

# VIRGINIA

## Capital Clemency Information Memorandum

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## **Introduction**

Clemency in capital cases serves a vital role in our 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 Virginia was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding clemency in Virginia. Some of the information contained within this memorandum does not relate directly to Virginia’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 Process**

### **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**

The Virginia Constitution vests the governor with the exclusive power to “grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates . . . and to commute capital punishment.”<sup>1</sup>

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

The clemency power is granted exclusively to the governor.<sup>2</sup> The governor may, but is not required to, request that the Virginia Parole Board (“Board”) investigate and report to the governor on any case in which clemency has been requested.<sup>3</sup> The Board may investigate and report its recommendations to the governor in the absence of an express request from the governor to do so, if the Board believes action is proper or in the best interest of the Commonwealth.<sup>4</sup>

The Board consists of no more than five members, each appointed by the governor and confirmed by the General Assembly.<sup>5</sup> At least one member of the Board shall be a representative of a crime victims’ organization or a victim of crime (as that term is defined in the Virginia Code).<sup>6</sup>

#### **c. When to Bring a Petition<sup>7</sup>**

A capital clemency petition is typically submitted after an execution warrant has been issued and an execution date has been set. In practice, attorneys working full-time in capital defender offices often begin

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<sup>1</sup> Va. Const. art. V, § 12.

<sup>2</sup> See Va. Code Ann. § 53.1-229 (“[T]he power to commute capital punishment and to grant pardons and reprieves is vested in the Governor.”).

<sup>3</sup> Va. Code Ann. § 53.1-231.

<sup>4</sup> *Id.*

<sup>5</sup> Va. Code Ann. § 53.1-134.

<sup>6</sup> *Id.*; Va. Code Ann. § 19.2-11.01(B) (defining victim of crime).

<sup>7</sup> This information comes from conversations with experienced Virginia practitioners who have worked on capital clemency cases.

working on a death row prisoner's clemency petition long before an execution date is set and submit the petition approximately a month before the execution date.

#### **d. How to Bring a Petition<sup>8</sup>**

Virginia does not require an official clemency petition form or format to be used by petitioners, and there are no guidelines on the governor's website regarding what sort of information a capital clemency petition should include. A letter or petition requesting clemency should be sent to:

Governor Ralph Northam  
Common Ground for Virginia  
P.O. Box 1475  
Richmond, VA 23218  
804-786-2211

Although there are no formal rules governing the content of the clemency petition, the petitioner should expect to specify the circumstances which support the request for mercy. Petitions may include letters in support of clemency from various sources, including other prisoners incarcerated with the petitioner, correctional officers, pen pals, family members, community members, church groups, and others. Attorneys for petitioners are encouraged to contact the governor's office early in the clemency application preparation process for additional information.

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

The governor may request that the Board hold a hearing on an application for executive clemency.<sup>9</sup> However, this process has not yet been utilized in a Virginia capital clemency case. Instead, legal representatives of petitioners have met with the governor's legal counsel or chief of staff regarding pending clemency petitions.<sup>10</sup>

#### **f. Responding to a Petition**

If the governor issues a reprieve, grants a pardon, or commutes a sentence, she must submit her reasons for doing so to the General Assembly.<sup>11</sup> The governor's reports to the General Assembly are available through Virginia's Legislative Information System.<sup>12</sup> In recent cases, the governor has publicly announced reasons for granting or denying clemency in capital cases in press releases or press conferences.<sup>13</sup>

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<sup>8</sup> This information comes from conversations with experienced Virginia practitioners who have worked on capital clemency cases.

<sup>9</sup> Va. Code Ann. §53.1-231.

<sup>10</sup> This information comes from conversations with experienced Virginia practitioners who have worked on capital clemency cases.

<sup>11</sup> Va. Const. art. V, § 12.

<sup>12</sup> *Reports to the General Assembly*, Virginia's Legislative Information System, <https://lis.virginia.gov/> (last visited Dec. 20, 2019).

<sup>13</sup> See *infra* Part IV(a).

## II. State Political and Judicial Information

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

Governor **Ralph S. Northam** took office in January 2018.<sup>14</sup> He grew up on a farm on the Eastern Shore of Virginia,<sup>15</sup> attended the Virginia Military Institute, and obtained his medical degree from Eastern Virginia Medical School.<sup>16</sup> Governor Northam has served as the chief neurological resident at Johns Hopkins Hospital, taught medicine and ethics at Eastern Virginia Medical School, and started his own pediatric practice.<sup>17</sup> Governor Northam served in the Army for eight years of active duty and became a major.<sup>18</sup> He assisted in Germany as an Army doctor and treated soldiers wounded in Operation Desert Storm.<sup>19</sup> His political aspirations began in 2007 when he was elected to the state senate, where he served two terms.<sup>20</sup> In 2014, he transitioned to the executive branch when elected as the Lieutenant Governor of Virginia.<sup>21</sup>

Governor Northam's views on the death penalty reflect some ambivalence. As a state senator in 2008, he voted against HB 933,<sup>22</sup> a bill that proposed expanding capital eligibility to "accomplices" and "accessories before the fact" in capital murders involving 1) an act of terrorism; 2) a continuing criminal enterprise; or 3) a murder for hire.<sup>23</sup> Accomplices could also be eligible if they had the same criminal intent as the "triggerman" and accessories could be eligible if they ordered the killing.<sup>24</sup> However, when the same expansions for eligibility were proposed again in 2009 as SB 961,<sup>25</sup> Northam voted in favor of them.<sup>26</sup>

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<sup>14</sup> Graham Moomaw, *Taking office as state's 73rd governor, Northam asks Virginians to follow 'moral compass.'* Richmond Times-Dispatch, (Jan. 13, 2018), [http://www.richmond.com/news/virginia/government-politics/general-assembly/taking-office-as-state-s-rd-governor-northam-asks-virginians/article\\_f96fd41c-0c73-566c-8ba1-efc7bf1e48b.html](http://www.richmond.com/news/virginia/government-politics/general-assembly/taking-office-as-state-s-rd-governor-northam-asks-virginians/article_f96fd41c-0c73-566c-8ba1-efc7bf1e48b.html).

<sup>15</sup> Kate Andrews, *Son of the Shore*, Richmond Magazine, (Oct. 16, 2017), <http://richmondmagazine.com/news/field-notes/ralph-northam-candidate-for-virginia-governor-2017/>.

<sup>16</sup> *Governor Ralph Northam*, Commonwealth of Virginia, <https://www.governor.virginia.gov/about-the-governor/governor-ralph-northam/> (last visited Dec. 20, 2019).

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.*

<sup>20</sup> Andrews, *supra* note 15.

<sup>21</sup> Moomaw, *supra* note 14.

<sup>22</sup> *2008 Regular Session – HB 933*, Virginia's Legislative Information System, (Feb. 25, 2008), <http://lis.virginia.gov/cgi-bin/legp604.exe?081+vot+SP0582>.

<sup>23</sup> *2008 Session – HB 933 Triggerman rule; redefinition thereof*, Virginia's Legislative Information System, <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=081&typ=bil&val=hb933> (last visited Dec. 20, 2019).

