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Rethinking the Timing of Capital Clemency

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RETHINKING THE TIMING OF CAPITAL CLEMENCY

Adam M. Gershowitz*

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 ended. 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, and 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 reserving clemency determinations for 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.

TABLE OF CONTENTS

INTRODUCTION	2
I. WHAT DO WE KNOW AT THE END OF DIRECT APPEALS?.....	6
A. <i>The Clemency Basis Was Known at the End of Direct Appeals in Over Half of Capital Commutations</i>	7
1. Doubts About Guilt.....	7
2. Defendant-Specific Characteristics: Mental Capacity, Mental Illness, History of Abuse, and Age.....	12
3. Questionable Evidence and Procedures.....	16
4. Different Treatment of Codefendants	18
5. Support for Clemency from Jurors and the Victim’s Family	19
6. Ineffective Assistance of Counsel.....	21
7. Racial Discrimination	22
8. Failure to Preserve Evidence	22
9. Proportionality	23
10. Religious Conversion.....	25
11. Mixed Rationales	25

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B.	<i>Cases Where the Same Information Was Probably Available at the Conclusion of Direct Review</i>	27
C.	<i>Insufficient Information in Some Cases to Assess Whether Clemency Could Have Been Granted Earlier</i>	31
D.	<i>Cases in Which Crucial Information Came After Direct Review</i>	33
	1. Commutations Based on Recent Legal Developments . .	34
	2. DNA and Other New Evidence	35
	3. Ineffective Assistance of Counsel	36
	4. Changes Related to the Defendant	37
	5. Outside Influence	38
II.	THE CASE FOR THRESHOLD CLEMENCY DECISIONS FOLLOWING DIRECT APPEALS	38
A.	<i>Efficient Clemency: Saving Hundreds of Years of Wasted Litigation</i>	39
	1. The Raw Numbers	39
	2. The Story of Habeas Evolution	41
B.	<i>An Earlier Clemency Decision Might Increase Commutations</i> . 44	
	1. The Full and Fair Access Excuse	44
	2. The Information Cascade Problem	46
C.	<i>Moving Clemency to an Earlier Stage Benefits Victims' Families</i>	48
D.	<i>Responding to the Major Objection</i>	50
III.	IMPLEMENTING A THRESHOLD CLEMENCY DETERMINATION AT THE END OF DIRECT REVIEW	52
	CONCLUSION	54

I am doing what a governor has to do I am taking a last, long look at it.
— Governor Buddy Roemer¹

INTRODUCTION

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.² In the ordinary case, commutation comes only days or hours before execution.³ Sometimes the inmate has

1. Jack Wardlaw & James Hodge, *Roemer Saves Inmate from Execution*, TIMES-PICAYUNE (New Orleans, La.), Aug. 17, 1989, at A1 (emphasis added).

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

3. See James R. Acker & Charles S. Lanier, *May God—or 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 made in the last few days and even the 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.” (citation omitted)).

already ordered his final meal when the governor steps forward to reduce the sentence from death to life imprisonment.⁴

There is a plausible argument for leaving clemency until the end of the process. In order to look holistically at a case, a governor or pardon board⁵ must have all the information to make an informed decision. And important information may come from the years of appeals and postconviction litigation. For instance, it may only be after years of habeas corpus proceedings that governors would learn how terribly an inmate's lawyer performed or about new DNA evidence suggesting his innocence.⁶ Therefore, the conventional wisdom is that governors and pardon boards should decide whether to commute a death sentence only at the very end of a case.

This Article challenges that 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 in the last forty years,⁷ I suggest that the governor or pardon board should make a clemency determination immediately after the conclusion of the direct appeals process but before any state or federal habeas corpus petitions are filed.⁸ 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 conviction to execution is almost fifteen years.⁹ Direct appeals typically take a few years,¹⁰ with the habeas process covering the largest portion of the time.¹¹ The threshold clemency determination should therefore be made relatively

4. See, e.g., Don Terry, *Hours Before Execution She Sought, Illinois Woman Is Given Clemency*, N.Y. TIMES, Jan. 17, 1996, at A10, available at <http://www.nytimes.com/1996/01/17/us/hours-before-execution-she-sought-illinois-woman-is-given-clemency.html>.

5. 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).

6. For examples of the innocence issues, see BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2012).

7. I have analyzed capital commutations granted for individualized reasons but excluded mass commutations that emptied death row.

8. 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, the inmate's direct appeals are completed. Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495 (2009).

9. *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay).

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

11. See, e.g., Uelmen, *supra* note 8, at 502.

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 supporting 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.¹² There have been sixty-six commutations for particularized reasons related to the inmate's case since the Supreme Court reinstated capital punishment in 1976.¹³ To determine why governors or pardon boards commuted the death sentences, I reviewed news reports, direct appeals, and habeas corpus decisions, and I 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 avoided roughly 300 years of litigation and hundreds of millions of dollars in expenses in these cases if they had made their clemency decisions at the end of direct review rather than at the conclusion of the habeas process.¹⁴

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, clemency has become a rarity.¹⁵ While there have been more than 1,300 executions since the Supreme Court reinstated capital punishment in 1976, there have been only 66 individualized commutations.¹⁶ By contrast, in the first half of the twentieth century, 1 out of every 4 or 5 death sentences was commuted to life imprisonment.¹⁷

In large part, the decline of clemency can be attributed to tough-on-crime politics.¹⁸ 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.¹⁹ And as the Supreme Court

12. See *infra* Part I.

13. The Death Penalty Information Center keeps careful track of commutations. See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2014).

14. For a good discussion of the appellate and postconviction costs of capital punishment, see Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 143–50.

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

16. See *Clemency*, *supra* note 13.

17. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 266 (1990–1991); see also Acker & Lanier, *supra* note 3, at 212–13 (cataloguing large numbers of commutations prior to 1972).

18. But 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 influences clemency but finding a lack of statistical significance).

19. 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 (2011) (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

and Congress imposed additional procedural obstacles in the 1980s and 1990s,²⁰ successful habeas claims declined.²¹ 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 postconviction habeas proceedings, with most, if not all, of these efforts having been unsuccessful.

Social science literature tells us that information cascades affect decisionmaking.²² When an actor is asked to reverse a decision that many prior decisionmakers have upheld for many years, 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 spur governors or pardon boards to 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 the family of the victims from emotional trauma. 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 more 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 two aggravated murders.²³ In 1993, the Ohio Supreme Court upheld his conviction and sentence, but Justice Pfeifer dissented, concluding that there was doubt about Hawkins's guilt. In particular, Pfeifer pointed to the possibility that a codefendant was the actual triggerman.²⁴ For nearly two decades thereafter, Hawkins litigated numerous state and federal petitions for postconviction relief.²⁵ With his habeas options exhausted, Hawkins petitioned for clemency in

PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 10 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

20. 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.").

21. See Liebman & Clarke, *supra* note 19, at 337 n.415.

22. See *infra* Section II.B.

23. See *State v. Hawkins*, 612 N.E.2d 1227, 1232 (Ohio 1993).

24. *Id.* at 1236 (Pfeifer, J., dissenting).

25. See, e.g., *Hawkins v. Coyle*, 547 F.3d 540 (6th Cir. 2008), *aff'g in part and rev'g in part* No. C-1-97-296, 2005 WL 1684022 (S.D. Ohio July 19, 2005); *State v. Hawkins*, No. C-950130, 1996 WL 348024 (Ohio Ct. App. June 26, 1996) (per curiam).

2011 and relied heavily on Pfeifer's dissenting opinion from 1993.²⁶ 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."²⁷ Yet after reviewing the old evidence, the pardon board was not certain that Hawkins was guilty and therefore recommended commutation to life imprisonment.²⁸ Governor Kasich concurred and, over twenty years after conviction, commuted Hawkins's sentence because of the very same concerns Hawkins had raised at the beginning of his case.²⁹ 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."³⁰ Hawkins's 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 that have been granted 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 argues for a threshold clemency determination at the end of direct review but before the habeas process begins. In addition to saving hundreds of years of litigation and sparing the victims' families considerable anguish, 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 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 direct appeals ended. All told, considering commutation only at the end of the habeas process—rather than providing for a threshold determination at the end of direct review—resulted in about 300 years of unnecessary litigation and caused serious anxiety for the victims' families.

26. See OHIO ADULT PAROLE AUTH., IN RE: SHAWN L. HAWKINS, OSP #A218-401, at 8 (2011), available at <http://www.drc.ohio.gov/Public/clemencyhawkins218401.pdf>.

27. *Id.* at 11.

28. *Id.* at 14–15.

29. See Mark Curnutte, *Kasich Grants Clemency to Death Row Inmate*, CINCINNATI ENQUIRER (June 8, 2011), <http://archive.cincinnati.com/article/20110608/NEWS010702/306080128/Kasich-grants-clemency-Death-Row-inmate>.

30. *Id.*

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 unquestionably 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, the defendant's particular characteristics—for instance, mental health problems, age, or an abusive childhood—served as the basis for clemency. Other reasons for commutation included differential treatment of codefendants, 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 relates to 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 involved Governor Kasich's commutation of Hawkins.³¹ Hawkins had raised questions about his guilt in his 1993 direct appeal to the Ohio Supreme Court, but he managed to convince only one of the seven justices.³² For the next eighteen years, Hawkins filed state and federal petitions for postconviction review without success.³³ In 2011, however, without any new evidence of his innocence since his conviction, Hawkins convinced Kasich to commute his sentence.³⁴ If the Ohio governor had considered clemency at the conclusion of direct appeals, it would have saved decades of litigation and reduced anxiety for the victim's family.

A similar turn of events occurred a decade earlier in the commutation of Phillip Dewitt Smith. In 2001, Governor Keating of Oklahoma commuted Smith's death sentence because the governor was not convinced to a "moral certainty" that Smith was guilty.³⁵ Keating noted that there was no eyewitness or forensic testimony and that the case against Smith was circumstantial.³⁶ But these evidentiary deficiencies were clear from the time of Smith's death sentence in 1984 and were discussed in a dissenting opinion in Smith's

31. See *supra* notes 23–30 and accompanying text.

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

33. See *supra* note 25.

34. Curnutte, *supra* note 29.

35. Barbara Hoberock, *Keating Spares Life of Slayer*, TULSA WORLD, Apr. 10, 2001, at A1, available at http://www.tulsaworld.com/archives/keating-spares-life-of-slayer/article_5e63864e-9b86-55ae-8525-f47d0c20ab7a.html.

36. See *id.*

direct appeal.³⁷ 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,³⁸ Maryland Governor Glendening commuted his sentence because there was not enough certainty of his guilt.³⁹ At Colvin-El's trial, there was neither eyewitness testimony nor forensic evidence, and he did not confess to the murder.⁴⁰ 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 postconviction review decisions,⁴¹ could have been avoided if the governor made a clemency determination at the conclusion of direct review.

In a more high-profile commutation, Governor Bush of Texas reduced the sentence of Henry Lee Lucas in 1998 because of doubts that Lucas had committed the crime for which he was to be executed.⁴² In the early 1980s, Lucas confessed to nearly 600 murders, and in 1984 he was sentenced to death in a Texas case.⁴³ 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."⁴⁴ In April 1985, Lucas recanted his confession to all but three of the murders, making front-page news across the country.⁴⁵ 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."⁴⁶ When Bush commuted Lucas's

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

38. See *Colvin v. State*, 472 A.2d 953 (Md. 1984), *cert. denied*, 469 U.S. 873 (1984).

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

40. *Id.*

41. See *Colvin-El v. Nuth*, 205 F.3d 1332 (4th Cir. 1999), *aff'g in part and rev'g in part* No. Civ.A. AW 97-2520, 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).

42. 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.

43. *Id.*

44. Cynthia Gorney & Paul Taylor, *The Killer Who Recanted; Did Henry Lee Lucas Kill All Those People?*, WASH. POST, Apr. 15, 1985, at B1.

45. See, e.g., *210 Deaths Recanted, Paper Says*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Apr. 14, 1985, at 1A, available at http://articles.sun-sentinel.com/1985-04-14/news/8501140358_1_lucas-confessions-henry-lee-lucas-murders; George Kuempel, *DPS Chief Defends Work on Lucas Case*, DALLAS MORNING NEWS, Apr. 17, 1985, at 1A; Storer Rowley, *Is Lucas a Bigger Liar Than Killer?*, CHI. TRIB., Apr. 18, 1985, at 1, available at http://articles.chicagotribune.com/1985-04-18/news/8501220836_1_lucas-confessions-henry-lee-lucas-lucas-isn-t.

