No. 07-8521

IN THE
Supreme Court of the United States

EDWARD JEROME HARBISON,
Petitioner,

v.

RICKY BELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is a nonprofit and nonpartisan organization seeking consensus solutions to difficult legal and constitutional issues. The Project seeks to achieve this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate.

The Project's blue-ribbon Death Penalty Committee includes both prominent supporters and opponents of the death penalty who are united in their profound concern that procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment be robust, and the flaws in such procedural safeguards corrected. The Committee's members have testified before Congress and state legislatures in support of successful reforms to the death penalty process.

Moreover, the Death Penalty Committee has made specific recommendations to ensure the availability of effective counsel throughout the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any party, any counsel for a party, nor any person other than *amicus*, its members, or its counsel make a monetary contribution intending to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

capital process. As noted in its recent report *Mandatory Justice: The Death Penalty Revisited*, "[t]he lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error – including the real possibility of executing an innocent person."[2] As such, the Committee has recommended that competent and adequately compensated counsel be provided at all stages of capital litigation – including during the critical clemency process.[3]

SUMMARY OF ARGUMENT

The Constitution Project submits this brief to highlight the critical role that clemency plays in the American system of justice. Throughout its jurisprudence, this Court has widely recognized and relied upon clemency as a backstop to any fallibility in the criminal justice system, reinforcing the view that Congress's provision of federally-funded counsel for capital defendants includes the clemency process. As this Court has repeatedly recognized, the clemency process performs unique functions in the criminal justice system that are not duplicated elsewhere. The clemency process serves as an error-correction means of last resort at the end of the habeas process, which may reveal and allow state

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[2] The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1 (2005), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

[3] *Id.* at 5-6.

officials to consider evidence no court has ever been able to examine. The clemency process also permits the state executive to weigh the state's interest in mitigating a sentence, in an exercise of mercy that no court can undertake.

However, that process may be rendered meaningless without the assistance of an attorney. Death row inmates as a class are most in need of the assistance of counsel to present their clemency case in a clear and articulate manner. Capital defendants are disproportionately uneducated, have below average intelligence, and have substantial psychological problems and mental deficiencies. In many individual cases, the very personal circumstances that may make mitigation of a death sentence appropriate are those that prevent a defendant from presenting a case on his or her own. For the system to ensure that capital punishment is imposed only on those who are unquestionably guilty and truly deserving of a death sentence, the assistance of an attorney is essential.

ARGUMENT

I. CLEMENCY IS AN INTEGRAL COMPONENT OF THE CAPITAL REVIEW PROCESS.

Clemency performs an integral function in the capital appeals process, one that complements the role of federal habeas courts. There are at least two critical functions that the clemency process plays that federal habeas review does not. First, clemency is a means of last resort for correcting error in the process, including the consideration of evidence

bearing on the defendant's actual innocence that may not have been presented to a court. Second, the clemency process permits the state executive to consider sentencing factors that courts, for a variety of reasons, may not have been able to take into account, such as capital defendants' blameworthiness, the proportionality of the sentence, and the desirability of exercising mercy. Clemency, in other words, provides a final opportunity to review both defendants' convictions and their sentences.

1. This Court has traced the central place of clemency throughout history and repeatedly emphasized and relied upon the role of clemency as a backstop for claims of actual innocence in the process of postconviction review. The clemency process is the final chance for a death row inmate to provide evidence of his or her actual innocence, or other evidence tending to undermine the guilty verdict – including evidence not presented to any court or jury.

The Court's most clear statement of its reliance on a robust clemency process to ensure the correction of erroneous verdicts was articulated in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the Court essentially foreclosed claims of actual innocence on habeas review that were not presented to the trial court. Integral to the Court's holding was that clemency provides a mechanism for review of the potential errors that habeas review is not able to correct: it is the "'fail safe' in our criminal justice system." *Id.* at 415; *see also id.* at 417 (clemency is the "remedy for claims of innocence based on new evidence, discovered too late in the day to file a new

trial motion"). The Court also stressed the rich history of clemency in Anglo-American criminal law. It "can be traced back to the 700's," featured prominently in Blackstone's Commentaries and the Federalist Papers, and today is available in all thirty-six states that authorize capital punishment. *See id.* at 412-14. Indeed, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12 (footnote omitted).

