

## Rethinking the Timing of Capital Clemency

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"I am doing what a governor has to do . . . I am taking a *last*, long look at it."<sup>1</sup>

-- Governor Buddy Roemer

*This article reviews every capital clemency over the last four decades. It demonstrates that in the majority of cases, the reason for commutation was known at the conclusion of direct appeals – years or even decades before the habeas process was concluded. Yet, when governors or pardon boards actually commuted the death sentences, they typically waited until the eve of execution, with only days or hours to spare. Leaving clemency until the last minute sometimes leads to many years of unnecessary state and federal habeas corpus litigation. This article documents nearly 300 years of wasted habeas corpus review. Additionally, last-minute commutations harm the victims' families by delaying closure for years. And placing clemency at the very end of the process creates an information cascade that makes it harder for governors to grant clemency in meritorious cases. This article therefore argues for a threshold clemency determination in capital cases at the conclusion of direct review, before any state or federal habeas litigation has begun.*

In death-penalty cases, clemency is typically the last stage of the process. While governors have occasionally used their commutation powers to empty death row, blanket commutations are rare.<sup>2</sup> In the ordinary case, commutation comes only days or hours before execution.<sup>3</sup> Sometimes the inmate has already ordered his final

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<sup>1</sup> Jack Wardlaw & James Hodge, *Roemer Saves Inmate From Execution*, NEW ORLEANS TIMES PICAYUNE, Aug. 17, 1989, at A1 (emphasis added).

<sup>2</sup> For an assessment of mass commutations, see AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* (2005); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004).

<sup>3</sup> See James R. Acker & Charles S. Lanier, *May God – of the Governor – Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 202-03 (2000) (“Executive clemency decisions typically are

meal when the governor steps forward to reduce the sentence from death to life imprisonment.<sup>4</sup>

There is a plausible argument for clemency being last. For a governor or pardon board<sup>5</sup> to look holistically at a case, she must have all the information to make an informed decision. And important information may come from the years of appeals and post-conviction litigation. For instance, it may only be after years of habeas corpus proceedings that governors would learn how terrible an inmate's lawyer performed or that new DNA evidence suggests he is innocent.<sup>6</sup> The conventional wisdom is therefore that governors and pardon boards should only decide whether to commute a death sentence at the very end of a case.

This article challenges the conventional wisdom and advocates for a threshold clemency determination much earlier in the criminal justice process. Based on a review of every capital clemency decision for the last forty years,<sup>7</sup> I suggest that the governor or pardon board should assess whether clemency is merited immediately after the conclusion of the direct appeals process, but before any state or federal habeas corpus petitions are filed.<sup>8</sup> If governors or pardon boards decline to grant clemency at the end of the direct appeals process, they should retain the option to revisit that decision at the conclusion of the state and federal habeas corpus process. Put simply, clemency should still be last, but it should also be much earlier in the criminal justice process. To put the timing in perspective, the average time from

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made in the last few days and even frantic hours and minutes before a scheduled execution; thus, the need for a special telephone line linking the governor's mansion and the death chamber.").

<sup>4</sup> See, e.g., Don Terry, *Hours Before Execution She Sought, Illinois Woman Is Given Clemency*, N.Y. TIMES, Jan. 17, 1996, at 10.

<sup>5</sup> In most jurisdictions with capital punishment, the governor is solely responsible for the clemency decision. In a smaller number of states, the decision rests in whole or in part with the pardon board. For an overview, see Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751 760-61 (2013).

<sup>6</sup> For examples of the innocence issues, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

<sup>7</sup> I have analyzed capital commutations granted for individualized reasons, but excluded mass commutations that emptied death row.

<sup>8</sup> In a typical death penalty case, the inmate first appeals to the state supreme court. If he is unsuccessful in state court, he then files a petition for certiorari with the Supreme Court of the United States. If the Supreme Court denies certiorari, his direct appeals are completed.

conviction to execution is almost fifteen years.<sup>9</sup> Direct appeals typically take a few years,<sup>10</sup> with the habeas process covering the largest portion of the time.<sup>11</sup> The threshold clemency determination should therefore be made fairly early in the capital punishment process. No legal obstacle stands in the way of considering clemency at the end of direct review.

There are three reasons for the unorthodox proposal to consider clemency much earlier. First, when governors and pardon boards have commuted death sentences over the last few decades, they have usually based their decisions on information that was known before the habeas corpus process even began.<sup>12</sup> There have been sixty-six commutations for particularized reasons related to the inmate's case since the Supreme Court reinstated capital punishment in 1976.<sup>13</sup> To determine why governors or pardon boards commuted the death sentences, I reviewed news reports, direct appeals, habeas corpus decisions, and spoke with some of the attorneys involved in the cases. In more than half of the cases, the reason for the commutation was already known and fully developed at the conclusion of direct appeals. Governors and pardon boards could have eliminated roughly three-hundred years of litigation and hundreds of millions of dollars of expenses in these cases if they had made their clemency decisions at the end of direct review rather than the conclusion of the habeas process.<sup>14</sup>

The second reason for adding a threshold clemency determination earlier in the criminal justice process is that it may reinvigorate the use of executive clemency. Over the last half century,

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<sup>9</sup> See *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Bryer, J. dissenting from denial of stay).

<sup>10</sup> This is typically, although not always, true. In California, the time spent awaiting the conclusion of direct review is enormous. See Judge Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 729 (2007).

<sup>11</sup> See, e.g., Gerald F. Uleman, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495 (2009).

<sup>12</sup> See Part I *infra*.

<sup>13</sup> The Death Penalty Information Center keeps careful track of commutations. See [Deathpenaltyinfo.org](http://www.deathpenaltyinfo.org). See DEATH PENALTY INFORMATION CENTER: CLEMENCY, available at <http://www.deathpenaltyinfo.org/clemency>.

<sup>14</sup> For a good discussion of the appellate and post-conviction costs of capital punishment, see Carol Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. L. F. 117, 143-150.

clemency has become a rarity.<sup>15</sup> While there have been more than 1,300 executions since the Supreme Court reinstated capital punishment in 1976, there have been only sixty-six individualized commutations.<sup>16</sup> By contrast, in the first half of the Twentieth Century, one out of every four or five death sentences was commuted to life imprisonment.<sup>17</sup>

In large part, the decline of clemency can be attributed to tough-on-crime politics.<sup>18</sup> There may also be another factor at play however. Because habeas corpus avenues expanded in the 1950s and 1960s, the time between conviction and execution thereafter increased.<sup>19</sup> And as the Supreme Court and Congress imposed additional procedural obstacles in the 1980s and 1990s,<sup>20</sup> successful habeas claims declined.<sup>21</sup> Thus, by the time a clemency application lands on a governor's desk, it is now common for the inmate to have had more than a decade of direct appeals and post-conviction habeas proceedings, with most, if not all, of it having been unsuccessful.

Social science literature tells us that information cascades affect decision-making.<sup>22</sup> When an actor is asked to reverse a decision that has been upheld for many years by numerous prior decision-

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<sup>15</sup> See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348-49 (2008).

<sup>16</sup> See *supra* note 13.

<sup>17</sup> See Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990-91); see also Acker & Lanier, *supra* note 3, at 212-13 (cataloging large number of commutations prior to 1972).

<sup>18</sup> See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 296 (2003) (noting the “widely held” belief that politics influence clemency, but finding a lack of statistical significance).

<sup>19</sup> See James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 337 n.415 (2009) (documenting the increasing time on death row); see also NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE (2007), at 10, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

<sup>20</sup> See John H. Blume, *AEDPA: The Hype and the Byte*, 91 CORNELL L. REV. 259, 262 (2006) (“The argument I advance here is that AEDPA's lack of bite is largely due to the fact that the Supreme Court, in the absence of congressional habeas reform throughout the 1960s, 1970s, 1980s, and 1990s, had already significantly curtailed the writ of habeas corpus.”).

<sup>21</sup> See Liebman & Clarke, *supra* note 19, at 337 n.415.

<sup>22</sup> See *infra* Part II.B.

makers, it is very hard to do so. By contrast, if we were to interject a threshold clemency decision early in the criminal justice process, before the years or decades of habeas litigation, it might be possible to limit the information cascade and have governors or pardon boards make a more independent decision. Earlier clemency review might therefore lead to more clemency.

The third reason for making initial clemency determinations before the habeas corpus process is to spare emotional trauma to the family of the victims. When a governor or pardon board commutes a death sentence it is often very difficult for the victim's family to accept that decision. If the inmates' appeals and habeas petitions have been rejected for years or even decades, it is even harder for the victim's family to understand the last-minute commutation. It is far preferable for the death sentence to be taken off the table earlier than for the governor or pardon board to quash the hopes of the family years or decades later.

The 2011 commutation of Shawn Hawkins in Ohio encapsulates the argument for a threshold clemency determination at the conclusion of direct appeals. Hawkins was sentenced to death in 1990 for an aggravated murder.<sup>23</sup> In 1993, the Ohio Supreme Court upheld his conviction and sentence, but Justice Pfeifer dissented, concluding that there was doubt about Hawkins' guilt. In particular, Justice Pfeifer pointed to the possibility that a co-defendant was the actual triggerman.<sup>24</sup> For nearly two decades thereafter, Hawkins litigated numerous state and federal habeas petitions.<sup>25</sup> With his habeas options exhausted, Hawkins petitioned for clemency in 2011 and relied heavily on Justice Pfeifer's dissenting opinion from 1993.<sup>26</sup> In opposing clemency, the county prosecutor argued that "[m]ost of what Hawkins' counsel is now alleging and/or arguing has been litigated and examined during appellate review and is not new."<sup>27</sup> Yet, after reviewing the old evidence, the pardon board was not certain Hawkins was guilty and recommended commutation to life

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<sup>23</sup> See *State v. Hawkins*, 612 N.E.2d 1227 (Ohio 1993).

<sup>24</sup> See *id.* at 1236.

<sup>25</sup> See, e.g., *Hawkins v. Coyle*, 547 F.3d 540 (6<sup>th</sup> Cir. 2008); *Hawkins v. Coyle*, 2005 WL 1684022 (S.D. Ohio Jul 19, 2005); *State v. Hawkins*, 1996 WL 348024 (Ohio App. 1 Dist. June 26, 1996).

<sup>26</sup> See *In re: Shawn L. Hawkins*, Death Penalty Clemency Report OSP #A218-401 (May 12, 2011) at 8 (available at <http://www.drc.ohio.gov/Public/clemencyhawkins218401.pdf>).

<sup>27</sup> *Id.* at 11.

imprisonment.<sup>28</sup> Governor John Kasich concurred and, over twenty years after conviction, commuted Hawkins' sentence because of the very same concerns Hawkins had raised since the very beginning of his case.<sup>29</sup> The victim's mother responded that "[i]f a man can spend 22 years in prison and still get clemency, then the system ain't working."<sup>30</sup> Hawkins' case is not unique. There are dozens of other cases in which it is completely clear that the same clemency determination, based on the same information, could have been made at the conclusion of direct appeals, before the start of the habeas process.

This article proceeds in three parts. Part I analyzes each of the sixty-six death row commutations granted for particular reasons since the Supreme Court reinstated capital punishment in 1976. It demonstrates how the same clemency decision based on the same information could have been made years or even decades earlier in more than half the cases. Part II then makes the argument for a threshold clemency determination at the end of direct review and before the habeas process begins. In addition to saving hundreds of years of litigation and sparing anguish to victims' families, earlier clemency review might increase the paltry number of commutations in capital cases. Finally, Part III explores the approaches for implementing a threshold clemency process.

## **I. What Do We Know at the End of Direct Appeals?**

Excluding blanket commutations that emptied death row, governors and pardon boards have commuted the death sentences of sixty-six people from 1976 to 2013. In thirty-five of the sixty-six commutations, all of the necessary information had already come to light at the conclusion of direct review. In some of the older cases, commutation came only a few years after the conclusion of direct review. More often, however, governors or pardon boards granted clemency more than a decade after the conclusion of direct appeals. All told, considering commutation only at the end of the habeas process, rather than having a threshold determination at the end of

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<sup>28</sup> See *id.* at 14-15.

<sup>29</sup> See Mark Curnutte, *Kasich Grants Clemency to Death Row Inmate*, CINCINNATI.COM, June 8, 2011.

<sup>30</sup> *Id.*

direct review, resulted in about 300 years of unnecessary litigation and anxiety to the victims' families.

### **A. The Clemency Basis Was Known at the End of Direct Appeals in Over Half of Capital Commutations**

Of the thirty-five cases in which clemency definitely could have been granted at the end of direct review, the most common reason for commutation was doubts about the inmate's guilt. In a large number of other cases, characteristics about the defendant – for instance, mental health problems, age, and an abusive childhood – served as the basis for clemency. Other reasons for commutation included differential treatment of co-defendants, support from jurors or the victim's family, proportionality, failure to preserve evidence, ineffective assistance of counsel, racial discrimination, and religious conversion. I analyze the cases below.

#### **1. Doubts About Guilt**

The most common reason for governors commuting a sentence from death to life imprisonment is doubts about the inmate's guilt. In nine cases, governors waited until the eve of execution, even though all necessary information was available years earlier.

As noted above, the most recent doubt-based commutation occurred was Governor Kasich's commutation of Shawn Hawkins.<sup>31</sup> Hawkins had raised questions about his guilt in his 1993 direct appeal to the Ohio Supreme Court, but only managed to convince one of the seven justices.<sup>32</sup> For the next eighteen years, Hawkins filed state and federal habeas petitions, but without success.<sup>33</sup> In 2011, however, and without any new evidence of his innocence having emerged since his conviction, Hawkins convinced Governor Kasich to commute his sentence.<sup>34</sup> If the Ohio governor had considered clemency at the conclusion of direct appeals, it would have saved decades of litigation and anxiety for the victim's family.

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<sup>31</sup> See *supra* notes 23-30 and accompanying text.

<sup>32</sup> See *State v. Hawkins*, 612 N.E.2d 1227, 1236 (Ohio 1993) (Pfeifer, J., dissenting).

<sup>33</sup> See *supra* note 25.

<sup>34</sup> See Curnutte, *supra* note 29.

A similar turn of events occurred a decade earlier in the commutation of Phillip Dewitt Smith. In 2001, Oklahoma Governor Frank Keating commuted Smith's death sentence because he was not convinced to a "moral certainty" that Smith was guilty.<sup>35</sup> Governor Keating noted that there was no eyewitness or forensic testimony and that the case against Smith was circumstantial.<sup>36</sup> However, this information was clear from the time of Smith's death sentence in 1984 and was discussed in a dissenting opinion in Smith's direct appeal.<sup>37</sup> Smith remained on death row for fourteen years longer than necessary.

Another nearly identical commutation occurred in Maryland in 2000. Almost twenty years after Eugene Colvin-el was sentenced to death and more than fifteen years after his direct appeals ended,<sup>38</sup> Maryland Governor Parris Glendening commuted his sentence because there was not enough certainty of his guilt.<sup>39</sup> At Colvin-el's trial, there was no eyewitness testimony nor forensic evidence, and he did not confess to the murder.<sup>40</sup> The commutation decision was based on the same evidence (or lack thereof) from trial, not new evidence discovered years later. More than fifteen years of litigation, including a retrial on sentencing and at least five state and federal habeas corpus decisions,<sup>41</sup> could have been avoided if the governor made a clemency determination at the conclusion of direct review.

In a more high-profile commutation, Governor George W. Bush reduced the sentence of Henry Lee Lucas in 1998 because of doubts that Lucas had committed the crime he was to be executed for.<sup>42</sup> In the early 1980s, Lucas confessed to nearly 600 murders and in

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<sup>35</sup> See Barbara Hoberock, *Keating Spares Life of Slayer*, TULSA WORLD, Apr. 10, 2001, at A1.

<sup>36</sup> See *id.*

<sup>37</sup> See *State v. Smith*, 737 P.2d 1206, 1218 (Okla. Cr. App. 1987) (Parks, J., dissenting) ("[T]he evidence against the appellant was entirely circumstantial, and cannot properly be termed overwhelming.").

<sup>38</sup> See *Colvin v. State*, 471 A.2d 953, *cert. denied* 469 U.S. 873 (1984).

<sup>39</sup> See Matthew Mosk & Daniel LeDuc, *Glendening Commutes Death Sentence; Lack of 'Absolute Certainty' Cited in 1980 Killing*, WASH. POST, June 8, 2000, at A1.

<sup>40</sup> See *id.*

<sup>41</sup> See *Colvin-El v. Nunth*, 205 F.3d 1332 (4<sup>th</sup> Cir. 1999); *Colvin-El v. Nunth*, 1998 WL 386403 (D. Md. July 6, 1998); *Colvin-El v. State*, 753 A.2d 13 (Md. 2000); *Colvin-El v. State*, 630 A.2d 725 (Md. 1993); *State v. Colvin*, 548 A.2d 506 (Md. 1988).

<sup>42</sup> Bruce Tomaso & David McLemore, *Bush Spares Lucas From Death Penalty; Governor Commutes Sentence To Life, Cites Doubts Over Guilt*, DALLAS MORNING NEWS, June 27, 1998, at 1A.



1984 he was sentenced to death in a Texas case.<sup>43</sup> By 1985, it was clear that Lucas had invented most of the murders. According to one officer, Lucas “would have admitted to killing Abraham Lincoln if you asked him to.”<sup>44</sup> In April 1985, Lucas recanted his confession to all but three of the murders, making front-page news across the country.<sup>45</sup> He said that his confessions were “all a big hoax meant to embarrass law enforcement and weed out corrupt officers who used his fake confessions to clear unsolved murders.”<sup>46</sup> When Governor Bush commuted Lucas’s sentence in 1998, his decision did not turn on new evidence discovered in the thirteen years since Lucas recanted.<sup>47</sup> Rather, Governor Bush simply waited until the post-conviction process had run its course and commuted the sentence three days before the execution.<sup>48</sup> More than thirteen years of litigation, plus emotional trauma to the victims’ families, could have been avoided if clemency was considered at the end of direct appeals.

In 1992, North Carolina Governor Jim Martin commuted the death sentence of Anson Avery Maynard because of doubts about Maynard’s guilt.<sup>49</sup> Governor Martin focused on the fact that “no physical evidence linked Maynard to the crime and that the only eyewitness to testify was an admitted participant in the murder who was given immunity from prosecution.”<sup>50</sup> Although Governor Martin claimed that he considered “some” evidence not before the jury, he

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<sup>43</sup> *See id.*

<sup>44</sup> Cynthia Gorney & Paul Taylor, *The Killer Who Recanted; Did Henry Lee Lucas Kill All Those People?* WASH. POST, Apr. 15, 1985.

