it does not meet in person to review clemency petitions.⁴⁸ Unless otherwise specified by the Chair, the Board will vote at 1:00 PM two days prior to the prisoner's execution date.⁴⁹ The Board's clemency administrator will inform the prisoner and prisoner's attorney which Board members voted for or against which form of relief sought,⁵⁰

⁴⁰ This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

⁴¹ *Interview of Bettie L. Wells, supra* note 25. The Polunsky Unit, which houses Texas' death row population, is in Livingston, Texas.

⁴² 37 Tex. Admin. Code § 143.43(f)(3).

⁴³ 37 Tex. Admin. Code § 143.43(g).

⁴⁴ *Id.*

⁴⁵ 37 Tex. Admin. Code § 143.43(h); *Open Meetings Handbook 2014*, Tex. Att'y Gen., (2014), available at https://www.texasattorneygeneral.gov/files/og/openmeeting_hb.pdf.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Board Directive 143.300*, Tex. Bd. of Pardons and Paroles, (Sept. 25, 2018), available at http://www.tdcj.texas.gov/bpp/policies_directives/DIR%20143.300%20_Capital%20Cases.pdf.

⁴⁹ *Id.*

⁵⁰ *Id.*

likely by email.⁵¹ The reason for votes (either in favor of or against recommending clemency) are not disclosed.

If a governor chooses to act favorably on a Board recommendation for clemency, he must file reasons for the grant with the Office of the Secretary of State.⁵² The Board is required to keep records of their acts concerning clemency matters.⁵³

III. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Board of Pardon and Paroles

Current Board Members ⁵⁴		
Office Holder	Represents	Term Ends
David Gutierrez (Chair)	Gatesville	02-01-2021
D'Wayne Jernigan	Huntsville	02-01-2025
Carmella Jones	Angleton	02-01-2025
James LeFavers	Amarillo	02-01-2023
Brian Long	Palestine	02-01-2023
Ed Robertson	Austin	02-01-2021
Col. Lionel F. "Fred" Solis	San Antonio	02-01-2021

Each of the seven offices is managed by a board member and includes two parole commissioners.⁵⁵ The fourteen parole commissioners are hired by the presiding officer to assist the Board in deciding parole releases and revocations by serving as voting members on parole panels.⁵⁶

Parole Commissioner ⁵⁷	Hire Date	Office
Elodia Brito	11/27/2018	Amarillo
Lee Ann Eck-Massingill	04/01/2014	Gatesville
Ira Evans	01/01/2015	Angleton

⁵¹ See Tex. Gov't Code Ann. § 508.115(e) (West 2019) (advising that sheriffs, chief of police, prosecuting attorneys, and district judges should be notified of executive clemency decisions via "e-mail or other electronic communication").

⁵² Tex. Code Crim. Proc. Ann. art. 48.02 (West 2019).

⁵³ 37 Tex. Admin. Code § 141.72(b).

⁵⁴ *Board Member Responsibilities*, Tex. Bd. of Pardons and Paroles, http://www.tdcj.texas.gov/bpp/brd_members/brd_members.html (last visited June 7, 2019); see also *Annual Statistical Report*, Tex. Bd. of Pardons and Paroles, (2018), available at <https://www.tdcj.texas.gov/bpp/publications/FY%202018%20AnnualStatistical%20Report.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Parole Commissioners Responsibilities*, Tex. Bd. of Pardons and Paroles, https://www.tdcj.texas.gov/bpp/brd_members/parole_commissioners.html (last visited June 7, 2019); see also *Annual Statistical Report*, *supra* note 54.

Troy Fox	01/15/2012	Austin
Roy (Tony) Garcia	07/17/2006	Huntsville
Gerald Garrett	07/02/2018	Angleton
Raymond Gonzalez	07/18/2016	Amarillo
James Hensarling	03/03/2008	Palestine
James (Paul) Kiel	04/05/2004	Palestine
Marsha Moberley	01/19/2010	Amarillo
Mary J. Farley	2019	Amarillo
Anthony Ramirez	12/10/2012	San Antonio
Wanda Saliagas	06/02/2015	Huntsville
Charles Speier	04/05/2004	San Antonio
Roel Tejada	04/01/2014	Gatesville

Details on the approval and denial rates for each individual Board member and Commissioner can be found online.⁵⁸ Limited information regarding Board members' backgrounds is also available online at the Board website.

The Governor

Texas' current governor, Greg Abbott, was elected in 2014 and has a strong record of conservative leadership as Texas' longest-serving attorney general and a prior member of the Texas Supreme Court.⁵⁹ His campaign stated: "Governor Abbott continues to fight to preserve our shared values—like faith, family and freedom—for future generations."⁶⁰ Governor Abbott is a strong supporter of the death penalty, though unlike the majority of his predecessors, he has granted clemency once in a capital case. On February 22, 2018, Governor Abbott granted a commutation to life in prison without parole to Thomas Whitaker after receiving a rare unanimous recommendation in favor of clemency from the Board.⁶¹ (See Clemency Grants, *infra*). Capital practitioners speculate that the rare circumstances of the case—where the sole remaining victim was the father of the death-row prisoner—coupled with the fact of the Board recommendation forced Abbott's hand in favor of mercy in that case.

After a spate of mass shootings in Texas in 2019, and after the federal government announced its intention to introduce new death penalty legislation expediting appeals in certain capital cases, Governor Abbott tweeted out support for passing similar legislation in Texas.⁶² It is unclear if such changes will move forward, however, and advocates for criminal justice reform state that there is no need to further expand Texas' use of the death penalty: Texas already considers a death with multiple victims an aggravator for purposes of

⁵⁸ *Annual Statistics Report supra* note 54.

⁵⁹ *Texas Governor Greg Abbott*, Office of the Tex. Governor, <http://gov.texas.gov/about> (last visited June 07, 2019).

⁶⁰ *Greg Abbott*, Abbott Governor, <http://www.gregabbott.com/bio/> (last visited June 7, 2019).

⁶¹ Tracy Connor, *Texas grants clemency to Thomas Whitaker minutes before execution*, NBC News, (Feb. 22, 2018), <https://www.nbcnews.com/news/us-news/texas-death-row-inmate-could-be-spared-after-unusual-appeal-n850276>.

