NO. 07-8521

IN THE

Supreme Court of the United States

EDWARD JEROME HARBISON,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

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

BRIEF OF CURRENT AND FORMER GOVERNORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES & CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (continued)

Page

REGULATIONS

TABLE OF AUTHORITIES (continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

BRIEF OF CURRENT AND FORMER GOVERNORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The following Current and Former Governors respectfully submit this brief as *amici curiae* in support of the petitioner:[1] Garrey E. Carruthers, former Governor of New Mexico; Richard F. Celeste, former Governor of Ohio; John J. Gilligan, former Governor of Ohio; James B. Hunt, Jr., former Governor of North Carolina; Gary E. Johnson, former Governor of New Mexico; Joseph E. Kernan, former Governor of Indiana; James G. Martin, former Governor of North Carolina; Ted Strickland, current Governor of Ohio; John Fife Symington, III, former Governor of Arizona; James R. Thompson, former Governor of Illinois; and Dick Thornburgh, former Governor of Pennsylvania.

INTEREST OF *AMICI CURIAE*

As Governors of States that employ the death penalty, *Amici* have had the responsibility under state law to make decisions on whether to pardon or reduce the sentence of persons sentenced to death. That experience gives *Amici* a unique perspective on the importance of counsel to the fairness and accuracy of capital clemency proceedings. As explained

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

in this brief, defense counsel play a critical role in ensuring that Governors have all the information they need to fulfill their responsibility to make clemency decisions. Accordingly, where funding for counsel is not otherwise available, federal funding pursuant to 18 U.S.C. § 3599 serves as a crucial backstop, ensuring that state clemency proceedings will continue to serve their historic role as the "fail safe" of state criminal justice systems.

SUMMARY OF ARGUMENT

Amici curiae are current and former Governors of States that employ the death penalty. In that capacity, *Amici* have been charged by state law with the responsibility of making executive clemency decisions. *Amici* hold a number of different views on the death penalty, with some supporting its use, and others personally opposing it. Regardless of their personal views, however, all believe that a Governor has the responsibility to enforce the laws of his State impartially and to exercise the clemency power in a manner that promotes fairness, accuracy, and public confidence in the criminal justice system.

Based on their experience, *Amici* agree that defense counsel play a vital role in ensuring that Governors obtain the information they need to fulfill that responsibility. Because of the legal and factual complexity of the issues that can arise in capital clemency proceedings, it is rarely possible for clemency decisions to be fully informed without the participation of counsel. Thus, when funding for counsel is not otherwise available, federal funding of clemency counsel pursuant to 18 U.S.C. § 3599 serves as an essential backstop, ensuring that Gov-

ernors can obtain the information they need to make fully informed clemency decisions.

ARGUMENT

I. Clemency Is A Crucial "Fail Safe" In State Systems Of Capital Punishment.

"Clemency is deeply rooted in our Anglo-American tradition of law." *Herrera v. Collins*, 506 U.S. 390, 411 (1993). It "exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Ex parte Grossman*, 267 U.S. 87, 120 (1925). As such, it provides the "fail safe" of the criminal justice system. *Herrera*, 506 U.S. at 415 (internal quotation marks omitted). For States that have adopted a system of capital punishment, the "fail safe" of executive clemency is essential to the fair administration of justice. As Justice Stewart explained in the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976) (opinion of Stewart, J.), to impose the death penalty without providing for executive clemency would be "totally alien to our notions of criminal justice." In a case involving the imposition of the death penalty, a grant of clemency can result in either a full pardon, a commutation of the death sentence, or a reprieve.

A. State Clemency Processes Provide An Opportunity For A Full Airing Of The Reasons Why Clemency May Be Appropriate.

The practice of the States attests to the crucial importance of clemency to our nation's system of criminal justice. "Every state constitution provides for an executive pardon authority." Margaret Col-

gate Love, *Relief from Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 18 (2006) (hereinafter "Love"); *see id.* at 22-36 (describing States' practices).

Moreover, States have adopted procedures for making clemency decisions in death penalty cases that reflect the importance they attach to the clemency process. A review of those procedures bears this out. The 36 States that impose the death penalty follow three different models for making clemency decisions. *See generally* Love at 99-101; Death Penalty Information Center, *Death Penalty Policy By State*, *available at* http://www.deathpenaltyinfo.org/death-penalty-policy-state. More than half of those States give the Governor ultimate authority to make executive clemency decisions, often assisted by an administrative agency. *See id.* at 23.[2] Nine States have a "hybrid" system in which the Governor exercises the clemency power after prior approval by an administrative board. *Id.* at 28-29; *see generally id.* at 99-101.[3] The remaining six States give clemency

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[2] Those States are: Alabama, Arkansas, California, Colorado, Indiana, Illinois, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming. Love at 32-36. Four of those States require the Governor to consult with an administrative body that issues a nonbinding recommendation. *See id.* (describing Arkansas, Kansas, Missouri, and Ohio). The other 17 States leave the decision to the Governor alone. *Id.* Two States, Alabama and South Carolina, provide the executive with such discretion *only* in capital cases. *Id.* at 23 n.39.