The Court's emphasis on the fundamental importance of the clemency process, however, far precedes *Herrera*. In diverse circumstances, various members of the Court have characterized clemency as a "fail safe" mechanism for correcting errors in the judicial review process. In *Ex parte Grossman*, 267 U.S. 87 (1925), for example, Chief Justice Taft wrote that "[e]xecutive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Id.* at 120. The Chief Justice added, "it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments." *Id.* at 121. In *Fay v. Noia*, 372 U.S. 391 (1963), similarly, Justice Harlan acknowledged that the defendant's "predicament may well be thought one that strongly calls for [judicial] correction. But the proper course to that end lies with the New York Governor's powers of executive clemency, not with the federal courts." *Id.* at 476 (Harlan, J., dissenting, joined by Clark and

Stewart, JJ.). Justice Scalia expressed analogous sentiments in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), dissenting from the Court's holding overturning a death sentence: "The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily that we, would certainly have used his pardon power if there was some mistake here." *Id.* at 876 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.); *see also Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J. concurring) (observing that "of course capital cases receive special attention in the application of executive clemency"); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (noting that a criminal system that includes the death penalty but lacks clemency would be "totally alien to our notions of criminal justice").

The Court's concern about correcting wrongful capital convictions is well-founded. A prominent study revealed that 68% of death penalty convictions on appeal from 1973–1995 – *over two out of three* convictions during that time period – were thrown out during appeal or post-conviction proceedings due to serious error, defined as "error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial."[4] Similarly, the Innocence Project estimates that at least 220 people have been exonerated *after* convictions for rape or murder thanks to DNA testing, 17 of whom had been

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[4] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 Tex. L. Rev. 1839, 1850 (2000).

sentenced to death.[5] *See also Herrera*, 506 U.S. at 415 ("In his classic work, Professor Edwin Borchard compiled 65 cases in which it was later determined that individuals had been wrongfully convicted of crimes.").

These statistics also suggest that substantial numbers of errors remained uncorrected in cases where individuals are not fortunate enough to have effective habeas counsel or hard scientific evidence to establish their innocence. Many states do not guarantee counsel in state habeas proceedings at all, and claims not raised in state proceedings may not be considered by federal habeas courts.[6] And the reversal rate where DNA testing is available points to a failure of the courts to adequately review claims of innocence – one study concludes that courts reversed only 14 percent of convictions in which the defendant was later exonerated *before* the DNA testing took place, meaning that "the appellate and postconviction process did not effectively ferret out innocence."[7] These exonerated individuals, of course,

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[5] The Innocence Project Case Profiles, http://www.innocenceproject.org/know (last visited Sept. 12, 2008); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008).

[6] *See Murray v. Giarratano*, 492 U.S. 1, 30-31 (1989) (Stevens, J., dissenting) (only 18 of the 37 states authorizing capital punishment "automatically provide their indigent death row inmates counsel to help them initiate state collateral proceedings," though another 13 "have created governmentally funded resource centers to assist counsel in litigating capital cases").

[7] Garrett, *supra* note 5, at 61.

were the ones fortunate enough to have effective representation provided to them as well as available DNA evidence.

The unsettlingly high probability of error demonstrated by these statistics, the importance of effective counsel in developing evidence, and the criminal justice system's historic reliance on clemency to correct errors all strongly suggest that Congress intended for paid appointed counsel to be available in clemency proceedings. It would have been altogether irrational for Congress to have provided for such paid counsel in federal habeas proceedings, but not during the clemency process that is the "fail safe" for judicial review. If grave mistakes are common at trial and exculpatory evidence emerges with some regularity after conviction, it is critical for clemency to be available and more than an empty formality. *See Herrera*, 506 U.S. at 415 ("[H]istory is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence. . . . Recent authority confirms that over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made.").

2. It is not just erroneous convictions that are addressed by the clemency process but also sentencing considerations that courts cannot easily take into account. One of the most important roles of clemency is assessing capital sentences that are disproportionate to the blameworthiness of the

defendant or to the offense. As noted by the American Bar Association, "[i]n cases of death row inmates, most clemencies are commutations to a long prison sentence, such as life in prison without parole."[8]

There is often no serious error in these cases with regard to guilt, but rather a reasoned conclusion by the executive that a particular defendant, though guilty, does not deserve to die. A robust clemency regime provides executive officials with the ability to recalibrate sentences to better reflect the goals of the criminal justice system.[9] And just as subsequent proceedings can turn up new evidence of guilt or innocence, they can also turn up evidence bearing directly on the appropriateness of a capital sentence.