⁶² Alex Samuels and Jolie McCullough, *Greg Abbott backs "expedited executions" for mass shooters after Odessa shooting*, The Tex. Trib., (Sept. 3, 2019), <https://www.texastribune.org/2019/09/03/greg-abbott-mass-shooting-expedited-execution/>.

a capital sentence, and its appellate process its appellate process already moves more quickly than in the majority of states with the death penalty.⁶³ Moving the appeals process any faster, advocates say, will further increase the risk of executing an innocent person.

b. Legislative Structure and Political Make-Up

The Texas legislature is a bicameral body composed of a 31-member Senate (19 Republicans and 12 Democrats), and a 150-member House of Representatives (83 Republicans and 67 Democrats).⁶⁴

c. Judicial Review of State Clemency

Several Texas Court of Criminal Appeals (TCCA) cases discussed the clemency power after the U.S. Supreme Court ruled the death penalty unconstitutional as applied in 1972. Advocates for Texas' death row prisoners argued that the Supreme Court's decision served to nullify their death sentences altogether, thus entitling them to a new trial rather than resentencing via commutation. The TCCA disagreed.⁶⁵ Otherwise, Texas courts have generally refused to review clemency decisions, explaining that the courts have "no power to review the wisdom of an act of the Governor so long as he operates within the law in exercising his own discretion and judgment in the performance of his constitutional duties."⁶⁶

The constitutional adequacy of the Texas clemency system, especially as it operates in practice, has been repeatedly challenged in litigation with no rulings in favor of petitioners.⁶⁷ In *Faulder v. Texas Board of Pardons and Paroles*, District Judge Sam Sparks described Texas' process as "extremely poor and certainly minimal" and found that "[a]dministratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system."⁶⁸

⁶³ *Id.*

⁶⁴ *Party Affiliation – 86th Legislature*, Legis. Reference Libr. of Tex., <https://lr.texas.gov/legLeaders/members/partyListSession.cfm?leg=86> (last visited June 7, 2019).

⁶⁵ See, e.g., *Stanley v. State*, 490 S.W.2d 828 (Tex. Crim. App. 1972) (holding commutation of death sentences to life-in-prison after Supreme Court found death penalty unconstitutional valid exercise of clemency power); *Cherry v. Texas*, 488 S.W.2d 744 (Tex. Crim. App. 1972) (same).

⁶⁶ *Ex parte Pitt*, 206 S.W.2d 596, 596 (Tex. Crim. App. 1947).

⁶⁷ *Graham v. Tex. Bd. of Pardons and Paroles*, 913 S.W.2d 745 (Tex. App.---Austin 1996) (holding no right to evidentiary hearing in clemency when hearing for innocence provided for in state habeas); *Ex parte Tucker*, 973 S.W.2d 950 (Tex. Crim. App. 1998) (Mem.) (rejecting claim that Texas clemency procedures are so inadequate as to violate due process); *Faulder v. Tex. Bd. of Pardons and Paroles*, 990 S.W.2d 944 (Tex. App.---Austin 1999) (holding no constitutional duty for board members to meet as a body to vote on clemency nor to state reasons for their votes); *Faulder v. Tex. Bd. of Pardons and Paroles*, 178 F.3d 343 (5th Cir. 1999) (holding no due process violations or "arbitrary exercise of administrative power" where it was alleged that Board gave petitioner "inadequate notice of issues" it would consider, acted in secret, refused to hold hearings, gave no reasons for its decisions, and kept no record of its actions).

⁶⁸ Jim Yardley, *Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. Times, (Jan. 7, 2000), <https://archive.nytimes.com/www.nytimes.com/library/politics/camp/010700wh-gop-bush.html>.

The U.S. Supreme Court ruled in *Harbison v. Bell* that federally appointed counsel are authorized to represent their clients in state clemency proceedings.⁶⁹ In *Holiday v. Stephens*, although the U.S. Supreme Court denied the petitioner’s writ of certiorari, Justice Sotomayor wrote separately to affirm the Court’s ruling in *Harbison* and argued that the Texas district court erred in declining to appoint substitute counsel when original counsel refused to file a clemency petition over their client’s express wish to do so.⁷⁰ The Fifth Circuit also affirmed counsel’s duties under 18 U.S.C. § 3599 in *Wilkins v. Davis*, holding that “counsel is authorized—and indeed obligated—to continue representing the defendant until the court permits him to withdraw.”⁷¹

IV. Supplemental State Information

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

a. State-wide Demographics

i. General Population

In 2018, Texas had a population of 28,701,845.⁷²

ii. Political Breakdown

Historically, Texas has been the nation’s largest reliably Republican state. In recent years, commentators have begun to wonder whether the increase in the number of non-white citizens in the state—in particular,

⁶⁹ *Harbison v. Bell*, 556 U.S. 180, 182-183 (2009). See also 18 U.S.C.A. § 3599(e) (2006) ([E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . proceedings for executive or other clemency as may be available to the defendant.)

⁷⁰ *Holiday v. Stephens*, 136 S. Ct. 387 (2015). See also 18 U.S.C.A. § 3599 (2006); *Harbison*, 556 U.S. at 180 .

⁷¹ *Wilkins v. Davis*, 832 F.3d 547, 558 (5th Cir. 2016).

⁷² *Quick Facts: Texas*, U.S. Census Bureau, <https://www.census.gov/quickfacts/table/PST045216/48,00> (last visited June 10, 2019).

those of Hispanic origin—will begin to shift Texas’ political bent.⁷³ As of 2018, non-Hispanic whites comprised 42% of the population, while Hispanics and African Americans made up 39.4%, and 12.7% of the population, respectively.⁷⁴ Since many Hispanic voters lean Democratic in Texas, it is possible that in future years Texas will become a purple, rather than a solidly red, state.⁷⁵ In the 2018 midterm elections, Texas Democrats had their best election results since 1994, with the Senate race between Democratic candidate Beto O’Rourke and incumbent Republican Senator Ted Cruz garnering particular national attention.⁷⁶

iii. Religious Make-Up

Texas is home to several of America’s largest mega-churches.⁷⁷ As of 2014, 31% percent of its population identified as Evangelical Protestant, 23% identified as Roman Catholic, and 13% identified as Mainline Protestant.⁷⁸

iv. Income/Socioeconomic Breakdown

14.7% of Texans live in poverty and the state’s median household income is \$57,051, compared to the U.S. averages for the same statistics, which are at 12.3% and \$57,652, respectively.⁷⁹

b. Criminal Justice

i. Overall Prison Population

As of April 2019, there were a total of 139,037 Texan prison inmates.⁸⁰ Texas regularly houses or supervises more total prisoners than any other state and has the seventh highest incarceration rate in the

⁷³ Andrew Dugan, *Texan Hispanics Tilt Democratic, but State Likely to Stay Red*, Gallup, (Feb. 7, 2014), <http://www.gallup.com/poll/167339/texan-hispanics-tilt-democratic-state-likely-stay-red.aspx>; Juan Carlos Huerta & Beatriz Cuartas, *Is Texas finally turning blue? We looked at the electorate to find out*, Wash. Post, (Dec. 18, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/18/are-texas-demographics-finally-turning-the-state-blue-we-looked-at-the-electorate-to-find-out/?utm_term=.b09d92c5e4eb.

⁷⁴ *Quick Facts: Texas*, *supra* note 72.

⁷⁵ Dugan, *supra* note 73.

⁷⁶ Christopher Hooks, *Texas is a Purple State Now. The Proof is in Last Night’s Results*, Tex. Observer, (Nov. 7, 2018), <https://www.texasobserver.org/texas-is-a-purple-state-now-the-proof-is-in-last-nights-results/>.