[3] In Arizona, Delaware, Idaho, Louisiana, Montana, New Hampshire, Oklahoma, Pennsylvania, and Texas, the Governor may grant clemency only with the prior approval of an admin-

authority to an administrative agency, either "an independent board of gubernatorial appointees" who serve for limited terms, *id.* at 23-24, or "a board composed of elected or appointed state officials that includes the Governor as a member," *id.* at 26.[4]

In all three systems, the clemency process is generally triggered when an inmate files an application either directly with the Governor, *e.g.*, N.C. Gen. Stat. § 147-21, or with a body that is directed to gather information or make recommendations about clemency requests. *See generally* Love Appendix B. From there, the States consider the applications in a number of different ways.

A number of States expressly provide for some kind of hearing. For example, at least eight States require a public hearing before a request for clemency may be granted in a capital case. *See* Ala. Code § 15-22-23(b)(1)-(2); Ariz. Admin. Code §§ R5-4-102, R5-4-201; Idaho Const. art. IV, § 7; La. Rev. Stat. Ann. § 15:572.4(B)(1); Okla. Stat. tit. 57, § 332.2(G); Okla. Admin. Code § 515:1-7-1(a); Mont. Code Ann. § 46-23-302; Mont. Admin. R. 20.25.902(3); 37 Pa. Code § 81.231(b); Utah Admin. Code r. 671-312-3,

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istrative agency. Love at 23 n.39, 28-30. Idaho uses a hybrid system for certain serious offenses, such as murder. *Id.* at 23 n.39. In New Hampshire, the Governor exercises the clemency power subject to the advice and consent of the elected "Executive Council." *Id.* at 23 n.38; *see* N.H. Const. pt. 2, art. 52; *id.* pt. 2, art. 60; N.H. Rev. Stat. Ann. §§ 4:21 to 4:28 (governing Executive Council).

[4] Those States are Connecticut, Florida, Georgia, Nebraska, Nevada, and Utah. Love at 23-24, 26. The Governor is included on the decision-making board in Florida, Nebraska, and Nevada. *Id.* at 26.

671-302-1. Illinois mandates a public hearing upon request, *see* 730 Ill. Comp. Stat. 5/3-3-13, and Florida likewise requires a hearing in a capital case whenever a member of the Board of Executive Clemency (which includes the Governor) requests one. Fla. Admin. Code r. 27, Appendix Rules of Executive Clemency, Rule 15(E)-(F). South Carolina and Indiana also require hearings, though they need not be public. *See* S.C. Code Ann. §§ 24-21-30, 24-21-50; Ind. Code. § 11-9-2-2(b). And in Delaware, the Board of Pardons holds open sessions at which it requests the presence of a representative from the office of the Attorney General. *See* Del. Code Ann. tit. 11 § 4361(d); Delaware Board of Pardons, Rules of the Board, Rule 8, *available at* http://pardons.delaware.gov/information/pardrule.shtml.

With respect to the role of counsel at clemency proceedings, several States expressly provide that an applicant may be represented by counsel. *See*, *e.g.*, Ariz. Admin. Code § R5-4-102; 158.00.02-001 Ark. Code R. Ch. XVIII § 5; 730 Ill. Comp. Stat. 5/3-3-13; Fla. Stat. Ann. §§ 27.51(5)(a), 27.5304(5)(b); 37 Pa. Code § 81.232; S.C. Code Ann. § 24-21-50; *see also* Utah Admin. Code r. 671-312-3(2)(a) (requiring petition to include name and address "of any attorney" who is assisting petitioner). Other States effectively leave the role of counsel to be determined by the Governor or the administrative body responsible for making clemency decisions. *See*, *e.g.*, Ky. Const. § 77 (providing Governor with absolute discretion to "commute sentences, grant reprieves and pardons"). In practice, therefore, many, if not all, States allow counsel to play an important role.

At the completion of the process, a few States require a formal decision on the clemency application. *See*, *e.g.*, Utah Admin. Code r. 671-312-3(10) (requiring Board in capital case to "reconvene in open session to announce and distribute its written decision"). Other States go further and require a statement of reasons for the decision, Ky. Const. § 77, or reasons for the decision when clemency is granted, *see* Del. Const. art. VII, § 1; Ohio Const. art. III § 11; Mont. Code Ann. § 46-23-316, or denied, *see* Conn. Gen. Stat. § 54-124a(j)(3).