<sup>24</sup> *Id.* Governor Tim Kaine vetoed the bill. The House of Delegates voted to override the veto, but the Senate override failed.

<sup>25</sup> *2009 Session – SB 961 Triggerman rule; redefinition thereof, penalty*, Virginia's Legislative Information System, <http://lis.virginia.gov/cgi-bin/legp604.exe?091+sum+SB961> (last visited Dec. 20, 2019). Governor Tim Kaine also vetoed this bill.

<sup>26</sup> *2009 Regular Session – SB 961*, Virginia's Legislative Information System, (Jan. 27, 2009), <http://lis.virginia.gov/cgi-bin/legp604.exe?091+vot+SP0089>.

During a gubernatorial debate hosted by the Virginia Bar Association, then-candidate Northam discussed his personal opposition to the death penalty.<sup>27</sup> He stated that he supports life in prison without parole, but he would rather give people the resources they need before they commit heinous acts.<sup>28</sup> Northam re-asserted his opposition to the death penalty later in the debate but added that he supported Governor McAuliffe's decision not to grant clemency to William Morva,<sup>29</sup> a man with severe mental illness.<sup>30</sup>

In 1994, then-governor George Allen abolished parole in Virginia for any prisoner sentenced for a felony offense committed on or after January 1, 1995.<sup>31</sup> Governor Northam has stated he has no intention of reinstating it.<sup>32</sup> However, he does hope to review the state's penalty and fine structures to determine whether they are fair.<sup>33</sup> Governor Northam characterizes himself as "tough on crime."<sup>34</sup>

Virginia is one of three states that permanently disenfranchises people convicted of felonies,<sup>35</sup> but the governor retains the authority to restore those rights via clemency.<sup>36</sup> Northam was the lieutenant governor when Governor Terry McAuliffe granted clemency to restore voting rights to more than 200,000 felons in 2016.<sup>37</sup> During the gubernatorial campaign, Northam's opponent, Ed Gillespie, criticized his support of the grants.<sup>38</sup> Northam's spokesperson responded, "Ralph believes all Virginians who have served their time and are law-abiding should have their rights restored."<sup>39</sup>

Since taking office, Governor Northam has signed a proclamation recognizing Crime Victims' Rights Week<sup>40</sup> and a criminal justice reform bill that raised the felony theft threshold from \$200 to \$500 in exchange for supporting Republican legislation that dictated prisoners must pay restitution to their victims prior to being released from probation.<sup>41</sup> Shortly after signing this bill, Governor Northam visited

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<sup>27</sup> Virginia Bar Association, *Virginia Gubernatorial Debate*, PBS, at 55:42 – 56:26, (July 22, 2017), <https://www.pbs.org/newshour/politics/judy-woodruff-host-first-virginia-governors-debate>.

<sup>28</sup> *Id.* at 56:26 – 56:48.

<sup>29</sup> *Id.* at 1:17:39 – 1:17:57.

<sup>30</sup> Paige Levin, *Virginia executes convicted killer, William Morva*, CNN, (July 7, 2017), <https://www.cnn.com/2017/07/06/us/clemency-sought-william-morva-trnd/index.html>.

<sup>31</sup> Va. Code § 53.1-165.1 (1994).

<sup>32</sup> *Ask the Governor*, iHeart Radio, at 34:24 – 34:47 (Feb. 22, 2018), <https://www.iheart.com/podcast/53-ask-the-governor-28350165/episode/februarys-ask-the-governor-022218-28976917/>.

<sup>33</sup> *Id.* at 34:47 – 35:07.

<sup>34</sup> *Id.* at 34:37 – 34:39.

<sup>35</sup> *Felony Disenfranchisement Laws (Map)*, ACLU, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> (last visited Dec. 20, 2019).

<sup>36</sup> Va. Const. art. V, § 12.

<sup>37</sup> Laura Vozzella and Fenit Nirappil, *Gillespie goes after Northam with TV ad on felon rights restoration*, Wash. Post, (Oct. 23, 2017), [https://www.washingtonpost.com/local/virginia-politics/gillespie-goes-after-northam-on-felon-rights-restoration-in-new-tv-ad/2017/10/23/afdcc4b8-b82c-11e7-a908-a3470754bbb9\\_story.html](https://www.washingtonpost.com/local/virginia-politics/gillespie-goes-after-northam-on-felon-rights-restoration-in-new-tv-ad/2017/10/23/afdcc4b8-b82c-11e7-a908-a3470754bbb9_story.html).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Governor Northam Honors Crime Victims and Victim Advocates at Capitol Event*, Office of the Governor, (Apr. 9, 2018), <https://www.governor.virginia.gov/newsroom/all-releases/2018/april/headline-822745-en.html>.

<sup>41</sup> Gregory S. Schneider, *Northam, Republicans reach bipartisan deal on criminal justice reform bills*, Wash. Post, (Feb. 8, 2018), [https://www.washingtonpost.com/local/virginia-politics/northam-republicans-reach-bipartisan-deal-on-criminal-justice-reform-bills/2018/02/08/834a8934-0cf6-11e8-8b0d-891602206fb7\\_story.html](https://www.washingtonpost.com/local/virginia-politics/northam-republicans-reach-bipartisan-deal-on-criminal-justice-reform-bills/2018/02/08/834a8934-0cf6-11e8-8b0d-891602206fb7_story.html).

Chesterfield County Jail to learn about their Heroin Addiction Recovery Program.<sup>42</sup> He expressed his desire to take participants to medical schools in Virginia to show future medical professionals the human cost of over-prescribing pain medications.<sup>43</sup>

When Governor Northam was the lieutenant governor, he broke a tie in the state senate to defeat a bill that would have banned sanctuary cities.<sup>44</sup> He argued that since there are no sanctuary cities in Virginia, passing this type of legislation “is a solution looking for a problem.”<sup>45</sup> As an alternative, he stated that he would rather support local law enforcement by recruiting and retaining high quality officers and “let them do the work that they are trained to do” to keep Virginians safe.<sup>46</sup>

Governor Northam advocates for common sense gun reform.<sup>47</sup> He introduced legislation to ban bump stocks and implement universal background checks, but the bills were defeated in the Virginia General Assembly.<sup>48</sup> Drawing from his experiences as an educator and veteran, he does not believe teachers should be armed, but he would be open to hiring retired veterans and law enforcement officers to monitor schools.<sup>49</sup>

In February 2019, a conservative website posted a page from Governor Northam’s medical school yearbook that featured a photo of two men, one in blackface and the other in Ku Klux Klan clothing.<sup>50</sup> While Governor Northam initially indicated he was one of the men in the photo, he later reversed his position. He said that although he had worn blackface in the past, he was not one of the men in the published photograph.<sup>51</sup>

Governor Northam promised the people of Virginia he would bring them hope.<sup>52</sup> During his inauguration speech, Governor Northam told a story about a mother that approached him in the grocery store one day and reminded him she had brought her son to him years ago. He had diagnosed her son with severe autism and explained he could do nothing to improve his condition or quality of life; she told him he took away her family’s hope that day. Ever since this encounter, Governor Northam says he realized the importance of

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<sup>42</sup> Brendan King, *Sheriff: 5 to 8 heroin addicts booked in Chesterfield jail every day*, WTVR, (Apr. 10, 2018), <https://wtvr.com/2018/04/10/sheriff-5-to-8-heroin-addicts-booked-in-chesterfield-jail-every-day/>.