46. Tomaso & McLemore, *supra* note 42.

sentence in 1998, his decision did not turn on new evidence discovered in the thirteen years since Lucas recanted.⁴⁷ Rather, Bush simply waited until the postconviction process had run its course and commuted the sentence four days before the execution.⁴⁸ 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 Martin commuted the death sentence of Anson Avery Maynard because of doubts about Maynard's guilt.⁴⁹ 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."⁵⁰ Although Martin claimed that he considered "some" evidence not before the jury, he never specified what evidence that was.⁵¹ The facts cited by 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.⁵² The direct appeals concluded in 1984,⁵³ but Martin did not grant clemency until more than seven years later.

The case of Ronald Monroe in Louisiana involved an even more inexcusable delay in commutation. Monroe, a mildly mentally handicapped laborer with no prior criminal record,⁵⁴ was sentenced to death in 1980 for killing his neighbor, Lenora Collins.⁵⁵ 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.⁵⁶ Stinson's confession was credible because he made it while in prison for killing another

47. James Pinkerton & Kathy Walt, *Lucas' Life Spared, But He May Never Be 'Free Again'*, HOUS. CHRON., June 27, 1998, at A1 (quoting district attorney and juror as saying there had been no new evidence).

48. 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 Bush's philosophy of deferring to the judiciary and denying clemency because an inmate had "full and fair access to the courts." Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 677–78 (2001).

49. Bruce Henderson, *Martin Commutes Man's Death Sentence*, CHARLOTTE OBSERVER, Jan. 11, 1992, at 1A.

50. *Id.*

51. *See id.*

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

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

54. Wardlaw & Hodge, *supra* note 1.

55. *State v. Monroe*, 397 So. 2d 1258, 1263 (La. 1981).

56. Wardlaw & Hodge, *supra* note 1.

one of his ex-wives.⁵⁷ In late 1983, just as Monroe's direct appeals were rejected,⁵⁸ his attorneys learned of Stinson's confession.⁵⁹ 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.⁶⁰ In 1988, the pardons board unanimously recommended commuting the sentence, but Governor Roemer still did not make a clemency determination because the Louisiana Supreme Court had stayed the execution.⁶¹ Litigation continued, with the state of Louisiana petitioning for the stay to be lifted⁶² and the Louisiana Supreme Court eventually allowing the execution to move forward in August 1989.⁶³ With no appellate avenues remaining, Roemer commuted Monroe's sentence two weeks before his scheduled execution.⁶⁴ 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 Hughes of Maryland commuted the death sentence of Doris Ann Foster because of lingering doubts about her guilt.⁶⁵ Foster had been convicted of killing her landlord, but she had claimed at trial that her husband was responsible.⁶⁶ Foster's husband had confessed on multiple occasions but had recanted.⁶⁷ Hughes commuted Foster's sentence, explaining that "there remained some doubt whether Foster committed the crime."⁶⁸ Foster's claim of innocence was known at trial, well before the conclusion of direct appeals. Because Hughes acted relatively

57. *See id.*

58. The Supreme Court denied certiorari in July 1983 and denied rehearing in September 1983. *Monroe v. Louisiana*, 463 U.S. 1249 (1983); *Monroe v. Louisiana*, 463 U.S. 1229 (1983).

59. *Monroe v. Blackburn*, 476 U.S. 1145, 1146 (1986) (Marshall, J., dissenting) ("[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.").

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

61. *Wardlaw & Hodge*, *supra* note 1.

62. *State ex rel. Monroe v. Butler*, 535 So. 2d 732 (La. 1988).

63. *State ex rel. Monroe v. Butler*, 547 So. 2d 367 (La. 1989).

64. *See Wardlaw & Hodge*, *supra* note 1.

65. Gwen Ifill, *Md. Woman's Death Term Commuted: Hughes Takes Action on His Final Day*, *WASH. POST*, Jan. 21, 1987, at B7.

66. *Foster v. State*, 464 A.2d 986, 988-89 (Md. 1983).

67. *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.").

68. Ifill, *supra* note 65.

quickly, Foster sat on death row for less than a year after the conclusion of her direct appeals.⁶⁹

In 1983, Florida Governor Graham commuted the death sentence of Jesse Rutledge.⁷⁰ 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.⁷¹ The victim had previously complained that Bessent had beaten and sexually assaulted her.⁷² Although it is not absolutely certain when the information about Rutledge's innocence emerged, two attorneys who represented him believed that the evidence about Bessent's possible involvement was known at the time of trial.⁷³ The commutation came about four years after Rutledge's conviction.⁷⁴

Finally, the case of Christopher Hallman also 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.⁷⁵ The jury was led to believe that Hallman directly caused the victim's death.⁷⁶ Hallman's direct appeals failed, and the Supreme Court denied certiorari in 1976.⁷⁷ Somewhere around that time (the exact date is unclear), Hallman's attorneys learned that the victim's estate had filed a wrongful death suit against the hospital where she was treated.⁷⁸ Hospital records showed that the victim actually died as a result of medical malpractice.⁷⁹ After conducting an internal investigation, the hospital quietly settled the malpractice lawsuit.⁸⁰ Hallman sought a new trial, but his request was rejected on December 1, 1976.⁸¹

69. See *Foster v. State*, 503 A.2d 1326 (Md. 1986), *cert. denied*, 478 U.S. 1023 (1986). Foster was awarded a new trial on sentencing, which explains the long delay between her trial and the conclusion of her direct appeals. *Foster*, 464 A.2d 986.

70. *Graham Backs Clemency for Condemned Man*, MIAMI HERALD, Apr. 7, 1983, at 2B.

71. See *id.*

72. *Id.*

73. See Telephone Interview with James G. Feiber, Jr., Founding Partner, Salter Feiber, P.A. (July 8, 2013) (clemency counsel); Telephone Interview with Alan R. Parlapiano, Of Counsel, Fine, Farkash & Parlapiano, P.A. (July 8, 2013) (trial counsel).

74. See *Graham Backs Clemency for Condemned Man*, *supra* note 70. Rutledge's direct appeal became final on April 21, 1980. See *Rutledge v. Florida*, 446 U.S. 913 (1980).

75. See *Hallman v. State*, 305 So. 2d 180, 181 (Fla. 1974).

76. 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 . . .").

77. See *Hallman v. Florida*, 428 U.S. 911 (1976).

78. A January 1977 news story discussed the hospital error. Tom Fiedler, *Is He Condemned for Hospital's Error?*, MIAMI HERALD, Jan. 23, 1977, at A1; see also DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF CAPITAL PUNISHMENT* 188–89 (2006); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 309 (1993).

79. See Fiedler, *supra* note 78.

80. See *id.*

81. *Id.*

Hallman's attorneys then brought the malpractice information before the Florida Parole and Probation Commission, which recommended clemency.⁸² 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 Supreme Court for a new trial for Hallman."⁸³ More than two years later, with a new governor in office, Hallman's death sentence was finally commuted.⁸⁴ Although it is not clear exactly when the exonerating evidence was publicly disclosed, the information was certainly available around the conclusion of direct review.

Across numerous states—Florida, Louisiana, Maryland, North Carolina, Ohio, Oklahoma, and Texas—inmates remained on death row for years despite doubts about their guilt. When judicial review ended and troubling cases came close to execution, governors and pardon boards stepped forward and granted clemency. And yet if they had considered clemency at the conclusion of direct review, they 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, History of Abuse, 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 the defendant's mental capacity, mental illness, history of abuse, and age.

The recent commutation of Joseph Murphy provides a compelling case for considering clemency earlier. In 1987, Murphy was sentenced to death for the brutal murder of an elderly woman.⁸⁵ On September 26, 2011, more than twenty-four years later, Governor 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."⁸⁶ Yet the Ohio Supreme Court considered this very argument in 1992 as part of Murphy's direct

82. See *3 More Cases Go to Clemency Board for Final Answer*, Ocala Star-Banner, Mar. 29, 1977, at 7A.

83. *Id.*

84. *2nd Fla. Killer Given Stay*, WASH. POST, June 27, 1979, at A15 (noting that Hallman's sentence was commuted to life).

85. *State v. Murphy*, 605 N.E.2d 884, 888, 897 (Ohio 1992).

86. Alan Johnson, *Governor Spares Life of Condemned Killer*, COLUMBUS DISPATCH (Sept. 26, 2011), <http://www.dispatch.com/content/stories/local/2011/09/26/kasich-approves-clemency-for-joseph-murphy.html>.

appeal. The court split four to three on the issue of whether Murphy's traumatizing background should be grounds for setting aside his death sentence. The majority of the court noted as follows:

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.⁸⁷

Three dissenting justices refused to agree that Murphy's abusive upbringing should be disregarded. In a detailed dissenting opinion, Chief Justice Moyer spent more than two pages describing the disturbing details of Murphy's childhood.⁸⁸

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 postconviction review petitions that were denied.⁸⁹

Another recent Ohio case also supports the argument for earlier clemency determinations. In 2012, Kasich commuted the death sentence of John Jeffrey Eley, convicted for a 1986 murder, because of his limited mental capacity.⁹⁰ This issue had been presented at trial,⁹¹ and Eley raised it in his direct appeals.⁹² In granting clemency, Kasich pointed to the fact that the prosecutor in the case now believed that execution was unwarranted.⁹³ Yet the prosecutor's change of opinion was not a last-minute decision based on new evidence. Shortly before Kasich's decision, the prosecutor noted that

87. *Murphy*, 605 N.E.2d at 908.

88. *Id.* at 909–11 (Moyer, C.J., dissenting).

89. See, e.g., *Murphy v. Ohio*, 551 F.3d 485 (6th Cir. 2009), *aff'g* No. 3:96 CV 7244, 2006 WL 3057964 (N.D. Ohio Sept. 29, 2006); *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001); *State v. Murphy*, 663 N.E.2d 939 (Ohio 1996); *State v. Murphy*, No. 9-04-36, 2005 WL 280446 (Ohio Ct. App. Feb. 7, 2005); *State v. Murphy*, No. 9-94-52, 1995 WL 275766 (Ohio Ct. App. May 12, 1995).

90. Reginald Fields, *Kasich Commutes Sentence of Death-Row Inmate Eley*, PLAIN DEALER (Cleveland, Ohio), July 11, 2012, at B1.

91. 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.").

92. *Id.* at 646, *aff'g* No. 87 C.A. 122, 1995 WL 758808 (Ohio Ct. App. Dec. 20, 1995).

93. Alan Johnson, *Kasich Cancels Death Sentence*, COLUMBUS DISPATCH, July 11, 2012, at 3B, available at <http://www.dispatch.com/content/stories/local/2012/07/11/kasich-cancels-death-sentence.html>.

Eley's case "has haunted me for more than 24 years."⁹⁴ In short, the governor could have granted clemency to Eley based on his limited intelligence when the U.S. Supreme Court refused to grant certiorari to his direct appeal in 1993.⁹⁵ Instead, the commutation was delayed for nearly fifteen years, until two weeks before the scheduled execution.⁹⁶

The same scenario occurred in Indiana. In 2005, Governor Daniels commuted the death sentence of Arthur Baird in part because it appeared that Baird was mentally ill at the time of the crime.⁹⁷ Baird had raised mental illness and insanity arguments in his direct appeals over a decade earlier.⁹⁸ In granting clemency, 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.⁹⁹ The law changed in 1993, but clemency was not granted until 2005, just days before Baird's scheduled execution.¹⁰⁰

On his last day in office in 2003, Governor Patton of Kentucky commuted the death sentence of Kevin Stanford.¹⁰¹ Stanford, who was sentenced to death for a murder he committed when he was seventeen, had litigated his death sentence for decades, including in the infamous U.S. Supreme Court decision that upheld the death penalty for juvenile offenders.¹⁰² 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."¹⁰³ Yet that rationale was known from the very moment the case began—and it was certainly known when Patton took office in 1995.¹⁰⁴ In total, fourteen needless years elapsed from the conclusion of direct appeals in 1989 and the clemency grant in 2003.

94. Gary L. Van Brocklin, Letter to the Editor, *Man Sitting on Death Row Does Not Deserve to Die for His Crime*, COLUMBUS DISPATCH, July 7, 2012, at 9A, available at <http://www.dispatch.com/content/stories/editorials/2012/07/07/man-sitting-on-death-row-does-not-deserve-to-die-for-his-crime.html>.

95. *Eley*, 672 N.E.2d 640, cert. denied, 521 U.S. 1124 (1997).

96. See Fields, *supra* note 90.

97. *Governor Commutes Death Sentence*, WTHR (2005), <http://www.wthr.com/Global/story.asp?s=3778726>.