<sup>45</sup> *See, e.g.,* Storer Rowley, *Is Lucas Bigger Liar Than Killer?* CHI. TRIB., Apr. 18, 1985, at 1; George Kuempel, *DPS Chief Defends Work on Lucas Case*, DALLAS MORNING NEWS, Apr. 17, 1985, at 1a; *210 Deaths Recanted, Paper Says*, SOUTH FLORIDA SUN-SENTINEL, Apr. 14, 1985, at 1A.

<sup>46</sup> Tomaso & McLemore, *supra* note 42.

<sup>47</sup> *See* James Pinkerton & Kathy Walt, *Lucas’ Life Spared, But He May Never Be Free Again*, HOUS. CHRON., June 27, 1998 (quoting district attorney and juror as saying there had been no new evidence).

<sup>48</sup> *See* S.K. Bardwell & Patty Reinert, *Kin of Lucas Victim Disappointed in Bush: Older Sister Planned to Witness Execution*, HOUS. CHRON., June 27, 1998, at A29. This was entirely in keeping with Governor Bush’s philosophy of deferring to the judiciary and denying clemency because an inmate had “full and fair access to the courts.” *See* Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J. L. POL. 669, 677-78 (2001).

<sup>49</sup> Bruce Henderson, *Martin Commutes Man’s Death Sentence*, CHARLOTTE OBSERVER, Jan. 11, 1992, at 1A.

<sup>50</sup> *Id.*

never specified what evidence that was.<sup>51</sup> The facts cited by Governor Martin -- the lack of physical evidence and the eyewitness's immunity -- were known from the beginning of trial, and the immunity issue was raised nearly a decade earlier in Maynard's direct appeal.<sup>52</sup> Maynard's direct appeals concluded in 1984,<sup>53</sup> but Governor Martin did not grant clemency until over seven years later.

The case of Ronald Monroe in Louisiana involved an even more inexcusable delay in commutation. Monroe, a mildly retarded laborer with no prior criminal record, was sentenced to death in 1980 for killing his next-door neighbor, Lenora Collins.<sup>54</sup> Only a few months after the trial, a prison inmate named George Stinson, who had previously been married to Collins, confessed to another inmate that he had killed her.<sup>55</sup> Stinson's confession was very believable because he made it while in prison for killing another one of his ex-wives.<sup>56</sup> In late 1983, just as Monroe's direct appeals were rejected,<sup>57</sup> Monroe's attorneys learned of Stinson's confession.<sup>58</sup> Nevertheless, neither the governor nor the Louisiana Board of Pardons acted on this credible claim of innocence. Instead, Monroe spent five years unsuccessfully seeking federal habeas corpus relief on the ground that Stinson's confession should have been disclosed to him earlier.<sup>59</sup> In 1988, the Louisiana Board of Pardons unanimously recommended commuting the sentence, but Governor Roemer still did not make a clemency determination because the Louisiana Supreme Court had stayed the execution.<sup>60</sup> Litigation continued, with the State of Louisiana

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<sup>51</sup> *See id.*

<sup>52</sup> *See State v. Maynard*, 316 S.E.2d 197, 215 (N.C. 1984).

<sup>53</sup> *See Maynard v. North Carolina*, 469 U.S. 963 (1984).

<sup>54</sup> *See State v. Monroe*, 397 So.2d 1345 (La. 1981).

<sup>55</sup> *See Jack Wardlaw & James Hodge, Roemer Saves Inmate From Execution*, NEW ORLEANS TIMES PICAYUNE, Aug. 17, 1989, at A1.

<sup>56</sup> *See id.*

<sup>57</sup> The Supreme Court denied certiorari in July 1983 and denied rehearing in September 1983. *See Monroe v. Louisiana*, 463 U.S. 1249 (1983); *Monroe v. Louisiana*, 463 U.S. 1229 (1983).

<sup>58</sup> *See Monroe v. Blackburn*, 476 U.S. 1145, 1146 (1986) ("[I]t was not until late 1983 that independent investigation by petitioner's counsel led him to Detective Gallardo, who told of Stinson's incriminating admissions and of the fact that the New Orleans police had long before known of the new evidence.").

<sup>59</sup> *See Monroe v. Butler*, 883 F.2d 331 (5<sup>th</sup> Cir. 1988); *Monroe v. Butler*, 690 F. Supp. 521 (E.D. La. 1988) *Monroe v. Blackburn*, 748 F.2d 958 (5<sup>th</sup> Cir. 1984).

<sup>60</sup> *See Wardlaw & Hodge, supra* note 55.

petitioning for the stay to be lifted<sup>61</sup> and the Louisiana Supreme Court eventually allowing the execution to move forward in August 1989.<sup>62</sup> With no appellate avenues remaining, Governor Roemer commuted Monroe's sentence two weeks before his scheduled execution.<sup>63</sup> The very same outcome, based on the same information, could have been reached nearly six years earlier at the conclusion of direct appeals.

On his last day in office in 1987, Governor Harry Hughes of Maryland commuted the death sentence of Doris Ann Foster because of lingering doubts about her guilt.<sup>64</sup> Foster had been convicted of killing her landlord, but she had claimed at trial that her husband was responsible.<sup>65</sup> Foster's husband had confessed on multiple occasions but had recanted.<sup>66</sup> Governor Hughes commuted Foster's sentence, explaining that "there remained some doubt whether Foster committed the crime."<sup>67</sup> Foster's claim of innocence had been known at trial, well before the conclusion of direct appeals. Because Governor Hughes acted relatively quickly, Foster sat on death row for less than a year after the conclusion of her direct appeals.<sup>68</sup>

In 1983, Florida Governor Bob Graham commuted the death sentence of Jesse Rutledge. The sparse news reports indicate that the governor may have been influenced by the possibility that another man – Charles (Sonny) Bessent – more closely matched the description of the suspect.<sup>69</sup> The victim had previously complained that Bessent had

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<sup>61</sup> See *State ex rel. Monroe v. Butler*, 535 So.2d 732 (La. 1988).

<sup>62</sup> See *State ex rel. Monroe v. Butler*, 547 So.2d 367 (La. 1989).

<sup>63</sup> See *Wardlaw & Hodge*, *supra* note 55.

<sup>64</sup> See Gwen Ifill, Md. *Woman's Death Term Commuted: Hughes Takes Action on His Final Day*, WASH. POST, Jan. 21, 1987.

<sup>65</sup> See *Foster v. State* 464 A.2d 986, 988-89 (Md. 1983).

<sup>66</sup> See *id.* at 989 ("In a letter dated 30 January, allegedly written by the accused's husband to her, he in essence admitted that he had killed the victim. In addition, in a letter postmarked 19 June 1981 addressed to 'The Attorney General, Cecil County, MD,' written by the accused's husband, he not only confessed that he killed the victim and was solely responsible for her death, but also described in detail the circumstances surrounding the murder."); *id.* at 989 n.2 ("At trial, the accused's husband admitted writing this letter. He explained that he had lied in the letter in order to protect the accused.").

<sup>67</sup> Ifill, *supra* note 64.

<sup>68</sup> See *Foster v. State*, 503 A.2d 1326, *cert. denied* 478 U.S. 1023 (1986). The long delay between Foster's trial and the conclusion of her direct appeals is because she was awarded a new trial on sentencing. See *Foster v. State*, 464 A.2d 986 (Md. 1983).

<sup>69</sup> See *Graham Backs Clemency for Condemned Man*, MIAMI HERALD, Apr. 7, 1983, at 2B.

beaten and sexually assaulted her. Although it is not absolutely certain when the information about Rutledge's innocence emerged, two attorneys who represented Rutledge believed that the evidence about Bessent's possible involvement was known at the time of trial.<sup>70</sup> The commutation came about four years after Rutledge's conviction.<sup>71</sup>

Finally, the case of Christopher Hallman supports the proposal to make threshold clemency decisions at the conclusion of direct appeals. Hallman was convicted in 1973 for murder; he slit a woman's throat in a bar fight and she slipped into a coma and later died.<sup>72</sup> The jury was led to believe that Hallman was the direct cause of the victim's death.<sup>73</sup> Hallman's direct appeals failed and the Supreme Court denied certiorari in 1976.<sup>74</sup> Somewhere around that time (the exact date is not clear), Hallman's attorneys learned that the victim's estate had filed a wrongful death suit against the hospital where she was treated.<sup>75</sup> Hospital records showed that the victim actually died as a result of medical malpractice.<sup>76</sup> After conducting an internal investigation, the hospital quietly settled the malpractice lawsuit.<sup>77</sup> Hallman sought a new trial, but his request was rejected on December 1, 1976. Hallman's attorneys then brought the malpractice information before the Parole and Probation Commission, which recommended clemency.<sup>78</sup> The attorneys then presented the same information to the governor in March 1977, but instead of ruling on the clemency petition the governor "prodded [the assistant public defender] to ask the state

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<sup>70</sup> See Telephone Interview with Alan R. Parapiano, July 8, 2013 (trial counsel); Telephone Interview with James Feiber, Jr., July 8, 2013 (clemency counsel).

<sup>71</sup> See *Graham Backs Clemency*, *supra* note 69. Rutledge's direct appeal became final on April 21, 1980. See *Rutledge v. Florida*, 446 U.S. 913 (1980).

<sup>72</sup> See *Hallman v. State*, 305 So.2d 180, 181 (Fla. 1978).

<sup>73</sup> See *id.* ("On April 10, 1973, appellant inflicted fatal cuts with broken glass about the throat and neck of Eleanor Groves, slit her throat, which resulted in her death. . .").

<sup>74</sup> See *Hallman v. Florida*, 428 U.S. 911 (1976).

<sup>75</sup> A January 1977 news story discussed the hospital error. See Tom Fiedler, *Is He Condemned for Hospital's Negligence?*, MIAMI HERALD, Jan. 23, 1977, at 1; see also DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF CAPITAL PUNISHMENT* 188-189 (2006); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 309 (1993).

<sup>76</sup> See Fiedler, *supra* note 75.

<sup>77</sup> See *id.*

<sup>78</sup> See *3 More Cases Go to Clemency Board for Final Answer*, OCALA STATE-BANNER, Mar. 29, 1977, at 7A.

Supreme Court for a new trial for Hallman.”<sup>79</sup> More than two years later, with a new governor in office, Hallman’s death sentence was finally commuted.<sup>80</sup> Although it is not clear exactly when the exonerating evidence was publicly disclosed, it is clear that the information was available around the conclusion of direct review.

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Across numerous states – Florida, Louisiana, Maryland, North Carolina, Ohio, Oklahoma, and Texas – inmates remained on death row for years even though there were doubts about their guilt. When judicial review ended and troubling cases came close to execution, governors and pardon boards stepped forward in these cases and granted clemency. If these governors had considered clemency at the conclusion of direct review, it would have removed potentially innocent men from death row decades earlier and saved tens of millions of dollars in litigation costs.

## **2. Defendant Specific Characteristics: Mental Capacity, Mental Illness, Abused Background, and Age**

Of the thirty-five commutations that could have been granted at the conclusion of direct review, six were eventually granted based on the characteristics or background of the defendant. Governors or pardon boards focused on mental capacity, mental illness, abused background, and the age of the defendant.

The recent commutation of Joseph Murphy provides a compelling example for considering clemency earlier. In 1987, Murphy was sentenced to death for the brutal murder of an elderly woman.<sup>81</sup> On September 26, 2011, more than twenty-four years later, Governor John Kasich commuted his punishment to life imprisonment, concluding that because of his “brutally abusive upbringing and the relatively young age at which he committed this terrible crime, the death penalty is not appropriate in this case.”<sup>82</sup> Yet,

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<sup>79</sup> *See id.*

<sup>80</sup> *See 2<sup>nd</sup> Fla. Killer Given Stay*, WASH. POST, June 27, 1979 (noting that Hallman’s sentence was commuted to life).

<sup>81</sup> *See State v. Murphy*, 605 N.E.2d 884, 897 (Ohio 1992).

<sup>82</sup> Alan Johnson, *Governor Spares Life of Condemned Killer*, THE COLUMBUS DISPATCH, Sept. 26, 2011.

the Ohio Supreme Court considered this very argument in 1992 as part of Murphy's direct appeal. The Court split by a vote of four to three on the whether Murphy's terrible background should be grounds for setting aside his death sentence. The majority of the court noted that:

It is undisputed that the mental capacity of appellant places him in the lowest six or seven percent of the population. Appellant was born into an impoverished background, had an alcoholic father, was the victim of verbal, physical and sexual abuse as a child and was generally maladjusted throughout his life. He was generally isolated from other members of his family and was often the brunt of taunting by his parents and siblings. He was also relatively young at the time of the commission of the offense.

While these family circumstances are indeed tragic, they are nevertheless outweighed by the aggravating circumstances presented by the instant case. . . .<sup>83</sup>

Three dissenting justices refused to agree that Murphy's terrible upbringing should be disregarded. In a detailed dissenting opinion, Chief Justice Moyer spent more than two pages describing the horrible details of Murphy's childhood.<sup>84</sup>

In short, the very issue that divided the Ohio Supreme Court in 1992 was the same issue that led the governor to grant clemency nearly twenty years later in 2011. In between, Murphy filed numerous habeas corpus petitions, which were denied.<sup>85</sup>

Another recent Ohio case also supports the argument for earlier clemency determinations. In 2012 Governor Kasich commuted the death sentence of John Jeffrey Eley for a 1986 murder because of his limited mental capacity.<sup>86</sup> This issue had been presented at trial<sup>87</sup> and

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<sup>83</sup> Murphy, 605 N.E.2d at 908.

<sup>84</sup> See *id.* at 909-911 (Moyer, C.J. dissenting).

<sup>85</sup> See, e.g., Murphy v. Ohio, 551 F.3d 485 (6th Cir. 2009); Murphy v. Ohio, 2006 WL 3057964 (N.D. Ohio Sep 29, 2006); State v. Murphy, 2005 WL 280446, (Ohio App. 3 Dist. Feb 07, 2005); Murphy v. Ohio, 263 F.3d 466, (6th Cir. 2001); State v. Murphy, 663 N.E.2d 939 (Ohio 1996); State v. Murphy, 1995 WL 275766 (Ohio App. 3 Dist. May 12, 1995).

<sup>86</sup> Reginald Fields, *Kasich Commutes Sentence of Death-Row Inmate Eley*, CLEVELAND PLAIN DEALER, July 11, 2012, at B1

Eley raised it in his direct appeals.<sup>88</sup> In granting clemency, Governor Kasich pointed to the fact that the prosecutor in the case now believed death was not warranted.<sup>89</sup> Yet that was not a last-minute conversion by the prosecutor based on new evidence. Shortly before Governor Kasich's decision, the prosecutor noted that Eley's case "has haunted me for more than 24 years."<sup>90</sup> In short, the governor could have granted clemency to Eley based on his low intelligence level when the U.S. Supreme Court refused to grant certiorari to his direct appeal in 1993.<sup>91</sup> Instead, the commutation was delayed for nearly twenty years, until two weeks before the scheduled execution.<sup>92</sup>

The same scenario occurred in Indiana. In 2005, Governor Mitch Daniels commuted the death sentence of Arthur Baird primarily because it appeared that Baird was mentally ill at the time of the crime.<sup>93</sup> Baird had raised mental illness and insanity arguments in his direct appeals over a decade earlier.<sup>94</sup> In granting clemency, Governor Daniels also relied on the fact that a few years after Baird's sentence Indiana law changed to allow jurors the option to impose life without the possibility of parole.<sup>95</sup> The law changed in 1993, but clemency was not granted until 2005, just days before Baird's scheduled execution.<sup>96</sup>

On his last day in office in 2003, Governor Paul Patton of Kentucky commuted the death sentence of Kevin Stanford.<sup>97</sup> Stanford, who was sentenced to death for a murder he committed at the age of seventeen, had litigated his death sentence for decades, including in the infamous U.S. Supreme Court decision that upheld the death

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<sup>87</sup> See *State v. Eley*, 672 N.E.2d 640, 645 (Ohio 1996) ("Dr. Douglas Darnall, a clinical psychologist, found Eley to be of borderline intelligence, and ranked him in the twelfth percentile on the Wechsler Adult Intelligence Test.").

<sup>88</sup> See *id.*; see also *State v. Eley*, 1995 WL 758808 (Ohio App. 7 Dist. 1995) at \*25.

<sup>89</sup> See Alan Johnson, *Kasich Cancels Death Sentence*, COLUMBUS DISPATCH, July 11, 2012, at 3B.

<sup>90</sup> Gary L. VanBrocklin, *Man Sitting on Death Row Does Not Deserve to Die for His Crime*, COLUMBUS DISPATCH, July 7, 2012 at 9A.

<sup>91</sup> *State v. Murphy*, 605 N.E.2d 884, cert. denied 510 U.S. 834 (1993).

<sup>92</sup> See Fields, *supra* note 86.

<sup>93</sup> See *Governor Commutes Death Sentence*, WTHR.COM, available at <http://www.wthr.com/Global/story.asp?s=3778726&clienttype=printable>

<sup>94</sup> See *Baird v. State*, 604 N.E.2d 1170, 1177 (Ind. 1992).

<sup>95</sup> See *Governor Commutes Death Sentence*, *supra* note 93.

<sup>96</sup> See *id.*

<sup>97</sup> See Tom Loftus, *Patton Has Short, Quiet Last Day as Governor*, LOUISVILLE COURIER-J., Dec. 9, 2003, at B1.

penalty for juvenile offenders.<sup>98</sup> Governor Patton commuted Stanford's death sentence fourteen years after the Supreme Court decision and more than twenty years after Stanford entered death row. The stated reason for the commutation was that the governor "believed sentencing a juvenile to death is an excessive punishment," yet that rationale was known from the very moment the case began and certainly when Governor Patton took office in 1995.<sup>99</sup> In total, fourteen needless years elapsed from the conclusion of direct appeals in 1989 and the clemency grant in 2003.