⁷⁷ *Database of Megachurches in the U.S.*, Hartford Inst. for Religion Res., <http://hir.hartsem.edu/megachurch/database.html> (last visited June 10, 2019) (select “Sort by Size.”)

⁷⁸ *Religious Composition of Adults in Texas*, Pew Res. Center: Religion & Pub. Life, <https://www.pewforum.org/religious-landscape-study/state/texas/> (last visited June 10, 2019).

⁷⁹ *Quick Facts: Texas*, *supra* note 72.

⁸⁰ *Texas Prison Inmates*, The Tex. Trib., <http://www.texastribune.org/library/data/texas-prisons/> (last visited June 10, 2019).

United States.⁸¹ In recent years, however, Texas has worked to reduce its overall prison population. Between 2013-2014, it reduced its rate of incarceration by 1.3%.⁸²

Most Common Crimes Among Total Texas Prison Population ⁸³	
Crime	Number of Incidents (Note: many prisoners are serving time for multiple charges)
Burglary of Habitation	32,953
Possession of a Controlled Substance (Less Than 1 Gram)	30,251
Aggravated Robbery	26,987
Aggravated Assault with a Deadly Weapon	17,050
Aggravated Sexual Assault of a Child	16,393
Burglary of a Building	14,747
Driving While Intoxicated in the 3 rd Degree	14,385
Possession of a Controlled Substance (More Than 1 Gram but Less Than 4)	13,820
Robbery	12,953
Unauthorized Use of a Vehicle	11,278

ii. Death Row Population and Demographics

As of April 2019, there were 220 prisoners on Texas' death row.⁸⁴ All male death-row prisoners are housed in the Allan B. Polunsky unit, which holds death-row prisoners in single cells on 23-hour-a-day lockdown.⁸⁵ Of note, studies show that prolonged solitary confinement can exacerbate pre-existing mental health disorders and has been associated with the development of mental health issues in otherwise unaffected individuals.⁸⁶ A 2016 report by the Department of Justice recommended that solitary confinement never be used as a default solution for behavioral or other problems due to the extreme social isolation and potential for serious, long-lasting harm on prisoners.⁸⁷

⁸¹ 10 States With Highest Incarceration Rates, (May 28, 2019), <https://www.usnews.com/news/best-states/slideshows/10-states-with-the-highest-incarceration-rates?slide=5>.

⁸² Jolie McCullough, *Dip in Prison Population Continues Trend*, The Tex. Trib., (Sept. 25, 2015), <https://www.texastribune.org/2015/09/25/slight-dip-in-texas-prisoner-population-trend/>.

⁸³ *Texas Prison Inmates*, *supra* note 80.

⁸⁴ *Gender and Racial Statistics of Death Row Offenders*, Tex. Dep't of Crim. Just., (April 25, 2019), http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html.

⁸⁵ *What it's like to spend half a life in solitary confinement*, The Economist, (June 6, 2019), <https://www.economist.com/united-states/2019/06/06/what-its-like-to-spend-half-a-life-in-solitary-confinement>.

⁸⁶ *Designed to Break You: Human Rights Violations on Texas' Death Row*, U. of Tex, Sch. of Law Hum. Rts. Clinic, (Apr. 2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf>.

⁸⁷ *Report and Recommendations Concerning the Use of Restrictive Housing*, U.S. Dep't of Just. Archives, <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing>, (last updated Mar. 13, 2017).

Breakdown of Texas Death Row Prisoners as of April 2019⁸⁸			
Race	Female	Male	Total
White	50%	25.7%	26.4%
Black	33.3%	44.4%	44.1%
Hispanic	16.7%	27.1%	26.8%
Other	0%	2.8%	2.7%
TOTAL	6	214	220
	2.7%	97.3%	100%

(Data taken from Texas Department of Criminal Justice website; last updated April 25, 2019).

iii. Executions (Past and Pending)

Executions have been on the decline countrywide, including in Texas.⁸⁹ Although Texas has still executed more individuals than any other state since the death penalty was reinstated there in 1976, only seven people were executed in Texas in 2016, compared to 40 people at its peak in 2000.⁹⁰ Seven people were likewise executed in 2017.⁹¹ Although that number rose to 13 in 2018, that same year Texas jurors rejected the death penalty in eight capital cases and only one defendant was sentenced to death in Harris County, which was once known as the “capital of capital punishment.”⁹²

Scheduled executions can be found on the Texas Department of Criminal Justice Website (see footnote for direct link to schedule page).⁹³ A list of all executed death row prisoners in Texas since 1982 can also be found there (see footnote for direct link to list).⁹⁴

Since 1977, lethal injection has been Texas’ method of execution.⁹⁵ The average time on death row prior to execution is 10.87 years, and the average age of executed prisoners is 39.⁹⁶ In comparison, the national average time on death row before execution is about 15.5 years.⁹⁷

⁸⁸ *Gender and Racial Statistics of Death Row Offenders*, *supra* note 84.

⁸⁹ Anna Arceneaux, *The Death Penalty in 2018: A Punishment on the Decline*, Am. C.L. Union, (Dec. 21, 2018), <https://www.aclu.org/blog/capital-punishment/innocence-and-death-penalty/death-penalty-2018-punishment-decline>.

⁹⁰ *Executed Offenders*, Tex. Dep’t of Crim. Just., https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited June 11, 2019).

⁹¹ *Id.*

⁹² Arceneaux, *supra* note 89.

⁹³ *Scheduled Executions*, Tex. Dep’t of Crim. Just., http://www.tdcj.state.tx.us/death_row/dr_scheduled_executions.html (last updated May 23, 2019).

⁹⁴ *Executed Offenders*, *supra* note 90.

⁹⁵ *Death Row Facts*, Tex. Dep’t of Crim. Just., http://www.tdcj.state.tx.us/death_row/dr_facts.html (last visited June 11, 2019).