98. *Baird v. State*, 604 N.E.2d 1170, 1177 (Ind. 1992).

99. *Governor Commutes Death Sentence*, *supra* note 97.

100. *Id.*

101. Tom Loftus, *Patton Has Short, Quiet Last Day as Governor*, COURIER-J. (Louisville, Ky.), Dec. 9, 2003, at 1B.

102. See *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court's precedent in *Stanford* lasted for sixteen years, a shorter period than Stanford's death sentence. The case was overruled by *Roper v. Simmons*, 543 U.S. 551 (2005).

103. See Loftus, *supra* note 101.

104. *Id.*

The previous year, Alexander Williams, a schizophrenic man convicted of murder, came within hours of execution before the pardon board commuted his sentence.¹⁰⁵ Shortly before the execution, the Georgia Board of Pardons and Paroles dispatched experts to evaluate Williams and—presumably based on the experts’ evaluation as well as on the fact that Williams was under the age of eighteen at the time of the crime—commuted Williams’s sentence to life without parole.¹⁰⁶ Yet Williams’s age and his mental-health problems had been known from the very beginning of the case. The *Los Angeles Times* revealed 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.’”¹⁰⁷ 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.”¹⁰⁸ While Williams’s mental-health issues were not raised at trial, they were raised and considered as part of his direct appeal.¹⁰⁹ Nearly thirteen years elapsed between the conclusion of direct appeals and the commutation.¹¹⁰

Finally, in 1999, Virginia Governor Gilmore commuted the death sentence of Calvin Swann because of his mental illness less than five hours before Swann’s scheduled execution.¹¹¹ Swann, who was forty-four years old at the time of the commutation, had been diagnosed as mentally ill at the age of nineteen.¹¹² He had been involuntarily committed to psychiatric hospitals sixteen times before he committed the murder that led to his death sentence.¹¹³ 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.”¹¹⁴ Not surprisingly, Swann’s mental illness figured prominently in his direct appeals.¹¹⁵ Although all of the information necessary to commute Swann’s death sentence was available at the

105. See Henry Weinstein, *Mentally Ill Killer Gains Clemency*, L.A. TIMES, Feb. 26, 2002, at A18, available at <http://articles.latimes.com/2002/feb/26/news/mn-29957>.

106. See David Firestone, *Georgia Will Not Execute Mentally Ill Killer*, N.Y. TIMES, Feb. 26, 2002, at A18, available at <http://www.nytimes.com/2002/02/26/us/georgia-will-not-execute-mentally-ill-killer.html>.

107. Weinstein, *supra* note 105.

108. Sue Anne Pressley, *Ga. Inmate’s Death Sentence Commuted*, WASH. POST, Feb. 26, 2002, at A2.

109. *Williams v. State*, 368 S.E.2d 742, 750 (Ga. 1988).

110. Williams’s direct appeals concluded in July 1989. See *id.*, cert. denied, 492 U.S. 925 (1989). His sentence was commuted in February 2002. See Weinstein, *supra* note 105.

111. Donald P. Baker, *Gilmore Stops Execution for First Time; Mental Illness of Inmate Cited*, WASH. POST, May 13, 1999, at A1.

112. Frank Green, *Swann’s Execution Set Wednesday; Mental Health Cited in Clemency Bid*, RICHMOND TIMES-DISPATCH, May 9, 1999, at C4.

113. *Id.*

114. *Id.*

115. See *Swann v. Commonwealth*, 441 S.E.2d 195 (Va. 1994).

conclusion of his direct appeals in 1994,¹¹⁶ 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 disconcerting police tactics during the initial investigation. These last-minute commutations followed decades of unnecessary litigation.

In 2010, Governor Strickland of Ohio commuted the death sentence of Kevin Keith, who had been on death row for over sixteen years.¹¹⁷ Strickland's decision appeared to turn on a defective lineup procedure used by the police and a troubling identification by a victim of the crime.¹¹⁸ Keith raised this information in a pretrial motion,¹¹⁹ and it was one of his primary appellate issues on direct review.¹²⁰ Keith's direct appeals ended in 1998, but the commutation of his sentence did not occur until a dozen years later.¹²¹

In 2008, Oklahoma Governor Henry commuted the death sentence of Kevin Young based on a four-to-one recommendation of the pardon board.¹²² News analysis of the clemency hearing appeared to indicate 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."¹²³ The jurors'

116. See *Swann v. Virginia*, 513 U.S. 889 (1994).

117. See Alan Johnson, *Governor Commutes Death Sentence to Life*, COLUMBUS DISPATCH, Sept. 3, 2010, at 1A, available at <http://www.dispatch.com/content/stories/local/2010/09/03/governor-commutes-death-sentence-to-life.html>.

118. See Editorial, *Case for Clemency*, AKRON BEACON J., Aug. 23, 2010, at A5, available at <http://www.ohio.com/editorial/editorials/case-for-clemency-1.177222> (mistakenly claiming that this information was new).

119. 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."); 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.").

120. See *State v. Keith*, No. 3-94-14, 1996 WL 156710, at *10–12 (Ohio Ct. App. Apr. 5, 1996).

121. See *State v. Keith*, 684 N.E.2d 47 (Ohio 1997), cert. denied, 523 U.S. 1063 (1998).

122. Michael McNutt & Julie Bisbee, *Governor Spares Second Killer's Life*, OKLAHOMAN, July 25, 2008, at 1A; Julie Bisbee, *Board Asks Henry to Stop Inmate's Execution*, NEWSOK (July 9, 2008), <http://newsok.com/board-asks-henry-to-stop-inmates-execution/article/3267727>.

123. 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), <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

statements had never been presented to a court and took the attorney general by surprise.¹²⁴ It appears that Young's lawyers simply gathered 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 a clemency hearing at the conclusion of direct appeals, which occurred seven years earlier.¹²⁵

Over a decade after Kenneth Foster was sentenced to death, Governor Perry of Texas commuted his sentence because Foster (who was the getaway driver) had been jointly tried along with the triggerman.¹²⁶ Perry thought that this procedure, which obviously was known from the very beginning of the case, was unfair and that "the Legislature should examine" it.¹²⁷ 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.¹²⁸ None of that litigation would have been necessary if Perry or his predecessor had considered clemency earlier in the process.

Last but not least, Governor Hunt of North Carolina commuted the death sentence of Marcus Carter in 2000 because of the lack of counsel at trial.¹²⁹ Carter's first murder trial resulted in a hung jury.¹³⁰ In the four months before the retrial, Carter's attorneys refused to speak with him, and he therefore requested new counsel.¹³¹ At the second trial, the judge gave Carter the choice either to rely on the same lawyers or to appear pro se.¹³² Carter chose to represent himself and was sentenced to death.¹³³ This course of events was well known from the very beginning of Carter's retrial, and the

during clemency hearing); see also McNutt & Bisbee, *supra* note 122 (noting that the clemency appeal "hinged on jury").

124. Bisbee, *supra* note 123 (quoting the attorney general as stating that "the [clemency] hearing was the first time that information was presented to the state").

125. See *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001).

126. Emily Ramshaw, *Perry Commutes Texas Death Row Inmate Foster's Sentence: Sentence Commuted to Life for Driver in '96 Murder*, DALLAS MORNING NEWS, Aug. 31, 2007, at 1A.

127. *Id.*

128. See *Foster v. Quarterman*, 466 F.3d 359, 363 (5th Cir. 2006); *Foster v. Dretke*, No. 05-70016, 2006 WL 616980 (5th Cir. Mar. 13, 2006); *Ex parte Foster*, No. WR-50823-03, 2007 WL 2460745 (Tex. Crim. App. Aug. 27, 2007); *Ex parte Foster*, No. WR-50823-02, 2007 WL 2257150 (Tex. Crim. App. Aug. 7, 2007).

129. Liz Chandler, *Gov. Hunt Intervenes to Call Off Execution*, CHARLOTTE OBSERVER, Nov. 22, 2000, at 1A.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

events could have been the basis of a clemency grant at any time. Nevertheless, Hunt waited until the day of execution to commute Carter's sentence¹³⁴—more than eight years after trial and almost five years after the conclusion of direct review.¹³⁵

4. Different Treatment of Codefendants

Inmates often seek clemency on the ground that a codefendant received a lighter sentence.¹³⁶ In theory, a request for mercy on this basis could be resolved early in the criminal justice process. When codefendants are involved, it is usually clear by the end of trial—and potentially even before trial if there was a plea bargain—whether one defendant is being treated much more harshly than another. In four cases, however, governors and pardon boards waited, very inefficiently, until the eve of execution to commute death sentences based on differential treatment of codefendants.

One day before Wendell Flowers was to be executed, North Carolina Governor Hunt commuted his death sentence to life without parole.¹³⁷ While he had been incarcerated for another crime, Flowers confessed to fatally stabbing a prisoner.¹³⁸ Because three other perpetrators involved in the killing were not sentenced to death, Hunt concluded that it would be unfair to execute Flowers.¹³⁹ The fate of Flowers's codefendants was clear from the beginning of the case and thus Hunt could have made his clemency decision years earlier instead of waiting until the day before the execution.¹⁴⁰

The same situation occurred in the Florida case of Michael Salvatore. Salvatore and two codefendants stood trial for the murder of a businessman, but only Salvatore was sentenced to death.¹⁴¹ The different sentence for Salvatore was obviously known at the conclusion of trial, and Salvatore raised this issue in his direct appeal.¹⁴² The governor commuted Salvatore's death sentence about eighteen months after the end of direct review.¹⁴³

134. *See id.*

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

136. Scholars sometimes refer to this as sentencing equity. *See, e.g.*, Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 358 (2003).

137. Foon Rhee, *Governor Blocks Execution*, CHARLOTTE OBSERVER, Dec. 16, 1999, at 1A.

138. *Id.*

139. *Id.*

140. *See id.* Flowers's execution date (and commutation) came only about a year after the conclusion of direct review. *See State v. Flowers*, 489 S.E.2d 391 (N.C. 1997), *cert. denied*, 522 U.S. 1135 (1998).

141. *Graham: Clemency Needed in Miami Case*, MIAMI NEWS, May 6, 1981, at 16A.

142. *Salvatore v. State*, 366 So. 2d 745, 749–51 (Fla. 1978) (“[D]efendant says that the death penalty is unconstitutionally imposed when a co-defendant on similar facts is not sentenced to death.”).

143. *See Salvatore v. Florida*, 444 U.S. 885 (1979).

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."¹⁴⁴ Prosecutors had argued in one trial that the codefendant had been the shooter, but they argued in Gibson's case that Gibson was the shooter.¹⁴⁵ Gibson was sentenced to death in 1975¹⁴⁶ and his direct appeals were final in 1978,¹⁴⁷ but he was not granted clemency until 1980.¹⁴⁸

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 were his codefendants.¹⁴⁹ Hill was one of three people involved in a murder during a failed burglary.¹⁵⁰ The first codefendant, the actual shooter, pled guilty to murder and received a life sentence; the second codefendant agreed to testify against Hill and was rewarded with a plea of voluntary manslaughter and a ten-year sentence.¹⁵¹ The pardon board moved relatively quickly and commuted Hill's sentence exactly one year after the Georgia Supreme Court rejected his direct appeal.¹⁵²

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.¹⁵³ Similarly, 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 after the clemency was granted. But there is no reason to think the jurors or family members formed their opinions because of years of postconviction litigation. Had the clemency decision been made years earlier, the jurors and family members likely would have made the same statements.

As discussed above,¹⁵⁴ Oklahoma Governor 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

144. Radelet & Zsembik, *supra* note 78, at 301.

145. VON DREHLE, *supra* note 78, at 190.

146. *Graham Signs Two Death Warrants*, MIAMI NEWS, Apr. 18, 1980, at 2A.

147. *See* Gibson v. State, 351 So. 2d 948 (Fla. 1977), *cert. denied*, 435 U.S. 1004 (1978).

148. *Graham Signs Two Death Warrants*, *supra* note 146.

149. Radelet & Zsembik, *supra* note 78, at 309–10.

150. *Id.*

151. *Id.*

152. *See* Hill v. State, 229 S.E.2d 737 (Ga. 1976).

153. Two of these three cases are also discussed above in conjunction with other reasons—specifically, procedural problems and mental illness—for granting clemency. *See supra* notes 97–100, 122–125 and accompanying text.