The previous year, Alexander Williams, a schizophrenic murderer, came within hours of execution before the pardon board commuted his sentence in 2002.<sup>100</sup> Shortly before the execution, the Georgia Board of Pardons and Paroles dispatched experts to evaluate Williams and, presumably based on their analysis as well as the fact that Williams was under the age of eighteen at the time of the crime, commuted Williams' sentence to life without parole.<sup>101</sup> Yet, Williams' age and his mental health problems had been known from the very beginning of the case. The *Los Angeles Times* reported that "[n]umerous reports over the last dozen years by prison doctors and psychologists have described Williams as severely mentally ill and 'out of touch with reality.'"<sup>102</sup> The *Washington Post* explained that in 1990, a dozen years before the commutation, "he attacked one of his attorneys, saying that a little red man had instructed him to do so, and later strutted around his prison cell, wearing a mask made from a bedsheet and calling himself the Lone Ranger."<sup>103</sup> While his mental health issues were not raised at trial, they were raised and considered

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<sup>98</sup> See *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court's precedent in *Stanford* lasted for sixteen years, a shorter period than Kevin Stanford's death sentence. It was overruled in *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>99</sup> See Loftus, *supra* note 97.

<sup>100</sup> See Henry Weinstein, *Mentally Ill Killer Gains Clemency*, L.A. TIMES, Feb. 26, 2002, at 18.

<sup>101</sup> See David Firestone, *Georgia Will Not Execute Mentally Ill Killer*, Feb. 26, 2002, at A18.

<sup>102</sup> Weinstein, *supra* note 100.

<sup>103</sup> Sue Anne Pressley, *Georgia Inmates Death Sentence Commuted*, WASH. POST, Feb. 26, 2002, at A2.



as part of his direct appeal.<sup>104</sup> The time between the conclusion of direct appeals and commutation was nearly thirteen years.<sup>105</sup>

Finally, in 1999, Virginia Governor Jim Gilmore commuted the death sentence of Calvin Swann less than five hours before his scheduled execution because of Swann's mental illness.<sup>106</sup> Swann, who was 44 at the time of the commutation, had been diagnosed as mentally ill at the age of 19.<sup>107</sup> He had been involuntarily committed to psychiatric hospitals sixteen times before he committed the murder that led to his death sentence.<sup>108</sup> When Swann arrived on death row he "was continually screaming and flushing his toilet. He was placed in four point restraints. The next day, he smeared feces all over his cell."<sup>109</sup> Not surprisingly, Swann's mental illness figured prominently in his direct appeals.<sup>110</sup> Although all of the information necessary to commute Swann's death sentence was available at the conclusion of his direct appeals in 1994,<sup>111</sup> the clemency grant did not come until nearly five years later.

### 3. Questionable Evidence and Procedures

In four cases, governors commuted death sentences because of troubling procedural problems at trial or police tactics during the initial investigation. These last-minute commutations followed decades of unnecessary litigation.

In 2010, Governor Ted Strickland of Ohio commuted the death sentence of Kevin Keith who had been on death row for over sixteen years.<sup>112</sup> Governor Strickland's decision appeared to turn on a defective lineup procedure used by the police and a troubling

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<sup>104</sup> See *Williams v. State*, 368 S.E.2d 742, 750 (Ga. 1988).

<sup>105</sup> *Williams* direct appeals concluded in July 1989. See *Williams v. State*, 368 S.E.2d 742 *cert. denied*, 492 U.S. 925 (1989). His sentence was commuted in February 2002. See *supra* note 100.

<sup>106</sup> Donald P. Baker, *Gilmore Stops Execution For First Time; Mental Illness Of Inmate Cited*, WASH. POST, May 13, 1999, at A1.

<sup>107</sup> See Frank Green, *Swann's Execution Set Wednesday, Mental Health Cited in Clemency Bid*, RICH. TIMES-DISPATCH, May 9, 1999, at C4.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> See *Swann v. Commonwealth*, 441 S.E.2d 195 (Va. 1994).

<sup>111</sup> See *Swann v. Virginia*, 513 U.S. 889 (1994).

<sup>112</sup> See Alan Johnson, *Governor Commutes Death Sentence To Life*, COLUMBUS DISPATCH, Sep. 3, 2010, at 1A.

identification by a victim of the crime.<sup>113</sup> Keith raised this information in a pre-trial motion,<sup>114</sup> and it was one of his primary appellate issues on direct review.<sup>115</sup> Keith's direct appeals ended in 1998, but the commutation of his sentence did not happen until a dozen years later.<sup>116</sup>

In 2008, Oklahoma Governor Brad Henry commuted the death sentence of Kevin Young based on a four-to-one recommendation of the Pardon Board.<sup>117</sup> It appears from news analysis of the clemency hearing that the Governor and pardon board based their decisions in large part on the fact that the jurors in the case "did not want to give Young the death sentence but did not receive clarification when they asked whether Young would be eligible for parole if he was sentenced to life without parole."<sup>118</sup> The jurors' statements had never been presented to a court and took the Attorney General by surprise.<sup>119</sup> It appears Young's lawyers simply rounded up the jurors' statements in order to make a convincing case for mercy at the clemency hearing. Defense lawyers could have used the same approach if there had been

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<sup>113</sup> *Case For Clemency*, AKRON BEACON J., Aug. 23, 2010, at A5 (mistakenly claiming that this information was new).

<sup>114</sup> Donna Glenn, *Selection Of Suspect Questioned*, COLUMBUS DISPATCH, May 13, 1994, at 4C ("Attorney James Banks of Columbus had questioned procedures used by police to identify the gunman . . . Banks claimed Bucyrus police used improper methods in providing the names of four possible suspects to [Richard] Warren, who police said identified Keith as the gunman."); Donna Glenn, *Lawyer: Defendant Victim Of Mistaken Identity*, COLUMBUS DISPATCH, May 20, 1994, at 2B ("Banks told jurors police arrested the wrong man based on witnesses' descriptions of an unknown, large, black man they saw after the shootings at the Bucyrus Estates apartments Feb. 13.").

<sup>115</sup> *See State v. Keith*, No. 3-94-14, 1996 WL 156710, at \*10-12, (Ohio App. 3 Dist. Apr. 5, 1996).

<sup>116</sup> *See State v. Keith*, 684 N.E.2d 47, *cert. denied* 523 U.S. 1063 (1998).

<sup>117</sup> Michael McNutt & Julie Bisbee, *Governor Spares Second Killer's Life*, DAILY OKLAHOMAN, July 25, 2008; Julie Bisbee, *Board Asks Henry to Stop Inmate's Execution*, NEWSOK, July 9, 2008, available at <http://newsok.com/board-asks-henry-to-stop-inmates-execution/article/3267727>.

<sup>118</sup> *See McNutt & Bisbee, supra* note 117 (noting that the clemency appeal "hinged on jury"); Julie Bisbee, *Clemency Bid Brings 30-Day Execution Stay: Governor Will Review Sentence Given in 1996 Slaying at a Steak House*, NEWSOK, July 16, 2008, available at <http://newsok.com/clemency-bid-brings-30-day-execution-staybrspan-classl2governor-will-review-sentence-given-in-1996-slaying-at-a-steak-house.span/article/3270720/> (discussing juror statements during clemency hearing).

<sup>119</sup> *See Bisbee, supra* note 117 (quoting the Attorney General as stating that "the [clemency] hearing was the first time that information was presented to the state").

a clemency hearing at the conclusion of direct appeals seven years earlier.<sup>120</sup>

Over a decade after Kenneth Foster was sentenced to die, Governor Rick Perry of Texas commuted his sentence because Foster (who was the getaway driver) had been jointly tried along with the triggerman.<sup>121</sup> Governor Perry thought this procedure, which obviously was known from the very beginning of the case, was unfair and that “the Legislature should examine” it.<sup>122</sup> Following the conclusion of direct appeals, Foster filed three separate state habeas corpus petitions and multiple federal habeas corpus petitions, all of which were decided while Perry was governor.<sup>123</sup> None of that litigation would have been necessary if Governor Perry or his predecessor had considered clemency earlier in the process.

Last but not least, Governor Jim Hunt of North Carolina commuted the death sentence of Marcus Carter in 2000 because of the lack of counsel at trial.<sup>124</sup> Carter’s first murder trial resulted in a hung jury.<sup>125</sup> In the four months before the retrial, Carter’s attorneys refused to speak with him and Carter requested new counsel.<sup>126</sup> At the second trial, the judge gave Carter the choice to either rely on the same lawyers or appear pro se.<sup>127</sup> Carter chose to represent himself and was sentenced to death.<sup>128</sup> This course of events was well known from the very beginning of Carter’s re-trial, and could have been the basis of a clemency grant at any time. Nevertheless, Governor Hunt waited until the day of execution to commute Carter’s sentence,<sup>129</sup> almost eight

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<sup>120</sup> See *Young v. State*, 12 P.3d 20 (Okla. Crim. App.), *cert. denied* 532 U.S. 1055 (2001).

<sup>121</sup> See Emily Ramshaw, *Perry Spares Death Row Inmate: Sentence Commuted To Life For Driver In '96 Murder*, DALLAS MORNING NEWS, Aug. 31, 2007, at 1A.

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

<sup>123</sup> See *Foster v. Quarterman*, 466 F.3d 359 (5<sup>th</sup> Cir. 2006); *Foster v. Dretke*, No. 05-70016, 2006 WL 616980 (5<sup>th</sup> Cir. Mar. 13, 2006); *Ex parte Foster*, No. WR-50823-02, 2007 WL 22571750 (Tex. Crim. App. Aug. 7, 2007); *Ex parte Foster*, No. WR-50,823-01 (Tex.Crim.App. March 6, 2002)

<sup>124</sup> Liz Chandler, *Gov. Hunt Intervenes To Call Off Execution*, CHARLOTTE OBSERVER, Nov. 22, 2000, at 1A.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

years after trial and almost five years after the conclusion of direct review.<sup>130</sup>

#### 4. Different Treatment of Co-Defendants

Inmates often seek clemency on the ground that a co-defendant received a lighter sentence.<sup>131</sup> In theory, a request for mercy on this ground could be resolved early in the criminal justice process. When co-defendants are involved, it is usually clear by the end of trial, and even before trial if there was a plea bargain, whether one defendant is being treated much more harshly than another. However, governors and pardon boards sometimes wait, very inefficiently, until the eve of execution to commute death sentences based on differential treatment of co-defendants.

One day before Wendell Flowers was to be executed, North Carolina Governor Jim Hunt commuted his death sentence to life without parole.<sup>132</sup> While incarcerated for another crime, Flowers confessed to fatally stabbing a prisoner.<sup>133</sup> Because three other perpetrators involved in the killing were not sentenced to death, Governor Hunt concluded it would be unfair to execute Flowers.<sup>134</sup> The fate of Flowers' co-defendants was clear from the beginning of the case and thus Governor Hunt could have made his clemency decision years earlier instead of waiting until the day before the execution.<sup>135</sup>

The same situation occurred in the Florida case of Michael Salvatore. Salvatore and two co-defendants stood trial for the murder of a businessman, but only Salvatore was sentenced to death.<sup>136</sup> The different sentencing result for Salvatore was obviously known at the

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<sup>130</sup> See *State v. Carter*, 451 S.E.2d 157, 161 (N.C. 1994), *cert. denied* 515 U.S. 1107 (1995).

<sup>131</sup> Scholars sometimes refer to this as sentencing equity. See Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States From Gregg to Atkins*, 33 N.M. L. REV. 349, 358 (2003).

<sup>132</sup> Foon Rhee, *Governor Blocks Execution Flowers To Serve Life; Action A First For Hunt*, CHARLOTTE OBSERVER, Dec. 16, 1999, at 1A.

<sup>133</sup> See *id.*

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* Flowers' execution date (and commutation) came only about a year after the conclusion of direct review. See *State v. Flowers* 489 S.E.2d 391, *cert. denied* 522 U.S. 1135 (1998).

<sup>136</sup> See *Graham: Clemency Needed in Miami Case*, PALM BEACH POST, May 6, 1981, at 16A.

conclusion of trial and Salvatore raised it in his direct appeal.<sup>137</sup> The governor commuted Salvatore's death sentence about eighteen months after the conclusion of direct review.<sup>138</sup>

In another Florida case, Richard Henry Gibson's death sentence was commuted because "one of his accomplices was sentenced to life and two others were never prosecuted."<sup>139</sup> Prosecutors had argued in one trial that the co-defendant had been the shooter, while arguing in Gibson's case that Gibson was the shooter.<sup>140</sup> Gibson was sentenced to death in 1975 and his direct appeals were final in 1978,<sup>141</sup> but he was not granted clemency until 1980.

Finally, in the first commutation after the Supreme Court reinstated capital punishment, the Georgia Board of Pardons and Paroles commuted the death sentence of Charles Harris Hill because he was sentenced more harshly than his co-defendants. Hill was one of three people involved in a murder during a failed burglary.<sup>142</sup> The first co-defendant, the actual shooter, plead guilty to murder and received a life sentence; the second co-defendant agreed to testify against Hill and was rewarded with a plea of voluntary manslaughter and a ten-year sentence.<sup>143</sup> The pardon board moved relatively quickly and commuted Hill's sentence exactly one year after the Georgia Supreme Court rejected his direct appeal.<sup>144</sup>

## **5. Support for Clemency from Jurors and the Victim's Family**

Three death sentences have been commuted, at least in part, because the jurors who imposed the death sentence later indicated that they favored a lighter sentence. Relatedly, at least one commutation was based on the fact that the victim's family opposed the execution. The statements from jurors and victims often became public only at

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<sup>137</sup> See *Salvatore v. State*, 366 So.2d 745, 751 (Fla. 1978) ("[D]efendant says that the death penalty is unconstitutionally imposed when a co-defendant on similar facts is not sentenced to death.").

<sup>138</sup> Compare *Graham: Clemency Needed in Miami Case*, *supra* note 136, with *Salvatore v. Florida*, 444 U.S. 885 (1979).

<sup>139</sup> *Radelet & Zsembik*, *supra* note 75, at 301.

<sup>140</sup> See *VON DREHLE*, *supra* note 75, at 190.

<sup>141</sup> See *Gibson v. State*, 351 So.2d 948, *cert. denied* 435 U.S. 1004 (1978).

<sup>142</sup> See *Radelet & Zsembik*, *supra* note 75, at 309-310.

<sup>143</sup> See *id.*

<sup>144</sup> See *Hill v. State*, 229 S.E.2d 737 (Ga. 1976).

the end of the case when the clemency decision was made. But there is no reason to think the jurors or family members formed their opinions because of years of post-conviction litigation. Had the clemency decision been made years earlier, the jurors and family members likely would have made the same statements.

As discussed above,<sup>145</sup> Oklahoma Governor Brad Henry commuted the death sentence of Kevin Young because the jurors in the case “did not want to give Young the death sentence but did not receive clarification when they asked whether Young would be eligible for parole if he was sentenced to life without parole.”<sup>146</sup> The jurors’ made these statements for the first time at the clemency stage.<sup>147</sup> Because the jurors’ statement stemmed from a faulty trial procedure, rather than a change of heart after trial, there is every reason to think they would have made the same statements if the clemency decision had been made before the habeas corpus process began. Young remained on death row for seven years following the end of his direct appeals.<sup>148</sup>

Statements from jurors played a smaller, albeit notable, role in the commutation of Arthur Baird’s death sentence. As discussed above,<sup>149</sup> Governor Daniels commuted Baird’s sentence primarily because of his mental illness, although he also relied on statements from jurors that they would have imposed life without parole if that option had been available at trial.<sup>150</sup> Although Indiana law was changed to add a life without parole option in 1993, the same year that Baird’s direct appeals ended,<sup>151</sup> Governor Daniels did not commute the sentence until days before Baird’s execution in 2005.<sup>152</sup> There is no reason to think the jurors would not have made their statements earlier if clemency had been considered years earlier.

A nearly identical turn of events played out in the commutation of Willie James Hall. While the Georgia State Parole Board did not state its reasons for commuting Hall’s sentence, six of the jurors from

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<sup>145</sup> See *supra* notes 117-120 and accompanying text.

<sup>146</sup> See *supra* notes 118; McNutt & Bisbee, *supra* note 117 (noting that the clemency appeal “hinged on jury”); Bisbee, *supra* note 117 (discussing juror statements during clemency hearing).

<sup>147</sup> See Bisbee, *supra* note 117.

<sup>148</sup> See *supra* note 120.

<sup>149</sup> See *supra* notes 93-96 and accompanying text.

<sup>150</sup> See *supra* notes 95 and accompanying text.

<sup>151</sup> See *Baird v. Indiana*, 510 U.S. 893 (1993).

<sup>152</sup> See *supra* note 96.

Hall's trial offered sworn statements to the Board that they would have given Hall life without parole if that were an option at his trial.<sup>153</sup> The Parole Board did not commute Hall's sentence until 2004, thirteen years after the end of direct review and one day before his scheduled execution.<sup>154</sup>

Relatedly, the views of the victim's family have also factored into commutation decisions.<sup>155</sup> At the clemency hearing for William Neal Moore, the victim's niece noted that "when she met Billy Moore on the night he was arrested, "he told her he was sorry and asked for her forgiveness."<sup>156</sup> The Chairman of the Georgia Board of Pardons and Paroles explained that "[t]o say the least, the board was very much impressed by the fact that we did have family of the victim who . . . also asked for clemency. That is something that we do not often see."<sup>157</sup> The pardon board also based its decision on the fact that Moore was sentenced to death without a jury trial before the U.S. Supreme Court had ruled on the constitutionality of Georgia's death penalty statute.<sup>158</sup> Both pieces of information – the lack of jury trial and the family's support for commutation – were available at the end of Moore's direct appeals nearly fourteen years before commutation.<sup>159</sup>

## **6. Ineffective Assistance of Counsel**

One of the best arguments against conducting a clemency determination after direct appeals is that we may not yet know whether the defendant received ineffective assistance of counsel. In state and

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<sup>153</sup> See Carlos Campos & Bill Rankin, *Murderer's Sentence Commuted*, ATLANTA J. & CONST., Jan. 27, 2004, at B1 ("On Monday, six of the jurors offered sworn statements to the parole board that they would have given Hall life without parole if that sentence had been an option at his trial."). The board members may also have relied in part upon the District Attorney's statement that he did not oppose life without parole, Hall's good behavior in prison, or his lack of criminal record prior to the crime. *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> In the case of Jeffrey Hill (described more fully below in Part II.A.11), the family's statements played a small role in the Ohio governor's decision to grant clemency. *See infra* notes 204-208 and accompanying text.

<sup>156</sup> Holly Morris, *Board Spares Murderer; Term Commuted To Life In Prison*, ATLANTA J. & CONST., Aug. 22, 1990, at A1.

<sup>157</sup> *See id.*

<sup>158</sup> *See id.*

<sup>159</sup> *See Moore v. State*, 213 S.E.2d 829 (Ga. 1975), *cert. denied* 428 U.S. 910 (1976).

federal habeas proceedings, courts can conduct hearings to document evidence about the quality of the lawyering that would not necessarily be clear from the trial record.<sup>160</sup> For this reason, many states do not even allow ineffective assistance of counsel claims on direct review.<sup>161</sup> Occasionally, however, there are capital cases in which the defense lawyer's incompetence is known by the end of the direct appeals process.