⁹⁶ *Id.*

⁹⁷ *Time on Death Row*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/time-death-row> (last visited June 11, 2019).

iv. Exonerations/Innocence⁹⁸

Since 1987, thirteen prisoners on Texas' death row have been exonerated, including⁹⁹:

- **Vernon McManus** (sentenced to death in 1977; key prosecution witness refused to testify at retrial; charges dismissed in 1987).
- **Randall Dale Adams** (sentenced to death in 1977; overturned based on substantial evidence of innocence and dubious witness testimony at trial; charges dismissed in 1989).
- **Clarence Brandley** (sentenced to death in 1981; overturned based on prosecutorial misconduct; charges dismissed in 1990).
- **John Skelton** (sentenced to death in 1983; overturned based on insufficient evidence; acquitted in 1990).
- **Federico Macias** (sentenced to death in 1984; overturned based on insufficient evidence and ineffective assistance of counsel; charges dismissed in 1993).
- **Muneer Deeb** (sentenced to death in 1985; overturned based on improperly admitted evidence at the original trial; acquitted in 1993).
- **Ricardo Aldape Guerra** (sentenced to death in 1982; overturned based on police misconduct and prosecutorial misconduct; charges dismissed in 1997).
- **Earnest Ray Willis** (sentenced to death in 1987; overturned based on prosecutorial misconduct and new evidence; charges dismissed in 2004).
- **Michael Blair** (sentenced to death in 1994; overturned based on DNA evidence; charges dismissed in 2008).
- **Michael Toney** (sentenced to death in 1999; overturned based on prosecutorial misconduct and false witness testimony; in charges dismissed in 2009).
- **Robert Springsteen** (sentenced to death in 2001; overturned based on DNA evidence; charges dismissed in 2009).
- **Anthony Graves** (sentenced to death in 1994; overturned based on prosecutorial misconduct and false witness testimony; charges dismissed in 2010).
- **Alfred DeWayne Brown** (sentenced to death in 2005; overturned based on prosecutorial misconduct; charges dismissed in 2015).

⁹⁸ 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 June 11, 2019); *Innocence: List of those freed from death row*, Death Penalty Info. Ctr., <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited June 11, 2019).

⁹⁹ *Innocence Cases*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/innocence-cases#30> (last visited June 11, 2019).

c. Public Opinion Polling

Public opinion strongly favors the death penalty, with nearly 75% of Texan voters supporting it for people convicted of violent crimes, 46% saying they strongly support it, and 20% opposed.¹⁰⁰ This is despite 89% of respondents to a 2013 poll believing the state has executed innocent people, with 49% saying it happens occasionally, and 13% saying it happens a great deal of the time.¹⁰¹ However, when offered the alternative of a life without parole sentence in a 2012 poll, 53% of Texas respondents supported the death penalty and 37% preferred life in prison.¹⁰²

V. Additional Information for Consideration in Clemency

a. Significant Past Capital Clemency Decisions

i. Grants (Commutations and Reprieves)

In 2018 (the most recent report published by the Board), the Board considered 171 petitions for non-capital clemency petitions.¹⁰³ Clemency was recommended in 21 cases.¹⁰⁴

In 2018 the Board received 14 capital clemency applications for a commutation of sentence, eleven of which also requested reprieves. Three of these cases received stays of execution before they could be heard by the Board, eleven were considered by the Board, and one case the Board considered was recommended for clemency.¹⁰⁵

It is notoriously difficult to secure a grant of capital clemency in Texas. Bettie L. Wells, General Counsel of Texas Board of Pardons and Paroles, stated in a January 22, 2013 interview that Texas governors have granted six *reprieves* in death penalty cases since 1992 (no other clemency was later granted in those cases).¹⁰⁶ However, there have only been three *commutations* granted in capital cases since 1976 in cases in which the defendant's death sentence had not been ruled retroactively unconstitutional or in which the defendant had not had a prior court reversal of sentence.¹⁰⁷

- **Henry Lee Lucas (Commutated)**

In 1998, Governor George W. Bush issued his sole death penalty commutation to Henry Lee Lucas on recommendation of the Board, citing serious doubt concerning Lucas' guilt in the crime for which he was

¹⁰⁰ Ross Ramsey, *UT/TT Poll: Texas Don't Trust Big Institutions When it Comes to Privacy*, The Tex. Trib., (Nov. 8, 2013), <https://www.texastribune.org/2013/11/08/utt-poll-texans-dont-trust-institutions-privacy/>.

¹⁰¹ *Id.*

¹⁰² Ross Ramsey, *UT/TT Poll: Texans Stand Behind Death Penalty*, The Tex. Trib., (May 24, 2012), <https://www.texastribune.org/2012/05/24/utt-poll-life-and-death/>

¹⁰³ *Annual Statistical Report*, *supra* note 54.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Interview of Bettie L. Wells*, *supra* note 25.

¹⁰⁷ *Clemency*, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/clemency> (last visited June 12, 2019).

set to be executed. Lucas famously confessed to multiple murders, for which he had received numerous life sentences. But despite his numerous confessions and convictions for other crimes, there was strong evidence that Lucas was in Florida at the time of the Texas murder for which he was sentenced to death. Furthermore, the only evidence tying him to that crime was Lucas' own confession, which—along with many others—was later called into question and ultimately recanted.¹⁰⁸ In discussing the case, Bush asserted, "I feel a special obligation to make sure the State of Texas never executes a person for a crime they may not have committed. I take this action so that all Texans can continue to trust the integrity and fairness of our criminal justice system."¹⁰⁹

- **Kenneth Foster (Commuted)**

Governor Rick Perry's only grant of capital clemency that was not issued in response to a Supreme Court decision¹¹⁰ came in 2007 in the case of Kenneth Foster, who was not the triggerman in a murder but was convicted due to Texas' controversial "law of parties" statute. Under the law of parties, a defendant can be sentenced to death even if the defendant "did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."¹¹¹ In addition to being convicted under the law of parties, Mr. Foster was tried jointly with his co-defendant. Governor Perry expressly stated he commuted the sentence because of the joint trial, suggesting that the jury may have considered aggravation evidence regarding the codefendant in sentencing Foster to death. Governor Perry stated: "I believe the right and just decision is to commute Foster's sentence from the death penalty to life imprisonment. I am concerned about Texas law that allows capital murder defendants to be tried simultaneously, and it is an issue I think the Legislature should examine."¹¹² Through the 2019 legislative session, although bills have been repeatedly filed, none have passed either amending the "law of parties" to exclude "non-shooters" from the death sentence or prohibiting the joint prosecution of capital murder defendants.¹¹³

- **Thomas Whitaker (Commuted)**

In 2018, less than one hour before Thomas Whitaker was scheduled to be executed, Governor Greg Abbott accepted the Board's unanimous recommendation to commute Whitaker's death sentence to life without

¹⁰⁸ Allen Myerson, *Citing Facts Bush Spares Texas Inmate on Death Row*, N.Y. Times, (June 27, 1998), <http://www.nytimes.com/1998/06/27/us/citing-facts-bush-spares-texas-inmate-on-death-row.html>.

¹⁰⁹ *Id.*

¹¹⁰ From 2000-2013, Governor Perry issued 30 other death penalty commutations (28 of which were in accordance with the Supreme Court's ruling in *Roper v. Simmons* barring the death penalty for minors; 2 of which were in accordance with the Supreme Court's ruling in *Atkins v. Virginia* barring the death penalty for persons with intellectual disability).

¹¹¹ Tex. Penal Code Ann. § 7.02 (West 1994).