As Justice Kennedy has noted, the opportunity to review capital sentences through clemency is

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[8] Adam C. Ortiz, *Clemency and Consequences: State Governors and the Impact of Granting Clemency to Death Row Inmates*, American Bar Association, at 1 (2002), http://www.abanet.org/crimjust/juvjus/juvdp/factsheetclemency.pdf (last visited Sept. 12, 2008).

[9] A comprehensive list of commutations in capital cases is available at Death Penalty Information Center – Clemency, http://www.deathpenaltyinfo.org/clemency. Many of these commutations were granted for reasons other than possible innocence. In 2007 and 2008 alone, for example, Kenneth Foster's sentence was commuted because he did not kill the victim but rather merely drove the getaway car; Samuel David Crowe's sentence was commuted because of his exemplary behavior and deep remorse in prison; Percy Walton's sentence was commuted because of his poor mental condition; and Kevin Young's sentence was commuted because of the disproportionality of the punishment. *See id.*

important because this is the one stage during which mercy can properly be considered and exercised:

> To help those who are serving under the minimums, the [American Bar Association] should consider a recommendation to reinvigorate the pardon process at the state and federal levels. The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of *mercy*.[10]

Put another way, "[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. These mechanisms hold out the promise that mercy is not foreign to our system." *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting); *see also id.* ("The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law.").

Consistent with Justice Kennedy's elaborations on the value of mercy, the Court has repeatedly recognized that the executive may reduce or eliminate punishment even where courts cannot. Thus in the recent decision of *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court, in an opinion by Justice Scalia, upheld a particularly severe state

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[10] Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (emphasis added).

statute regulating the possession of cocaine. The Court declared that the application of the harsh penalty in any individual case was a matter for executive review, not judicial correction. *See id.* at 996 (although "petitioner's sentence is unique . . . . there remain[s] the possibilities of retroactive legislative reduction and executive clemency"). Similarly, in the much older decision of *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1855), the Court made clear that the "first" meaning of clemency is "forgiveness, release, remission." The Court added that clemency was appropriate where "there might be a mitigation of the punishment without lessening the obligation of vindicatory justice," and that "[w]ithout such a power of clemency," justice "would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy." *Id.* at 310.

There is thus no question that clemency plays a central role both in reviewing convictions for errors and in ensuring that the harshest of punishments is imposed only when it corresponds to the severity of the offense and is appropriate in the executive's sound discretion, taking into account information produced both at trial and after conviction. The emphasis on the clemency process as a crucial "fail safe" pervades this Court's jurisprudence, and provides the backdrop for the necessary conclusion that Congress in fact authorized the federal funding of counsel for clemency proceedings.

II. THE PARTICULAR CHARACTERISTICS OF CAPITAL DEFENDANTS MEAN THAT THE CLEMENCY PROCESS IS INEFFECTIVE WITHOUT FEDERALLY FUNDED COUNSEL.

Given that clemency is structurally and historically such an integral part of the capital review process, the danger is that the clemency process will become useless without the assistance of counsel at this critical step in the process. As the Constitution Project's Death Penalty Committee has noted, capital defense is demanding: it requires mastery of rapidly changing and complex legal doctrine and labor-intensive and time-consuming factual investigation.[11] Adequate attorney compensation that reflects these extraordinary responsibilities is necessary for capital defendants to consistently receive effective representation to present a coherent and persuasive case for clemency.[12] This is particularly true given the demographic characteristics of the population of capital convicts – which make them uniquely unsuited to present their cases.

Capital defendants as a group suffer from acute educational and mental deficiencies that make them particularly unequipped to navigate the clemency process on their own. One recent comprehensive analysis of studies to date on death row inmate

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[11] The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1-2.

[12] *Id.* at 5-6.

characteristics concludes that "the intellectual, literacy, psychological deficits of most death row inmates render them incapable of responding to the demands of direct appeals or postconviction proceedings without the assistance and representation of qualified legal counsel."[13] There is no reason to doubt that this incapacity extends to the clemency petition stage as well.