In 2012, Governor John Kasich commuted the death sentence of Ronald Post.<sup>162</sup> In voting five to three to recommend clemency, the Ohio Board of Pardons focused on "omissions, missed opportunities and questionable decisions made by his previous attorneys and [recommended clemency] because that legal representation didn't meet expectations for a death penalty case."<sup>163</sup> The attorneys' poor performance was well known at the time of trial. For instance, in 1987, the local newspaper ran a front-page story explaining how Post's attorneys convinced him to plead no contest to the murder charges and, allegedly, promised him that by doing so he would not receive the death penalty.<sup>164</sup> The public defender's office focused on the no contest plea and other alleged ineffectiveness in the direct appeal of Post's death sentence.<sup>165</sup> The Ohio Supreme Court considered the ineffectiveness claim and rejected it in a written opinion.<sup>166</sup> While the federal habeas court considered the issue in more detail twenty-three years later,<sup>167</sup> the ineffectiveness issue was well known in 1987 and the governor could have relied on it then (just as in 2012) as the basis for commutation.

## 7. Racial Discrimination

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<sup>160</sup> See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) (arguing for earlier consideration of ineffective assistance claims on direct review).

<sup>161</sup> See Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1097 & n.165 (2009).

<sup>162</sup> See *Correcting Authority: The Governor's Appropriate Choice In The Ronald Post Case*, AKRON BEACON J., Dec. 19, 2012, at A6.

<sup>163</sup> See Ronald Post, *Condemned Obese Ohio Killer Granted Clemency*, CBS NEWS, Dec. 17, 2012.

<sup>164</sup> See David Knox & Scott Stephens, *Ronald Post's Plea Puts Him On Death Row—C-T Probe Raises Question: Was It Legal?*, LORAIN COUNTY CHRON.-TELEGRAM, Jan. 14, 1987, at A1.

<sup>165</sup> See *id.*

<sup>166</sup> See *State v. Post*, 513 N.E.2d 754, 762-763 (Ohio 1987).

<sup>167</sup> See *Post v. Bradshaw*, 621 F.3d 406 (6<sup>th</sup> Cir. 2010).



Although there is a broad literature on racial discrimination and the death penalty,<sup>168</sup> race (perhaps not surprisingly) has played a comparatively minor role in successful commutations during the modern era. One exception is the 2001 commutation of Robert Bacon, Jr. in North Carolina. In 2001, Governor Easley commuted Bacon's death sentence without giving a specific explanation. It appears, however, that he "agreed that Bacon received the death penalty, rather than life in prison, largely because of his race."<sup>169</sup> Bacon and his lover, Bonnie Clark, killed Clark's husband in order to acquire life insurance proceeds.<sup>170</sup> Clark, who was white, was sentenced to life imprisonment; Bacon, who was black, was sentenced to death.<sup>171</sup> Bacon's commutation came over six-and-a-half years after the conclusion of direct review.<sup>172</sup>

## 8. Failure to Preserve Evidence

Although DNA exonerations have received enormous attention in recent years, the government's failure to preserve evidence has also stopped executions. In two cases, governors commuted death sentences because potentially exculpatory evidence had been destroyed or lost.

In 2005, Virginia Governor Mark Warner commuted the death sentence of Robin Lovitt because the murder weapon had been destroyed prior to the start of federal habeas corpus proceedings.<sup>173</sup>

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<sup>168</sup> For an overview, see David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 501 (James R. Acker et al. eds., 2d ed. 2003).

<sup>169</sup> Anna Griffin, *Easley Spares Man On N.C. Death Row; Robert Bacon Gets Life For Murder In Case With Racial Overtones*, CHARLOTTE OBSERVER, Oct. 3, 2001, at 1A.

<sup>170</sup> See *id.*

<sup>171</sup> See *id.* One additional fact could move the Bacon case into the uncertainty category. A juror came forward shortly before the execution and said that other jurors had made racist comments during deliberations. I have coded the case as supporting the theory that threshold clemency decisions can be made at the conclusion of direct appeals because the different result for a black and white defendant in the same case appears to be the main reason for Bacon's commutation.

<sup>172</sup> See *State v. Bacon*, 446 S.E.2d 542, cert. denied 513 U.S. 1159 (1995).

<sup>173</sup> See David Stout, *Clemency Stops an Execution in Virginia*, N.Y. TIMES, Nov. 30, 2005.

The destruction of the evidence was litigated throughout the federal court system and Governor Warner granted clemency the day before the scheduled execution,<sup>174</sup> more than four years after the conclusion of direct review.<sup>175</sup>

In a very similar case, Governor Mike Easley commuted the death sentence of Charlie Mason Alston, Jr. in 2002. Although the governor did not specify the basis for his decision, Alston's clemency petition "was based largely on missing scrapings from beneath" the victim's fingernails.<sup>176</sup> The sheriff's office lost the scrapings, which could have contained DNA from the perpetrator, "sometime between Alston's 1992 trial and a 1996 appeal."<sup>177</sup> The governor made his clemency decision years later and just nine hours before the scheduled execution.<sup>178</sup> Had the governor considered clemency at the end of direct review,<sup>179</sup> it would have saved nearly six years of litigation.

In both of these cases, the loss of evidence was well known at the conclusion of direct review. Nevertheless, the governors waited until the eve of execution to commute the death sentences, no doubt hoping that courts would act first.

## 9. Proportionality

Inmates who have been sentenced to death often argue that their sentences are disproportionate to the sentence received by defendants in comparable cases. When the Supreme Court reinstated capital punishment in 1976, it seemed to require that states conduct proportionality review of death sentences on appeal.<sup>180</sup> By 1983, however, the Court backtracked and held that judicial proportionality review was not mandatory.<sup>181</sup> Proportionality claims are still raised in clemency proceedings however. In two cases, governors were swayed by proportionality arguments, although they did not act until the last minute.

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<sup>174</sup> *See id.*

<sup>175</sup> *See Lovitt v. Commonwealth*, 537 S.E.2d 866, *cert. denied* 534 U.S. 815 (2001).

<sup>176</sup> *Griffin*, *supra* note 169.

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

<sup>178</sup> *See id.*

<sup>179</sup> *See Alston v. North Carolina*, 461 S.E.2d 687, *cert. denied* 516 U.S. 1148 (1996).

<sup>180</sup> *See Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

<sup>181</sup> For a helpful analysis, see William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 695-697 (2012).

A few days before leaving office in January 2011, Governor Phil Bredesen commuted the sentence of Edward Jerome Harbison because “when I compare it to others I don't think it rose to the level of a death penalty crime.”<sup>182</sup> Harbison had been sentenced to death in 1983 and his case had wound its way up and down the state and federal courts for almost thirty years.<sup>183</sup> Harbison even managed to have the U.S. Supreme Court decide whether the federal statute governing appointment of counsel for an indigent state defendant allows the attorney to represent the prisoner in subsequent state clemency proceedings.<sup>184</sup> After these decades of litigation, the governor granted clemency based on information that was available directly after Harbison's trial ended. In total, more than twenty-four years passed between the conclusion of direct review and Harbison's commutation.<sup>185</sup>

In 1996, Illinois Governor Jim Edgar commuted the death sentence of Guinevere Garcia for killing her husband. The commutation came less than four years after Garcia's trial and before her direct appeals were even final.<sup>186</sup> The speed of the clemency decision was not because Governor Edgar decided to act at the conclusion of the direct appeals process as this article suggests, but because Garcia abandoned her appeals and requested to be put to death.<sup>187</sup> Although some speculated that Governor Edgar granted clemency because Garcia was a woman or because she was sexually abused by her husband,<sup>188</sup> Governor Edgar maintained that he commuted her sentence because of a lack of premeditation and

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<sup>182</sup> *Bredesen Commutes Death Sentence, Pardons 22*, THE TENNESSEAN, Jan. 12, 2011.

<sup>183</sup> For bookends of the state litigation, see *Harbison v. State*, 2012 WL 1956757, (Tenn.Crim.App., May 31, 2012); *State v. Harbison*, 704 S.W.2d 314 (Tenn. 1986).

<sup>184</sup> See *Harbison v. Bell*, 556 U.S. 180 (2009). A majority of the Court agreed with Harbison that such representation is authorized under the statute.

<sup>185</sup> See *Harbison v. Tennessee*, 704 S.W.2d 314, *cert. denied* 476 U.S. 1153 (1986).

<sup>186</sup> The Illinois Supreme Court rejected Garcia's direct appeal on May 30, 1995. See *People v. Garcia*, 651 N.E.2d 100, 109 (Ill. 1995). Garcia did not petition the Supreme Court of the United States for certiorari. Governor Edgar granted clemency in early 1996 after “celebrity Bianca Jagger became aware of Ms. Garcia's case and, over her objection, petitioned Governor Edgar for clemency on her behalf.” Heise, *supra* note 18, at 270.

<sup>187</sup> *Edgar Commutes Sentence; Guinevere Garcia, Killer Of Abusive Husband, To Serve Life Without Parole*, CHI. TRIB., Jan. 16, 1996, at 1.

<sup>188</sup> For a detailed analysis of the case, see Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty, and Commutation*, 11 WIS. WOMEN'S L.J. 283 (1996).

proportionality.<sup>189</sup> Governor Edgar concluded that Garcia's case looked more like a robbery gone wrong, than a premeditated vicious homicide that merited death.<sup>190</sup> Although Governor Edgar did not set out to resolve the clemency question before the conclusion of direct appeals, this case demonstrates that it is possible to do so.

## 10. Religious Conversion

Death-row inmates have famously made religious conversions prior to their executions,<sup>191</sup> although this has rarely moved governors to commute their sentences.<sup>192</sup> In one case, however, a governor granted clemency based on rehabilitation.

At the end of his term, Governor Ted Schwinden followed the recommendation of the Montana Pardons Board and commuted the death sentence of David Cameron Keith.<sup>193</sup> Governor Schwinden visited Keith in prison and concluded that "[h]e certainly manifests a deep sense of remorse . . . He is a very strong Christian."<sup>194</sup> In addition to focusing on Keith's "legitimate religious conversion," the pardon board had also noted that "Keith is partially paralyzed and nearly blind from gunshot wounds . . . and may have shot his victim in reflex to being shot himself."<sup>195</sup> Whether Governor Schwinden relied exclusively on Keith's religious conversion or other factors as well, the case demonstrates that it is possible to make a threshold clemency decision at the conclusion of direct review. Keith's conviction became

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<sup>189</sup> See *Edgar Commutes Sentence*, *supra* note 187.

<sup>190</sup> *Official Statement*, CHI. SUN TIMES, Jan. 17, 1996, at 18 ("Horrible as was her crime, it is an offense comparable to those that judges and jurors have determined over and over again should not be punishable by death.").

<sup>191</sup> The most famous example is probably Karla Faye Tucker. See Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455 (2007).

<sup>192</sup> Commentators, however, have advocated for such commutations. See, e.g., B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115 (2001).

<sup>193</sup> See *Outgoing Governor Extends Clemency to Killer*, DESERET NEWS, Jan. 2, 1989.

<sup>194</sup> *Id.*

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

final in March of 1988 and the commutation came nine months later in December 1988.<sup>196</sup>

## 11. Mixed Rationales

In commuting death sentences, governors sometimes point to multiple reasons for their decision. In two cases, governors offered a panoply of reasons for last-minute commutations, all of which were known at the end of direct review.

In 2012, Governor Jack Markell of Delaware commuted the sentence of Robert Gattis after the pardon board recommended commutation by a vote of 4 to 1.<sup>197</sup> The board was swayed by the fact that only ten of the twelve jurors voted for death,<sup>198</sup> that other offenders were not punished as harshly,<sup>199</sup> and Gattis's horrific childhood.<sup>200</sup> Governor Markell commuted Gattis's sentence three days before the execution.<sup>201</sup> Yet, all of the crucial information was known since his 1990 conviction and sentence<sup>202</sup> and certainly by the time the Supreme Court denied certiorari in 1994.<sup>203</sup> At least eighteen years of litigation, and perhaps more, could have been spared if a Delaware governor considered the case earlier.

A similar mixed-rationale clemency occurred in Ohio three years earlier. In 2009, Governor Ted Strickland commuted the death sentence of Jeffrey Hill, who had been on death row for seventeen

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<sup>196</sup> See *State v. Keith*, 754 P.2d 474 (Montana 1988). Keith never petitioned the U.S. Supreme Court for certiorari.

<sup>197</sup> *Gattis Spared: Markell Commutes Death Sentence To Life In Prison*, WILMINGTON NEWS J., Jan. 18, 2012 ("Markell cited the 'unusual and perhaps historic' recommendation of the Delaware Board of Pardons . . . to offer Gattis mercy").

<sup>198</sup> Delaware is one of only a handful of states that allows non-unanimous jury votes. See Adam M. Gershowitz, *Delaware's Capital Jury Selection: Inadequate Voir Dire and the Problem of Automatic Death-Penalty Jurors*, 2 DEL. L. REV. 235 (1999).

<sup>199</sup> *Board Of Pardons Votes To Spare Convicted Killer*, WILMINGTON NEWS J., Jan. 16, 2012.

<sup>200</sup> See *Gattis Spared*, *supra* note 197.

<sup>201</sup> See *id.*

<sup>202</sup> See, e.g., *Gattis v. State*, 637 A.2d 808, 822 (Del. 1994) ("In evaluating the evidence in mitigation, the trial judge . . . noted that in his childhood the defendant had experienced abuse and been exposed to domestic violence.").

<sup>203</sup> See *Gattis v. Delaware*, 513 U.S. 843 (1994).

years.<sup>204</sup> Governor Strickland agreed with the pardon board, which had offered five reasons for clemency: “the views of the victim's family, the lack of adequate representation by counsel at Mr. Hill's sentencing, the remorse demonstrated by Mr. Hill regarding his actions, the lack of proportionality of the sentence of death in this case when compared with similar murder cases, and the expressed views of two justices of the Ohio Supreme Court which reviewed this case on appeal.”<sup>205</sup> Hill's direct appeals raised the proportionality and ineffective assistance of counsel claims, and the comments of the Ohio Supreme Court justices came as part of the direct appeal.<sup>206</sup> The pardon board noted that Hill expressed remorse from his first interviews with the police following the crime.<sup>207</sup> Finally, although the victim's family members did not speak out against Hill's execution until the clemency proceeding, the pardon board noted that they “were unaware that they could speak out on his behalf at the time of the court proceedings,” which suggests they would have spoken earlier if the clemency hearing had been held following direct appeals.<sup>208</sup>

Finally, in 1980, Governor Bob Graham commuted the death sentence of Darrell Hoy, who had been involved in the brutal rape and murder of a Florida woman.<sup>209</sup> Governor Graham did not explain the reason for the commutation,<sup>210</sup> although media coverage suggests the clemency application focused on the fact that the judge overrode the jury's recommendation for a life sentence and imposed death.<sup>211</sup> Hoy's

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<sup>204</sup> See Gov. Strickland *Issues Statement On Clemency Application Of Jeffrey D. Hill*, US FEDERAL NEWS, June 3, 2009.

<sup>205</sup> *Id.*

<sup>206</sup> State v. Hill, No. C-920497, 1993 WL 538902, at \*7-8 (Ohio App. 1 Dist. Dec. 22, 1993); State v. Hill, 653 N.E.2d 271, 278-80 (Ohio 1995). State v. Hill, 653 N.E.2d 271, 278-80 (Ohio 1995) (Wright, J., dissenting).

<sup>207</sup> See In Re: Jeffrey D. Hill, OSP #A261-876 (Jan. 29, 2009), at 9.

<sup>208</sup> *Id.*

<sup>209</sup> See Virginia Ellis, *2 Death Warrants Signed; Hoy May Get Life*, ST. PETERSBURG TIMES, Jan. 10, 1980, at B1.

<sup>210</sup> See *id.* Governor Graham “made a point of never saying publicly why he chose to commute a man's sentence. . . . Graham worried that if he spelled out his reason for granting mercy, clemency would become just another quasi-judicial proceeding.” VON DREHLE, *supra* note 75, at 190.

<sup>211</sup> See Nancy Kalwary, *Murderer's Life On The Line*, THE EVENING INDEPENDENT, Dec. 12, 1979, at A28. Florida allows judges to override jury recommendations for life sentences. See Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31 (1985).

lawyer also focused on the fact that Hoy was “young, impressionable and of low intelligence.”<sup>212</sup> All of this information was known at the time of trial, and the same clemency decision therefore could have been made more than a year earlier at the conclusion of direct appeals.<sup>213</sup>

#### **B. Cases Where the Same Information Was *Probably* Available at the Conclusion of Direct Review**

In addition to the thirty-five cases set forth in Part I.A, there are an additional six cases in which the reason for the clemency grant was probably available at the end of direct review. In each of these cases, however, there is not enough information to be certain.

In 2010, Governor Ted Strickland commuted the death sentence of Sidney Cornwell because the jury had not been informed that he suffered from Klinefelter’s syndrome, which is associated with developmental difficulties.<sup>214</sup> The diagnosis of Klinefelter’s syndrome only came about as part of post-conviction litigation.<sup>215</sup> However, even though no court mentioned Klinefelter’s syndrome by name in Cornwell’s direct appeals, the courts did consider the symptoms that eventually gave rise to the diagnosis.<sup>216</sup> The key facts (albeit without the technical medical terminology) were thus known by the conclusion of direct appeals, about a decade before the clemency grant.<sup>217</sup>

Also in 2010, Governor Phil Bredesen granted clemency to Gaile Owens who had been on death row since 1986 for the murder of her husband.<sup>218</sup> The governor pointed to the fact that Owens had been abused during her marriage and that she had consistently admitted her

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<sup>212</sup> See *id.*

<sup>213</sup> See *Hoy v. Florida*, 439 U.S. 920 (1978).

<sup>214</sup> See Joe Gorman, *Clemency Stuns Family, Detective*, TRIB. TODAY, Nov. 17, 2010.

<sup>215</sup> See *Cornwell v. Bradshaw*, 559 F.3d 398, 408 (6<sup>th</sup> Cir. 2009)

<sup>216</sup> *State v. Cornwell*, 715 N.E.2d 1144, 1155-56 (Ohio. 1999) (“Psychologist James Eisenberg testified that Cornwell functions in the low average to borderline range of intelligence, with a verbal IQ of 83. Based on various tests that he administered to Cornwell, Eisenberg described Cornwell as a person who is shy and fairly introverted and as one who lacks self-confidence and has low self-esteem”).