154. *See supra* notes 122–125 and accompanying text.

whether Young would be eligible for parole if he was sentenced to life without parole.”¹⁵⁵ The jurors made these statements for the first time at the clemency stage.¹⁵⁶ Because the jurors’ statements stemmed from a faulty trial procedure rather than from 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.¹⁵⁷

Statements from jurors played a smaller, albeit notable, role in the commutation of Arthur Baird’s death sentence. As discussed above,¹⁵⁸ Governor Daniels commuted Baird’s sentence because of his mental illness, although Daniels also relied on statements from jurors that they would have imposed life without parole if that option had been available at trial.¹⁵⁹ Although Indiana law was changed to add a life without parole option in 1993, the same year that Baird’s direct appeals ended,¹⁶⁰ Daniels did not commute the sentence until days before Baird’s execution in 2005.¹⁶¹ The jurors likely would have made their statements earlier if clemency had been considered earlier.

A nearly identical turn of events played out in the commutation of Willie James Hall. While the Georgia parole board did not state its reasons for commuting Hall’s sentence, six of the jurors from Hall’s trial offered sworn statements to the board indicating that they would have given Hall life without parole if that were an option at his trial.¹⁶² 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.¹⁶³

Relatedly, the views of the victim’s family have also factored into commutation decisions.¹⁶⁴ 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.”¹⁶⁵ The

155. See McNutt & Bisbee, *supra* note 122 (noting that the clemency appeal “hinged on jury”); Bisbee, *supra* note 123.

156. Bisbee, *supra* note 123.

157. See *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001).

158. See *supra* notes 97–100 and accompanying text.

159. *Governor Commutes Death Sentence*, *supra* note 97.

160. See *Baird v. Indiana*, 510 U.S. 893 (1993).

161. See *supra* text accompanying note 100.

162. Carlos Campos & Bill Rankin, *Murderer’s Sentence Commuted*, ATLANTA J.-CONST., Jan. 27, 2004, at 1B (“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 have also relied in part on the district attorney’s statement that he did not oppose life without parole because of Hall’s good behavior in prison and his lack of a criminal record prior to the crime. See *id.*

163. See *id.*

164. In the case of Jeffrey Hill (see discussion *infra* Section I.A.11), the family’s statements played a small role in the Ohio governor’s decision to grant clemency. See *infra* notes 215–219 and accompanying text.

165. Holly Morris, *Board Spares Murderer: Term Commuted to Life in Prison*, ATLANTA J.-CONST., Aug. 22, 1990, at A1 (internal quotation marks omitted).

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.”¹⁶⁶ 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.¹⁶⁷ Both pieces of information—the lack of a jury trial and the family’s support for commutation—were available at the end of Moore’s direct appeals nearly fourteen years before commutation.¹⁶⁸

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 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.¹⁶⁹ For this reason, many states do not even allow ineffective assistance of counsel claims on direct review.¹⁷⁰ Occasionally, however, there are capital cases in which the defense lawyer’s incompetence is known by the end of the direct appeals process. In one case, poor lawyering was well known from the beginning of the case and served as the basis for commutation decades later.

In 2012, Governor Kasich of Ohio commuted the death sentence of Ronald Post.¹⁷¹ In voting five to three to recommend clemency, the Ohio Parole Board 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.”¹⁷² 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 that Post’s attorneys convinced him to plead no contest to the murder charges and, allegedly, promised him that, by doing so, he would not

166. *Id.* (internal quotation marks omitted).

167. *Id.*

168. *See Moore v. State*, 213 S.E.2d 829 (Ga. 1975) (per curiam), *cert. denied*, 428 U.S. 910 (1976).

169. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 688–89 (2007) (arguing for earlier consideration of ineffective assistance claims on direct review).

170. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1097 & n.165 (2009).

171. *See* Editorial, *Correcting Authority: The Governor’s Appropriate Choice in the Ronald Post Case*, AKRON BEACON J., Dec. 19, 2012, at A6.

172. *Ronald Post, Condemned Obese Ohio Killer, Granted Clemency*, CBS NEWS (Dec. 17, 2012, 5:21 PM), <http://www.cbsnews.com/news/ronald-post-condemned-obese-ohio-killer-granted-clemency/>.

receive the death penalty.¹⁷³ The public defender's office focused on the no contest plea and other alleged ineffectiveness in the direct appeal of Post's death sentence.¹⁷⁴ The Ohio Supreme Court rejected the ineffectiveness claim in a written opinion.¹⁷⁵ While the federal habeas court considered the issue in more detail twenty-three years later,¹⁷⁶ 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

Although there is an extensive literature on racial discrimination and the death penalty,¹⁷⁷ 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.¹⁷⁸ It appears, however, that Easley "agreed that Bacon received the death penalty, rather than life in prison, largely because of his race."¹⁷⁹ Bacon and his lover, Bonnie Clark, killed Clark's husband in order to acquire life insurance proceeds.¹⁸⁰ Clark, who was white, was sentenced to life imprisonment; Bacon, who was black, was sentenced to death.¹⁸¹ Bacon's commutation came more than six-and-a-half years after the conclusion of direct review.¹⁸²

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.

173. David Knox & Scott Stephens, *Ronald Post's Plea Puts Him on Death Row—C-T Probe Raises Question: Was It Legal?*, CHRON.-TELEGRAM (Lorain County, Ohio), Jan. 14, 1987, at A1.

174. *Id.*

175. *State v. Post*, 513 N.E.2d 754, 762–63 (Ohio 1987).

176. *See Post v. Bradshaw*, 621 F.3d 406 (6th Cir. 2010).

177. 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).

178. 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.

179. *Id.*

180. *Id.*

181. *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.

182. *See State v. Bacon*, 446 S.E.2d 542 (N.C. 1994), *cert. denied*, 513 U.S. 1159 (1995).

In 2005, Virginia Governor Warner commuted the death sentence of Robin Lovitt because the murder weapon had been destroyed prior to the start of federal habeas corpus proceedings.¹⁸³ The destruction of the evidence was litigated throughout the federal court system, and Warner granted clemency the day before the scheduled execution,¹⁸⁴ more than four years after the conclusion of direct review.¹⁸⁵

In a very similar case, Governor 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.¹⁸⁶ 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."¹⁸⁷ The governor made his clemency decision years later and just nine hours before the scheduled execution.¹⁸⁸ Had the governor considered clemency at the end of direct review,¹⁸⁹ 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 sentences 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.¹⁹⁰ By 1983, however, the Court backtracked and held that judicial proportionality review was not mandatory.¹⁹¹ Nevertheless, proportionality claims are still raised in clemency proceedings. In two cases, governors were swayed by proportionality arguments, although they did not act until the last minute.

A few days before leaving office in January 2011, Governor Bredesen of Tennessee commuted the sentence of Edward Jerome Harbison because

183. See David Stout, *Clemency Stops an Execution in Virginia*, N.Y. TIMES, Nov. 30, 2005, at A19, available at <http://www.nytimes.com/2005/11/30/national/30execution.html>.

184. *Id.*

185. See *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000), *cert. denied*, 534 U.S. 815 (2001).

186. Anna Griffin, *Easley Commutes Alston's Sentence*, CHARLOTTE OBSERVER, Jan. 11, 2002, at 1A.

187. *Id.*

188. *Id.*

189. See *Alston v. North Carolina*, 461 S.E.2d 687 (N.C. 1995), *cert. denied*, 516 U.S. 1148 (1996).

190. See *Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

191. For a helpful analysis, see William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 695–697 (2012).

“when [he] compare[d] it to others [he did]n’t think it rose to the level of a death penalty crime.”¹⁹² 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.¹⁹³ He even managed to have the 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.¹⁹⁴ After 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.¹⁹⁵

In 1996, Illinois Governor 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.¹⁹⁶ The speed of the clemency decision was not due to Edgar’s decision 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.¹⁹⁷ Although some speculated that Edgar granted clemency because Garcia was a woman or because her husband sexually abused her,¹⁹⁸ Edgar maintained that he commuted her sentence because of a lack of premeditation and proportionality.¹⁹⁹ Edgar concluded that Garcia’s case looked more like a robbery gone wrong than a premeditated vicious homicide that merited death.²⁰⁰ Although 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.

192. Brian Haas, *Bredesen Commutes Death Sentence, Pardons 22*, TENNESSEAN, Jan. 12, 2011 (internal quotation marks omitted).

193. For bookends of the state litigation, see *State v. Harbison*, 704 S.W.2d 314 (Tenn. 1986), and *Harbison v. State*, No. E2011-01711-CCA-R3-PC, 2012 WL 1956757 (Tenn. Crim. App. May 31, 2012).

194. A majority of the Court agreed with Harbison that such representation is authorized under the statute. *Harbison v. Bell*, 556 U.S. 180 (2009).

195. See *Harbison*, 704 S.W.2d 314, *cert. denied*, 476 U.S. 1153 (1986).

196. The Illinois Supreme Court rejected Garcia’s direct appeal on May 30, 1995. *People v. Garcia*, 651 N.E.2d 100, 109 (Ill. 1995). Garcia did not petition the U.S. Supreme Court for certiorari. 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.

197. *Edgar Commutes Sentence; Guinevere Garcia, Killer of Abusive Husband, to Serve Life Without Parole*, CHI. TRIB., Jan. 16, 1996, at 1 [hereinafter *Edgar Commutes Sentence*].

198. 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).

199. See *Edgar Commutes Sentence*, *supra* note 197.

200. *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.”).

10. Religious Conversion

Death-row inmates have famously made religious conversions prior to their executions,²⁰¹ although this has rarely moved governors to commute their sentences.²⁰² In one case, however, a governor granted clemency based on rehabilitation. At the end of his term, Governor Schwinden of Montana followed the recommendation of the state board of pardons and commuted the death sentence of David Cameron Keith.²⁰³ Schwinden visited Keith in prison and concluded that “[h]e certainly manifests a deep sense of remorse He is a very strong Christian.”²⁰⁴ 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.”²⁰⁵ Whether Schwinden relied exclusively on Keith’s religious conversion or on 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 final in March of 1988, and the commutation came nine months later in December 1988.²⁰⁶

11. Mixed Rationales

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

In 2012, Governor Markell of Delaware commuted the sentence of Robert Gattis after the state pardons board recommended commutation by a vote of four to one.²⁰⁷ The board was swayed by the fact that only ten of the twelve jurors voted for death,²⁰⁸ that other offenders were not punished as

201. 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).

202. B. Douglas Robbins, Comment, *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, 1169 (2001). Commentators, however, have advocated for such commutations. E.g., *id.* at 1170.

203. *Outgoing Governor Extends Clemency to Killer*, DESERET NEWS, Jan. 2, 1989, at E2, available at <http://www.deseretnews.com/article/29202/outgoing-governor-extends-clemency-to-killer.html>.

204. *Id.* (internal quotation marks omitted).

205. *Id.*

206. See *State v. Keith*, 754 P.2d 474 (Mont. 1988). Keith never petitioned the Supreme Court for certiorari.

207. *Gattis Spared: Markell Commutes Death Sentence to Life in Prison*, NEWS J. (Wilmington, Del.) (Jan. 18, 2012) [hereinafter *Gattis Spared*] (“Markell cited the ‘unusual and perhaps historic’ recommendation of the Delaware Board of Pardons . . . to offer Gattis mercy.”).

208. *Board of Pardons Recommendation to Governor Markell Regarding Clemency of Robert Gattis*, NEWS.DELAWARE.GOV (Jan. 15, 2012), <http://news.delaware.gov/2012/01/15/board-of-pardons-recommendation-regarding-clemency-of-robert-gattis/>. Delaware is one of only a

harshly,²⁰⁹ and that Gattis had a traumatizing childhood.²¹⁰ Markell commuted Gattis's sentence three days before the execution.²¹¹ Yet all of the crucial information was known since his 1990 conviction and sentence,²¹² and therefore it was certainly known when the Supreme Court denied certiorari in 1994.²¹³ At least eighteen years of litigation, and perhaps more, could have been avoided if a Delaware governor considered the case earlier.

A similar mixed-rationale clemency occurred in Ohio three years before. In 2009, Governor Strickland commuted the death sentence of Jeffrey Hill, who had been on death row for seventeen years.²¹⁴ Strickland agreed with the parole 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."²¹⁵ Hill's direct appeals raised the proportionality and ineffective assistance of counsel claims,²¹⁶ and the comments of the Ohio Supreme Court justices came as part of the direct appeal.²¹⁷ The parole board noted that Hill expressed remorse during his first interviews with the police following the crime.²¹⁸ Finally, although the victim's family members did not speak out against Hill's execution until the clemency proceeding, the parole board observed that they "were unaware that they could speak out on his behalf at the time of the court proceedings," which suggests that they would have spoken earlier if the clemency hearing had been held following direct appeals.²¹⁹

Finally, in 1980, Governor Graham of Florida commuted the death sentence of Darrell Hoy, who had been involved in the brutal rape and murder

handful of states that allows nonunanimous jury votes. Adam M. Gershowitz, *Delaware's Capital Jury Selection: Inadequate Voir Dire and the Problem of Automatic Death-Penalty Jurors*, 2 DEL. L. REV. 235, 237–38 (1999).