¹¹² Brian Chasnoff, *Perry Grants Rare Reprieve to Inmate Set to Die*, Hous. Chron., (Aug. 30, 2007), <http://www.chron.com/news/houston-texas/article/Perry-grants-rare-reprieve-to-inmate-set-to-die-1816529.php>

¹¹³ In the 2017 regular session, SB 1867, requiring severance in cases involving the death penalty, was only referred to the Senate criminal justice committee. In April 2019, HB 472, limiting a defendant's liability for his codefendant's actions in capital murder cases, failed to receive an affirmative vote in committee. Tex. Legislature Online, <http://www.legis.state.tx.us>.

parole.¹¹⁴ The Board had not made a recommendation for commutation since 2009 but based its recommendation in part on a plea for mercy by Whitaker's father, the sole survivor of the attack that killed his wife and only other son and earned Thomas Whitaker the death penalty.¹¹⁵ Governor Abbott said his decision to commute Whitaker's death sentence was based upon several factors, including the unanimous Board recommendation, the fact that the triggerman who killed the victims did not receive the death penalty, the surviving victim's opposition to execution, and the fact that Whitaker waived all future claims to parole in exchange for life in prison.¹¹⁶ "The murders of Mr. Whitaker's mother and brother are reprehensible. The recommendation of the Texas Board of Pardons and Paroles, and my action on it, ensures Mr. Whitaker will never be released from prison," Governor Abbott said.¹¹⁷

- **Frances Newton (120-Day Reprieve)**

Acting on a Board recommendation, Governor Perry issued Frances Newton a 120-day reprieve on December 1, 2004—the same day as her scheduled execution—to allow the courts the opportunity to order a retesting of gunpowder residue on the skirt the defendant wore at the time of the murders and of the gun used in the murders.¹¹⁸ Newton had been convicted of the 1987 shooting of her husband and children.¹¹⁹

The *Austin Chronicle* wrote, "[Newton's] story is one more in a long line of Texas death row cases in which the prosecutions were sloppy or dishonest, the defenses incompetent or negligent, and the constitutional guarantee of a fair trial was honored only in name."¹²⁰ According to the prosecution theory, Newton was a cold-blooded killer who murdered her husband and children in order to collect the \$100,000 life insurance from policies she'd recently taken out on their lives.¹²¹ However, post-conviction defense counsel presented a plausible alternative theory of the crime, arguing the victims were likely murdered by someone connected to a drug dealer to whom Newton's husband owed \$1,500. This theory, according to Newton's attorneys, would explain the lack of physical evidence connecting Newton to the murders.¹²²

Testing on Newton's skirt proved to be impossible, because it had been improperly stored, and further testing on the gun confirmed it was the pistol used in the murder of Newton's husband and children.¹²³ The state district court refused Newton's attorneys' request for additional testing.¹²⁴ In April 2005, after the 120-

¹¹⁴ *Clemency*, *supra* note 107.

¹¹⁵ Jolie McCullough, *In rare move, Texas parole board recommends clemency for death row inmate Thomas Whitaker*, *The Tex. Trib.*, (Feb. 20, 2018), <https://www.texastribune.org/2018/02/20/rare-move-texas-parole-board-recommends-clemency-death-row-inmate-thom/>.

¹¹⁶ *Clemency*, *supra* note 107; see also Jolie McCullough, *Minutes before execution, Texas Gov. Greg Abbott commutes the sentence of Thomas Whitaker*, *The Tex. Trib.*, (Feb. 22, 2018), <https://www.texastribune.org/2018/02/22/texas-gov-greg-abbott-thomas-whitaker-death-sentence/>.

¹¹⁷ McCullough, *supra* note 115.

¹¹⁸ Jordan Smith, *Without Evidence: Executing Frances Newton*, *The Austin Chron.*, (Sept. 9, 2005), <http://www.austinchronicle.com/news/2005-09-09/288994/>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Michael Graczyk, *Judge denies more testing in case of condemned Texas woman*, *Midland Reporter-Telegram*, (Mar. 16, 2005), <https://www.mrt.com/news/article/Judge-denies-more-testing-in-case-of-condemned-7524551.php>.

¹²⁴ *Id.*

day reprieve ran its course, the state district court rescheduled Newton's execution date for September of that same year.¹²⁵ The Supreme Court subsequently declined to hear two appeals, and the Board unanimously rejected a request for commutation.¹²⁶ After Governor Perry declined to issue another stay, Newton was executed on September 14, 2005.¹²⁷ Governor Perry's office received more than 4,000 letters, faxes, e-mails, and postcards imploring him to commute her death sentence to life in prison.¹²⁸ The day of her execution, approximately 50 people protested outside the Walls Unit in Huntsville, Texas.¹²⁹

ii. Denials (where newsworthy or controversial)

• Karla Faye Tucker¹³⁰

Karla Faye Tucker was convicted of murder and executed in 1998.¹³¹ While on death row, Tucker experienced a religious conversion and argued that her sentence should be commuted to life in prison so she could continue to do God's work.¹³² A coalition of prominent figures advocated for Tucker's commutation, including Pope John Paul II, Amnesty International, and, in particular, Pat Robertson, who broadcast a prison cell interview with Tucker on his show *The 700 Club*.¹³³ However, the Board unanimously rejected Tucker's clemency application and Governor Bush declined to grant her a stay of execution.¹³⁴ Tucker was executed on February 3, 1998.¹³⁵ Tucker's case was noteworthy because she was the first woman to be executed in Texas since 1863, and only the second woman to be executed in the United States since the reinstatement of the death penalty in 1976.¹³⁶

• John Frank Garrett (1992)¹³⁷

John Frank Garrett was scheduled to be executed in January 1992 for raping and murdering a nun when he was seventeen years old. However, Governor Ann Richards granted Garrett a thirty-day reprieve at the request of Pope John Paul II. Mr. Garrett's counsel argued that it would be unjust to execute him because

¹²⁵ *Death row woman inmate gets another execution date*, Midland Reporter-Telegram, (Apr. 21, 2005), <https://www.mrt.com/news/article/Death-row-woman-inmate-gets-another-execution-date-7687288.php>.

¹²⁶ Stephen Smith, *Frances Newton Executed In Texas*, CBS News, (Sept. 14, 2005), <https://www.cbsnews.com/news/frances-newton-executed-in-texas/>.

¹²⁷ *Id.*

¹²⁸ Jordan Smith, *supra* note 118.

¹²⁹ Stephen Smith, *supra* note 126.

¹³⁰ *Tucker v. State*, 771 S.W.2d 523 (Tex. Crim. App. 1988).

¹³¹ *Karla Faye Tucker*, Office of the Clark County Prosecuting Attorney, <http://www.clarkprosecutor.org/html/death/US/tucker437.htm> (last visited June 14, 2019).

¹³² Rebecca Leung, *Texas Executes Tucker: Case Raised Questions About Women and the Death Penalty*, ABC News, (Feb. 3, 1998), <https://web.archive.org/web/20010303043233/http://abcnews.go.com/sections/us/DailyNews/tucker0202.html>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Karla Faye Tucker*, *supra* note 131.