<sup>217</sup> See *Cornwell v. Ohio*, 528 U.S. 1172 (2000). Because it is possible that the specific diagnosis of Klinefelter’s Syndrome was the basis for the commutation, I have placed Cornwell’s case in the “likely” rather than “certainly” category.

<sup>218</sup> See Jeff Woods, *Governor’s Statement on Owens Commutation*, NASHVILLE SCENE, July 14, 2010.

guilt in the murder and accepted a conditional guilty plea, which the prosecutor later refused to honor. Additionally, the governor noted that he had reviewed thirty-three other Tennessee cases in which a wife was convicted of first-degree murder for arranging the murder of her husband and noted that each one ended in life imprisonment.<sup>219</sup> Some of this information – such as the revoked guilty plea and many of the thirty-three murder-for-hire cases – was known at the conclusion of direct appeals. However, Owens did not acknowledge that she was abused by her spouse until after direct review ended.<sup>220</sup>

If the governor had been called upon to grant clemency at the conclusion of Owens' direct appeals, it is not clear whether Owens would have offered information about the domestic abuse at that point. However, it is not clear how much emphasis the governor placed on the abuse. In his statement explaining the commutation, Governor Bredesen said only that "there's at least the possibility of her being in an abusive marriage" and followed that with a single sentence about abuse being a factor in the severity of the punishment.<sup>221</sup> By contrast, the governor spent four paragraphs detailing the revoked guilty plea and comparable cases not receiving the death penalty.<sup>222</sup> On balance, given that governors show a propensity to grant clemency for female offenders<sup>223</sup> and that many of the key facts giving rise to Owens' commutation were known from the time of her trial, it is likely (although not certain) that the governor would have had access to the salient information at the conclusion of direct appeals. If so, a clemency determination at that point would have saved more than twenty-two years of post-conviction petitions.<sup>224</sup>

In 1999, Arkansas Governor Mike Huckabee commuted the death sentence of Bobby Ray Fretwell, after a juror appeared before

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<sup>219</sup> See *id.* Governor Bredesen noted that one of the thirty-three had been sentenced to death and commuted by a previous governor.

<sup>220</sup> See Clay Carey, *Influential Nashvillians, Juror Fight Gail Owens' Execution*, THE TENNESSEAN, May 2, 2010.

<sup>221</sup> See Woods, *supra* note 218.

<sup>222</sup> See *id.*

<sup>223</sup> See, e.g., Heise, *supra* note 18, at 277 ("Women are significantly more likely to receive clemency than men, even after controlling for an array of background factors.").

<sup>224</sup> Owens direct appeals ended in 1988. See *State v. Porterfield*, 746 S.W.2d 441, *cert. denied* 486 U.S. 1017 (1988).



the Arkansas Post-Prison Transfer Board to urge clemency.<sup>225</sup> The juror, who was from the same small town where the murder occurred, said he felt pressured to vote for a death sentence because he lived in the town.<sup>226</sup> At trial, the jury had been deadlocked eleven to one and the judge's charge to break the deadlock was a major issue in Fretwell's direct appeal.<sup>227</sup> Governor Huckabee granted clemency based on the holdout juror's plea for mercy.<sup>228</sup> It is impossible to say for certain, but it stands to reason that the juror would have made the same plea for mercy at the end of the direct appeals process that he did on the eve of execution. Fretwell remained on death row for nearly thirteen years after his direct appeals ended.<sup>229</sup>

In 1999, Governor Forrest James commuted the death sentence of Judith Ann Neelley without ever offering an explanation.<sup>230</sup> Although there could be multiple reasons for the commutation, legal scholars believe that it was because Neelley was a woman.<sup>231</sup> The capital punishment system rarely imposes or carries out death sentences against women.<sup>232</sup> Thus, it seems very likely, although not certain, that the rationale for the commutation would have been available a dozen years earlier at the conclusion of direct appeals.<sup>233</sup>

In 1996, Governor George Allen of Virginia commuted the death sentence of Joseph Payne, who had been convicted of killing another prison inmate. The primary witness against Payne, another

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<sup>225</sup> See Steve Barnes, *Death-Row Inmate Spared After Juror Makes Plea*, N.Y. TIMES, Feb. 6, 1999, at A12.

<sup>226</sup> See *id.*

<sup>227</sup> See *Fretwell v. State*, 708 S.W.2d 630, 632-33 (Ark. 1986).

<sup>228</sup> See *Arkansas Governor Listens to Plea, Spare's Killer's Life*, ASSOC. PRESS, Feb. 6, 1999. ("[The juror] said he was the lone holdout against the death penalty.").

<sup>229</sup> See *Fretwell v. State*, 708 S.W.2d 630 (Ark. 1986). Fretwell never petitioned for a writ of certiorari.

<sup>230</sup> See Kathy Kemp & Scottie Vickery, *Women on Death Row: Is the Death Penalty Sexist?* BIRMINGHAM NEWS, Sept. 19, 1999, at 1 (noting that eight months after the commutation the governor "has yet to explain publicly" the commutation).

<sup>231</sup> See *id.*

<sup>232</sup> See John Kraemer, *An Empirical Examination of the Factors Associated With the Commutation of State Death Row Prisoners' Sentences Between 1986 and 2005*, 45 AM. CRIM. L. REV. 1389, 1406 (2008) ("Adjusting for other characteristics, women on death row between 1986 and 2005 had nearly eleven times the odds of clemency."); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 978 (2001); Victor Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (1996).

<sup>233</sup> See *Neelley v. Alabama*, 480 U.S. 926 (1987).

inmate named Robert Francis Smith, recanted his allegations in 1987, only a year after Payne's conviction.<sup>234</sup> Smith, however, later recanted his recantation. Shortly before the execution date, Smith took a polygraph test and the results indicated he was untruthful about parts of his testimony.<sup>235</sup> It was not clear whether Governor Allen granted clemency primarily because of the polygraph test, or whether it was because he found Smith to be generally untrustworthy. Governor Allen vaguely explained that Smith's recanting of his testimony was a factor and that he found Smith "not sufficiently believable, obviously, to allow the death sentence to proceed."<sup>236</sup> It is difficult to say what would have happened if the governor had made a threshold clemency decision at the conclusion of direct appeals, rather than only hours before execution. It is possible the governor would have found Smith to be an untrustworthy witness in 1987,<sup>237</sup> just as he did in 1996. It is also possible that Smith would have sat for a polygraph test in 1987, just as he did in 1996. However, because Smith changed his story so many times, it is difficult to say for certain how the governor would have decided the clemency question at an earlier point.

In 1992, Governor Douglas Wilder of Virginia commuted the death sentence of Herbert Bassette because of innocence questions.<sup>238</sup> Bassette's lawyers focused their clemency petition on the credibility of three trial witnesses and on evidence that implicated another man.<sup>239</sup> The credibility of the trial witnesses was raised in Bassette's 1981 direct appeal to the Virginia Supreme Court.<sup>240</sup> And the other possible perpetrator was actually arrested and charged with the murder before

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<sup>234</sup> See Laura LaFay, *Allen Commutes Death Sentence: Reprieve Comes 3 Hours Before Joseph Payne's Scheduled Death*, VIRGINIA PILOT & LEDGER STAR, Nov. 18, 1996, at A1.

<sup>235</sup> Peter Finn, *Polygraph Test Cited In Clemency; Witness's Mixed Results Were Known To Allen*, WASHINGTONPOST.COM, Nov. 9, 1996.

<sup>236</sup> *Id.*

<sup>237</sup> The Supreme Court denied certiorari in Payne's case in 1987. *See Payne v. Virginia*, 484 U.S. 933 (1987).

<sup>238</sup> Peter Hardin & Jim Mason, *Wilder Spares Bassette From Electric Chair*, RICHMOND TIMES DISPATCH, Jan. 23, 1992, at 1.

<sup>239</sup> *See id.*

<sup>240</sup> *See Bassette v. Com.*, 284 S.E.2d 844, 850 (Va. 1981) ("The Commonwealth presented three key witnesses . . . Each had been convicted of crimes. Bassett sought in a pretrial discovery motion before his first trial to obtain records of those convictions. He argued that the trial court's refusal prevented him from effectively impeaching the witnesses' testimony and contributed to his erroneous conviction.").

Bassette, but the police chose to focus on Bassette instead.<sup>241</sup> Thus, it seems that all of the key information that formed the basis of the clemency decision was actually known more than a decade before Governor Wilder granted clemency. However, there is a small possibility that the governor could have been influenced by new evidence. At Bassette's trial, a woman testified that her boyfriend had confessed to the crime, but that he tended to be a braggart and that she didn't believe him.<sup>242</sup> Shortly before Bassette's execution, the woman changed her story and told defense attorneys that she believed her boyfriend had been telling the truth.<sup>243</sup> While this piece of evidence was new, it does not appear that it was the reason for clemency.<sup>244</sup> Rather, the governor seemed to focus on the credibility of the witnesses who implicated Bassette at trial. Nevertheless, it is impossible to say for certain whether the recanted testimony played any role in the clemency decision.

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In these six cases, it is not possible to say for certain that a governor could have used the same information to make the same decision at the conclusion of direct appeals. However, there is enough information to make an educated guess that the outcome probably would have been the same.

### **C. Insufficient Information in Some Cases To Assess Whether Clemency Could Have Been Granted Earlier**

In eight cases, it is not possible to assess whether a governor or pardon board could have relied on the same information to commute a sentence at the conclusion of direct review. These cases can be subdivided into two categories: (1) the governor or pardon board did not state a reason for the commutation; and (2) the governor relied on multiple reasons for the commutation, only some of which were clear at the end of direct review.

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<sup>241</sup> See Arthur Hodges, *Murder Case Evidence Questioned*, RICHMOND TIMES-DISPATCH, Dec. 15, 1991, at B1.

<sup>242</sup> See Jim Mason, *Inmate's Lawyers Abandon Court Fight, Appeal for Clemency*, RICHMOND TIMES-DISPATCH, Jan. 22, 1992, at 15.

<sup>243</sup> See *id.*

<sup>244</sup> See Hardin & Mason, *supra* note 238.

In four very recent cases, it is impossible to discern the reason for the commutation because the governor or pardon board offered nothing or very little in the way of explanation. In 2012, the Georgia State Board of Pardons and Paroles offered no reason for ending Daniel Greene's twenty-one year stay on death row.<sup>245</sup> Four years earlier, the Georgia board commuted the death sentence of Samuel David Crowe less than three hours before execution, but "it did not give a reason for its decision."<sup>246</sup> In 2011, Missouri Governor Jay Nixon commuted the death sentence of Richard Clay in Missouri "with almost no explanation" other than that he based his decision on a "number of factors."<sup>247</sup> Finally, in 2010, Governor Brad Henry followed a divided recommendation of the Oklahoma Board of Pardon and Parole in 2010 and commuted the death sentence of Richard Tandy Smith.<sup>248</sup> Governor Henry's explanation for the commutation was vague, stating only that "after reviewing all of the evidence and hearing from both prosecutors and defense attorneys, I decided the Pardon and Parole Board made a proper recommendation to provide clemency and commute the death sentence."<sup>249</sup>

In four other cases, it is not possible to say if clemency could have been granted at the end of direct appeals because governors relied on multiple rationales (some of which were not available at the end of direct review) for the commutations. Two recent cases from Ohio, as well as clemencies in Missouri and Georgia, fall into this category.

In 2010, Governor Ted Strickland commuted Richard Nields' death sentence to life imprisonment because: (A) there was a faulty conclusion by the medical examiner that evidence showed premeditation, and (B) appellate judges had repeatedly expressed concern about whether the facts of the case were sufficiently heinous

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<sup>245</sup> See Jim Mustian, *Update: Paroles Board Grants Clemency To Condemned Taylor County Prisoner*, COLUMBUS LEDGER-ENQUIRER, Apr. 20, 2012

<sup>246</sup> *Georgia Man's Death Sentence Changed to Life in Prison*, CNN.COM, May 22, 2008.

<sup>247</sup> Phil O'Connor, *Nixon Discusses Commuting Death Sentence*, ST. LOUIS POST-DISPATCH, Jan. 14, 2011.

<sup>248</sup> See Michael McNutt, *Oklahoma Gov. Brad Henry Approves Clemency Recommendation*, DAILY OKLAHOMAN, May 20, 2010.

<sup>249</sup> *Id.*

to merit death.<sup>250</sup> The proportionality concerns were apparent during the direct appeals process,<sup>251</sup> although the problems with the medical examiner's testimony were not clear until later.

Two years earlier, Governor Strickland commuted the death sentence of John Spirko, who had been on death row for nearly twenty-five years. There had long been questions about whether Spirko was guilty of the crime, and he had raised innocence questions in his direct appeals.<sup>252</sup> After seven reprieves by the Ohio Pardon Board so that DNA testing could be conducted, the DNA test was conducted shortly before the scheduled execution and the results came back inconclusive (with the DNA neither inculcating nor exculpating Spirko).<sup>253</sup> While questions about Spirko's innocence had circulated since the time of his conviction, it is not clear what role the last-minute, inconclusive DNA test played in the clemency grant.

In 1993, Missouri Governor Mel Carnahan commuted the death sentence of Bobby Lee Shaw, who had been on death row for almost fourteen years. While Shaw was serving a life sentence for first-degree murder, he murdered a prison guard.<sup>254</sup> At trial, a psychiatrist testified to Shaw's low IQ but concluded he was only borderline mentally retarded and did not suffer from a mental disease or defect.<sup>255</sup> Years later, however, the Missouri Capital Punishment Resource Center unearthed new evidence of Shaw's mental health issues and convinced the psychiatrist who testified at trial to recant the

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<sup>250</sup> Alan Johnson, *Inmate Moved Off Death Row*, COLUMBUS DISPATCH, June 5, 2010, at 1B; *Board Votes For Mercy For Killer*, CINCINNATI ENQUIRER, May 19, 2010.

<sup>251</sup> *See State v. Nields*, 752 N.E.2d 859, 899 (Ohio 2001) (Pfeifer, J., dissenting) ("I do not believe that Nields's is the type of crime that the General Assembly did contemplate or should have contemplated as a death penalty offense.").

<sup>252</sup> *See State v. Spirko*, No. 15-84-22, 1989 WL 17734 (Ohio App. 3 Dist. Mar. 6, 1989).

<sup>253</sup> *See* Alan Johnson, *Strickland Commutes Spirko's Death Sentence to Life Without Parole*, THE COLUMBUS DISPATCH, Jan. 10, 2008. Governor Strickland commuted Spirko's death sentence because "the lack of physical evidence linking him to the murder, as well as the slim residual doubt about his responsibility for the murder that arises from careful scrutiny of the case record and revelations about the case over the past 20 years, makes the imposition of the death penalty inappropriate in this case." *Id.*

<sup>254</sup> *See State v. Shaw*, 636 S.W.2d 667, 669 & n.1 (Mo. 1982).

<sup>255</sup> *See id.* at 670.

trial testimony.<sup>256</sup> A few months before the execution, lawyers presented additional expert testimony in a competency hearing.<sup>257</sup> One week before Shaw's execution, Governor Carnahan commuted his sentence because of his mental health problems.<sup>258</sup> There was evidence of Shaw's mental health problems at trial. And it is possible that lawyers would have presented the new psychiatric evidence if a clemency hearing was held at the end of direct appeals. However, it is not possible to say for certain whether the governor would have had all the same information at that point.

Finally, it is not possible to say whether the commutations of ex-marine Harold Williams could have been made earlier. A spokesman for the Georgia Board of Pardons and Paroles said that "there was ample evidence the co-defendant . . . was the ringleader in the murder," that the co-defendant served only five years, and that the co-defendant signed an affidavit taking responsibility for the murder while he was in prison.<sup>259</sup> Williams raised his limited role in the murder in his direct appeal,<sup>260</sup> however it is not clear when the other factors came to light. Because the pardon board did not explain which factors were most important and when the information became available, it is impossible to say for certain whether the necessary information was known at the conclusion of direct appeals.

#### **D. Cases in Which Crucial Information Came After Direct Review**

In sixteen cases, commutations were based on information that came to light only after the post-conviction process had begun. In some of these cases, governors or pardon boards still could have granted clemency years earlier than they actually did, but it would not have been possible to reach the same conclusion at the end of direct review.

##### **1. Commutations Based on Recent Legal Developments**

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<sup>256</sup> See Edward Walsh & Sue Anne Pressley, *Time Running Out for 2 Residents of Death Row*, WASH. POST, Mar. 13, 2011, at A4.

<sup>257</sup> See *id.*

<sup>258</sup> See Virginia Young, *Carnahan Commutes Killer's Death Sentence; Inmate With Mental Problems Gets Life Term*, ST. LOUIS POST-DISPATCH, June 3, 1993, at 1A.

<sup>259</sup> Jingle Davis, *Ex-Marine's Death Sentence For Murder Is Commuted*, ATLANTA J. & CONST., Mar. 23, 1991, at B5.

<sup>260</sup> See *Williams v. State*, 300 S.E.2d 301, 305 (Ga. 1983).

In three cases, the U.S. Supreme Court's decision in *Atkins v. Virginia*<sup>261</sup> -- which outlawed the execution of the mentally retarded -- led to commutations. In 2002, three psychologists evaluated Thomas Nevins and concluded he was mentally retarded.<sup>262</sup> The Nevada Pardon Board then unanimously commuted Nevins' sentence.<sup>263</sup> The following year, Governor Mike Foster of Louisiana commuted the death sentence of Herbert Welcome.<sup>264</sup> Welcome had the intellectual abilities of an eight year old and had been on death row for over twenty years.<sup>265</sup> The *Atkins* decision also indirectly led to the commutation of Darnell Williams in Indiana.<sup>266</sup> In 2003, one year after *Atkins*, a state judge ruled that Williams' co-defendant was mentally retarded and could not be executed.<sup>267</sup> The following year, Governor Joe Kernan commuted Williams' sentence because he believed Williams was less culpable than the co-defendant.<sup>268</sup>

In two other cases, different legal developments created a basis for clemency that did not exist before the conclusion of direct review. Six hours before Freddie Davis was to be executed in Georgia, the Board of Pardons and Paroles stayed (and later commuted) his death sentence.<sup>269</sup> The Board pointed to "questions over Davis' role in the killing, a new trial granted an alleged accomplice and the accomplice's recantation of incriminating testimony."<sup>270</sup> Because the accomplice's death sentence was not reversed until 1988,<sup>271</sup> well after the conclusion of Davis's direct appeals, the same clemency determination could not have been made earlier. In an Oklahoma case, Governor Brad Henry commuted the death sentence of Osbaldo Torres, in large part because of international outrage that Osbaldo, who was a Mexican

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<sup>261</sup> 536 U.S. 304 (2002).