Death-row inmates, as a group, tend to be relatively uneducated and display below-average intelligence that inhibits their ability to develop and prepare effective clemency petitions. More than half of all death row inmates did not even finish high school, and even those with some high-school experience have a functional literacy far below their limited grade level.[14] Various studies show that the mean IQ of death-row inmates is below the national average, and roughly 30 percent of death row inmates in two samples were considered to have

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[13] Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191, 206 (2002) (hereinafter "Cunningham & Vigen 2002"); *see id.* at 202 (study of capacity of Mississippi death row inmates to represent themselves on state habeas review concluded that "these death row inmates did not have the intellectual capability, academic skills, psychological resources, or legal knowledge to function as their own counsels in seeking habeas relief").

[14] Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2004*, Bureau of Just. Stat. Bull., Nov. 2004, at 6, *available at* http://www.ojp.usdoj.gov/bjs/ pub/pdf/cp04.pdf; Cunningham & Vigen 2002, *supra* note 13, at 199-200.

borderline mental retardation.[15] Indeed, one assessment of 44 death-row inmates in Mississippi concluded that almost half of the inmates scored below the 10th percentile in "verbal IQ," and 84.1% scored at or below the sixth-grade level in reading comprehension."[16]

Death row inmates are also more likely to be mentally ill and have severe psychological problems. Academic studies investigating the psychological functioning of death row inmates consistently find high rates of psychological disorders.[17] Though estimates vary, one study has estimated that 5-10 percent of such inmates have "serious" mental illness.[18] These mental health problems can often traced to physiological dysfunction and abnormalities in the brain.[19] Other studies have shown that

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[15] Cunningham & Vigen 2002, *supra* note 13, at 199; Richard L. Frierson et al., *Capital Versus Non-Capital Murderers*, 26 J. Am. Acad. Psychiatry & Law 403, 406-07 (1998).

[16] Mark P. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice & Behav. 293, 300-01 (1999) (hereinafter "Cunningham & Vigen 1999").

[17] Cunningham & Vigen 2002, *supra* note 13, at 200.

[18] Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Cath. U. L. Rev. 1169, 1192 (2005).

[19] Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psych. 838, 840-44 (1986); David Freedman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Soc. Sci. & Med. 1757, 1759-66 (2000).

substantial numbers of death row inmates have suffered severe head injuries (often via physical abuse) that may be the cause of neurological impairment.[20]

Indeed, those most impaired may be the most likely to have mitigating personal circumstances that may potentially warrant a grant of clemency if properly and thoroughly presented. According to one recent empirical analysis, it is already the case that death row inmates with less education are more likely to receive clemency than those with more education.[21] This trend may reflect a growing unease within the states with executing more mentally challenged inmates, as lower education levels likely correlate with greater mental impairment.[22] But a high level of mental impairment is hardly a factor that a capital defendant can fairly present without an attorney.

Moreover, aside from the relatively high incidence of borderline mental retardation, capital defendants may have mitigating personal circumstances that would be difficult for such individuals to fairly present themselves. Studies show that "[m]any if not most death row inmates have histories of paternal abandonment, foster care

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[20] Lewis et al, *supra* note 19, at 840; Cunningham & Vigen 1999, *supra* note 16, at 305-306; Freedman & Hemenway, *supra* note 19, at 1762.

[21] Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 Va. L. Rev. 239, 285-86 (2003).

[22] *Id.*

and institutionalization, abuse and neglect, and/or parental substance abuse."[23] One study found evidence of "extraordinary" physical and/or sexual abuse in 12 out of 15 death row inmates in the study.[24] A broader study of murder defendants similarly found that 84 percent had histories of physical abuse, and 32 percent had histories of sexual abuse.[25] This abuse can be traced in part to high rates of substance abuse among the parents of death row inmates – in one study as high as 57 percent.[26] These too are facts bearing on potential mitigation that should be clearly developed and presented to the state executive for consideration.

Capital defendants simply cannot effectively present their cases for clemency without the assistance of an attorney. Capital defendants as a class are overwhelmingly indigent.[27] In many cases trial counsel may not have fully developed all the facts that the capital defendant needs to rely upon in his clemency petition, in part due to meager financial resources that states provide for capital defense – and while trial counsel's conduct may not be so

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[23] Cunningham & Vigen 2002, *supra* note 13, at 202.