209. Sean O'Sullivan, *Board of Pardons Votes to Spare Convicted Killer*, NEWS J. (Wilmington, Del.) (Jan. 16, 2012), <http://www.delawareonline.com/article/20120116/NEWS01/201160322/>.

210. *Gattis Spared*, *supra* note 207.

211. *Id.*

212. *See, e.g.*, *Gattis v. State*, 637 A.2d 808, 822 (Del. 1994) (en banc) ("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.").

213. *See Gattis v. Delaware*, 513 U.S. 843 (1994).

214. *See Gov. Strickland Issues Statement on Clemency Application of Jeffrey D. Hill*, U.S. FED. NEWS SERVICE, June 3, 2009.

215. *Id.*

216. *State v. Hill*, No. C-920497, 1993 WL 538902, at *7–9 (Ohio Ct. App. Dec. 22, 1993).

217. *State v. Hill*, 653 N.E.2d 271, 284–85 (Ohio 1995) (Wright, J., dissenting).

218. OHIO ADULT PAROLE AUTH., IN RE: JEFFREY D. HILL, OSP #A261-876, at 9 (2009), available at http://www.drc.ohio.gov/public/Clemency_JeffreyHill.pdf.

219. *See id.*

of a Florida woman.²²⁰ Graham did not explain the reason for the commutation,²²¹ although media coverage suggests that the clemency application focused on the fact that the judge overrode the jury's recommendation for a life sentence and imposed death instead.²²² Hoy's lawyer also focused on the fact that Hoy was "young, impressionable and of low intelligence."²²³ 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.²²⁴

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 Section I.A, there are an additional six cases in which the information justifying 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 Strickland commuted the death sentence of Sidney Cornwell because the jury had not been informed that Cornwell suffered from Klinefelter's syndrome, which is associated with developmental difficulties.²²⁵ The diagnosis of this syndrome only came about as part of post-conviction litigation.²²⁶ 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.²²⁷ The key facts (albeit shorn of the technical medical terminology) were thus known by the conclusion of direct appeals, about a decade before the clemency grant.²²⁸

220. Virginia Ellis, *2 Death Warrants Signed; Hoy May Get Life*, ST. PETERSBURG TIMES, Jan. 10, 1980, at 1B.

221. *Id.* 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 reasons for granting mercy, clemency would become just another quasi-judicial proceeding." VON DREHLE, *supra* note 78, at 190.

222. See Nancy Kalwary, *A Murderer's Life Goes on the Line*, EVENING INDEP. (St. Petersburg, Fla.), Dec. 12, 1979, at 26A. Florida allows judges to override jury recommendations for life sentences. 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).

223. Kalwary, *supra* note 222.

224. See *Hoy v. Florida*, 439 U.S. 920 (1978).

225. Joe Gorman, *Clemency Stuns Family, Detective*, TRIB. CHRON. (Warren, Ohio), Nov. 17, 2010, <https://www.tribtoday.com/page/content.detail/id/549705/Clemency-stuns-family--detective.html>.

226. *Cornwell v. Bradshaw*, 559 F.3d 398, 408 (6th Cir. 2009).

227. *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.").

228. 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.

Also in 2010, Governor Bredesen of Tennessee granted clemency to Gaile Owens, who had been on death row since 1986 for the murder of her husband.²²⁹ The governor pointed to the fact that Owens had been abused during her marriage²³⁰ and that she had consistently admitted her guilt in the murder and accepted a conditional guilty plea, which later became ineffective.²³¹ 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 the governor observed that each case had resulted in life imprisonment.²³² 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. But Owens did not acknowledge that she suffered abuse from her spouse until after direct review ended.²³³

If the governor had been called upon to grant clemency at the conclusion of Owens's direct appeals, Owens may or may not have offered information about the domestic abuse at that point. In any event, it is not clear how much emphasis the governor placed on the abuse. In his statement explaining the commutation, Bredesen said only that "there's at least the possibility of her being in an abusive marriage" and then made a brief reference, in a single sentence, to abuse being a factor in the severity of the punishment.²³⁴ By contrast, the governor spent four paragraphs detailing the revoked guilty plea and discussing comparable cases where the defendant did not receive the death penalty.²³⁵ On balance, given that governors have a propensity to grant clemency for female offenders²³⁶ and that many of the key facts giving rise to Owens's 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 postconviction petitions.²³⁷

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

229. Jeff Woods, *Governor's Statement on Owens Commutation*, NASHVILLE SCENE (July 14, 2010, 10:55 AM), <http://www.nashvillescene.com/pitw/archives/2010/07/14/governors-statement-on-owens-commutation>.

230. *See id.*

231. *Id.*

232. *Id.* Bredesen noted that one of the thirty-three had been sentenced to death and commuted by a previous governor.

233. Clay Carey, *Influential Nashvillians, Juror Fight Gaile Owens' Execution*, TENNESSEAN, May 2, 2010, available at <http://www.tennessean.com/article/20100502/NEWS03/5020370>.

234. Woods, *supra* note 229.

235. *Id.*

236. *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.").

237. Owens's direct appeals ended in 1988. *See State v. Porterfield*, 746 S.W.2d 441 (Tenn. 1988), *cert. denied*, 486 U.S. 1017 (1988).

Transfer Board to urge clemency.²³⁸ 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.²³⁹ 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.²⁴⁰ Huckabee granted clemency based on the holdout juror's plea for mercy.²⁴¹ 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.²⁴²

In 1999, Governor James of Alabama commuted the death sentence of Judith Ann Neelley without ever offering an explanation.²⁴³ Although there could be multiple reasons for the commutation, legal scholars believe that it was because Neelley was a woman.²⁴⁴ The capital punishment system rarely imposes or carries out death sentences against women.²⁴⁵ 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.²⁴⁶

In 1996, Governor Allen of Virginia commuted the death sentence of Joseph Payne, who had been convicted of killing another prison inmate.²⁴⁷ The primary witness against Payne, an inmate named Robert Francis Smith, recanted his allegations in 1987, only a year after Payne's conviction.²⁴⁸

238. Steve Barnes, *Death-Row Inmate Spared After Juror Makes Plea*, N.Y. TIMES, Feb. 6, 1999, at A12, available at <http://www.nytimes.com/1999/02/06/us/death-row-inmate-spared-after-juror-makes-plea.html>.

239. *Id.*

240. *Fretwell v. State*, 708 S.W.2d 630, 632–33 (Ark. 1986).

241. *Arkansas Governor Listens to Plea, Spares Killer's Life*, L.A. TIMES, Feb. 6, 1999, available at <http://articles.latimes.com/1999/feb/06/news/mn-5472> (“[The juror] said he was the lone holdout against the death penalty.”).

242. See *Fretwell*, 708 S.W.2d 630. Fretwell never petitioned for a writ of certiorari.

243. Kathy Kemp & Scottie Vickery, *Women on Death Row: Is the Death Penalty Sexist? Only Three Women Ever Executed in Alabama*, BIRMINGHAM NEWS, Sept. 19, 1999, at 1-E (noting that eight months after the commutation the governor “has yet to explain publicly” the commutation).

244. *Id.*

245. Victor L. Streib, Special Feature, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609 (2006); see also 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).

246. See *Neelley v. Alabama*, 480 U.S. 926 (1987).

247. Laura LaFay, *Allen Commutes Death Sentence: Reprieve Comes 3 Hours Before Joseph Payne's Scheduled Death*, VIRGINIAN-PILOT (Norfolk, Va.), Nov. 18, 1996, at A1.

248. *Id.*

Smith, however, later recanted his recantation.²⁴⁹ Shortly before the execution date, Smith took a polygraph test, and the results indicated that he fabricated parts of his testimony.²⁵⁰ It was not clear whether Allen granted clemency primarily because of the polygraph test or because he found Smith to be generally untrustworthy. Allen vaguely explained that Smith's recantation was a factor and that he found Smith "not sufficiently believable, obviously, to allow the death sentence to proceed."²⁵¹ 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 making the decision only hours before execution. It is possible that the governor would have found Smith to be an untrustworthy witness in 1987,²⁵² 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. Because Smith changed his story so many times, however, it is difficult to say for certain how the governor would have decided the clemency question at an earlier time.

In 1992, Governor Wilder of Virginia commuted the death sentence of Herbert Bassette because of questions about his innocence.²⁵³ Bassette's lawyers focused their clemency petition on the credibility of three trial witnesses and on evidence that implicated another man.²⁵⁴ The credibility of the trial witnesses was raised in Bassette's 1981 direct appeal to the Virginia Supreme Court.²⁵⁵ And the other possible perpetrator was actually arrested and charged with the murder before Bassette, but the police chose to focus on Bassette instead.²⁵⁶ 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 Wilder granted clemency. But there remains a remote possibility that new evidence could have influenced the governor's decision. At Bassette's trial, a woman testified that her boyfriend had confessed to the crime but that he tended to be a braggart and therefore she didn't believe him.²⁵⁷ Shortly before Bassette's execution, the woman changed her story and told defense attorneys that she believed her boyfriend had been telling the

249. *Id.*

250. Peter Finn, *Polygraph Test Cited in Clemency*, WASH. POST, Nov. 9, 1996, at B3.

251. *Id.* (internal quotation marks omitted).

252. The Supreme Court denied certiorari in Payne's case in 1987. *Payne v. Virginia*, 484 U.S. 933 (1987).

253. Peter Hardin & Jim Mason, *Wilder Spares Bassette from Electric Chair*, RICHMOND TIMES-DISPATCH, Jan. 23, 1992, at 1.

254. *Id.*

255. *Bassett v. Commonwealth*, 284 S.E.2d 844, 850 (Va. 1981) ("The Commonwealth presented three key witnesses . . . Each had been convicted of crimes. Bassett [*sic*] 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.")

256. Arthur Hodges, *Murder Case Evidence Questioned*, RICHMOND TIMES-DISPATCH, Dec. 15, 1991, at B1.

257. Jim Mason, *Inmate's Lawyers Abandon Court Fight, Appeal for Clemency*, RICHMOND TIMES-DISPATCH, Jan. 22, 1992, at 15.

truth.²⁵⁸ While this piece of evidence was new, it does not appear that it was the reason for clemency.²⁵⁹ Rather, the governor seemed to focus on the credibility of the witnesses who implicated Bassette at trial.²⁶⁰ Nevertheless, it is impossible to say for certain whether the recanted testimony played any role in the clemency decision.

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. But 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.

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.²⁶¹ 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."²⁶² In 2011, Missouri Governor Nixon commuted the death sentence of Richard Clay in Missouri "[w]ith almost no explanation" other than that he based his decision on a "number of factors."²⁶³ Finally, in 2010, Governor Henry followed a divided recommendation of the Oklahoma Pardon and Parole Board and commuted the death sentence of Richard Tandy Smith.²⁶⁴ Henry's explanation for the

258. *Id.*

259. See Hardin & Mason, *supra* note 253.

260. See *id.*

261. See Jim Mustian, *Update: Paroles Board Grants Clemency to Condemned Taylor County Prisoner*, LEDGER-ENQUIRER (Columbus, Ga.), Apr. 20, 2012, <http://www.ledger-enquirer.com/2012/04/20/2019283/paroles-board-commutes-sentence.html>.

262. *Georgia Man's Death Sentence Changed to Life in Prison*, CNN (May 22, 2008, 10:31 PM), <http://www.cnn.com/2008/CRIME/05/22/georgia.execution/index.html>.

263. Phil O'Connor, *Nixon Discusses Commuting Death Sentence*, ST. LOUIS POST-DISPATCH, Jan. 14, 2011, http://www.stltoday.com/news/state-and-regional/missouri/nixon-discusses-commuting-death-sentence/article_2571da0d-d239-5ff1-a50b-ec3925d7999c.html (internal quotation marks omitted).

264. See Michael McNutt, *Oklahoma Gov. Brad Henry Approves Clemency Recommendation*, OKLAHOMAN, May 20, 2010, at 15A, available at <http://newsok.com/oklahoma-gov.-brad>

commutation was vague; he stated 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.”²⁶⁵

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 for the commutations, with some of these rationales unavailable at the end of direct review. Two recent cases from Ohio, as well as clemencies in Missouri and Georgia, fall into this category.