<sup>262</sup> See Ed Vogel, *Board Allows Killer To Live*, LAS VEGAS REV.-J., Nov. 21, 2002, at 1A.

<sup>263</sup> See *id.*

<sup>264</sup> See Gwen Filosa, *Mentally Disabled Inmate Spared*, NEW ORLEANS TIMES-PICAYUNE, May 10, 2003, at 4.

<sup>265</sup> See *id.*

<sup>266</sup> See *Governor Spares Life of Inmate: Convicted Killer of Gary Couple Was To Be Executed Next Week*, THE INDIANAPOLIS STAR, July 3, 2004, at A1.

<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

<sup>269</sup> See *Davis v. State*, 252 S.E.2d 442 (Ga. 1979 (direct appeal)); *Davis v. Kemp*, 829 F.2d 1522 (11<sup>th</sup> Cir. 1987) (habeas corpus review).

<sup>270</sup> *Execution Halted in Georgia*, ASSOC. PRESS, June 16, 1988.

<sup>271</sup> See *Spraggins v. State*, 364 S.E.2d 861 (Ga. 1988).

citizen, was not informed of his right to contact the Mexican Consulate following his arrest.<sup>272</sup> The Consulate issue arose because, only weeks earlier, a decision by the International Court of Justice held that the United States had violated the Vienna Convention in dozens of cases.<sup>273</sup>

## 2. DNA and Other New Evidence

Although new evidence of innocence may seem like the quintessential reason for clemency, in only five cases did governors commute death sentences because of new evidence that came to light after the conclusion of direct review.

In 2003, Governor Bob Taft of Ohio relied in part on new DNA evidence to commute the death sentence of Jerome Campbell.<sup>274</sup> Following enactment of a DNA testing law in 2001,<sup>275</sup> the defense was able to show that blood on Campbell's shoes at the time of the murder was his own, not the victim's.<sup>276</sup> When the Ohio Supreme Court denied Campbell a new trial based on this evidence, Governor Taft commuted the sentence to life without parole.<sup>277</sup>

Governor Phil Batt of Idaho commuted the death sentence of Donald Paradis in 1996 because there was "some element of doubt" surrounding Paradis' guilt.<sup>278</sup> While Governor Batt did not specify exactly why he was granting clemency, a spokesman for the Idaho Commission on Pardons and Parole said that while the Board still believed Paradis was guilty, evidence presented at his clemency hearing had cast some doubt as to his guilt in the 1980 murder for which he was convicted.<sup>279</sup> At the clemency hearing, Paradis' attorneys focused on a blood analysis called luminol testing.<sup>280</sup>

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<sup>272</sup> See Sean Murphy, *Mexican Wins Clemency Plea in Oklahoma*, CHI. TRIB., May 14, 2004, at 14.

<sup>273</sup> See *Torres v. State*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004).

<sup>274</sup> See Sharon Turco, *Governor Taft Grants Campbell Clemency*, CINCINNATI ENQUIRER, June 27, 2003, at A1.

<sup>275</sup> See David Wells, Editorial, *Why Campbell Gets to Live*, CINCINNATI ENQUIRER, June 27, 2003, at B6.

<sup>276</sup> See Turco, *supra* note 274.

<sup>277</sup> See *id.*

<sup>278</sup> *Death Sentence Commuted*, SEATTLE TIMES, May 25, 1996, at A6.

<sup>279</sup> *Idaho Inmate May Get Off Death Row*, SEATTLE TIMES, May 18, 1996, at A6.

<sup>280</sup> *Id.*



Paradis's earlier appeals did not mention the luminol test and it appears that it occurred after the conclusion of direct appeals.<sup>281</sup>

On his last day in office in 1994, Virginia Governor Douglas Wilder commuted the death sentence of Earl Washington, Jr. A few months before the clemency decision, a new DNA test indicated that "sperm found in the victim identified a genetic trait that could not have come from Washington or [the victim's husband]." <sup>282</sup> Because that type of DNA testing did not exist at the conclusion of Washington's direct appeals,<sup>283</sup> the clemency determination likely would not have been the same years earlier.

In 1991, Virginia Governor Douglas Wilder granted a conditional pardon to Joseph Giarratano, who had attracted international attention based on his claims of innocence.<sup>284</sup> Giarratano had been convicted of rape and murder, but new psychiatric evidence suggested that he might have made up all or part of the confession used to convict him.<sup>285</sup> The new evidence came to light after his direct appeals ended in 1980.<sup>286</sup>

In 1979, Florida Governor Bob Graham commuted the death sentence of Learie Leo Alford. Alford's direct appeals were rejected and the Supreme Court denied certiorari in 1976.<sup>287</sup> The following year, an eyewitness recanted his testimony and told authorities that the true killer was larger than Alford.<sup>288</sup> Although the commutation decision could have been made almost two years earlier based on the recanted testimony, it still would have occurred after the conclusion of direct appeals.

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<sup>281</sup> State v. Paradis, 676 P.2d 31, 34 (Idaho 1983).

<sup>282</sup> Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Day Of Suspense*, WASH. POST, Jan. 15, 1994, at A1 ("In October, a DNA test on sperm found in the victim identified a genetic trait that could not have come from Washington or her husband, leading [the Attorney General] to announce that he had doubts about Washington's guilt.").

<sup>283</sup> For a discussion of the development of DNA testing and the timing of Washington's case, see GARRETT, *supra* note 6, at 219-222.

<sup>284</sup> Jim Clardy, *Wilder Halts Giarratano's Trip To Chair*, WASH. TIMES, Feb. 20, 1991, at A1.

<sup>285</sup> See Joseph Williams, *Attorney General Turns Down Giarratano's Plea for a New Trial*, RICH. TIMES-DISPATCH, Feb. 21, 1991, at A1.

<sup>286</sup> See *Giarratano v. Commonwealth*, 266 S.E.2d 94 (Va. 1980). It appears that Giarratano never petitioned the Supreme Court for a writ of certiorari on direct review.

<sup>287</sup> See *Alford v. Florida*, 428 U.S. 912 (1976).

<sup>288</sup> See *Radelet & Zsembik*, *supra* note 75, at 306.

Finally, on President Clinton's last day in office, he commuted the death sentence of David Ronald Chandler, who was sentenced to death in 1991 under the federal drug kingpin law.<sup>289</sup> A year after Chandler's direct appeals ended,<sup>290</sup> but well before the 2001 commutation, the star witness signed an affidavit indicating that he had lied.<sup>291</sup>

### 3. Ineffective Assistance of Counsel

As explained earlier,<sup>292</sup> ineffective assistance of counsel claims would seem to be better considered after the habeas process than before it. Ineffective assistance claims are usually first raised in state habeas proceedings. A new attorney typically takes over the case and builds a record of how trial counsel performed poorly. In many cases, the state habeas court holds a full evidentiary hearing that creates a detailed record of the quality of counsel. Yet, in only three cases were commutations made because of ineffective assistance allegations developed after the conclusion of direct review.

In 2007, Kentucky Governor Ernie Fletcher commuted the death sentence of Jeffrey Leonard based on ineffective assistance of counsel.<sup>293</sup> Leonard did not raise an ineffectiveness claim in his direct appeal,<sup>294</sup> once he had new counsel in his habeas proceedings, Leonard focused on ineffective assistance as a reason to vacate his conviction and death sentence.<sup>295</sup> Thus, while the ineffectiveness claim was known almost two decades before Leonard's commutation, it was not well developed prior to the conclusion of direct appeals.

Also in 2007, Tennessee Governor Phil Bredesen commuted the death sentence of Michael Boyd because of ineffective assistance of counsel at the trial and post-conviction stages of Boyd's case.<sup>296</sup> According to news reports, "no court [ever] reviewed the merits of

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<sup>289</sup> Bill Rankin, *Alabama Man Seeks Clemency; Lawyer Argues Innocence In Plea To Clinton*, ATLANTA J. & CONST., Jan. 12, 2001, at A12.

<sup>290</sup> See *United States v. Chandler*, 512 U.S. 1227 (1994).

<sup>291</sup> See Bill Rankin & Rhonda Cook, *Execution Set in U.S. Drug Case, But Witness Says He Lied to Convict Alabama Man*, ATLANTA J. & CONST. Mar. 14, 1995, at E1.

<sup>292</sup> See *supra* notes 160-161 and accompanying text.

<sup>293</sup> *3 Have Sentences Commuted*, KENTUCKY POST, Dec. 11, 2007, at A2.

<sup>294</sup> See *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987).

<sup>295</sup> See *Slaughter v. Parker*, 187 F. Supp.2d 755, 827 (W.D. Ky. 2001).

<sup>296</sup> See Richard Locker, *Bredesen Spares Killer's Life -- Believes Memphian Lacked Effective Legal Counsel*, MEMPHIS COMM. APPEAL, Sep. 15, 2007, at B1.

Boyd's claim of ineffective assistance of counsel because his post-conviction lawyer initially failed to raise it on appeal, which kept it from being raised later.”<sup>297</sup> Accordingly, the ineffectiveness issue would not have been fully developed for review if a clemency determination had been made at the conclusion of direct appeals.

Finally, in 2005, just days before the end of his term, Governor Joe Kernan of Indiana commuted the death sentence of Michael Daniels.<sup>298</sup> Governor Kernan offered a number of reasons for his decision, including ineffective assistance of counsel.<sup>299</sup> The ineffective assistance claim had not been litigated in Daniels’ direct appeal in 1983, but it was thoroughly considered in his state habeas petition in 1988.<sup>300</sup> The Daniels case thus does not support the argument that clemency can be addressed at the end of direct review. However, it does demonstrate that clemency could be considered far earlier in the process. The thorough state habeas corpus decision in Daniels’ case was issued in 1988, over seventeen years before Governor Kernan’s clemency decision.

#### **4. Changes Related to the Defendant**

In two Virginia cases, governors commuted death sentences because of changes undergone by the defendant – mental illness and rehabilitation – since the trial. This information was not available at the conclusion of direct review.

In 2008, Virginia Governor Kaine commuted Percy Walton’s death sentence to life without parole because “one cannot reasonably conclude that Walton is fully aware of the punishment he is about to suffer and why he is to suffer it.”<sup>301</sup> The degree of Walton’s mental illness was apparently not as advanced at the time of trial and was not raised in his direct appeals.<sup>302</sup>

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<sup>297</sup> *Id.*

<sup>298</sup> *Kernan Commutes Man's Death Sentence*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.

<sup>299</sup> *See id.* Governor Kernan also pointed to Daniels’ mental illness, questions about whether he was the triggerman, and a lighter sentences for co-defendants.

<sup>300</sup> *Compare* Daniels v. State, 528 N.E.2d 775 (Ind. 1988) (state habeas petition) with Daniels v. State, 453 N.E.2d 160 (Ind. 1983) (direct appeal decision).

<sup>301</sup> Jerry Markon, *Va. Governor Commutes Death Sentence Kaine Gives Murderer Life, Calls Inmate Mentally Unfit*, WASH. POST, June 10, 2008, at B1.

<sup>302</sup> *See* Walton v. Commonwealth, 501 S.E.2d 134, cert. denied, 525 U.S. 1046 (1998).

In 1997, Governor George Allen of Virginia commuted the death sentence of William Ira Saunders. Governor Allen said that “he was swayed by a prosecutor and judge who said Saunders is not the same violent man sentenced to death” for the 1989 murder, and “it would be in the “best interest of justice” for Saunders’ sentence to be commuted to life in prison.”<sup>303</sup> The judge in Saunders’ trial wrote that he had initially imposed the death penalty in Saunders’ case because of Saunders’ violent conduct in jail, but his improved behavior in prison showed that he was no longer a continuing threat.<sup>304</sup> It is unlikely the prosecutor and judge would have reached the same conclusion about Saunders’ improved behavior at the conclusion of direct appeals.

## **5. Outside Influence**

Finally, after allowing twenty-six executions to go forward, Missouri Governor Mel Carnahan commuted the death sentence of Darrell Mease after Pope John Paul II personally requested it.<sup>305</sup> The Pope was coincidentally in Saint Louis at the same time that Mease was to be executed, and Governor Carnahan acknowledged that the commutation “was more out of respect for the pope” than because of the facts of the case.<sup>306</sup> Because the governor was moved by an unusual series of events, the same result would not have occurred at the conclusion of direct appeals.

## **II. The Case for Threshold Clemency Decisions Following Direct Appeals**

Governors and pardon boards almost always leave capital clemency decisions until an execution date is looming. Yet, as Part I.A demonstrated, for most commutations, the crucial information was known years or even decades before the last-minute clemency decision.

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<sup>303</sup> *Death Sentence Commuted*, WASHINGTONPOST.COM, Sep. 16, 1997.

<sup>304</sup> *See id.*

<sup>305</sup> See Terry Ganey, *Carnahan Sparing Murderer's Life: Brief Meeting With Pope Led Governor To Cancel Execution; 'It's A Miracle!' Lawyer Says*, ST. LOUIS POST-DISPATCH, Jan. 29, 1999, at A1.

<sup>306</sup> *Id.*

Leaving clemency until the end of the case is flawed for at least three reasons: (1) it is extremely inefficient, leading to hundreds of years of wasted litigation; (2) it creates an information cascade that makes governors and pardon boards less likely to grant clemency at all; and (3) it is harmful to the victims' families who endure years of appeals and habeas petitions only to have the inmate escape execution at the last minute. I explore these three rationales below.

### **A. Efficient Clemency: Saving Hundreds of Years of Wasted Litigation**

The Supreme Court has described clemency as a “matter of grace.”<sup>307</sup> This article does not suggest otherwise. Governors and pardon boards should remain free to grant or deny clemency as they please. At the same time, clemency is an integral part of the capital punishment process in every state.<sup>308</sup> The Court has called clemency the “fail safe” of the criminal justice system.<sup>309</sup> There is no reason that such an important stage of the process should operate in a needlessly inefficient manner.

#### **1. The Raw Numbers**

As detailed in Part I.A above, it is clear that in a majority of cases (35 of 66) the capital commutations could have been made based on the same information at the end of direct review. And as explained in Part I.B governors *probably* had the necessary information to grant clemency at the end of direct review in an additional six cases. In most cases, governors and pardon boards waited until the last minute to make clemency decisions based on information that had been readily available for years or even decades.

Quantifying the inefficiency is difficult. How much effort was spent on the state and federal habeas petitions in cases where the necessary information was already available? How many briefs were filed? How many paralegals, defense attorneys, prosecutors, law clerks, judges, and other lawyers needlessly worked on the cases? It is impossible to answer these questions for certain, but one benchmark is

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<sup>307</sup> Ohio v. Woodard, 523 U.S. 272, 281 (1998).

<sup>308</sup> See Herrera v. Collins, 506 U.S. 390, 414 (1993)

<sup>309</sup> See *id.* at 415 (rejecting freestanding claims of actual innocence because clemency is the “fail safe” to deal with such claims).

clear: the number of years of litigation between the conclusion of direct review and the commutation.

Taking only the cases from Part I.A, where it was completely clear that the commutation was based on information known by the conclusion of direct appeals, more than 299 years of total litigation could have been avoided. In some cases, – for example, Ronald Post and Edward Jerome Harbison – a clemency decision at the end of direct review would have eliminated more than two decades of litigation.

**Table 1: Cases in Which Clemency Could Have Been Granted at the End of Direct Review**

<b>Defendant Name</b>	<b>Direct Appeal End Date</b>	<b>Commutation Date</b>	<b>Time Elapsed Between Appeal and Commutation</b>
Shawn Hawkins	11/15/1993	6/8/2011	17 years, 7 months
Eugene Colvin-el	10/1/1984	6/7/2000	15 years, 8 months
Henry Lee Lucas	3/22/1989	6/26/1998	9 years, 3 months
Anson Avery Maynard	10/29/1984	1/10/1992	7 years, 2 months
Ronald Monroe	9/8/1983	8/17/1989	5 years, 11 months
Doris Ann Foster	6/30/1986	1/21/1987	0 years, 6 months
Jesse Rutledge	4/21/1980	4/19/1983	3 years, 0 months
Christopher Hallman	10/4/1976	6/26/1979	2 years, 9 months
Joseph Murphy	10/4/1993	9/26/2011	18 years, 0 months
John Jeffrey Eley	6/27/1997	7/10/2012	15 years, 0 months
Arthur Baird	10/4/1993	8/29/2005	11 years, 11 months
Kevin Stanford	8/30/1989	12/8/2003	14 years, 3 months
Alexander Williams	8/30/1989	2/25/2002	12 years, 6 months

<b>Defendant Name</b>	<b>Direct Appeal End Date</b>	<b>Commutation Date</b>	<b>Time Elapsed Between Appeal and Commutation</b>
Calvin Swann	10/3/1994	5/13/1999	4 years, 7 months
Kevin Keith	4/6/1998	9/2/2010	12 years, 5 months
Kevin Young	5/29/2001	7/24/2008	7 years, 2 months
Kenneth Foster	4/3/2000	8/30/2007	7 years, 5 months
Phillip Dewitt Smith	11/16/1987	4/9/2001	13 years, 5 months
Marcus Carter	5/30/1995	11/21/2000	5 years, 6 months
Wendell Flowers	2/23/1998	12/15/1999	1 year, 10 months
Michael Salvatore	11/26/1979	5/19/1981	1 year, 6 months
Richard Henry Gibson	6/5/1978	5/6/1980	1 year, 11 months
Charles Harris Hill	9/28/1976	9/29/1977	1 year, 0 months
Willie James Hall	11/26/1990	1/26/2004	13 years, 2 months
William Neal Moore	10/4/1976	8/21/1990	13 years, 11 months
Ronald Post	4/18/1988	12/18/2012	24 years, 8 months
Robert Bacon, Jr.	2/21/1995	10/2/2001	6 years, 7 months
Robin Lovitt	10/1/2001	11/29/2005	4 years, 2 months
Charlie Mason Alston, Jr.	2/26/1996	1/10/2002	5 years, 10 months
Edward Jerome Harbison	5/27/1986	1/12/2011	24 years, 8 months
Guinevere Garcia	3/23/1995	1/16/1996	0 years, 10 months
David Cameron Keith	3/23/1988	12/29/1988	0 years, 9 months
Robert Gattis	10/3/1994	1/17/2012	17 years, 3 months
Jeffrey Hill	1/16/1996	2/12/2009	13 years, 1 month
Darrell Hoy	10/16/1978	1/9/1980	1 year, 3 months

Defendant Name	Direct Appeal End Date	Commutation Date	Time Elapsed Between Appeal and Commutation
Total			299 years and 5 months

The total amount of wasted litigation rises considerably if we add the six cases from Part I.B in which the basis for the commutation was *probably* known at the end of direct review. These six cases add another seventy-six years of unnecessary habeas review.