¹³⁶ *Id.*

¹³⁷ *Texas Executes Killer of a Nun*, N.Y. Times, (Feb. 12, 1992), <https://www.nytimes.com/1992/02/12/us/texas-executes-killer-of-a-nun.html>.

of his insanity, and his case garnered support from several anti-death penalty groups, including the Catholic Diocese of Amarillo, 16 Catholic bishops, and the human rights group Amnesty International.

In response to Governor Richards' reprieve, the Board held a hearing to determine if Garrett's sentence should be commuted to life. However, the Board recommended to the governor that Garrett's execution proceed with a vote of 17-0, with one abstention. Garrett was executed on February 12, 1992.

- **Leonel Herrera (1993)**

Leonel Herrera was executed on May 13, 1993, after the Supreme Court declined to hear four late-hour appeals.¹³⁸ Herrera had been convicted of killing two police officers in 1981, though Herrera claimed that both murders had been committed by his brother, Raul, who died in 1984.¹³⁹ Herrera supported his new innocence claim with polygraphs and videotapes of his family and Raul's lawyer insisting that Raul had committed both murders.¹⁴⁰

Herrera's actual innocence claim during federal habeas proceedings led to a landmark Supreme Court decision in which the Court determined that a claim of actual innocence based on newly discovered evidence was not grounds for federal habeas relief.¹⁴¹ Instead, the Court found that clemency was the proper avenue for actual innocence claims foreclosed by the courts.¹⁴² However, Governor Richards subsequently denied Herrera's request for a reprieve.¹⁴³

- **Gary Graham (2000)**

Despite confessing to several robbery and assault charges, Gary Graham (later known as Shaka Sankofa) maintained he was innocent of the murder charge which earned him the death penalty until his execution in June 2000.¹⁴⁴ Graham's murder conviction was largely based on the single eyewitness testimony of a woman who observed the murder through her windshield while sitting in her car 30–40 feet away.¹⁴⁵ Two other eyewitnesses who affirmatively stated that Graham was not the murderer were never interviewed by Graham's trial counsel. Three of the jurors who voted to convict Graham signed affidavits saying they would have voted differently had all of the evidence been available¹⁴⁶

¹³⁸ *Man in Case on Curbing New Evidence Is Executed*, N.Y. Times, (May 13, 1993), <https://www.nytimes.com/1993/05/13/us/man-in-case-on-curbing-new-evidence-is-executed.html>.

¹³⁹ *Id.*

¹⁴⁰ Lara Bazelon, *Scalia's Embarrassing Question: Innocence is not enough to get you out of prison*, Slate, (Mar. 11, 2015), <https://slate.com/news-and-politics/2015/03/innocence-is-not-cause-for-exoneration-scalias-embarrassing-question-is-a-scandal-of-injustice.html>.

¹⁴¹ *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

¹⁴² *Id.* at 391-392 ("History shows that executive clemency is the traditional 'fail safe' remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion.").

¹⁴³ *Man in Case on Curbing New Evidence Is Executed*, *supra* note 138.

¹⁴⁴ Jessica Reaves, *The Final Hours of Gary Graham*, (June 22, 2000), <http://content.time.com/time/magazine/article/0,9171,48004,00.html>.

¹⁴⁵ *Executed but Possibly Innocent*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executed-possibly-innocent> (last visited June 14, 2019).

¹⁴⁶ *Id.*

Despite new evidence, both federal and state courts rejected Graham's ineffective assistance of counsel claims.¹⁴⁷ Governor Ann Richards granted Graham a reprieve in 1993, and Governor George W. Bush later stated that he was procedurally barred from doing the same, as Texas law only allows the governor to issue one 30-day reprieve without the recommendation of the Board.¹⁴⁸ Governor Bush also emphasized that Graham's case had been reviewed by 33 state and federal judges.¹⁴⁹ The Board itself voted 14-3 against the 120-day reprieve, 12-5 against commutation to a lesser sentence, and 17-0 against a conditional pardon.¹⁵⁰ After the execution, two Board members were recorded on film expressing shock, asserting that they had not known he had not been given an evidentiary hearing when they made their decision to deny clemency.¹⁵¹

- **Napoleon Beazley (2002)**

Napoleon Beazley was sentenced to death for a 1994 murder he committed in the course of a carjacking when he was seventeen years old.¹⁵² Beazley's case gained notoriety not only because of his age at the time of his crime, but also because his victim was the father of a judge sitting on the Fourth Circuit Court of Appeals.¹⁵³ The state district court judge who heard Beazley's case asked the governor to commute his sentence to life in prison on account of his age at the time of his crime.¹⁵⁴ The Board rejected Beazley's application for commutation in a vote of 10-7.¹⁵⁵ The vote was divided along racial lines with all six minority members of the Board voting for commutation, and all but one white member of the Board voting against the request.¹⁵⁶ The Supreme Court also declined to stay Beazley's execution with a vote of 3-3, with three justices having recused themselves based on their personal relationships with the victim's son.¹⁵⁷

On the day of Beazley's execution, his counsel once again petitioned the governor for a stay of execution. Counsel cited a Missouri Supreme Court stay granted that same day based on the argument that to execute juvenile offenders violated the Eighth Amendment's provision against cruel and unusual punishment. Governor Rick Perry remained unpersuaded to issue another reprieve, and Beazley was executed on May 28, 2002.¹⁵⁸ The Missouri stay of execution cited by Beazley's attorneys would go on to result in the

¹⁴⁷ *The Case of Gary Graham – Post-Trial Period*, Capital Punishment in Context, <https://capitalpunishmentincontext.org/cases/graham/posttrial> (last visited June 14, 2019).

¹⁴⁸ Reaves, *supra* note 144.

¹⁴⁹ *Death Row Man Executed*, BBC News, (June 23, 2000), <http://news.bbc.co.uk/2/hi/americas/802425.stm>.

¹⁵⁰ *Id.*

¹⁵¹ This information comes from conversations with experienced Texas practitioners who have worked on capital clemency cases.

¹⁵² *Texas Executes Beazley*, CNN, (May 29, 2002), <http://www.cnn.com/2002/LAW/05/28/beazley.execution/index.html>.

¹⁵³ Pamela Colloff, *Does Napoleon Beazley Deserve to Die?*, *Tex. Monthly*, (Apr. 2002), <https://www.texasmonthly.com/articles/does-napoleon-beazley-deserve-to-die/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Texas Executes Beazley*, *supra* note 152.

¹⁵⁶ This information comes from conversations with Mr. Beazley's appellate counsel.

¹⁵⁷ Colloff, *supra* note 153.