<sup>43</sup> *Id.*

<sup>44</sup> Fenit Nirappil, *Did Ralph Northam cast the deciding vote to allow sanctuary cities in Virginia?*, Wash. Post, (Aug. 30, 2017), [https://www.washingtonpost.com/local/virginia-politics/did-ralph-northam-cast-the-deciding-vote-to-allow-sanctuary-cities-in-virginia/2017/08/30/c2e874ce-8d95-11e7-8df5-c2e5cf46c1e2\\_story.html](https://www.washingtonpost.com/local/virginia-politics/did-ralph-northam-cast-the-deciding-vote-to-allow-sanctuary-cities-in-virginia/2017/08/30/c2e874ce-8d95-11e7-8df5-c2e5cf46c1e2_story.html).

<sup>45</sup> *Ask the Governor*, iHeart Radio, at 28:39 – 29:03, (Mar. 14, 2018), <https://www.iheart.com/podcast/53-ask-the-governor-28350165/episode/march-ask-the-governor-031418-29061250/>.

<sup>46</sup> *Id.* at 29:03 – 29:45.

<sup>47</sup> *Id.* at 5:33 – 6:07.

<sup>48</sup> *Id.* at 3:49 – 4:13.

<sup>49</sup> *Id.* at 6:18 – 7:06.

<sup>50</sup> Ben Finley & Alan Suderman, *Virginia gov’s yearbook: Probe of racist photo completed*, The Sacramento Bee, (May 21, 2019), <https://www.sacbee.com/news/nation-world/article230647489.html>.

<sup>51</sup> *Id.*

<sup>52</sup> *Virginia Governor’s Inaugural Address*, C-SPAN2, at 21:01 – 23:16, (Jan. 13, 2018), <https://www.c-span.org/video/?439887-1/virginia-governors-inaugural-address>.

instilling hope in others, especially the people that he serves.<sup>53</sup> He explained, “Hope is not just a source of comfort for the afflicted, it is a wellspring of energy to fight for a better tomorrow, no matter the odds.”<sup>54</sup>

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

As set forth under the Virginia Constitution, the General Assembly consists of a Senate and House of Delegates.<sup>55</sup> The Senate shall consist of between 33 and 40 members and shall be elected every four years.<sup>56</sup> The House of Delegates shall consist of between 90 and 100 members and shall be elected every two years.<sup>57</sup>

In November 2019, Democrats in Virginia gained a majority in both the Senate and House of Delegates in the General Assembly for the first time in 26 years.<sup>58</sup> In the State Senate, Democrats flipped two seats for control<sup>59</sup> and now hold 21 seats to Republicans’ 19; and in the House of Delegates, Democrats flipped five seats<sup>60</sup> to now hold 54 seats to Republicans’ 43.<sup>61</sup>

### **c. Judicial Review of State Clemency**

Since the clemency power is vested solely in the governor, the separation of powers doctrine prevents the courts from reviewing challenges to clemency decisions unless “there is a procedural or fundamental constitutional right which creates a protected interest in clemency.”<sup>62</sup> To qualify for judicial review, the right allegedly violated in the claim “must be based on statutes or rules defining the scope of the clemency power and the obligations of the office charged with exercising the power.”<sup>63</sup> However, “[t]he Code of Virginia does not place any conditions or limitations on the power vested in the Governor to commute capital punishment sentences. Therefore, a clemency petition to the Governor is not subject to judicial review.”<sup>64</sup>

In *Montgomery v. Virginia*, 751 S.E.2d 692 (Va. Ct. App. 2013), the Court of Appeals of Virginia analyzed the constitutionality of the judiciary participating in the executive clemency process. Johnathan Montgomery, convicted of forcible sodomy and rape, asked for an executive pardon after his accuser admitted the accusation was false.<sup>65</sup> Governor Robert McDonnell granted a conditional pardon that required

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<sup>53</sup> *Id.* at 22:38 – 22:48.

<sup>54</sup> *Id.* at 22:48 – 22:58.

<sup>55</sup> Va. Const. art. IV, § 1.

<sup>56</sup> Va. Const. art. IV, § 2.

<sup>57</sup> Va. Const. art. IV, § 3.

<sup>58</sup> *2019 Virginia Gen. Election Results*, N.Y. Times, (Nov. 14, 2019),

<https://www.nytimes.com/interactive/2019/11/05/us/elections/results-virginia-general-elections.html>.

<sup>59</sup> *Virginia Election Results*, Wash. Post, (Nov. 6, 2019), <https://www.washingtonpost.com/elections/election-results/virginia/>.

<sup>60</sup> *Id.*

<sup>61</sup> *2019 Virginia Gen. Election Results*, *supra* note 58.

<sup>62</sup> *Graham v. Angelone*, 73 F.Supp.2d 629, 630-31 (E.D. Va. 1999) (“The separation of powers doctrine prohibits the courts from placing restrictions on the powers delegated to the executive branch. Accordingly, decisions to grant clemency or commute a sentence are rarely appropriate subjects for judicial review. . . . In order for a clemency petition to be subject to judicial review, there must be a procedural or fundamental constitutional right which creates a protected interest in clemency.” (internal citations omitted)).

<sup>63</sup> *Id.* at 631.

<sup>64</sup> *Id.* at 631 (citing Va. Const. art. V, §12; Va. Code Ann. §53.1-229 – 231).

<sup>65</sup> *Montgomery v. Virginia*, 751 S.E.2d 692, 694-95 (Va. Ct. App. 2013).



Montgomery to file a writ of actual innocence with the Court of Appeals of Virginia. If the court granted his petition, then he would receive a full pardon; conversely, if the court denied his petition, he would be rearrested and sent to finish the remainder of his sentence.<sup>66</sup> The court determined the condition was unconstitutional, because “[t]he Governor may not transfer or delegate his constitutional authority to pardon to another department of government nor does the judiciary have any proper constitutional role in a decision to grant executive clemency.”<sup>67</sup>

Although the legislature has not placed any restrictions on the governor’s ability to grant clemency in capital cases, the courts have recognized restrictions on the governor’s authority to restore the rights of convicted felons. The governor can restore a felon’s civil rights, such as the right to vote, to serve on a jury, to become a notary public, and to run for office,<sup>68</sup> but the Supreme Court of Virginia has held that does not include the authority to restore a felon’s firearm rights.<sup>69</sup> The right to ship, transport, possess, or receive firearms “may only be restored to a convicted felon by a permit issued by a circuit court.”<sup>70</sup>

A contentious challenge to the governor’s authority to restore other civil rights arose in 2016 when Governor Terry McAuliffe issued an executive order that restored the voting rights of approximately 206,000 Virginians that had completed their sentences for felony convictions.<sup>71</sup> After the order was challenged by members of the Virginia General Assembly and registered voters, the Virginia Supreme Court declared that the governor’s clemency power requires an individualized consideration of each case, meaning the governor cannot issue blanket grants of clemency.<sup>72</sup>

### 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*

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 698 (finding “the condition of Montgomery’s pardon requiring that he receive a writ of actual innocence from [the Court of Appeals of Virginia] is a condition that delegates the chief executive’s whole clemency power to the judiciary thereby transgressing the constitutional constraints of Article III, §1.”).