[24] Marilyn Feldman et al., *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. & Law 345, 348 (1986).

[25] Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 Neurology 1641, 1644 (1995).

[26] Cunningham & Vigen 2002, *supra* note 13, at 193.

[27] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 330, 334 (1995).

ineffective as to drop below the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's failure to uncover certain facts or raise certain issues at trial may vastly narrow the scope of appellate review.[28] Indeed, one recent study analyzing the record of cases where convictions were later overturned based on DNA evidence concluded that, through each stage of trial and appellate review, key facts supporting innocence were not developed.[29] A good attorney may be able to develop or uncover new evidence never presented at trial or procedurally barred from consideration by a court. On the other hand, it is unrealistic, to say the least, that death row inmates would be able to develop and marshal these facts in support of their requests for clemency in the face of these barriers.

Given the evident shortcomings in the abilities of death row inmates on their own to present a compelling – or even coherent – case for clemency,

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[28] See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1841 (1994) ("Inadequate legal representation does not occur in just a few capital cases. It is pervasive in those jurisdictions which account for most of the death sentences."); The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, at 1-2.

[29] Garrett, *supra* note 5, at 121. That study concludes that the "exonerees [in the study] often did not invoke factual claims during their appeals and postconviction proceedings, much less claims of their innocence. Once we look at state law and indirect means for challenging the facts at trial, higher percentages brought factual claims, but significant percentages still did not. Very few succeeded on any claims related to the factual evidence supporting their convictions." *Id.* at 126.

the assistance of federally-funded counsel at the clemency stage is necessary for the clemency process to have any teeth at all. Attorneys must play an important role in obtaining, interpreting, and presenting the information necessary to make a convincing case for clemency. And a defendant's federal habeas attorney is in fact uniquely situated to play that role, having already expended considerable effort investigating and developing the facts on habeas review. That knowledge and expertise can be brought to bear on preparation of a clemency petition with only minimal incremental costs, yet substantial benefits to the defendant.

Finally, the assistance of attorneys in distilling and clarifying the issues in clemency petitions also performs a critical role in enhancing the transparency of state clemency review, which may be the most high-profile and publicly visible portion of any criminal defendant's post-conviction review. At a time where public skepticism that the death penalty is always accurately applied is on the rise,[30] it disserves both the state and the public not to have a clear presentation of reasons for potential clemency

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[30] *Over Three in Five Americans Believe in Death Penalty: Half of Americans Say Death Penalty Not a Deterrent to Others*, Harris Interactive, Mar. 18, 2008, http://www.businesswire.com/portal/site/home/?epi_menuItemID=8529ea2ad8631dcd3bb97904c6908a0c&epi_menuID=887566059a3aedb6efaaa9e27a808a0c&epi_baseMenuID=384979e8cc48c441ef0130f5c6908a0c&ndmViewId=news_view&newsLang=en&newsId=20080318005337 ("95 percent of U.S. adults say that sometimes innocent people are convicted of murder while only 5 percent believe that this never occurs.") (last visited Sept. 12, 2008).

in any particular case. The clemency decision is often the last step of a death row inmate's postconviction review, and acts of clemency tend to be highly public: as the American Bar Association has recognized, "[t]he act of clemency is not like other executive powers that are easily generalized as matters of policy, the ultimate fate of an individual who is easily identified and known to the public – and perhaps even despised – is in question."[31] Thus, the clemency process may serve as a barometer on the community's judgment of whether death is an appropriate punishment for the crimes committed.[32]

The clemency process as currently practiced is not without its flaws and its critics. But observers across the ideological spectrum hope that it can be successfully revitalized and returned to its historic role as a final check on accuracy and a final decision on the appropriateness of mercy. The clemency process cannot be revitalized unless capital defendants receive the effective assistance of counsel in presenting their cases to the state executive, thus bringing clarity to the process and enabling a fully informed decision.

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[31] Ortiz, *supra* note 8, at 1.

[32] "For criminal punishment to communicate consistently and effectively, criminal procedure must be transparent. Otherwise, current and prospective criminals, victims, and the public do not see justice done or hear the law's message." Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 947-48 (2006).

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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