¹⁵⁸ Pamela Colloff, *Napoleon's Last Stand*, *Tex. Monthly*, (July 2002), <https://www.texasmonthly.com/articles/napoleons-last-stand/>.

landmark Supreme Court decision *Roper v. Simmons*, which rendered capital punishment against juvenile offenders unconstitutional.¹⁵⁹

- **Johnny Joe Martinez (2002)**

In 1993, Johnny Joe Martinez killed a convenience store clerk during the course of a drunken robbery. Martinez, who had no criminal record prior to the crime, contacted the police and confessed to the murder shortly thereafter.¹⁶⁰

While in prison, Martinez reconciled with the victim's mother, who proceeded to write an emotional letter to the Board asking for clemency.¹⁶¹ The Board narrowly rejected Martinez's application for commutation in a 9–8 vote. Those who voted for commutation cited both the letter and their general disbelief that Martinez continued to be a danger to society.¹⁶²

- **Cameron Todd Willingham (2004)**¹⁶³

On August 20, 1992, Cameron Todd Willingham was convicted of setting the house fire that killed his three children. Willingham, who refused to plead guilty in return for a life sentence, maintained his innocence until his February 17, 2004 execution.¹⁶⁴ Governor Perry refused to temporarily stay Willingham's execution, despite the report of a leading forensic expert that sharply disputed the finding of arson by a Texas deputy fire marshal.¹⁶⁵ In 2006, the Innocence Project submitted Willingham's case to the Texas Forensic Science Commission, a commission created by the state legislature the previous year to investigate complaints of forensic negligence or misconduct in Texas criminal cases.¹⁶⁶ Former Governor Rick Perry's administration discounted the conclusions of the Commission, which agreed with advocates that the arson finding relied on flawed analysis.¹⁶⁷ Perry replaced three members of the Commission, including its chairman, at a critical point in the Willingham investigation, and the new chairman put the investigation on hold, delaying the report's release by more than a year.¹⁶⁸ Defending his handling of the case in 2009, the governor declared

¹⁵⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁶⁰ Michael Graczyk, *Corpus Christi Convenience Store Clerk Killer Executed*, Plainview Daily Herald, (May 22, 2002), <https://www.myplainview.com/news/article/Corpus-Christi-convenience-store-clerk-killer-8933825.php>.

¹⁶¹ Laura Dimon, *Chilling Testimony of Death Row Executioners Casts Dark Shadow Over Entire System*, Mic, (Jan. 15, 2014), <https://www.mic.com/articles/78235/chilling-testimony-of-death-row-executioners-casts-dark-shadow-over-entire-system>.

¹⁶² Diane Jennings, *Board Affirms Killer's Execution by One Vote; 'We're sad about it,' says victim's mom, who had sought life for inmate*, Dallas Morning News, (May 21, 2002), available at <http://www.clarkprosecutor.org/html/death/US/martinez778.htm>.

¹⁶³ Maurice Possley, *Fresh Doubts over a Texas Execution*, Wash. Post, (Aug. 3, 2014), <http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *The Texas Forensic Science Commission and the Willingham Case*, Innocence Project, (Sept. 14, 2010), <https://www.innocenceproject.org/the-texas-forensic-science-commission-and-the-willingham-case/>.

¹⁶⁷ *Id.*

¹⁶⁸ *The Texas Forensic Science Commission and the Willingham Case supra* note 166; Matt Smith and Ed Lavandra, *Perry 'squashed' Texas execution probe, ex-official says*, CNN, (Sept. 8, 2011), <http://www.cnn.com/2011/POLITICS/09/07/texas.execution.probe/index.html>.

that Willingham “was a monster.”¹⁶⁹ Since the execution, a series of forensic experts have discredited the evidence shown at trial. The Board voted in March 2014 to deny Willingham a posthumous pardon.¹⁷⁰

- **Kelsey Patterson (2004)**¹⁷¹

Kelsey Patterson was found guilty of murder and sentenced to death in 1993.¹⁷² He was executed in 2004 after Governor Perry rejected a rare recommendation that his sentence be commuted to life, or his punishment be delayed, on the grounds of mental illness.¹⁷³ Patterson’s case was notable because he had also been involved with two non-fatal shootings prior to the 1993 event, but he had been diagnosed with paranoid schizophrenia and was deemed unfit to stand trial.¹⁷⁴ After the 1993 murders, Patterson was once again analyzed by a psychiatrist who also found him to be suffering from schizophrenia and under the delusion that he was being controlled by aliens.¹⁷⁵

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

Ex Parte Graves (2002)¹⁷⁶

Anthony Graves was convicted of six counts of murder and sentenced to death in 1994.¹⁷⁷ Following affirmance of his conviction and death sentence, and after denial of two previous writ petitions, Graves filed his third post-conviction death penalty writ, arguing that his original habeas counsel was constitutionally ineffective.¹⁷⁸ The Texas Court of Criminal Appeals held that competency of prior habeas counsel was not a cognizable issue on habeas corpus review.¹⁷⁹ Therefore, Texas petitioners cannot use ineffectiveness of state habeas counsel to excuse procedurally defaulted claims in successive state court petitions, as they can under limited circumstances in the federal habeas system.

Medellin v. Texas (2008)¹⁸⁰

Jose Ernesto Medellin, a Mexican national raised in Texas, was sentenced to death in 1993 for the gang rape and murder of two Houston teenagers.¹⁸¹ Although the International Court of Justice (ICJ) issued an

¹⁶⁹ *Id.*; Possley, *supra* note 163.

¹⁷⁰ Possley, *supra* note 163.

¹⁷¹ *Patterson v. Dretke*, 370 F.3d 480 (5th Cir. 2004).

¹⁷² *Kelsey Patterson*, Office of the Clark Cty. Prosecuting Att’y, <http://www.clarkprosecutor.org/html/death/US/patterson910.htm> (last visited June 14, 2019).

¹⁷³ Maria McEvoy and David Millward, *America’s Most Controversial Executions*, The Telegraph, (Apr. 30, 2014), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10798389/Americas-most-controversial-executions.html>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Ex parte Graves*, 271 S.W.3d 801 (Tex. App. 2008).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁸¹ *Id.*

opinion stating Medellín should be retried because he was not informed of his rights under the Vienna Convention to inform the Mexican government of his charges, the U.S. Supreme Court held that that neither the ICJ's decision nor a memorandum issued by President George W. Bush mandating compliance with the decision required Texas to provide reconsideration and review of Medellín's case.¹⁸²