<sup>68</sup> See Va. Const. art. II, §1 (“No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority”); *Restoration of Rights*, Secretary of the Commonwealth, <https://www.restore.virginia.gov/> (last accessed Dec. 20, 2019).

<sup>69</sup> *Gallagher v. Virginia*, 732 S.E.2d 22, 26 (Va. 2012) (“[T]he Governor is empowered to remove political disabilities, but not to restore all rights lost as a result of a felony conviction. The jurisdiction to restore firearm rights lost in those circumstances is vested solely in the circuit court.”).

<sup>70</sup> *Id.* at 27.

<sup>71</sup> *Howell v. McAuliffe*, 788 S.E.2d 706, 710 (Va. 2016).

<sup>72</sup> *Id.* at 719 (finding Article V, § 12 of the Virginia Constitution renders blanket pardons unconstitutional, because it requires “that the Governor communicate to the General Assembly the ‘particulars of every case’ and state his ‘reasons’ for each pardon. . . . This requirement implies a specificity and particularity wholly lacking in a blanket, group pardon of a host of unnamed and, to some extent, still unknown number of convicted felons.”).

*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**

As of July 1, 2017, the U.S. Census Bureau estimated Virginia's population to be 8,517,685.<sup>73</sup> Roughly 69.7% of Virginia's population is white, 19.8% is black, and 9.4% is Hispanic or Latino.<sup>74</sup> The remaining population consists of citizens who identify as Native American, Asian, or Pacific Islander.<sup>75</sup>

### **ii. Political Breakdown**

According to polling, Virginia leans 38% Republican and 45% Democratic.<sup>76</sup> Despite the population's split between political parties, the Virginia legislature was dominated by Republicans in the General Assembly until the 2017 election, which resulted in 16 new Democratic lawmakers sworn in.<sup>77</sup> That election also brought more diversity; Virginia elected its first openly lesbian member, first Latina, first female Asian American, and the first openly transgender person to serve in a U.S. state legislature.<sup>78</sup> The 2019 election brought even more political change to Virginia, as it resulted in Democratic control of both state houses and the executive.<sup>79</sup> Governor Northam is a moderate Democrat,<sup>80</sup> and upon his taking office, Republicans in the state legislature expressed their trust in his ability to work with them, a change from their lack of confidence in working with his predecessor, Terry McAuliffe.<sup>81</sup>

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<sup>73</sup> *QuickFacts – Virginia*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/VA/PST045216> (last visited Dec. 20, 2019).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *State of the States: Virginia*, Gallup, <http://news.gallup.com/poll/125066/state-states.aspx> (last visited Dec. 20, 2019).

<sup>77</sup> Sarah Rankin, *Newly Diverse Virginia House Convenes for Its First Day*, U.S. News, (Jan. 10, 2018), <https://www.usnews.com/news/best-states/virginia/articles/2018-01-10/2018-general-assembly-session-set-to-kick-off>.

<sup>78</sup> *Id.*

<sup>79</sup> Virginia Gen. Election Results, *supra* note 58.

<sup>80</sup> Trip Gabriel, *Who is Ralph Northam, Winner of Virginia's Governor's Race?*, N.Y. Times, (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/us/politics/ralph-northam-bio-facts.html>.

<sup>81</sup> Gregory S. Schneider et al., *A pragmatist in partisan times: Ralph Northam becomes Virginia's 73<sup>rd</sup> governor*, Wash. Post, (Jan. 13, 2018), [https://www.washingtonpost.com/local/virginia-politics/a-pragmatist-in-partisan-times-ralph-northam-becomes-virginias-73-governor/2018/01/13/86982592-f7d4-11e7-a9e3-ab18ce41436a\\_story.html](https://www.washingtonpost.com/local/virginia-politics/a-pragmatist-in-partisan-times-ralph-northam-becomes-virginias-73-governor/2018/01/13/86982592-f7d4-11e7-a9e3-ab18ce41436a_story.html).

On the national level, Virginia has two Democratic senators, Mark Warner and Tim Kaine.<sup>82</sup> Senator Warner won reelection in 2014 with 49.2% of the vote, while the newcomer, Senator Kaine, was elected in 2012 with 52.5% of the vote.<sup>83</sup> Senator Kaine was Hillary Clinton's vice-presidential running mate in the 2016 presidential election.<sup>84</sup> Senator Warner and Senator Kaine's approval ratings are 48% and 46%, respectively.<sup>85</sup>

Of Virginia's 11 delegates to the U.S. House of Representatives, seven are Democratic and four are Republican.<sup>86</sup> In the districts that elected Republican representatives, white residents compose between approximately 72% and 91% of the population.<sup>87</sup> Conversely, the districts that elected Democratic representatives have higher percentages of minority voters—the most notable is District 3, which is about 46% African American.<sup>88</sup>

### iii. Religious Make-Up

According to a Pew Research Poll, 73% of Virginians consider themselves to be Christian.<sup>89</sup> Of that number, 30% identify as Evangelical Protestants.<sup>90</sup> The largest single denomination is Baptist, with 15% of Virginians claiming membership.<sup>91</sup> Forty-four percent of Virginians say they attend church at least once a week.<sup>92</sup>

### iv. Income/Socioeconomic Breakdown

Virginia's residents have a median household income of \$71,564,<sup>93</sup> higher than the median national household income of \$60,293.<sup>94</sup> Further, 10.7% of Virginia's residents live in poverty,<sup>95</sup> which is lower than

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<sup>82</sup> *Senators of the 115th Congress*, U.S. Senate, [https://www.senate.gov/general/contact\\_information/senators\\_cfm.cfm?State=VA](https://www.senate.gov/general/contact_information/senators_cfm.cfm?State=VA) (last visited Dec. 20, 2019).

<sup>83</sup> *Election 2014: Virginia*, N.Y. Times, (Dec. 17, 2014), <https://www.nytimes.com/elections/2014/virginia-elections>; *Election 2012: Virginia*, N.Y. Times, <https://www.nytimes.com/elections/2012/results/states/virginia.html> (last visited Dec. 20, 2019).

<sup>84</sup> Sam Frizell, *Hillary Clinton Chooses Tim Kaine as Her Running Mate*, Time, (July 23, 2016), <http://time.com/4419165/hillary-clinton-tim-kaine-vice-president-running-mate/>.

<sup>85</sup> *Morning Consult's Senator Approval Rankings*, Morning Consult, (Mar. 31, 2019), <https://morningconsult.com/senator-rankings/>.

<sup>86</sup> *Directory of Representatives*, U.S. House of Representatives, <https://www.house.gov/representatives> (last visited Dec. 20, 2019).