**Table 2: Cases in Which Clemency *Probably* Could Have Been Granted at the End of Direct Review**

Defendant Name	Direct Appeal End Date	Commutation Date	Time Elapsed Between Appeal and Commutation
Sidney Cornwell	2/22/2000	11/15/2010	10 years, 9 months
Gaile Owens	5/16/1988	7/13/2010	22 years, 2 months
Bobby Ray Fretwell	5/19/1986	2/5/1999	12 years, 9 months
Judith Ann Neelley	3/9/1987	1/15/1999	11 years, 10 months
Joseph Payne	1/11/1988	11/7/1996	8 years, 10 months
Herbert Bassette	4/19/1982	1/23/1992	9 years, 9 months
Total			76 years and 1 month

## 2. The Story of Habeas Evolution

The raw numbers tell a powerful story, but the case for a threshold clemency decision is even stronger when we consider the development of habeas corpus law over the last half-century. As explained below, the Supreme Court has expanded the substantive law that can be the basis for habeas relief. This has meant more reasons for



inmates to file habeas petitions and more issues for courts to resolve. At the same time, both the Supreme Court and Congress have tightened the procedural rules for bringing habeas claims and Congress has heightened the standards for inmates to win on the merits. This means more litigation over whether issues have been preserved, fewer cases being decided on the merits, and a lower chance that inmates will win the merits decisions. Although we are a long way from federal habeas review becoming “full of sound and fury, signifying nothing”<sup>310</sup> in capital cases, we are moving in that direction.<sup>311</sup>

The starting point for the habeas maze is *Brown v. Allen*, in which the Court opened the door for state prisoners to file habeas claims in federal court even if their claims had already been litigated in state court.<sup>312</sup> With the exception of Fourth Amendment claims, the Court has left the door open to allow any type of federal constitutional violation to be the basis for a habeas petition.<sup>313</sup> And as substantive criminal procedure has expanded, the number of substantive claims that can be the basis for a habeas petition has also expanded. For instance, in the 1960s and 1970s Court developed the *Brady* doctrine requiring prosecutors to turn over favorable, material evidence,<sup>314</sup> (even if the defense had not requested it)<sup>315</sup> and creating a fertile ground for habeas corpus litigation. During the Warren Court revolution the Court announced the supposedly simple *Miranda* doctrine, but later vastly complicated it with dozens of other decisions.<sup>316</sup> In 2002, the Court outlawed the execution of the mentally challenged, but left undecided (and thus the focus of much habeas litigation)<sup>317</sup> what it actually means to be mentally challenged. And, of

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<sup>310</sup> WILLIAM SHAKESPEARE, *MACBETH*, Act V, Scene 5.

<sup>311</sup> I do not want to suggest that habeas corpus is not valuable in capital cases. Troubling death sentences are still thrown out on habeas review because of *Brady* claims, ineffective assistance of counsel findings, and for other reasons. See *infra* notes 329-332 and accompanying text.

<sup>312</sup> 344 U.S. 443 (1953).

<sup>313</sup> See *Stone v. Powell*, 428 U.S. 465 (1976) (forbidding habeas review of Fourth Amendment claims if there was a full and fair opportunity to litigate the issue in state court).

<sup>314</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>315</sup> See *United States v. Agurs*, 427 U.S. 97, 107 (1976).

<sup>316</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); George C. Thomas, III, *Lost in the Fog of Miranda*, 64 HASTINGS L.J. 1501, 1505 (2013) (describing *Miranda* as a “vast doctrinal web”).

<sup>317</sup> See Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 93 (2011) (“[N]ew and retroactive capital eligibility rules, such as the *Atkins v. Virginia* bar on

course, the Court recognized a claim of ineffective assistance of counsel in 1984<sup>318</sup> and in recent years has expanded it to immigration advice<sup>319</sup> as well as defective plea negotiations,<sup>320</sup> all of which are the subject of habeas litigation.<sup>321</sup> In short, there is a lot more substantive law for habeas petitioners to point to in claiming their death sentences violate the Constitution of the United States.

More substantive law now runs head-on into greater procedural obstacles. From 1963 until 1977, the Court allowed state prisoners to file federal habeas claims even if they had failed to exhaust state remedies as long as they had not deliberately bypassed the state courts.<sup>322</sup> In *Wainwright v. Sykes*, the Court drastically switched course however and required prisoners to demonstrate cause and prejudice for any procedural default,<sup>323</sup> a much higher burden. The Court also imposed limits on successive petitions (bringing the same claim more than once)<sup>324</sup> and abusive petitions (failing to raise a claim in a previous petition).<sup>325</sup> In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act and made the procedural hurdles even more difficult. The AEDPA scaled back gateway claims in which petitioners could use innocence to overcome procedural obstacles.<sup>326</sup> It also established, for the first time, a statute of limitations for federal habeas petitions.<sup>327</sup> When an inmate surmounts all of these hurdles and finally reaches the merits, AEDPA imposes yet another obstacle. In addition to showing a constitutional violation, the

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executing mentally retarded offenders, are frequently the bases for claims in successive petitions.”); John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628 (2009) (finding that at least 234 death-row inmates filed claims under *Atkins*, although noting that the total number amounts to only seven percent of death-row inmates).

<sup>318</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>319</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>320</sup> See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>321</sup> See Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 439 (2011) (arguing that ineffective assistance claims have “come to dominate habeas corpus doctrine”).

<sup>322</sup> See *Faye v. Noia*, 372 U.S. 391 (1963).

<sup>323</sup> 433 U.S. 72 (1977).

<sup>324</sup> See *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

<sup>325</sup> See *McKleskey v. Zant*, 499 U.S. 467 (1991).

<sup>326</sup> See Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 340-41 (2010).

<sup>327</sup> See 28 U.S.C. 2244(d).

inmate must demonstrate either that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that the state courts' decision was "based on an unreasonable determination of the facts."<sup>328</sup> That standard is very difficult to overcome.

All of this is not to say that habeas corpus is not valuable. The "Great Writ" remains the primary bulwark against unconstitutional detention. But its utility is far less than in decades past. In the early 1970s, "capital murder defendants enjoyed a more than fifty percent success rate in federal habeas corpus litigation."<sup>329</sup> As time went on, however, the percentage began to drop. In a study of pre-AEDPA cases from 1973 to 1995, Professor James Liebman and other leading scholars found that the "overall reversal rate for federal habeas cases is 40%."<sup>330</sup> In subsequent work, Professor Liebman recognized that "[g]iven Congress's adoption of legislation in 1996 reducing federal prisoners' access to federal habeas corpus review, it is likely that the reversal rate in federal court has declined recently."<sup>331</sup> Indeed, a recent study by Professor Nancy King and colleagues that looked at 267 capital cases filed in 2000-2002 found that less than thirteen percent received habeas relief from a federal district court.<sup>332</sup> Importantly, while finding that relief had declined, Professor King and her colleagues discovered that "[e]ach capital habeas filing appears to be taking at least twice as long to finish, on average, than prior to AEDPA."<sup>333</sup>

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<sup>328</sup> See 28 U.S.C. 2254(d). For a detailed review of federal habeas corpus (and the obstacles to it) see BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* (2013).

<sup>329</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 43 (1997).

<sup>330</sup> See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), at 6. JEFFREY FAGAN ET AL., *GETTING TO DEATH: FAIRNESS AND EFFICIENCY IN THE PROCESSING AND CONCLUSION OF DEATH PENALTY CASES AFTER FURMAN*, FINAL TECHNICAL REPORT, Dept. of Justice Document No. 203935, Award Number 2000-IJ-CX-0035 (Feb. 2004), at 56.

<sup>331</sup> See Liebman & Clarke, *supra* note 19, at 337 n.415.

<sup>332</sup> See KING ET AL., *supra* note 19, at 61.

<sup>333</sup> *Id.* at 60. The authors are careful to note that "[i]t is not known whether AEDPA has had any effect on total processing time for all habeas challenges filed by a given death row inmate." *Id.*

At bottom, we know that federal habeas review is less beneficial to death row inmates than it was twenty years ago, perhaps much less so. We also know that habeas review takes longer than it did twenty years ago. Finally, we know that before the Supreme Court drastically expanded habeas corpus access to state prisoners in the 1950s that governors and pardon boards considered clemency at the end of direct review and that it was much more widely exercised.<sup>334</sup>

Not surprisingly, one of the leading commentators to study capital habeas has proposed that it be dramatically scaled back. Professor Liebman has suggested that in exchange for procedural safeguard such as videotaped confessions and better charge screening, as well as more robust direct review, that “capital defendants . . . agree to give up state post-conviction review and a significant amount of federal habeas review.”<sup>335</sup>

I do not suggest scaling back state or federal habeas review. However, by looking to the same premise – that habeas is incredibly time-consuming and inefficient – this article offers the modest proposal to insert a threshold clemency determination before any state or federal habeas proceedings begin.

### **B. An Earlier Clemency Decision Might Increase Commutations**

Many commentators have bemoaned the decline of executive clemency, both in the capital<sup>336</sup> and non-capital<sup>337</sup> context. The traditional explanation for the decline is that tough on crime politics

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<sup>334</sup> See Bedau, *supra* note 17, 262-66.

<sup>335</sup> See James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 328, 337 (2002). Other habeas experts would not go so far. While arguing for a dramatic reduction of non-capital habeas review, Professors Nancy King and Joseph Hoffman maintain that there is a “continuing need for broad habeas jurisdiction in capital cases.” NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 149 (2011). Professors King and Hoffman argue for less stringent procedural default rules and for a greater focus on protecting against the execution of the innocent. *See id.* at 149-52.

<sup>336</sup> See, e.g., Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1124 (2012).

<sup>337</sup> For an analysis of the federal system, see Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010); Douglas A. Berman, *Turning Hope-and-Change Talk Into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59 (2010).

has unduly invaded the criminal justice process and made it impossible for governors and pardon boards to grant mercy.<sup>338</sup> In a world with twenty-four hour news cycles and one-hundred-and-forty character tweets, it is difficult for political actors to make nuanced decisions while still seeking re-election. While the conventional explanation is very plausible, it is possible that the lengthy habeas corpus process could also be playing a role in the reduction of clemency.

### 1. The Full and Fair Access Excuse

First, the sheer length of the habeas process could be signaling to governors and pardon boards that inmates have already had a fair shake and that in-depth review is not needed.<sup>339</sup> Governors sometimes invoke an inmate's "full and fair access to the courts" as a primary reason to deny clemency. For instance, Governor George W. Bush stated that he would only grant clemency if the inmate were innocent or had not received full and fair access to the courts.<sup>340</sup> Similarly, in Missouri, Governor John Ashcroft remarked that "[i]t would have been arrogant and irresponsible of me to second-guess the people and the court system by arbitrarily reversing the decision of unmistakable juries and judges."<sup>341</sup> Other governors have similarly relied on access to the courts as a reason for denying clemency.<sup>342</sup> Yet, access to the

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<sup>338</sup> See, e.g., Michael Korengold et. al, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 363-65 (1996).

<sup>339</sup> As Professors Carol and Jordan Steiker recognized almost twenty years ago, this is a pervasive problem with capital punishment regulation. The Court's considerable involvement in capital punishment "creates an impression of enormous regulatory effort but achieves negligible regulatory effects." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 360 (1995).

<sup>340</sup> See T. Christian Miller, *Race Issues Raised in Latest Texas Death Penalty Appeal*, L.A. TIMES, June 29, 2000, at A22.

<sup>341</sup> CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 161 (2002).

<sup>342</sup> See, e.g., John Moritz, *Woman on Death Row Gets Reprieve*, FORT WORTH STAR-TELEGRAM, Dec. 2, 2004, at A1 (quoting Texas Governor Rick Perry as saying that "he based his decision in Newton's case on whether she had been given ample access to the courts."); Lawrence Buser, *Sundquist Says 'No' to Workman*, MEMPHIS COMM. APPEAL, Mar. 28, 2001, at A1 (noting that Tennessee Governor Don Sundquist denied clemency in part because "I am confident that he has had adequate access to the courts."); Tom Sherwood, *Robb: Final Judge on Life, Death*, WASH. POST, May 9, 1985 (quoting Virginia Governor Charles S. Robb as saying that in

courts does not prove that it is just and wise to execute an inmate.<sup>343</sup> It proves only that there was no properly preserved and cognizable legal violation that required a remedy on direct or post-conviction review.<sup>344</sup>

By pointing to the lengthy review process, governors can convince the public (and perhaps themselves) that there is no need for their thorough involvement because the courts have already eliminated any prospect of a wrongful execution. As I have explained elsewhere, this diffusion of responsibility has contributed to the decline of executive clemency.<sup>345</sup> Of course, as long as there is judicial review of death sentences, some diffusion of responsibility between the courts and the clemency decisionmaker is inevitable. But it is harder for governors and pardon boards to point the finger at courts when most habeas review has not yet occurred and when the governors have been specifically tasked with reviewing a death-penalty case in the middle of the appellate scheme.

## 2. The Information Cascade Problem

A second, and related, problem with placing the clemency decision at the end of the lengthy habeas process is that it may create an information cascade that makes it less likely for governors or pardon board to reach a different conclusion than the courts. An information cascade “occurs when it becomes optimal for an

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reviewing cases for executive clemency, “his main role is to make certain that a condemned person has had full access to the courts”).

<sup>343</sup> As Justice Kennedy has recognized, “[a]mong its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.” *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting); see also Sarat & Hussain, *supra* note 2, at 1309 (explaining that the full and fair access rationale “leaves little, if any, room to consider mental illness or incompetence, childhood physical or sexual abuse, remorse, [or] rehabilitation”).

<sup>344</sup> In some instances, judges are required to uphold cases that they personally believe to be unjust. These judges occasionally advocate for clemency. See Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 156 (2010); cf. *Williams v. Woodford*, 384 F.3d 567, 628 (9th Cir. 2002) (“Although Williams’s good works and accomplishments since incarceration may make him a worthy candidate for the exercise of gubernatorial discretion, they are not matters that we in the federal judiciary are at liberty to take into consideration in our review of Williams’s habeas corpus petition.”).

<sup>345</sup> See Gershowitz, *Diffusion of Responsibility*, *supra* note 48.

individual, having observed the actions of those ahead of him, to follow the behavior of the preceding individual without regard to his own information.”<sup>346</sup> Examples abound. Students want to go to a particular university because it is popular; an employer declines to hire you after learning that two other businesses turned down your application; no one wants to eat in a restaurant because it is empty.<sup>347</sup> Upon seeing many other people reaching a conclusion, it is much easier to ignore your own information and follow the herd.<sup>348</sup>

There is already a strong possibility that information cascades exist in the criminal justice system. In the typical case, police decide to arrest a suspect, the grand jury or prosecutor opts to charge him, the jury decides to convict, and the state courts uphold his conviction. Even if there were no habeas corpus review, a governor might be convinced by the cascade not to alter a decision reached by so many people.

In many capital cases, the habeas process simply makes the possibility of an information cascade much worse. By offering death-row inmates so many bites at the state and federal habeas apple, the process may signal to the governor<sup>349</sup> that the decision should not be changed. Consider the difference between the direct appellate process and the habeas process. In direct review, a capital defendant typically has an automatic right of appeal to the state supreme court and then the very unlikely chance that the U.S. Supreme Court will hear his case. At that point, his conviction is final. In the habeas corpus process, by contrast, the petitioner (after already having his direct appeals rejected) seeks review from the state trial court, the state appeals courts, and then again files a petition for certiorari with the U.S. Supreme Court. If that fails, he can file a habeas petition in the federal district court and also seek review in the federal circuit court of appeals and the U.S. Supreme Court. The habeas process thus adds at

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<sup>346</sup> Sushil Bikchandani, et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992).

<sup>347</sup> For these and other examples, see WARD FARNSWORTH, *A TOOLKIT FOR THINKING ABOUT LAW* 136 (2007).

<sup>348</sup> See Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797, 799 (1992).

<sup>349</sup> It is of course possible that judges are victims of the information cascade as well, by being unduly influenced by their predecessors’ opinions. For a skeptical assessment see Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 132 (1999) (concluding that it is “unlikely that information cascades present a significant impediment to the judiciary”).

least six separate review stages to the criminal justice process.<sup>350</sup> If an inmate files an additional successive habeas petition<sup>351</sup> and loses then there will be an even longer cascade before the case reaches the governor or pardon board.

Social science literature has documented that cascade behavior increases with the number of previous agreements.<sup>352</sup> In one study, all the subjects joined the cascade by the time there had been seven previous decisions on an issue.<sup>353</sup> As one review of the literature put it, “[d]ecision makers are more willing to agree with the choices of others, the more others there are who all agree.”<sup>354</sup> Or as another group of scholars put it more colorfully, “[t]he longer the bandwagon continues, the more robust it becomes.”<sup>355</sup> The habeas process – because of its sheer length and numerous bites at the apple – makes an information cascade more likely by the time it reaches the clemency stage.

Additionally, researchers have found that strong-willed actors have a better chance of resisting a cascade than weaker, less-informed actors, but that even strong actors fall victim to the cascade once it becomes very long. As Professor Farnsworth has explained:

[T]he point of a cascade – the feature that makes it insidious – is that it takes in the weaker and the stronger alike by enlisting them in order. A strong onlooker who isn’t impressed by a consensus of two or three people comes back later to find a consensus of two or three hundred, and this time thinks there must be a solid basis for it after all; he starts to doubt his own thinking. But the only development while he was gone was that others, more

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<sup>350</sup> For a good overview of the stages, including a helpful diagram, see GARRETT & KOVARSKY, *supra* note 328, at 170-172.

<sup>351</sup> See *supra* note 324 and accompanying text. Successive petitions are filed in about five percent of all habeas cases and are generally rejected. See Kovarsky, *Death Ineligibility*, *supra* note 326, at 339-341.

<sup>352</sup> See, e.g., Lisa R. Anderson, *Payoff Effects in Information Cascade Experiments*, 39 ECON. INQUIRY 609 (2001).