Despite their differences, the States' procedural schemes have one thing in common: they all lend themselves to a full exploration of the issues that bear on whether a person sentenced to death should be granted clemency or have his sentence carried out.

B. Governors Consider A Broad Array Of Fact-Intensive Issues When Deciding Whether Clemency Is Appropriate In Capital Cases.

In practice, the States strive to achieve the goal of thoroughly examining the complicated factual and legal issues underpinning capital clemency determinations. Statements and actions of particular Governors illustrate the commitment that all Governors share to making the clemency process the "fail safe" envisioned by this Court. For example, former Governor Parris Glendening of Maryland stated that he would not move forward with an execution if he had "any level of uncertainty" as to the guilt of a defendant. Henry Weinstein, *Maryland Governor Calls Halt to Executions*, Los Angeles Times, May 10, 2002

(hereinafter "Weinstein"). Former Governor Paul Patton of Kentucky emphasized his desire to assure uniformity and "promote justice" in the clemency process. Statement from Governor Patton (Nov. 25, 2003), *at* http://www.e-archives.ky.gov/_govpatton/search/pressreleases/2003/pardonstatement112503.htm. And former Governor Bob Taft went so far as to direct the Ohio Parole Board to consider the case of a man who did not apply for clemency and to consider thoroughly all the available evidence. *See*, *e.g.*, Statement of Ohio Governor Bob Taft Denying Clemency to Stephen Vrabel (July 12, 2004), App. at 1a.

In order to fulfill their responsibility to examine scrupulously each application for clemency in a capital case, Governors engage in a fact-specific inquiry into the circumstances of each case. The nature of the general questions that must be resolved in a clemency proceeding demand such a wide-ranging inquiry. For example, there is ordinarily no way to decide whether there is sufficient doubt about a death row inmate's guilt to warrant a full pardon without meticulously examining all the facts of the case. Similarly, an inquiry into all the circumstances of a capital case is required to decide whether that applicant has the degree of culpability that warrants the punishment of death, rather than a lesser sentence.[5]

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[5] *See*, *e.g.*, Miguel Bustillo, *Gov. Calls Off Texas Execution*, Los Angeles Times, Aug. 31, 2007, at A-15 (explaining that Texas Governor Rick Perry commuted sentence of inmate Kenneth Foster, Jr., whose co-defendant pulled the trigger in the fatal shooting for which the inmate was sentenced to death, and noting the Governor's statement that he was "concerned

Governors also consider a broad range of more specific issues in capital clemency proceedings that are highly fact-intensive. Such issues include mental illness,[6] ineffective assistance of counsel,[7] the reliability of testimony from jailhouse informants,[8] non-compliance with the Vienna Convention,[9] con-

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about Texas law that allows capital murder defendants to be tried simultaneously").

[6] *See* Dena Potter, *Inmate Spared: Va. Governor Grants Clemency Day Before Execution*, Associated Press, June 9, 2008 (noting that Governor Kaine commuted "the sentence of a death row inmate [(Percy Walton)] with a history of mental issues" whose "attorneys claim[ed] he suffers from schizophrenia"); Press Release, Office of the Governor, *Governor Schwarzenegger Denies Clemency to Convicted Murderer Donald Beardslee* (Jan. 18, 2005), *available at* http://gov.ca.gov/press-release/2342/ (rejecting claims, presented "[w]ith the assistances of [the applicant's] attorneys," that Mr. Beardslee suffered from mental impairment and that death was a disproportionate punishment given his role in the crime).

[7] *See*, *e.g.*, John Stamper, *101 Get Pardons, Commutations*: *GOP Governor's Final Acts*, Lexington Herald-Leader, Dec. 11, 2007 (describing Governor Ernie Fletcher's commutation of sentence for death-row inmate Jeffrey Devan Leonard, whose counsel did not know his name during the trial, admitted to having done little to investigate the case, and was later charged with perjury for having claimed that he had handled four death penalty cases before Leonard's, *see* Brett Barrouquere, *Supreme Court Rejects Inmate Appeal*, Kentucky Post, June 5, 2007).

[8] *See* Press Release, Office of the Governor, *Governor Schwarzenegger Denies Clemency to Convicted Murderer Michael Morales* (Feb. 17, 2006), *available at*: http://gov.ca.gov/press-release/463.