<sup>87</sup> See *116<sup>th</sup> Congress: My Congressional District, Virginia*, U.S. Census Bureau, <https://www.census.gov/mycd/?st=51&cd=0> (1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 9<sup>th</sup> Congressional Districts) (last visited Dec. 20, 2019).

<sup>88</sup> *Id.*

<sup>89</sup> *Religious Landscape Study: Adults in Virginia*, Pew Research Ctr., <http://www.pewforum.org/religious-landscape-study/state/virginia/> (last visited Dec. 20, 2019).

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

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *QuickFacts: Virginia*, *supra* note 73.

<sup>94</sup> *QuickFacts: United States*, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (last visited Dec. 20, 2019).

<sup>95</sup> *QuickFacts: Virginia*, *supra* note 73.

the national percentage of 11.8%.<sup>96</sup> In 2018, 17.9% of those in poverty were African American, 13.7% were Latino, and 9.0% were Native American.<sup>97</sup>

## b. Criminal Justice

### i. Overall Prison Population

According to data from 2016, Virginia's property crime rate is 24% lower than the national average,<sup>98</sup> and U.S. News ranked Virginia sixth in public safety.<sup>99</sup> Virginia's violent crime rate is 45% lower than the national average.<sup>100</sup> Between 2006 and 2013, Virginia saw a steady decrease in violent crime, but it rose again over the last few years.<sup>101</sup> Although Virginia has a lower crime rate than most states, it has the 16<sup>th</sup> highest incarceration rate.<sup>102</sup>

As of November 2019, there were 29,336 people incarcerated in Virginia.<sup>103</sup> In 2016, Virginia's prisoner intake exceeded its facilities' housing capabilities by 108%.<sup>104</sup> The Sentencing Project released a study of Virginia's incarcerated population in 2014 showing African Americans composed 58% of Virginia's prison population, even though they account for only 19% of the state's total population.<sup>105</sup> Furthermore, black Virginians are five times more likely to be incarcerated than white Virginians,<sup>106</sup> who comprise approximately 70% of the total population.<sup>107</sup>

According to a 2017 report from the Department of State Police, the most common crime in Virginia is larceny, with a rate of 1,477 per 100,000 people, followed by simple assault and drug/narcotic offenses, with rates of 1,045 and 838 per 100,000 people, respectively.<sup>108</sup>

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<sup>96</sup> *QuickFacts: United States*, *supra* note 94.

<sup>97</sup> Talk Poverty, *Virginia: 2017*, Ctr. for Am. Progress, <https://talkpoverty.org/state-year-report/virginia-2018-report/> (last visited Dec. 20, 2019).

<sup>98</sup> *Virginia Crime Statistics and Rates Report (VA)*, CityRating.com, <https://www.cityrating.com/crime-statistics/virginia/> (last visited Dec. 20, 2019).

<sup>99</sup> *Public Safety Rankings: Measuring crime levels in each state*, U.S. News, <https://www.usnews.com/news/best-states/rankings/crime-and-corrections/public-safety> (last visited Dec. 20, 2019).

<sup>100</sup> *Virginia Crime Statistics and Rates Report (VA)*, *supra* note 98.

<sup>101</sup> *Id.*

<sup>102</sup> *State-by-State Data: Virginia*, The Sentencing Project, <https://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR> (last visited Dec. 20, 2019).

<sup>103</sup> *Monthly Population Summary November 2019*, Va. Dep't of Corr., <https://vadoc.virginia.gov/media/1470/vadoc-monthly-offender-population-report-2019-11.pdf>.

<sup>104</sup> E. Ann Carson, *Prisoners in 2016*, Bureau of Just. Statistics, at 14, (Jan. 2018), available at <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

<sup>105</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project, at 16, (June 14, 2016), available at <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

<sup>106</sup> *Id.* at 17.

<sup>107</sup> *QuickFacts – Virginia*, *supra* note 73.

<sup>108</sup> *Crime in Virginia 2017*, Dep't of State Police, at 4, available at [http://www.vsp.state.va.us/VSP%20site/VSP/downloads/Crime\\_in\\_Virginia/Crime%20in%20Virginia\\_2017.pdf](http://www.vsp.state.va.us/VSP%20site/VSP/downloads/Crime_in_Virginia/Crime%20in%20Virginia_2017.pdf).

## ii. Death Row Population and Demographics

As of November 2019, there were 3 people on Virginia's death row.<sup>109</sup>

Virginia's Death Row Demographics	
Women <sup>110</sup>	0
Black <sup>111</sup>	2
White	1
Hispanic	0
Asian	0

## iii. Executions (Past and Pending)

Executions since 1976 <sup>112</sup>	113
Most Recent Execution <sup>113</sup>	July 6, 2017
Number of Executions in 2017 <sup>114</sup>	2
Stays issued in 2018 <sup>115</sup>	0
Scheduled Executions in 2019 <sup>116</sup>	0

## iv. Exonerations/Innocence<sup>117</sup>

In 2000, after spending more than 17 years behind bars, **Earl Washington** became the first person to be exonerated from Virginia's death row.<sup>118</sup> Washington was convicted of the 1982 rape and murder of Rebecca Lynn Williams—a crime he confessed to, along with four other crimes, after two days of

<sup>109</sup> *Prisoners on Death Row*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/death-row/overview> (last visited Dec. 20, 2019).

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

<sup>111</sup> *Racial Demographics*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/death-row/overview/demographics> (last visited Dec. 20, 2019).

<sup>112</sup> *Prisoners on Death Row*, *supra* note 109.

<sup>113</sup> *Searchable Execution Database*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/views-executions> (last visited Dec. 20, 2019) (select "VA" under "State," then click "apply.")

<sup>114</sup> *Id.* (select "2017" under "Year" and "VA" under "State," then click "apply.")

<sup>115</sup> *Stays of Execution in 2018*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/2018-stays-execution> (last visited Dec. 20, 2019).

<sup>116</sup> *Executions Scheduled for 2019*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/upcoming-executions> (last visited Dec. 20, 2019).

<sup>117</sup> For inclusion in this section, an individual must have been convicted, sentenced to death, and subsequently either been acquitted of all charges related to the crime that placed them on death row, had all charges related to the crime that placed them on death row dismissed by the prosecution, or been granted a complete pardon based on evidence of innocence. This characterization mirrors the language used by national entities tracking death row exonerations, such as the National Registry of Exoneration and the Death Penalty Information Center. See *Glossary*, Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 20, 2019); *Criteria for Inclusion on DPIC's Innocence List*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/stories/criteria-for-inclusion-on-dpics-innocence-list> (last visited Dec. 20, 2019).