<sup>353</sup> See Anthony Ziegelmeyer, et al., *Fragility of Information Cascades: An Experimental Study Using Elicited Beliefs*, 13 EXP. ECONOMICS 121 (2010)

<sup>354</sup> Dorothea Kubler & Georg Weizsacker, *Are Longer Cascades More Stable?* 3 J. EUROPEAN ECON. ASSOC. 330, 338 (2005).

<sup>355</sup> Bikchandani, et al., *supra* note 346, at 993.



easily impressed than he was, signed on to the emerging opinion and so made it seem more dominant.<sup>356</sup>

As politicians, governors are the classic strong-willed actors who might be able to break a cascade at an earlier stage. But placing clemency at the end of numerous appeals and habeas petitions may make it difficult for even strong-willed actors to resist the cascade.

I do not mean to suggest that we can eliminate the possibility of an information cascade altogether by having governors and pardon boards consider clemency before the habeas process begins. However, decision-makers may be less susceptible to an information cascade at the end of direct review (typically after two appellate decisions) than at the end of the habeas process when the case has been rejected by at least eight judicial decisions.

### **C. Moving Clemency to an Earlier Stage Benefits Victims' Families**

Beginning in the early 1990s, death penalty proponents and the media began invoking closure as an independent justification for capital punishment.<sup>357</sup> Many scholars are critical of the focus on closure<sup>358</sup> because of the risk that focusing on victims will deny due process to the defendants and lead to arbitrary death sentences.<sup>359</sup> Another strand of criticism questions whether the criminal justice system can even provide desirable therapeutic closure for victims.<sup>360</sup> I do not want to wade into the debate over the wisdom of how much emphasis the criminal justice process should place on victims' closure.

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<sup>356</sup> FARNSWORTH, *supra* note 347, at 137.

<sup>357</sup> See Jody Lynee Madeira, *Why Rebottle the Genie? Capitalizing on Closure in Death Penalty Proceedings*, 85 IND. L.J. 1477, 1479-80 (2010).

<sup>358</sup> As Professor Madeira has explained, the "majority of scholars" see the focus on closure in capital cases as a "grievous error." See *id.* at 1479.

<sup>359</sup> There is a wide literature. For some of the best writing on the risks to defendants, see Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 1-2 (2009); Vik Kanwar, *Capital Punishment as "Closure: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 248 (2001); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 393-402 (1996). For a counter-point on the need for more victim involvement in the criminal justice process, see STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 83-107 (2012).

<sup>360</sup> See Susan Bandes, *When Victims Seek Closure: Forgiveness Vengeance, and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1606 (2000).

I simply offer the logical deduction that if we are concerned about closure in capital cases, granting clemency at the end of direct appeals is preferable to granting it years or decades later at the end of the habeas process.

There is no question that many murder victims' families believe executing the offender will bring closure.<sup>361</sup> But, as Professor James Liebman has shown, an enormous number of death sentences are reversed on appeal and habeas review, often many years after conviction.<sup>362</sup> This lengthy process creates tremendous anxiety for many families.<sup>363</sup> The husband of a murder victim described the effect on the victim's parents: "Every time they hear about another appeal, another delay, it throws them into a grave depression . . . I think it happens to all of us. We're all thrown back to square one."<sup>364</sup> In New Jersey, the mother of a murder victim remarked that "our current system is most unjust for the victims and their loved ones. I can only hope to save other families from the grief of the never-ending appellate process."<sup>365</sup> In Maryland, a family member explained that "[w]hen they talk in court about how brutally she was murdered, the pictures come back in your mind. Then you finally get rid of them, and he wants an appeal again. There is no closure with the death penalty for me and my family."<sup>366</sup>

In a comparison of Texas (which has the death penalty) and Minnesota (which does not) scholars found that victims' families had more anxiety about the appeals process in Texas. One person remarked:

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<sup>361</sup> The extent of closure, however, varies. See Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486 (2003).

<sup>362</sup> See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

<sup>363</sup> See Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 613, 621 (James R. Acker et al., 2<sup>d</sup> ed. 2003).

<sup>364</sup> Tom Gibbons, *Victims Again: Survivors Suffer Through Capital Appeals*, 74-SEP A.B.A. J. 64 (1988).

<sup>365</sup> See N.J. DEATH PENALTY STUDY COMM'N, DEATH PENALTY STUDY COMMISSION REPORT 58 (2007) available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

<sup>366</sup> See Alyson R. Klein, *Man Found Guilty Again: He Is Convicted In Retrial Of Capital Murder Case Two Slain In Baltimore County In '94; Conyers Faces Possibility Of Death Sentence 3rd Time*, BALTIMORE SUN, July 25, 2003, at 1B.

We haven't had a sense of justice. I feel like my life is on hold because it just hasn't been carried out . . . . When is it gonna be over? . . . [T]here are other murders that happened in 1995 that they have already been put to death. And ours is still lingering? Why aren't things moving on? Why is everything at a standstill?<sup>367</sup>

Last minute commutations only exacerbate the suffering felt by the victim's family. For example, when Governor John Kasich of Ohio commuted a death sentence more than twenty years after conviction the victim's mother responded that "[i]f a man can spend 22 years in prison and still get clemency, then the system ain't working."<sup>368</sup> Recently, Governor Kasich angered victims' families by commuting another death sentence more than two decades after conviction without first alerting the families about his decision.<sup>369</sup>

If there will be no execution because of an eventual commutation, and if closure is an important value to victims' families, it stands to reason that the commutation decision should be made as early as is feasible. Ending the uncertainty of the process is extremely valuable to families who are criminal justice outsiders and do not have a good sense of what is around the next corner of the process.<sup>370</sup>

#### **D. Responding to the Major Objection**

There is one obvious objection to the proposal to move the timing of executive clemency: If clemency precedes the lengthy habeas process, why would governors and pardon boards take the risk of commuting a death sentence that might be overturned by the courts? Governors are political actors who often have to run for re-election or wish to seek other elective office. And granting clemency to death-row

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<sup>367</sup> Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1, 55 (2012).

<sup>368</sup> Curnutte, *supra* note 29.

<sup>369</sup> See *Kasich To Alert Families to Execution Mercy*, REV. TIMES, May 18, 2013, at 5.

<sup>370</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923-31 (2006) (detailing the public's general lack of understanding of the criminal justice system).

inmates is not good politics. If, as I have argued elsewhere,<sup>371</sup> there is a diffusion of responsibility in capital clemency, it will be difficult to encourage governors to seriously consider clemency at the end of direct review. By the time a case then makes its way through the lengthy habeas process, another governor will be in office. When the inmate asks the new governor to grant a last-minute commutation, the new governor – for both political and information cascade reasons – will have reason to deny commutation and simply point to the negative decision at the threshold clemency stage. This is a powerful objection, although not fatal by any means.

First, capital clemency has dramatically declined compared to the first half of the Twentieth Century. For instance, from 1920 to 1936, New York commuted 83 death sentences; from 1909 through 1954, North Carolina commuted 229 death sentences.<sup>372</sup> Looking at only twelve states, Professor Bedau found more than seven-hundred capital commutations between 1900 and 1968.<sup>373</sup> By contrast, from 1976 to 2013 governors and pardon boards granted only sixty-six capital commutations based on individual reasons of the case. A sizeable number of these recent commutations came at the end of governors' terms when they no longer had to stand for re-election.<sup>374</sup> Moreover, when we compare the sixty-six commutations to the more than 1,300 executions carried out during the same period, it is clear that the current state of capital clemency is paltry. Adding a threshold clemency determination thus creates very little risk that governors will dispense less mercy than they do presently.

Second, there are modest signs that governors will not act in a purely cynical and political manner. Ohio Governor John Kasich, who is often mentioned as a presidential candidate,<sup>375</sup> granted four

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<sup>371</sup> See Gershowitz, *Diffusion of Responsibility*, *supra* note 48.

<sup>372</sup> See Bedau, *supra* note 17, at 265.

<sup>373</sup> See *id.*

<sup>374</sup> See *supra* notes 64, 97, 182, 193, 282, 289, 298 and accompanying text; Laura M. Argys & Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 LEGAL. STUD. 255, 280 (2004) (“We find that if an inmate’s stay on death row ends at a point in time where the governor is a lame duck, the probability of commutation increases significantly. . . .”); *but see* Heise, *supra* note 18, at 292-93 (finding no systematic variation in cases where a governor has already been defeated for reelection or is about to retire from office).

<sup>375</sup> See, e.g., Thomas Suddes, *Kasich Might Fancy a Move Up in 2016*, THE PLAIN DEALER, Dec. 29, 2012.

commutations in 2011 and 2012.<sup>376</sup> Other prominent governors such as Robert Ehrlich in Maryland, Mike Huckabee in Arkansas, and Tim Kaine in Virginia frequently utilized their clemency power in non-capital cases (as well as two death penalty cases)<sup>377</sup> with minimal political fallout.<sup>378</sup> As Professor Rachel Barkow has explained, “using the themes of redemption and forgiveness as tenets of religious faith or constitutional duty can, in turn, offer a competing political narrative that may shield governors who exercise their pardon power from attack.”<sup>379</sup>

Third, in five states – Connecticut, Georgia, Nebraska, Nevada, and Utah – an independent pardon board has exclusive control over whether to commute a death sentence.<sup>380</sup> Over 200 inmates presently sit on death row in these states,<sup>381</sup> and clemency claims could be addressed at the end of direct review with minimal political involvement.<sup>382</sup>

Finally, governors and pardon boards may be motivated by the potential cost savings of acting prior to the habeas process. In an effort to save money over the last decade, states have made criminal justice reforms that were unthinkable only a short time ago.<sup>383</sup> States have repealed mandatory minimum sentencing laws, lowered maximum sentences, and provided for drug treatment in lieu of incarceration.<sup>384</sup> States have also adopted more flexible parole and probation policies, and expanded early release programs.<sup>385</sup> To balance budgets, states –

<sup>376</sup> See *supra* notes 29, 82, 87, 162 and accompanying text.

<sup>377</sup> See *supra* notes 225 & 301 and accompanying text.

<sup>378</sup> See Drinan, *supra* note \_\_\_, at 1145-47.

<sup>379</sup> Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 Fed. Sent’g Rep. 153, 154 (2009).

<sup>380</sup> See DEATH PENALTY INFORMATION CENTER: CLEMENCY, available at <http://www.deathpenaltyinfo.org/clemency>.

<sup>381</sup> See DEATH PENALTY INFORMATION CENTER, DEATH ROW INMATES BY STATE, available at <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#state>.

<sup>382</sup> Ironically, as Professor Heise has observed, administrative clemency boards were created because of concerns that governors were granting clemency too often. In the modern era, favorable clemency decisions are more likely from administrative boards. See Heise, *supra* note 18, at 297-98.

<sup>383</sup> See Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013.

<sup>384</sup> See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285-88 (2005).

<sup>385</sup> See Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 82 (2008).

including the tough on crime, Texas<sup>386</sup> -- have closed existing prisons and refused to build new facilities.<sup>387</sup> A prominent group of conservative, law-and-order politicians has started the “Right on Crime” movement to adopt sensible cost-cutting criminal justice reform.<sup>388</sup> Perhaps most tellingly, five states abolished capital punishment altogether between 2007 and 2012. As one prominent scholar explained, “[i]n each of those states, the cost of the death penalty -- or at least what the state was getting for the cost -- played a critical role in the decision to abandon capital punishment as the ultimate sanction.”<sup>389</sup>

All told, politicians (as well as the general public) are much more susceptible to cost arguments than in the past. If politicians are willing to reduce sentences, close prisons, and even abolish capital punishment altogether, there is reason to be optimistic that governors will not reflexively reject a threshold clemency determination that might save their states millions of dollars. Indeed, the governor of Michigan recently took cost into account when commuting 133 non-capital cases.<sup>390</sup>

### **III. Implementing a Threshold Clemency Determination at the End of Direct Review**

The remaining question is one of implementation. Is there any legal impediment to considering clemency at the end of direct review? And, if not, how do you convince governors to undertake politically

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<sup>386</sup> See Brandi Grissom, *Prison Closing Pleases City and Helps State Budget*, N.Y. TIMES, Aug. 19, 2011, at 19A.

<sup>387</sup> See CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 6 (2009), available at [http://www.vera.org/files/The-fiscal-crisis-in-corrections\\_July-2009.pdf](http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf); Gershowitz, *An Informational Approach*, *supra* note 385, at 82-83 & n.185.

<sup>388</sup> See Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?* 28 GA. ST. U. L. REV. 1275, 1285-86 (2012) (noting the involvement of former House Speaker Newt Gingrich, former Attorney General Edwin Meese, former drug czar Asa Hutchinson, anti-tax leader Grover Norquist, and former Governor Jeb Bush).

<sup>389</sup> Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 408 (2013).

<sup>390</sup> See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 624 (2012).

risky actions that they could otherwise pass down the road to their successors?

The first question is easy. There is very little law specifying the timing of clemency review. While there are some restrictions on the clemency power – such as forbidding a governor from granting clemency for the crime of treason<sup>391</sup> – state constitutions and statutes do not typically impose limits on when governors and pardon boards can consider clemency.<sup>392</sup> Indeed, in a few states, the law actually seems to specifically contemplate the possibility of early clemency decisions. For instance, in Colorado, “[t]he Governor is hereby fully authorized, when he or she deems it proper and consistent with the public interests and the rights and interests of the condemned to commute the sentence in any [capital] case. . . .”<sup>393</sup> In California, the governor can grant clemency anytime after conviction, and even before the sentence is handed down.<sup>394</sup> In other states, courts have held that governors are free to grant clemency while the judicial process is ongoing.<sup>395</sup> Of course, some parole boards may have internal rules specifying the timing of clemency review,<sup>396</sup> but these rules could easily be amended by the board itself or abrogated by statute.

The second issue – convincing governors and pardon boards to consider clemency after direct review -- is harder. Governors and pardon boards could, on their own initiative, simply take it upon themselves to consider clemency before the conclusion of direct appeals. A handful of governors have done something similar by granting blanket commutations that emptied death row.<sup>397</sup> Rather than going this far, decision-makers – particularly politically insulated pardon boards or lame duck governors – might look on a case-by-case

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<sup>391</sup> For an aging, but thorough, overview of the substantive restrictions, see NATIONAL GOVERNORS’ ASSOCIATION, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988).

<sup>392</sup> See Acker & Lanier, *supra* note 3, at 222 (“Legislative initiatives specifying fact-finding procedures for capital case clemency decisions in virtually all jurisdictions are either nonexistent or conspicuously incomplete.”).

<sup>393</sup> Colo. Rev. Stat. Ann. 16-17-101.

<sup>394</sup> See *In Re Anderson*, 92 P.2d 1020, 1021 (Cal. App. 1<sup>st</sup> Dist. 1939).

<sup>395</sup> See, e.g., *Cole v. State*, 106 S.W. 673 (Ark. 1907).

<sup>396</sup> See Daniel Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U.L. REV. 567, 573 (2000) (discussing Ohio Adult Parole Authority rule that it “evaluate a prisoner’s fitness for clemency forty-five days before his scheduled execution, regardless of whether the condemned had yet applied for clemency.”)

<sup>397</sup> See *supra* note 2.

basis at inmates who do not yet have approaching execution dates. While this might happen in a few instances, it is unlikely to occur on a wide scale. Politicians typically want to be re-elected or at least to protect their legacies, thus making threshold clemency decisions unlikely.

A second solution would be for the legislature to require a threshold clemency determination at the end of direct review. While there are relatively few statutory restrictions and requirements on clemency practice, they do exist. For instance, the Tennessee Code requires governors to provide the general assembly with the reasons for commuting any sentences.<sup>398</sup> When Governor Bob Graham commuted a few death sentences in the 1980s, the Florida legislature attempted to regulate the governor's clemency power by considering (and nearly passing) a bill with a reporting requirement similar to Tennessee's.<sup>399</sup>

State legislatures could simply pass a bill requiring a threshold clemency review after direct review. A lame duck governor – particularly one who wants to fix the dysfunctional capital punishment system but doesn't want to risk his legacy by commuting any particular sentence – might be willing to sign such a law. This scenario might be particularly plausible if the outgoing governor is of a different political party than the incoming governor.

A third, and more dramatic, proposal would be for Congress to alter the habeas statute to require a threshold clemency determination before an inmate could pursue federal habeas relief.<sup>400</sup> Under the current federal habeas statute “an application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the *courts* of the State.”<sup>401</sup> An inmate therefore cannot pursue federal habeas relief until he has exhausted his state appeals and state post-conviction options. Clemency is not a judicial remedy and therefore need not be exhausted before the federal habeas process. Congress could simply change the statute to provide that federal habeas corpus “shall not be granted unless it appears that the applicant has exhausted the remedies

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<sup>398</sup> See Tenn. Code § 40-27-107. In some states, similar requirements are imposed by the state constitution. See, e.g., Ohio Const. Art. III, § 11.

<sup>399</sup> See VON DREHLE, *supra* note 75, at 190.

<sup>400</sup> I am grateful to Professor Alan Meese for suggesting this approach.

<sup>401</sup> 28 U.S.C. § 2254(b)(1)(A) (emphasis added).



available in the courts of the State, as well as a threshold clemency review.”

Congress has strong incentive to make this amendment to the habeas statute. The federal courts are clogged with habeas cases, and capital cases are typically the most time-consuming. If a threshold clemency determination kept only a handful of capital cases out of the federal habeas process, it would save the federal courts (including judges, clerks, court staff, and attorneys) both time and money. Moreover, the savings would be amplified in light of the Supreme Court’s recent decision in *Harbison v. Bell* which held that the federal habeas statute allows the appointment of counsel to indigent defendants in state clemency hearings following failed federal habeas review.<sup>402</sup>

### Conclusion

The capital clemency system is broken. Governors and pardon boards dispense mercy far less than in the recent past. And when they do commute death sentences, governors and pardon boards typically wait until the last minute, even though the relevant information was usually known for years or even decades before the commutation. This article demonstrates that in the majority of cases it was possible for governors and pardon boards to make a clemency determination at the conclusion of direct review. Earlier commutations would soften the blow to the victims’ families. Conducting clemency review at the end of direct appeals would also lessen the information cascade effect and possibly resuscitate the use of clemency in the United States. Most importantly, analyzing clemency before state and federal habeas corpus would be far more efficient. This article demonstrates that last-minute commutations in dozens of cases resulted in nearly 300 years of wasted litigation. In a time when states are closing prisons and even abolishing capital punishment to save money, governors and pardon boards would be wise to consider clemency at the end of direct review and possibly avoid the thousands of hours of litigation and millions of dollars in expenses that are typically consumed by the post-conviction habeas process.

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<sup>402</sup> 556 U.S. 180 (2009).