In 2010, Governor Strickland of Ohio commuted Richard Nields’s death sentence to life imprisonment because (1) there was a faulty conclusion by the medical examiner that evidence showed premeditation, and (2) appellate judges had repeatedly expressed concern about whether the facts of the case evinced sufficiently heinous conduct to merit death.²⁶⁶ The proportionality concerns were apparent during the direct appeals process,²⁶⁷ although the problems with the medical examiner’s testimony were not clear until later.

Two years earlier, 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.²⁶⁸ After the Ohio Parole Board granted seven reprieves for DNA testing to be conducted, the test was administered shortly before the scheduled execution, but the results came back inconclusive—the DNA neither inculpated nor exculpated Spirko.²⁶⁹ While questions about Spirko’s innocence had surfaced since the time of his conviction, it is not clear what role the last-minute, inconclusive DNA test played in the grant of clemency.

In 1993, Missouri Governor Carnahan commuted the death sentence of Bobby Lee Shaw, who had been on death row for almost fourteen years.

henry-approves-clemency-recommendation/article/3462495; Brian Evans, *Oklahoma Board Votes for Clemency in Death Penalty Case*, AMNESTY INTERNATIONAL USA (Mar. 26, 2010, 11:05 AM), <http://blog.amnestyusa.org/deathpenalty/update-oklahoma-board-votes-for-clemency-in-death-penalty-case/>.

265. McNutt, *supra* note 264 (internal quotation marks omitted).

266. Sharon Coolidge & Jon Craig, *Board Votes for Mercy for Killer*, CINCINNATI ENQUIRER, May 19, 2010; Alan Johnson, *Inmate Moved Off Death Row*, COLUMBUS DISPATCH, June 5, 2010, at 1B, available at <http://www.dispatch.com/content/stories/local/2010/06/05/inmate-moved-off-death-row.html>.

267. 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.”).

268. See *State v. Spirko*, No. 15-84-22, 1989 WL 17734 (Ohio Ct. App. Mar. 6, 1989).

269. Alan Johnson, *Strickland Commutes Spirko’s Death Sentence to Life Without Parole*, COLUMBUS DISPATCH, Jan. 10, 2008, at 1B, available at <http://www.dispatch.com/content/stories/local/2008/01/09/spirk.html>. 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.*

While Shaw was serving a life sentence for first-degree murder, he murdered a prison guard.²⁷⁰ At trial, a psychiatrist testified to Shaw's low IQ but concluded that he was only borderline mentally disabled and did not suffer from a mental disease or defect.²⁷¹ 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 trial testimony.²⁷² A few months before the execution, lawyers presented additional expert testimony in a competency hearing.²⁷³ One week before Shaw's execution, Carnahan commuted his sentence because of his mental-health problems.²⁷⁴ There was evidence of these problems at trial. And it is possible that lawyers would have presented the new psychiatric evidence if a clemency hearing had been held at the end of direct appeals. But it is not possible to say for certain whether the governor would have had all the same information at that point.

Finally, it is impossible 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 codefendant served only five years, and that the codefendant signed an affidavit taking responsibility for the murder while he was in prison.²⁷⁵ Williams raised his limited role in the murder in his direct appeal,²⁷⁶ but 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 seventeen cases, commutations were based on information that surfaced only after the postconviction 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.

270. *State v. Shaw*, 636 S.W.2d 667, 669 & n.1 (Mo. 1982).

271. *See id.* at 670.

272. Edward Walsh & Sue Anne Pressley, *Time Running Out Again for 2 Residents of Death Row*, WASH. POST, June 1, 1993, at A4.

273. *Id.*

274. Virginia Young, *Carnahan Commutes Killer's Death Sentence: Inmate with Mental Problems Gets Life Term*, ST. LOUIS POST-DISPATCH, June 3, 1993, at 1A.

275. Jingle Davis, *Ex-Marine's Death Sentence for Murder Is Commuted*, ATLANTA J.-CONST., Mar. 23, 1991, at B5.

276. *See Williams v. State*, 300 S.E.2d 301, 305 (Ga. 1983).

1. Commutations Based on Recent Legal Developments

In three cases, the Supreme Court's decision in *Atkins v. Virginia*²⁷⁷—which outlawed the execution of the mentally disabled—led to commutations. In 2002, three psychologists evaluated Thomas Nevius and concluded that he was mentally disabled.²⁷⁸ The Nevada Board of Pardons then unanimously commuted Nevius's sentence.²⁷⁹ The following year, Governor Foster of Louisiana commuted the death sentence of Herbert Welcome.²⁸⁰ Welcome had the intellectual abilities of an eight year old and had been on death row for over twenty years.²⁸¹ The *Atkins* decision also indirectly led to the commutation of Darnell Williams in Indiana.²⁸² In 2003, one year after *Atkins*, a state judge ruled that Williams's codefendant was mentally disabled and could not be executed.²⁸³ The following year, Governor Kernan commuted Williams's sentence because he believed that Williams was less culpable than the codefendant.²⁸⁴

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.²⁸⁵ 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.”²⁸⁶ Because the accomplice’s death sentence was not reversed until 1988,²⁸⁷ well after the conclusion of Davis’s direct appeals, the same clemency determination could not have been made earlier. In an Oklahoma case, Governor Henry commuted the death sentence of Osbaldo Torres, in large part because of international outrage that Torres, who was a Mexican citizen, was not informed of his right to contact the Mexican Consulate following his arrest.²⁸⁸ The consulate issue arose because, only weeks earlier, a decision

277. 536 U.S. 304 (2002).

278. Ed Vogel, *Board Allows Killer to Live*, LAS VEGAS REV.-J., Nov. 21, 2002, at 1A.

279. *Id.*

280. See Gwen Filosa, *Mentally Disabled Inmate Spared*, TIMES-PICTAYUNE (New Orleans, La.), May 10, 2003, at 4.

281. *See id.*

282. *Governor Spares Life of Inmate: Convicted Killer of Gary Couple Was to Be Executed Next Week*, INDIANAPOLIS STAR, July 3, 2004, at A1.

283. *See id.*

284. *See id.*

285. *Execution Halted in Georgia*, ASSOCIATED PRESS (June 16, 1988), <http://www.apnewsarchive.com/1988/Execution-Halted-In-Georgia/id-9e90dce69c67f98623cc83529bdfff3>; see also *Davis v. Kemp*, 829 F.2d 1522 (11th Cir. 1987) (habeas corpus review); *Davis v. State*, 252 S.E.2d 443 (Ga. 1979) (direct appeal).

286. *Execution Halted in Georgia*, *supra* note 285.

287. See *Spraggins v. State*, 364 S.E.2d 861 (Ga. 1988).

288. See Sean Murphy, *Mexican Wins Clemency Plea in Oklahoma*, CHI. TRIB., May 14, 2004, at 14.

by the International Court of Justice held that the United States had violated the Vienna Convention in dozens of cases.²⁸⁹

2. DNA and Other New Evidence

Although new evidence of innocence may seem like the quintessential reason for clemency, there were only six cases in which governors commuted death sentences because of new evidence that came to light after the conclusion of direct review.

In 2003, Governor Taft of Ohio relied in part on new DNA evidence to commute the death sentence of Jerome Campbell.²⁹⁰ Following the enactment of a DNA testing law in 2001,²⁹¹ the defense was able to show that blood on Campbell's shoes was his own, not the victim's.²⁹² When the Ohio Supreme Court denied Campbell a new trial based on this evidence, Taft commuted the sentence to life without parole.²⁹³

Governor Batt of Idaho commuted the death sentence of Donald Paradis in 1996 because there was "some element of doubt" surrounding Paradis's guilt.²⁹⁴ While Batt did not specify why he was granting clemency, a spokesman for the Idaho Commission of Pardons and Parole said that while the commission still believed Paradis was guilty, evidence presented at his clemency hearing had cast some doubt on this conclusion.²⁹⁵ At the clemency hearing, Paradis's attorneys focused on a blood analysis.²⁹⁶ Paradis's earlier appeals did not mention the blood test, and it appears that this test occurred after the conclusion of direct appeals.²⁹⁷

On his last day in office in 1994, Virginia Governor 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."²⁹⁸ Because that type of DNA testing did not exist at the

289. *Torres v. State*, No. PCD-04-442, 2004 WL 3711623, at *1 (Okla. Crim. App. May 13, 2004).

290. Sharon Turco, *Governor Taft Grants Campbell Clemency*, CINCINNATI ENQUIRER, June 27, 2003, at A1.

291. David Wells, Editorial, *Why Campbell Gets to Live*, CINCINNATI ENQUIRER, June 27, 2003, at B6.

292. Turco, *supra* note 290.

293. *Id.*

294. *Death Sentence Commuted*, SEATTLE TIMES, May 25, 1996, at A6, available at <http://community.seattletimes.nwsourc.com/archive/?date=19960525&slug=2331127>.

295. *Idaho Inmate May Get Off Death Row*, SEATTLE TIMES, May 18, 1996, at A6, available at <http://community.seattletimes.nwsourc.com/archive/?date=19960518&slug=2329864>.

296. *Id.*

297. See *State v. Paradis*, 676 P.2d 31, 34–38 (Idaho 1983), *cert. denied*, 468 U.S. 1220 (1984).

298. Peter Baker, *Death-Row Inmate Gets Clemency*, 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.").

conclusion of Washington's direct appeals,²⁹⁹ the clemency determination likely would not have been the same years earlier.

In 1991, Wilder granted a conditional pardon to Joseph Giarratano, who had attracted international attention based on his claims of innocence.³⁰⁰ 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.³⁰¹ The new evidence came to light after his direct appeals ended in 1980.³⁰²

In 1979, Florida Governor Graham commuted the death sentence of Learie Leo Alford. Alford's direct appeals were rejected, and the Supreme Court denied certiorari in 1976.³⁰³ The following year, an eyewitness recanted his testimony and told authorities that the true killer was larger than Alford.³⁰⁴ 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.

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.³⁰⁵ A year after Chandler's direct appeals ended³⁰⁶ but well before the 2001 commutation, the star witness signed an affidavit indicating that he had lied.³⁰⁷

3. Ineffective Assistance of Counsel

As explained earlier,³⁰⁸ ineffective assistance of counsel claims should be considered after the habeas process rather 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 showing 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 there were only three cases in which commutations were made because

299. For a discussion of the development of DNA testing and the timing of Washington's case, see GARRETT, *supra* note 6, at 219–22.

300. Jim Clardy, *Wilder Halts Giarratano's Trip to Chair*, WASH. TIMES, Feb. 20, 1991, at A1.

301. Joseph Williams, *Attorney General Turns Down Giarratano's Plea for New Trial*, RICHMOND TIMES-DISPATCH, Feb. 21, 1991, at A1.

302. 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.

303. *Alford v. Florida*, 428 U.S. 912 (1976).

304. Radelet & Zsembik, *supra* note 78, at 306.

305. John Solomon, *In Final Act, Clinton Issues Pardons*, WASH. POST (Jan. 20, 2001, 4:25 PM), http://www.washingtonpost.com/wp-srv/aponline/20010120/aponline162547_000.htm.

306. See *Chandler v. United States*, 512 U.S. 1227 (1994).

307. 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.

308. See *supra* notes 169–170 and accompanying text.

of ineffective assistance allegations developed after the conclusion of direct review.

In 2007, Kentucky Governor Fletcher commuted the death sentence of Jeffrey Leonard based on ineffective assistance of counsel.³⁰⁹ Leonard did not raise an ineffectiveness claim in his direct appeal;³¹⁰ once he had new counsel in his habeas proceedings, he focused on ineffective assistance as a reason to vacate his conviction and death sentence.³¹¹ 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, Governor Bredesen of Tennessee commuted the death sentence of Michael Boyd because of ineffective assistance of counsel at the trial and postconviction stages of Boyd's case.³¹² According to news reports, "no court [ever] reviewed the merits of 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."³¹³ 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 Kernan of Indiana commuted the death sentence of Michael Daniels.³¹⁴ Kernan offered a number of reasons for his decision, including ineffective assistance of counsel.³¹⁵ The ineffective assistance claim had not been litigated in Daniels's direct appeal in 1983, but it was thoroughly considered in his state habeas petition in 1988.³¹⁶ The *Daniels* case thus does not support the argument that clemency can be addressed at the end of direct review. It does demonstrate, however, that clemency could be considered far earlier in the process. The thorough state habeas corpus decision in Daniels's case was issued in 1988, over seventeen years before Kernan's clemency decision.