<sup>118</sup> *Earl Washington*, Innocence Project, <https://www.innocenceproject.org/cases/earl-washington/> (last visited Dec. 20, 2019).

questioning.<sup>119</sup> The questioning revealed that Washington did not know the location of the murder, any physical characteristics of the victim, or any details about the crime scene.<sup>120</sup> Psychological analyses of Washington revealed that he had the IQ of a 10-year-old and would often defer to authority figures to gain their approval.<sup>121</sup> Despite these revelations, which strongly indicated he has an intellectual disability, Washington was sentenced to death on January 20, 1984.<sup>122</sup>

After a pro bono attorney secured a stay of execution for Washington in 1985, DNA testing conducted in 1993 revealed that Washington could not have been the source of the sperm found with the victim.<sup>123</sup> However, Virginia law at that time gave defendants only 21 days to introduce new evidence, so Washington was unable to pursue exoneration in the courts. Instead, his sentence was commuted to life imprisonment by Governor Douglas Wilder.<sup>124</sup> In 2000, Washington's attorneys were able to persuade the newly elected Governor Jim Gilmore to grant Washington a limited pardon so that he could be released from prison on parole supervision.<sup>125</sup> And in 2007, Governor Tim Kaine issued a full pardon to Washington when another convicted rapist serving a life sentence pled guilty to Ms. Williams' rape and murder.<sup>126</sup> Washington's case and long journey to full exoneration ultimately inspired the Virginia legislature to pass a law that allows prisoners to seek DNA testing at any time to support innocence claims.<sup>127</sup>

### c. Public Opinion Polling

There is little recent polling data available regarding support for the death penalty among Virginians. However, a 2016 poll from Virginia Commonwealth University found that 64% of Virginians support the death penalty in certain cases.<sup>128</sup>

## IV. Additional Information for Consideration in Clemency

### a. Significant Past Capital Clemency Decisions

#### i. Grants

Ten death row inmates have received grants of capital clemency in Virginia since 1976.<sup>129</sup>

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<sup>119</sup> *Earl Washington: Other Virginia False Confession Cases*, Nat'l Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3721> (last visited Dec. 20, 2019).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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

<sup>123</sup> *Earl Washington*, Innocence Project, *supra* note 118.

<sup>124</sup> *Id.*

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*; Va. Code Ann. § 19.2-327.1.

<sup>128</sup> Frank Green, *Poll: Virginians strongly support marijuana legalization, criminal justice reform*, Richmond Times-Dispatch, (Jan. 28, 2016), [http://www.richmond.com/news/local/poll-virginians-strongly-support-marijuana-legalization-criminal-justice-reform/article\\_48590dd2-1e64-539b-a840-6d46e8689c6f.html](http://www.richmond.com/news/local/poll-virginians-strongly-support-marijuana-legalization-criminal-justice-reform/article_48590dd2-1e64-539b-a840-6d46e8689c6f.html).

<sup>129</sup> *Clemency*, Death Penalty Info. Ctr., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 20, 2019).

Name	Year	Governor	Reason	Notes
Joseph Giarratano	1991	Douglas Wilder	Possible Innocence	Sentence was commuted to life imprisonment with the possibility of parole in 25 years; granted parole in 2017. <sup>130</sup>
Herbert Bassette	1992	Douglas Wilder	Possible Innocence	Doubt over testimony presented at trial and police statement revealed a witness had implicated someone else. <sup>131</sup> Sentence was commuted to life without parole.
Earl Washington	1994	Douglas Wilder	Possible Innocence	In 2000, DNA confirmed Washington's innocence; Governor Jim Gilmore then granted a conditional pardon. Tim Kaine then granted a full pardon in 2013.
Joseph Payne	1996	George Allen	Possible Innocence	Mother of victim asked for clemency and 4 of 12 jurors changed their minds about the death sentence. Governor agreed to commute only if Payne waived right to ask for a new trial. <sup>132</sup>
William Saunders	1997	George Allen	Possible Innocence	Prosecutor and trial judge recommended clemency.
Calvin Swann	1999	Jim Gilmore	Serious Mental Illness	Jury had been misinformed as to the extent of defendant's mental illness. Prosecutor said he would have sought life without parole if that sentence was available.
Robin Lovitt	2005	Mark Warner	Public Trust in the Justice System	State court clerk illegally destroyed evidence that could have been used in appeals.
Percy Walton	2008	Timothy Kaine	Serious Mental Illness	Execution had been previously stayed twice.
Ivan Teleguz	2017	Terry McAuliffe	Unfair Sentencing	Comments made by prosecutors and witnesses insinuated Teleguz was involved in a murder that did not actually occur and that he was a member of the Russian mafia. <sup>133</sup>

<sup>130</sup> Frank Green, *Joseph M. Giarratano, controversial former death row inmate, granted parole*, Richmond Times-Dispatch, (Nov. 20, 2017), [http://www.richmond.com/news/virginia/government-politics/joseph-m-giarratano-controversial-former-death-row-inmate-granted-parole/article\\_2eb47e71-4a18-5122-87ad-61681185b17d.html](http://www.richmond.com/news/virginia/government-politics/joseph-m-giarratano-controversial-former-death-row-inmate-granted-parole/article_2eb47e71-4a18-5122-87ad-61681185b17d.html).

<sup>131</sup> *Possible Innocence – Sentence Commuted*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/policy-issues/innocence/possible-innocence-sentence-commuted> (last visited Dec. 20, 2019).

<sup>132</sup> Mike Allen, *Virginia Prisoner Receives Rare Mercy on Death Row*, N.Y. Times, (Nov. 10, 1996), <https://www.nytimes.com/1996/11/10/us/virginia-prisoner-receives-rare-mercy-on-death-row.html>.

<sup>133</sup> Gina Cherelus, *Virginia governor spares convicted murderer from execution*, Reuters, (Apr. 20, 2017), <https://www.reuters.com/article/us-virginia-execution/virginia-governor-spares-convicted-murderer-from-execution-idUSKBN17M2YY>.

William Joseph Burns	2017	Terry McAuliffe	Serious Mental Illness	Experts said Burns was mentally incompetent and would not likely be restored to competency, so the governor decided continuing to seek the death penalty would be fruitless and an unjustified expense of Virginia's resources. <sup>134</sup>
Source: <i>Clemency</i> , Death Penalty Information Center, <a href="http://www.deathpenaltyinfo.org/clemency">http://www.deathpenaltyinfo.org/clemency</a> (last visited Dec. 20, 2019).				