***Moore v. Texas* (2017)**¹⁸³

Bobby James Moore was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a botched robbery that occurred when Moore was 20 years old.¹⁸⁴ A state habeas court subsequently determined that Moore qualified as intellectually disabled, and that his death sentence therefore violated the Eighth Amendment's ban on "cruel and unusual punishments."¹⁸⁵ Based on its findings, the habeas court recommended to the Texas Court of Criminal Appeals (TCCA) that Moore be granted relief. The TCCA declined to adopt the judgment recommended by the habeas court, instead holding that the habeas court erred by not following the TCCA's 2004 decision in *Ex parte Briseno*,¹⁸⁶ which relied on a wholly non-scientific analysis to determine intellectual disability.¹⁸⁷ In 2017, the Supreme Court held that the *Briseno* factors used by the Texas courts to assess intellectual disability were unconstitutional, in that they did not adequately ensure that an intellectually disabled person would not be executed.¹⁸⁸ Despite the Supreme Court decision, the TCCA again found Moore to be eligible for the death penalty, relying on a report issued by a state expert who had relied on the unconstitutional framework. This issue was again taken to the Supreme Court, which granted the writ, vacated the decision, and remanded to the TCCA to *again* rule on Moore's intellectual disability claim. On November 6, 2019, the TCCA issued its opinion resentencing Moore to life in prison, finding that the 2019 decision of the Supreme Court was "determinative" and left the TCCA with "nothing . . . to do but to implement the Supreme Court's holding."¹⁸⁹

c. Divisive/Important Political Issues in the State

Governor Abbott's administration describes the following agenda for the state over the coming years: growing Texas' economy, protecting the Second Amendment, defending religious liberty, securing the border, increasing government transparency, improving education, fostering safety in communities, defending the Tenth Amendment, and stopping human trafficking.¹⁹⁰ A poll conducted in February 2019 by the Texas Politics Project at the University of Texas at Austin asked participants to identify the most important problem facing Texas. The breakdown of answers was as follows: border security (20%),

¹⁸² *Id.*

¹⁸³ *Moore v. Texas*, 137 S. Ct. 1039 (2017).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

¹⁸⁷ *Moore*, 137 S. Ct. at 1041.

¹⁸⁸ *Id.*

¹⁸⁹ *Ex parte Moore*, No. WR-13,374-05, 2019 WL 5778063, at *1 (Tex. Crim. App. Nov. 6, 2019).

¹⁹⁰ *Issues*, Texans for Greg Abbott, <http://www.gregabbott.com/issues/> (last visited June 14, 2019).

immigration (16%), health care (8%), political corruption/leadership (7%), education (7%), and gun control/gun violence (5%).¹⁹¹

d. Other Relevant Legal, Historical, or Social Issues

As of May 26, 2017, 55% of death row prisoners in the United States are black or Latino.¹⁹² Furthermore, even though only 50% of national murder victims are white, over 75% of the murder victims in cases resulting in execution are white.¹⁹³ In 2000, a Justice Department review of the federal death penalty found that 80% of the cases submitted by federal prosecutors for death penalty review in the past five years have involved racial minorities as defendants, with more than half of the cases involving black defendants.¹⁹⁴ Data collected throughout the states are in agreement: African-American people are being sentenced to death more than other defendants for similar crimes.¹⁹⁵

The same holds true in Texas. African Americans in Texas have an incarceration rate 73% higher than white Americans in the state,¹⁹⁶ and an incarceration rate 20% higher than the national incarceration rate for African Americans.¹⁹⁷ As of 2019, African Americans and Hispanics account for 71% of Texas death row inmates (44.1% are black, 26.8% are Hispanic).¹⁹⁸

Texas also gained national notoriety for racial bias in capital proceedings when the United States Supreme Court weighed in on the case of Thomas Miller-El in two separate opinions.¹⁹⁹ The Court eventually held that Miller-El was entitled to a new trial, because the State had unconstitutionally prevented black jurors from serving at his trial.²⁰⁰ The Court cited to an earlier Texas prosecutor's manual that recommended excluding "Jews, Negroes, Dagos and Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."²⁰¹ In 2008, Thomas Miller-El's long court battle came to an end when he pled guilty to a Dallas murder and agreed to serve life in prison in exchange for the prosecution's agreement not to again seek the death penalty.²⁰²

¹⁹¹ *Most Important Problem Facing Texas*, The Tex. Politics Project, <https://texaspolitics.utexas.edu/set/most-important-problem-facing-texas-february-2019#gender> (last visited June 14, 2019).

¹⁹² *Facts about the Death Penalty*, Death Penalty Info. Ctr., (May 31, 2019), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

¹⁹³ *Id.*

¹⁹⁴ *Survey of the Federal Death Penalty System 1988-2000*, U.S. Dep't of Just., (Mar. 3, 2017), <https://www.justice.gov/dag/survey-federal-death-penalty-system>.

¹⁹⁵ Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides> (last visited June 14, 2019).

¹⁹⁶ *Texas Profile*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/TX.html> (last visited June 9, 2017).

¹⁹⁷ *Id.*; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Initiative, (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html>.

¹⁹⁸ *Death Row Information: Gender and Racial Statistics of Death Row Offenders*, Tex. Dep't of Crim. Just., http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html (last visited June 14, 2019).

¹⁹⁹ *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Miller-El v. Dretke*, 545 U.S. 231 (2005).

²⁰⁰ *After Two Supreme Court Reversals, Texas Man Sentenced to Life*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/node/2332> (last visited June 14, 2019).

²⁰¹ *Id.*

²⁰² *No longer on Death Row, inmate pleads guilty to killing*, Chi. Trib., (Mar. 21, 2008), <http://www.chicagotribune.com/news/ct-xpm-2008-03-21-0803210240-story.html>.

In October 2017, Duane Buck was sentenced to life in prison to be served concurrently with two 60-year sentences.²⁰³ Buck, who is black, was originally sentenced to death for a 1995 double murder.²⁰⁴ Under Texas law, a person can only receive the death penalty if prosecutors show he/she poses a future danger to society (in capital cases, taken to mean, society within the prison).²⁰⁵ A psychologist testifying at Buck's trial said Buck's race is one of the factors associated with future dangerousness. There was widespread agreement—including among one of Buck's prosecutors, Texas' state courts, the federal district and appeals courts, and the Supreme Court—that presenting an evidentiary link between race and future dangerousness is wrong, but his conviction and sentence were repeatedly upheld.²⁰⁶ However, on February 22, 2017, the Supreme Court reversed and remanded the case, finding that Buck adequately demonstrated ineffective assistance of counsel and was entitled to receive a new sentencing hearing.²⁰⁷ In delivering the Court's opinion, Chief Justice Roberts stated that the "particularly noxious strain of racial prejudice" demonstrated in Buck's trial proceedings was prejudicial no matter how brief the statement. "Some toxins," he wrote, "can be deadly in small doses."²⁰⁸

²⁰³ *Buck goes from Death Row to life plus two 60 year terms*, Office of Dist. Att'y: Harris Cty., Tex., (Oct. 3, 2017), <https://app.dao.hctx.net/buck-goes-death-row-life-plus-two-60-year-terms>.

²⁰⁴ *Race and the Death Penalty in Texas*, N.Y. Times, (Apr. 2, 2016), http://www.nytimes.com/2016/04/03/opinion/sunday/race-and-the-death-penalty-in-texas.html?_r=0.

²⁰⁵ Tex. Code Crim. Proc. Ann. art. 37.071 § 2.

²⁰⁶ *Race and the Death Penalty in Texas*, *supra* note 204.

²⁰⁷ *Buck v. Davis*, SCOTUS Blog, <http://www.scotusblog.com/case-files/cases/buck-v-stephens/> (last visited June 9, 2017).

²⁰⁸ *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).