4. Changes Related to the Defendant

In two Virginia cases, governors commuted death sentences because of changes in the defendant's condition—mental illness and rehabilitation—since the trial. This information was unavailable at the conclusion of direct review.

309. See *3 Have Sentences Commuted*, KY. POST (Covington, Ky.), Dec. 11, 2007, at A2.

310. *Slaughter v. Commonwealth*, 744 S.W.2d 407, 410 (Ky. 1987).

311. See *Slaughter v. Parker*, 187 F. Supp. 2d 755, 827 (W.D. Ky. 2001).

312. Richard Locker, *Bredesen Spares Killer's Life*, COM. APPEAL (Memphis, Tenn.), Sept. 15, 2007, at B1, available at <http://www.commercialappeal.com/news/2007/sep/15/bredesen-spares-killers-life/>.

313. *Id.*

314. Richard D. Walton, *Kernan Commutes Man's Death Sentence*, INDIANAPOLIS STAR, Jan. 8, 2005, at A1.

315. *Id.* Kernan also pointed to Daniels's mental illness, questions about whether he was the triggerman, and lighter sentences for codefendants.

316. Compare *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988) (state postconviction petition), with *Daniels v. State*, 453 N.E.2d 160 (Ind. 1983) (direct appeal decision).

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."³¹⁷ 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.³¹⁸

In 1997, Governor Allen of Virginia commuted the death sentence of William Ira Saunders.³¹⁹ 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."³²⁰ The judge in Saunders's trial wrote that he had initially imposed the death penalty in this case because of Saunders's violent conduct in jail, but the judge determined that Saunders's improved behavior in prison showed that he was no longer a continuing threat.³²¹ It is unlikely that the prosecutor and judge would have reached the same conclusion about Saunders's improved behavior at the conclusion of direct appeals.

5. Outside Influence

Finally, after allowing twenty-six executions to proceed, Missouri Governor Carnahan commuted the death sentence of Darrell Mease after Pope John Paul II personally requested the commutation.³²² The pope was coincidentally in Saint Louis at the same time that Mease was to be executed, and Carnahan acknowledged that the commutation "was more out of respect for the pope" than because of the facts of the case.³²³ 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 Section I.A demonstrated, for most commutations, the crucial information was known years or even decades before the last-minute clemency decision.

317. Jerry Markon, *Va. Governor Commutes Death Sentence: Kaine Gives Murderer Life, Calls Inmate Mentally Unfit*, WASH. POST, June 10, 2008, at B1.

318. *Walton v. Commonwealth*, 501 S.E.2d 134 (Va. 1998), cert. denied, 525 U.S. 1046 (1998).

319. *Death Sentence Commuted*, WASH. POST, Sept. 16, 1997, at B3.

320. *Id.*

321. *Id.*

322. Terry Ganey, *Carnahan Spares 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.

323. *Id.* (internal quotation marks omitted).

Leaving clemency until the end of the case is imprudent for at least three reasons: (1) it is extremely inefficient, leading to hundreds of years of needless 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.”³²⁴ 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, however, clemency serves as an integral part of the capital punishment process in every state with capital punishment.³²⁵ The Court has called clemency the “fail safe” of the criminal justice system.³²⁶ 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 Section I.A, it is clear that in a majority of cases (thirty-five of sixty-six), the capital commutations could have been made based on the same information at the end of direct review. And as explained in Section 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 available: the number of years of litigation between the conclusion of direct review and the commutation.

Taking only the cases from Section 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, in those of Ronald Post and Edward Jerome Harbison—a clemency decision at the end of direct review would have eliminated more than two decades of litigation.

324. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998).

325. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993).

326. *Id.* at 415 (rejecting freestanding claims of actual innocence because clemency is the “fail safe” to deal with such claims).

TABLE 1.
CASES IN WHICH CLEMENCY COULD HAVE BEEN GRANTED
AT THE END OF DIRECT REVIEW

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

The total amount of wasted litigation rises considerably if we add the six cases from Section 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 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, 1 month

2. The Story of Habeas Evolution

The raw numbers tell a powerful story, but the case for a threshold clemency decision becomes even clearer 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 provide the basis for habeas relief. This broadening of the law has given inmates more reasons to file habeas petitions and presented courts with more issues to resolve. At the same time, both the Supreme Court and Congress have tightened the procedural rules for bringing habeas claims, and Congress has raised 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. In short, most capital habeas petitioners—even those with compelling reasons for why they should not be executed—are likely to spend many years litigating procedural and substantive issues that they are unlikely to win in court. Although we are a long way from federal habeas review in capital cases becoming “full of sound and fury, [s]ignifying nothing,”³²⁷ we are moving in that direction.³²⁸ And this gradual move drastically delays commutation decisions.

The starting point for the habeas maze is *Brown v. Allen*, in which the Supreme 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.³²⁹ With the exception of Fourth Amendment claims, the Court has left the door open for any type of federal constitutional violation to be the basis for a habeas petition.³³⁰ And as substantive criminal procedure has expanded, the number of substantive claims that can serve as the basis for a habeas petition has also expanded. For instance, in the 1960s and 1970s, the Court developed the *Brady* doctrine, which requires prosecutors to turn over favorable, material evidence,³³¹ even if the defense has not requested it.³³² The introduction of this doctrine created 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.³³³ In 2002, the Court outlawed the execution of the mentally challenged but left undecided—and therefore made the focus

327. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5.

328. 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 331–338 and accompanying text.

329. 344 U.S. 443 (1953).

330. *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).

331. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

332. *United States v. Agurs*, 427 U.S. 97, 110–11 (1976).

333. *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”).

of much habeas litigation³³⁴—what it actually means to be mentally challenged. And, of course, the Court recognized a claim of ineffective assistance of counsel in 1984,³³⁵ and in recent years it has expanded the claim to cover immigration advice³³⁶ as well as defective plea negotiations,³³⁷ all of which are the subject of habeas litigation.³³⁸ In short, there is a lot more substantive law for habeas petitioners to point to in claiming that their death sentences violate the Constitution.

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.³³⁹ In *Wainwright v. Sykes*, however, the Court drastically switched course and required prisoners to demonstrate cause and prejudice for any procedural default,³⁴⁰ a much higher burden. The Court also imposed limits on successive petitions (bringing the same claim more than once)³⁴¹ and abusive petitions (failing to raise a claim in a previous petition).³⁴² In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and made the procedural hurdles even more difficult. AEDPA scaled back gateway claims in which petitioners could use innocence to overcome procedural obstacles.³⁴³ It also established, for the first time, a statute of limitations for federal habeas petitions.³⁴⁴ 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 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 court’s decision was “based on

334. See John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 627, 628 (2009) (finding that at least 234 death-row inmates filed claims under *Atkins*, although noting that the total number amounts to only 7 percent of death-row inmates); 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 executing mentally retarded offenders, are frequently the bases for claims in successive petitions.”).

335. *Strickland v. Washington*, 466 U.S. 668 (1984).

336. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

337. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

338. Tom Zimpleman, Essay, *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”).

339. *Faye v. Noia*, 372 U.S. 391 (1963).

340. 433 U.S. 72 (1977).

341. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

342. *McKleskey v. Zant*, 499 U.S. 467 (1991).

343. Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 340–41 (2010).

344. 28 U.S.C. § 2244(d) (2012).

an unreasonable determination of the facts.”³⁴⁵ That standard is very difficult to meet.

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 it was in decades past. In the early 1970s, “capital murder defendants enjoyed a more than fifty percent success rate in federal habeas corpus litigation.”³⁴⁶ 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 find that the “overall reversal rate for federal habeas cases is 40%.”³⁴⁷ In subsequent work, Liebman recognizes 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.”³⁴⁸ Indeed, a recent study by Professor King and colleagues that looks at 267 capital cases filed between 2000 and 2002 finds that less than 13 percent received habeas relief from a federal district court.³⁴⁹ Importantly, while finding that relief had declined, 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.”³⁵⁰

In short, we know that federal habeas review is less beneficial to death-row inmates now 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, governors and pardon boards considered clemency at the end of direct review, and it was much more widely exercised.³⁵¹

Not surprisingly, one of the leading commentators to study capital habeas proposes that it be dramatically scaled back. Liebman suggests that in

345. *Id.* § 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).

346. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 43 (1997).

347. JEFFREY FAGAN ET AL., *GETTING TO DEATH: FAIRNESS AND EFFICIENCY IN THE PROCESSING AND CONCLUSION OF DEATH PENALTY CASES AFTER FURMAN* 56 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/203935.pdf>; JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995*, at 6 (2000).

348. Liebman & Clarke, *supra* note 19, at 337 n.415.

349. NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: 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*, at 61 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

350. *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.*

351. See Bedau, *supra* note 17, at 262–66.

exchange for procedural safeguards, such as videotaped confessions and better charge screening, as well as more robust direct review, “capital defendants . . . agree to give up state post-conviction review and a significant amount of federal habeas review.”³⁵²

I do not suggest scaling back state or federal habeas review. But by starting from 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 capital³⁵³ and noncapital³⁵⁴ context. The traditional explanation for the decline is that tough-on-crime politics has unduly invaded the criminal justice process and made it impossible for governors and pardon boards to grant mercy.³⁵⁵ In a world with 24-hour news cycles and 140-character tweets, it is difficult for political actors to make nuanced decisions while still seeking reelection. While the conventional explanation is very plausible, it is possible that the lengthy habeas corpus process could also be playing a role in clemency’s decline.

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.³⁵⁶ Governors sometimes invoke an inmate’s

352. James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 332–34 (2002). Other habeas experts would not go so far. While arguing for a dramatic reduction of noncapital habeas review, Professors King and 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). King and Hoffman argue for less stringent procedural default rules and for a greater focus on protecting “against the execution of an innocent.” *Id.* at 149–52.

353. See, e.g., Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1124–25 (2012).

354. For an analysis of the federal system, see Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010), and 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).

355. See, e.g., Michael A.G. 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).

356. 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).

“full and fair access to the courts” as a primary reason to deny clemency. For instance, Governor Bush of Texas stated that he would grant clemency only if the inmate were innocent or had not received full and fair access to the courts.³⁵⁷ Similarly, in Missouri, Governor 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 unmistaken juries and judges.”³⁵⁸ Other governors have similarly relied on access to the courts as a reason for denying clemency.³⁵⁹ Yet access to the courts does not prove that it is just and wise to execute an inmate.³⁶⁰ It only proves that there was no properly preserved and cognizable legal violation that required a remedy on direct or postconviction review.³⁶¹

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.³⁶² 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

357. T. Christian Miller, *Race Issues Raised in Latest Texas Death Penalty Appeal*, L.A. TIMES, June 29, 2000, at A22, available at <http://articles.latimes.com/2000/jun/29/news/mn-46186>.

358. CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 161 (2002).

359. E.g., Lawrence Buser, *Sundquist Says ‘No’ to Workman*, COM. APPEAL (Memphis, Tenn.), Mar. 28, 2001, at A1 (noting that Tennessee Governor Sundquist denied clemency in part because “I am confident that he has had adequate access to the courts.”); John Moritz, *Woman on Death Row Gets Reprieve*, FORT WORTH STAR-TELEGRAM, Dec. 2, 2004, at A1 (reporting that Texas Governor Perry said that “he based his decision in Newton’s case on whether she had been given ample access to the courts”); Tom Sherwood, *Robb: Final Judge on Life, Death*, WASH. POST, May 9, 1985, at VA1 (reporting that Virginia Governor Robb stated that in reviewing cases for executive clemency, “his main role is to make certain that a condemned person has had full access to the courts”).

360. 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 “leave[s] little, if any, room to consider mental illness or incompetence, childhood physical or sexual abuse, remorse, [or] rehabilitation” (quoting Alan Berlow, *The Texas Clemency Memos*, ATLANTIC MONTHLY, July–Aug. 2003, at 91, available at <http://www.theatlantic.com/issues/2003/07/berlow.htm>) (internal quotation marks omitted)).

361. 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. 2004) (“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.”).

362. See Gershowitz, *supra* note 48.

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 reduces the likelihood of governors or pardon boards reaching a different conclusion than do the courts. An information cascade “occurs when it is optimal for an individual, having observed the actions of those ahead of him, to follow the behavior of the preceding individual without regard to his own information.”³⁶³ Examples of this situation abound. Students want to attend a particular university because it is popular; an employer declines to hire a prospective employee after learning that two other businesses turned down his application; no one wants to eat in a restaurant because it is empty.³⁶⁴ Upon seeing many other people reaching a conclusion, a person finds it much easier to ignore his own information and follow the herd.³⁶⁵

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, the cascade might dissuade a governor from altering 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 governor³⁶⁶ 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 he has 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 his direct appeals have already been rejected) seeks review from the state trial court and the state appeals courts and then he files a petition for certiorari with the U.S.

363. Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 994 (1992).

364. For these and other examples, see WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT LAW* 136 (2007).

365. See Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797, 798–99 (1992).

366. It is of course possible that judges can be unduly influenced by their predecessors' opinions and thus become victims of the information cascade as well. 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”).

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 least six separate review stages to the criminal justice process.³⁶⁷ If an inmate files an additional successive habeas petition³⁶⁸ and loses, 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.³⁶⁹ In one study, all the subjects joined the cascade by the time there had been seven previous decisions on an issue.³⁷⁰ As one review of the literature puts it, “Decision makers are more willing to agree with the choices of others, the more others there are who all agree.”³⁷¹ Or as another group of scholars put it more colorfully, “[T]he longer the bandwagon continues, the more robust it becomes.”³⁷² The habeas process—because of its sheer length and numerous opportunities for appeal—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 their studies indicate that even strong actors fall victim to the cascade once it becomes too heavy. Professor Farnsworth explains as follows:

[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 easily impressed than he was, signed on to the emerging opinion and so made it seem more dominant.³⁷³

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.

367. For a good overview of the stages, including a helpful diagram, see GARRETT & KOVARSKY, *supra* note 345, at 170–73.

368. See *supra* text accompanying note 341. Successive petitions are filed in about 5 percent of all capital habeas cases and are generally rejected. Kovarsky, *supra* note 343, at 339–41.

369. See, e.g., Lisa R. Anderson, *Payoff Effects in Information Cascade Experiments*, 39 *ECON. INQUIRY* 609 (2001).

370. Anthony Ziegelmeyer et al., *Fragility of Information Cascades: An Experimental Study Using Elicited Beliefs*, 13 *EXPERIMENTAL ECON.* 121, 123 (2010).

371. Dorothea Kübler & Georg Weizsäcker, *Are Longer Cascades More Stable?*, 3 *J. EUR. ECON. ASS’N* 330, 330 (2005).

372. Bikhchandani et al., *supra* note 363, at 993.

373. FARNSWORTH, *supra* note 364, at 137.

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. But decisionmakers 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.³⁷⁴ Many scholars are critical of the focus on closure³⁷⁵ because of the risk that focusing on victims will deny due process to the defendants and lead to arbitrary death sentences.³⁷⁶ Another strand of criticism questions whether the criminal justice system can even provide desirable therapeutic closure for victims.³⁷⁷ 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. 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 that executing the offender will bring closure.³⁷⁸ But as Liebman has shown, an enormous number of death sentences are reversed on appeal and habeas review, often many years after conviction.³⁷⁹ This lengthy process creates tremendous anxiety for many families.³⁸⁰ The husband of a murder victim described the effect on the victim's parents in this way: "Every time they hear

374. Jody Lyneé Madeira, "Why Rebottle the Genie?": *Capitalizing on Closure in Death Penalty Proceedings*, 85 *IND. L.J.* 1477, 1479–80 (2010).

375. As Professor Madeira explains, the "majority of scholars" see the focus on closure in capital cases as a "grievous error." *Id.* at 1489.

376. 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); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. CHI. L. REV.* 361, 393–402 (1996); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 *N.Y.U. REV. L. & SOC. CHANGE* 215, 248 (2001). For a counterpoint on the need for more victim involvement in the criminal justice process, see STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 83–107 (2012).

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

378. The extent of closure varies, however. 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).

379. James S. Liebman, *The Overproduction of Death*, 100 *COLUM. L. REV.* 2030, 2052–57 (2000).

380. 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., 2d ed. 2003).

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."³⁸¹ In New Jersey, the daughter 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."³⁸² 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."³⁸³

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. The families remarked on the long appellate process in Texas and the lack of transparency, both of which contributed to a fear that the case would be overturned.³⁸⁴ One person explained as follows:

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?³⁸⁵

Last-minute commutations only exacerbate the suffering of the victim's family. For example, when Governor 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."³⁸⁶ Recently, Kasich angered victims' families by commuting another death sentence more than two decades after conviction without first alerting the families to his decision.³⁸⁷

If there will be no execution because of an eventual commutation, and if closure is an important value to victims' families, the commutation decision should be made as early as is feasible. Ending the uncertainty of the process

381. Tom Gibbons, *Victims Again: Survivors Suffer Through Capital Appeals*, A.B.A. J., Sept. 1, 1988, at 64, 64.

382. N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 58 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

383. Alyson R. Klein, *Man Found Guilty Again*, BALT. SUN, July 25, 2003, at 1B, available at http://articles.baltimoresun.com/2003-07-25/news/0307250034_1_death-sentence-death-penalty-conyers.

384. See 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, 51–55 (2012).

385. *Id.* at 54.

386. Curnutte, *supra* note 29.

387. See Andrew Welsh-Huggins, *Ohio Governor to Meet Murder Victim's Family*, FT. WAYNE J. GAZETTE, Apr. 6, 2013, available at <http://www.journalgazette.net/article/20130406/NEWS11/304069966/1177/news11>.

is extremely valuable to families, many of whom are criminal justice outsiders without a keen sense of the nature of the process.³⁸⁸

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 reelection or might wish to seek another elective office. And granting clemency to death-row inmates is not good politics. If, as I have argued elsewhere,³⁸⁹ there is a diffusion of responsibility in capital clemency, it will be difficult to encourage governors seriously to consider clemency at the end of direct review. By the time a case 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 likely 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 in more recent years 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.³⁹⁰ In examining the practices of only twelve states, Professor Bedau found more than 700 capital commutations between 1900 and 1968.³⁹¹ By contrast, from 1976 to 2013, governors and pardon boards granted only 66 capital commutations based on the particular circumstances of individual cases.³⁹² A sizeable number of these recent commutations came at the end of governors' terms when they no longer had to stand for reelection.³⁹³ Moreover, when we compare the 66 commutations with the more than 1,300 executions carried out during the same period, it is clear that capital clemency is currently seldom used.³⁹⁴

388. See generally 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).

389. Gershowitz, *supra* note 48.

390. Bedau, *supra* note 17, at 265.

391. *Id.*

392. See *supra* note 13 and accompanying text.

393. See Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. 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”); *supra* notes 65, 101, 192, 203, 298, 305, 314 and accompanying text. *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).

394. See *supra* notes 13, 16 and accompanying text.

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 Kasich, who is often mentioned as a presidential candidate,³⁹⁵ granted four commutations in 2011 and 2012.³⁹⁶ Other prominent governors, such as Robert Ehrlich in Maryland, Mike Huckabee in Arkansas, and Tim Kaine in Virginia, frequently utilized their clemency power in noncapital cases (as well as in two death penalty cases)³⁹⁷ with minimal political fallout.³⁹⁸ As Professor Barkow explains, “[U]sing 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.”³⁹⁹

Third, in five states—Connecticut, Georgia, Nebraska, Nevada, and Utah—an independent pardon board has exclusive control over whether to commute a death sentence.⁴⁰⁰ Over 200 inmates presently sit on death row in these states,⁴⁰¹ and clemency claims could be addressed at the end of direct review with minimal political involvement.⁴⁰²

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.⁴⁰³ For example, states have repealed mandatory-minimum sentencing laws, lowered maximum sentences, and provided for drug treatment in lieu of incarceration.⁴⁰⁴ States have also adopted more flexible parole and probation policies and expanded early-

395. E.g., Thomas Suddes, *Kasich Might Fancy a Move Up in 2016*, PLAIN DEALER (Cleveland, Ohio), Dec. 29, 2012, at G1, available at http://www.cleveland.com/opinion/index.ssf/2012/12/kasich_might_fancy_a_move_up_i.html.

396. See *supra* notes 29, 86, 90, 171 and accompanying text.

397. See *supra* notes 238, 317 and accompanying text.

398. Drinan, *supra* note 353, at 1145–47.

399. Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT’G REP. 153, 154 (2009).

400. See *Clemency*, *supra* note 13.

401. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#state> (last visited Mar. 23, 2014).

402. Ironically, as Professor Heise observes, 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.

403. See Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, at A11, available at <http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html>.

404. Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–88 (2005).

release programs.⁴⁰⁵ To balance budgets, states—including tough-on-crime Texas⁴⁰⁶—have closed existing prisons and refused to build new facilities.⁴⁰⁷ A prominent group of conservative, law-and-order politicians has started the “Right on Crime” movement to adopt sensible cost-cutting criminal justice reform.⁴⁰⁸ Perhaps most tellingly, five states abolished capital punishment altogether between 2007 and 2012.⁴⁰⁹ As one prominent scholar explains, “In 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.”⁴¹⁰

All told, politicians (as well as the general public) are much more receptive to cost arguments today 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 noncapital cases.⁴¹¹

III. IMPLEMENTING A THRESHOLD CLEMENCY DETERMINATION AT THE END OF DIRECT REVIEW

The remaining questions pertain to 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 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 treason⁴¹²—state constitutions and statutes do not typically impose

405. Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 82 (2008).

406. Brandi Grissom, *Prison Closing Pleases City and Helps State Budget*, N.Y. TIMES, Aug. 19, 2011, at 19A, available at <http://www.nytimes.com/2011/08/19/us/19tprison.html>.

407. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUST., 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; Gershowitz, *supra* note 405, at 82–83 & n.185.

408. 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 Gingrich, former Attorney General Meese, former drug czar Asa Hutchinson, antitax leader Grover Norquist, and former Governor Jeb Bush).

409. Corinna Barrett Lain, *The Virtues of Thinking Small*, 67 U. MIAMI L. REV. 397, 408 (2013).

410. *Id.*

411. Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 623–24 (2012).

412. For an increasingly old, but thorough, overview of the substantive restrictions, see NAT'L GOVERNORS' ASS'N, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 8 (1988), available at <https://www.ncjrs.gov/pdffiles1/Digitization/114588NCJRS.pdf>.

limits on when governors and pardon boards can consider clemency.⁴¹³ Indeed, in a few states, the law actually seems specifically to contemplate the possibility of early clemency decisions. For instance, Colorado law states that “[t]he governor is hereby fully authorized, when he deems it proper and advisable and consistent with the public interests and the rights and interests of the condemned, to commute the sentence in any [capital] case.”⁴¹⁴ In California, the governor can grant clemency anytime after conviction and even before the sentence is handed down.⁴¹⁵ In other states, courts have held that governors are free to grant clemency while the judicial process is ongoing.⁴¹⁶ Of course, some parole boards may have internal rules specifying the timing of clemency review,⁴¹⁷ 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 more difficult. 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.⁴¹⁸ Rather than going this far, decisionmakers—particularly politically insulated pardon boards or lame-duck governors—might look on a case-by-case basis at inmates who do not yet have impending execution dates. While this might happen in a few instances, it is unlikely to occur on a wide scale. Politicians typically want to be reelected or at least to protect their legacies, which makes 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.⁴¹⁹ When Governor Graham of Florida 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.⁴²⁰

413. 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.”).

414. COLO. REV. STAT. § 16-17-101 (2013).

415. *E.g.*, *In re Anderson*, 92 P.2d 1020, 1021 (Cal. Ct. App. 1939).

416. *E.g.*, *Cole v. State*, 106 S.W. 673 (Ark. 1907) (per curiam).

417. *E.g.*, Daniel T. 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”).

418. *See supra* note 2.

419. *See* TENN. CODE ANN. § 40-27-107 (2012). In some states, the state constitution imposes similar requirements. *E.g.*, OHIO CONST. art. III, § 11.

420. *See* VON DREHLE, *supra* note 78, at 190.

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.⁴²¹ 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.”⁴²² An inmate therefore cannot pursue federal habeas relief until he has exhausted his state appeals and state postconviction 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 available in the courts of the State, as well as a threshold clemency review.”

Congress has strong incentives 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.⁴²³

CONCLUSION

The capital clemency system is broken. Governors and pardon boards dispense mercy far less often 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, and conducting clemency review at the end of direct appeals would also mitigate 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 shows that

421. I am grateful to Professor Alan Meese for suggesting this approach.

422. 28 U.S.C. § 2254(b)(1)(A) (2012) (emphasis added).

423. 556 U.S. 180 (2009).

last-minute commutations in dozens of cases resulted in nearly 300 years of needless 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. Changing course in this way could prevent the thousands of hours of litigation and millions of dollars in expenses that are typically consumed by the postconviction habeas process.