**Joe Giarratano** woke up in the house he had been staying at for a month to find a 15-year-old girl and her mother deceased.<sup>135</sup> He initially ran away, assuming he had committed the crime, but with no recollection of it because he had taken drugs the night before while partying at the house.<sup>136</sup> Giarratano was convicted based on his confession and circumstantial evidence; there was no physical evidence tying him to the crime.<sup>137</sup> Giarratano had confessed on four occasions, but each time, his story changed, and his accounts were not consistent with the evidence at the crime scene.<sup>138</sup> Finally, during the fifth confession, police coached him through what happened, and then Giarratano “gave” the confession that would be used to convict him.<sup>139</sup>

Based on doubts about his guilt, in 1991 Governor L. Douglas Wilder commuted Giarratano’s sentence to life in prison with the possibility of parole.<sup>140</sup> He said his decision was based on the evidence presented to him, separate from the pleas from the public to release Giarratano; the campaign promoting Giarratano’s innocence had spread worldwide, and advocates believed all the available evidence weighed heavily in his favor.<sup>141</sup> For example, one of the victims had been stabbed by someone right-handed, but Giarratano is left-handed.<sup>142</sup> Additionally, there was no DNA evidence linking him to the crime.<sup>143</sup> The police had found pubic hair, fingerprints, and footprints at the scene, but they did not match Giarratano or either of the victims.<sup>144</sup>

<sup>134</sup> Andrew Cain, *McAuliffe commutes death sentence of killer found mentally incompetent to be executed*, Richmond-Times Dispatch, (Dec. 29, 2017), [https://www.richmond.com/news/virginia/government-politics/mcauliffe-commutes-death-sentence-of-killer-found-mentally-incompetent-to/article\\_eea2ba62-8575-5d4f-9684-3f7a815ff6f2.html](https://www.richmond.com/news/virginia/government-politics/mcauliffe-commutes-death-sentence-of-killer-found-mentally-incompetent-to/article_eea2ba62-8575-5d4f-9684-3f7a815ff6f2.html).

<sup>135</sup> *Ex-Virginia Death-Row Prisoner With Strong Claim of Innocence Get [sic] Parole After 38 Years*, Death Penalty Info. Ctr., (Nov. 21, 2017) <https://deathpenaltyinfo.org/news/ex-virginia-death-row-prisoner-with-strong-claim-of-innocence-get-parole-after-38-years>.

<sup>136</sup> *Id.*

<sup>137</sup> Green, *supra* note 130.

<sup>138</sup> *Id.*

<sup>139</sup> *Ex-Virginia Death-Row Prisoner*, *supra* note 135.

<sup>140</sup> B. Drummond Ayres, Jr. *Virginia Governor Blocks an Execution*, N.Y. Times, (Feb. 20, 1991), <https://www.nytimes.com/1991/02/20/us/virginia-governor-blocks-an-execution.html>.

<sup>141</sup> *Id.*

<sup>142</sup> *Ex-Virginia Death-Row Prisoner*, *supra* note 135.

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

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



While in prison, Giarratano became known as a jailhouse lawyer and assisted in helping to free Earl Washington, the only person to be fully exonerated from Virginia's death row.<sup>145</sup> He was also the named party in *Murray v. Giarratano*, a 5-4 decision by the U.S. Supreme Court holding that prisoners are not constitutionally entitled to counsel during post-conviction proceedings.<sup>146</sup> Giarratano was released on parole on December 20, 2017.<sup>147</sup> He is currently working for the University of Virginia's Innocence Project.<sup>148</sup>

**Ivan Teleguz** was sentenced to death after being convicted of murder-for-hire.<sup>149</sup> Governor Terry McAuliffe commuted Teleguz's sentence to life without parole on April 20, 2017, due to concerns about false testimony at his trial.<sup>150</sup> His codefendants testified that he had hired them to murder the mother of his child, Stephanie Sipes.<sup>151</sup> The codefendants claimed they carried out the murder at Teleguz's request, because they were afraid that Teleguz had ties to the Russian mafia.<sup>152</sup> However, no other evidence was offered to support the allegation that Teleguz was involved with the mafia.<sup>153</sup> Additional testimony at trial insinuated Teleguz was involved in a separate homicide that occurred outside of a rec center in Ephrata, Pennsylvania; it later emerged that that homicide never actually happened.<sup>154</sup> During closing arguments, the prosecutor suggested that because of his mafia ties, Teleguz could simply pick up the phone in prison and order more people killed.<sup>155</sup> Governor McAuliffe was mostly concerned about the influence these statements had on the jury.<sup>156</sup> For example, a juror asked the bailiff if Teleguz would have access to her personal information.<sup>157</sup> The judge sent back a note to the entire jury stating Teleguz's attorney had all of the jurors' information and failed to reassure the jurors that Teleguz could not gain access to it. Soon after this question was answered, the jury returned a death sentence.<sup>158</sup> Governor McAuliffe stated, "American values demand that every person, no matter their crime, be given due process of law. In this case, we now know that the jury acted on false information and it was driven by passions and fears raised, not from actual evidence introduced at trial, but from inference. To allow a sentence to stand based on false information and speculation is a violation of the very principles of justice our system holds so dear."<sup>159</sup>

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<sup>145</sup> Green, *supra* note 130.

<sup>146</sup> *Ex-Virginia Death-Row Prisoner*, *supra* note 135; *Murray v. Giarratano*, 492 U.S. 1 (1989).

<sup>147</sup> Brendan Ponton, *Virginia inmate once on death-row expected to be released from prison*, WTKR, (Dec. 15, 2017), <https://wtkr.com/2017/12/14/inmate-once-on-death-row-is-expected-to-be-released-from-prison-next-week/>.

<sup>148</sup> Faith Schweikert, *Joe Giarratano finds a place at U.Va.'s Innocence Project*, Cavalier Daily, (Apr. 4, 2018),

<http://www.cavalierdaily.com/article/2018/04/joe-giarratano-finds-a-place-at-uva-innocence-project>.

<sup>149</sup> *Teleguz v. Virginia*, 643 S.E.2d 708, 714 (Va. 2007).

<sup>150</sup> Gina Cherehus, *Virginia governor spares convicted murderer from execution*, Reuters, (Apr. 20, 2017), <https://www.reuters.com/article/us-virginia-execution/virginia-governor-s pares-convicted-murderer-from-execution-idUSKBN17M2YY>.

<sup>151</sup> *Teleguz*, 643 S.E.2d at 714-15.

<sup>152</sup> *Id.* at 722.

<sup>153</sup> *Id.*

<sup>154</sup> *Teleguz v. Davis*, No. 7:10CV00254, 2014 WL 3548982, \*14 (W.D. Va. July 17, 2014).

<sup>155</sup> *Teleguz*, 643 S.E.2d at 730.

<sup>156</sup> Frank Green, *McAuliffe commutes Ivan Teleguz's death sentence to life without parole*, Richmond Times-Dispatch, (Apr. 20, 2017), [http://www.richmond.com/news/virginia/mcauliffe-commutes-ivan-teleguz-s-death-sentence-to-life-without/article\\_fc6460df-25ff-5a6e-8243-c88af91cfe00.html](http://www.richmond.com/news/virginia/mcauliffe-commutes-ivan-teleguz-s-death-sentence-to-life-without/article_fc6460df-25ff-5a6e-8243-c88af91cfe00.html).

<sup>157</sup> *Teleguz*, 643 S.E.2d at 724.

<sup>158</sup> *Id.*

<sup>159</sup> *Governor McAuliffe commutes sentence of Ivan Teleguz to life imprisonment*, WINA, (Apr. 20, 2017), <https://wina.com/news/064460-governor-mcauliffe-commutes-sentence-of-ivan-teleguz-to-life-imprisonment/>.

**William Burns** was sentenced to death for killing and raping his mother-in-law.<sup>160</sup> He challenged his sentence on the grounds that he had an intellectual disability and therefore could not be executed.<sup>161</sup> However, the psychologist appointed by the circuit court concluded that Burns had mental health issues that prevented an accurate intellectual disability evaluation.<sup>162</sup> Furthermore, he declared Burns incompetent to assist his defense attorney in the proceedings because of his psychosis, which a court-appointed neuropsychiatrist described as “impairment of autobiographical memory, derailment of language and thought, and significant social deterioration.”<sup>163</sup> The Virginia Supreme Court halted the appeals, declaring the courts could not decide Burns’ intellectual disability claim until his mental capacity was restored, because a defendant must be competent to assist with his defense.<sup>164</sup> In order to execute Burns, he would have to be returned to competency during a new sentencing phase, the appeals process, and for execution.<sup>165</sup> However, experts were in agreement that it is highly unlikely that his competency could be restored.<sup>166</sup> Governor McAuliffe intervened and commuted Burns’ sentence to life without parole, citing the legal difficulties created by Burns’ incompetence, and explained that continuing the appeals process in Burns’ case would “tax the resources of the Commonwealth” when those funds could be devoted to other cases.<sup>167</sup>

## ii. Denials (where newsworthy or controversial)

On July 6, 2017, Governor Terry McAuliffe denied William Morva’s clemency despite widespread support for commutation because of his serious mental illness.<sup>168</sup> In 2006, Morva was in custody on charges of attempted armed robbery when he demanded treatment for some minor injuries.<sup>169</sup> After being transported to the hospital, he knocked a sheriff’s deputy unconscious, took his gun, and fatally shot a security guard to escape.<sup>170</sup> The following day, before he was apprehended, Morva killed a sheriff’s corporal.<sup>171</sup> Morva was sentenced to death in 2008.<sup>172</sup>

Morva’s execution received widespread attention after the jury was told by experts that he had a personality disorder which manifested as odd beliefs, instead of a diagnosed delusional disorder which left him unable to separate reality from delusion.<sup>173</sup> Once Morva exhausted all of his appeals, many hoped McAuliffe would

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<sup>160</sup> Cain, *supra* note 134.

<sup>161</sup> *Burns v. Virginia*, 688 S.E.2d 263 (Va. 2010); see *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to impose the death penalty on intellectually disabled persons).

<sup>162</sup> *Burns*, 688 S.E.2d at 265.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 268–69.

<sup>165</sup> Cain, *supra* note 134.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Levin, *supra* note 30.

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

<sup>170</sup> *Id.*

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

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

<sup>173</sup> Mike Gangloff, *Morva attorneys ask governor to stop execution*, Roanoke Times, (June 26, 2017), [http://www.roanoke.com/news/crime/montgomery\\_county/morva-attorneys-ask-governor-to-stop-execution/article\\_377a6619-8c16-51e8-ad23-3c394797c5ea.html](http://www.roanoke.com/news/crime/montgomery_county/morva-attorneys-ask-governor-to-stop-execution/article_377a6619-8c16-51e8-ad23-3c394797c5ea.html).

grant him clemency given the role that mental illness played in the crime.<sup>174</sup> As coverage of the case grew, various people and organizations petitioned McAuliffe to stop the execution, including the European Union,<sup>175</sup> Amnesty International,<sup>176</sup> the ACLU of Virginia (along with over 31,000 signatories),<sup>177</sup> several Virginia state legislators,<sup>178</sup> Virginia representatives in Congress,<sup>179</sup> and one of the victim's daughters.<sup>180</sup>

Hours before Morva was scheduled to die, however, McAuliffe quietly released a statement declining to intervene, saying "After extensive review and deliberation, I do not find sufficient cause in Mr. Morva's petition or case records to justify overturning the will of the jury that convicted and sentenced him."<sup>181</sup>

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

In *Atkins v. Virginia*, 536 U.S. 304 (2002), Daryl Atkins was sentenced to death in Virginia for an abduction, armed robbery, and murder.<sup>182</sup> Atkins appealed his sentence on the grounds that his intellectual disability precluded him from execution.<sup>183</sup> The U.S. Supreme Court held 6-3 that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishment but found that states could establish their own methods for assessing intellectual disability.<sup>184</sup>

### **c. Other Relevant Legal, Historical, or Social Issues**

In April 2007, twenty-three-year-old Seung-Hui Cho killed 32 people on the Virginia Polytechnic Institute and State University campus in Blacksburg, Virginia, before committing suicide, in what was the second deadliest mass shooting in U.S. history at that time.<sup>185</sup> Thousands of people were affected by the shootings, according to Virginia Tech spokesperson Mark Owczarski,<sup>186</sup> and the shock of a university shooting was felt around the country. The Virginia Tech shooting reignited conversations surrounding access to guns and gun control laws, and these conversations continue today.<sup>187</sup>

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

<sup>175</sup> Justin Ward, *Lawyers, supporters make one last attempt to stop William Morva's execution*, WDBJ7, (June 26, 2017), <http://www.wdbj7.com/content/news/Lawyers-supporters-make-one-last-attempt-to-stop-William-Morvas-execution-430952723.html>.

<sup>176</sup> Frank Green, *Advocates deliver 31,000 petition signatures to Gov. McAuliffe urging clemency for death row inmate Morva*, Richmond Times-Dispatch, (June 29, 2017), [http://www.richmond.com/news/advocates-deliver-petition-signatures-urging-clemency-for-death-row-inmate/article\\_3577c6ae-1502-54c2-b1d8-9143b5ac4e39.html](http://www.richmond.com/news/advocates-deliver-petition-signatures-urging-clemency-for-death-row-inmate/article_3577c6ae-1502-54c2-b1d8-9143b5ac4e39.html).

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

<sup>178</sup> Ann E. Marimow, *Convicted killer executed after Va. Governor declined clemency bid*, Wash. Post, (July 6, 2017), [https://www.washingtonpost.com/local/public-safety/va-governor-declines-to-halt-execution-of-killer-whose-mental-illness-spurred-clemency-bid/2017/07/06/a1b4f4ba-5b4c-11e7-9fc6-c7ef4bc58d13\\_story.html?utm\\_term=.ec868770daaf](https://www.washingtonpost.com/local/public-safety/va-governor-declines-to-halt-execution-of-killer-whose-mental-illness-spurred-clemency-bid/2017/07/06/a1b4f4ba-5b4c-11e7-9fc6-c7ef4bc58d13_story.html?utm_term=.ec868770daaf).

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

<sup>180</sup> Levin, *supra* note 30.

<sup>181</sup> Marimow, *supra* note 178.

<sup>182</sup> *Atkins*, 536 U.S. at 307.

<sup>183</sup> *Id.* at 310.

<sup>184</sup> *Id.* at 317, 321.

<sup>185</sup> *Virginia Tech Shootings Fast Facts*, CNN, (May 2, 2018), <http://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/>.

<sup>186</sup> Sarah McCammon, *The Uninjured Victims of the Virginia Tech Shooting*, NPR, (Apr. 14, 2017), <http://www.npr.org/2017/04/14/523042249/the-uninjured-victims-of-the-virginia-tech-shootings>.

<sup>187</sup> *America's Tragedy*, The Economist, (Apr. 19, 2007), <http://www.economist.com/node/9040170>.