[9] *See* Statement of Governor Brad Henry of Oklahoma Commuting Sentence of Osbaldo Torres (May 13, 2004), *available at* http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1&print=true.

cerns regarding whether the death sentence is being applied evenhandedly with respect to race,[10] and the effect of remorse and possibility of redemption.[11] In one recent petition the Governor was required to scrutinize carefully 20 years of proceedings to evaluate whether the evidence raised sufficient doubt about the applicant's responsibility to warrant commutation of the death sentence.[12]

The clemency inquiry in a death penalty case is not only fact-intensive; it is resource-intensive as well. Much of the information that bears on a clemency decision may be in existing court records. But there may also be highly relevant information that does not appear anywhere in existing records, and that will only come to light through further investigation. Regardless of its source, the relevant information must be assessed for its reliability, and it must be organized and presented in a way that ensures that its significance will not be missed. Only through this kind of process can Governors fulfill

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[10] *See* Weinstein, *supra* (describing stay of execution and general moratorium issued by Maryland Governor Parris Glendening).

[11] *See* Daniel T. Kobil, *Should Mercy Have a Place In Clemency Decisions?*, in Austin Sarat & Nasser Hussain, *Forgiveness, Mercy, and Clemency* 43-44 (2007) (describing Georgia Board of Pardons and Paroles' commutation of death sentence of William Neal Moore, a death row inmate who expressed remorse to the family of his victim immediately after his arrest, underwent a religious conversion on death row, and reached out to others through prison ministry).

[12] Statement of Governor Ted Strickland of Ohio Commuting Sentence of John G. Spirko (Jan. 9, 2008), *available at*: http://governor.ohio.gov/Default.aspx?tabid=568.

their responsibility to make capital clemency decisions that are as fair and accurate as possible.

II. Attorneys Play A Vital Role In The State Clemency Process In Capital Cases.

Amici believe that, for state clemency proceedings to serve their historic "fail-safe" function in capital cases, the participation of counsel is vital. Without counsel, there is a serious risk that Governors and the responsible administrative bodies will not obtain the information they need to make fully informed clemency decisions.

It has long been recognized that applicants for clemency are rarely able to present their case effectively when they are unassisted by counsel. Almost 90 years ago, an expert on the clemency process put it this way:

> An observer at clemency hearings who notes the illogical, unsystematic, and haphazard manner in which pleas are made by uneducated, poorly prepared, and frightened relatives and friends in behalf of applicants cannot help feeling that the cause of the applicant is often poorly presented.

Christen Jensen, *The Pardoning Power in the American States* 54 (1922).

That same expert pointed out the critical role that counsel can play in presenting the case for clemency:

> If, in the place of these persons, a capable and conscientious attorney could take charge of the case, present evidence

> systematically, and logically argue the cause of the applicant, there is reason to believe that the authorities would be in possession of fuller evidence than is now the case in many states.

Id.

The advantages of counsel presenting the case for clemency are especially pronounced in cases involving capital defendants. As the ABA has explained, "[m]any capital defendants are . . . severely impaired in ways that make effective communication difficult." ABA Death Penalty Guidelines 10.5 cmt. Empirical evidence supports that conclusion. *See, e.g.*, Mark D. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice and Behav. 293, 300-01 (1999) (studying 44 death-row inmates in Mississippi, 84 percent of whom performed at or below a sixth-grade level in reading comprehension and who, on average, scored at roughly the tenth percentile in terms of intelligence as measured by "verbal IQ"); Richard M. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Catholic U. L. Rev. 1169, 1192 (2005) (estimating that 5-10 percent of death-row inmates are "seriously" mentally ill). A death row inmate's incarceration also severely constrains his ability to conduct any additional investigation that could uncover new evidence supporting his clemency application.

Experience bears out the importance of counsel to the clemency process, particularly in cases involving

persons who have been sentenced to death. When two commentators sought to compile a list of cases in which individuals were found to have been wrongly convicted of capital crimes, they discovered that, "[i]n by far the largest proportion of [these] cases . . . the error was exposed through the dogged efforts of defense counsel." Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 67 (1987).

The fact-intensive nature of the issues that are raised in clemency proceedings involving the death penalty also confirms counsel's vital role. *See supra* pp. 8-10 (identifying issues). When complex issues of this kind arise in a courtroom, it is obvious that their effective presentation requires the assistance of counsel. The same is true when the forum for resolving the issues shifts to the Governor's office.

Counsel's participation also helps ensure that Governors will obtain all the information they need to make a fair and accurate clemency decision. Governors usually have access to government counsel who will provide information from the existing record that supports carrying out the sentence. They do not, however, typically receive from those attorneys the information and arguments that would support a grant of clemency. Thus, defense counsel are especially qualified to conduct whatever additional investigation is needed and to organize and present the information in favor of clemency so that it will be most useful to Governors. Defense counsel also serve the further role of eliminating from any presentation extraneous and unmeritorious issues. The participation of counsel for the applicant thus fills a gap and ensures that Governors will make

their decisions based on the most complete information available.

Four examples of the process that preceded clemency decisions underscore the importance of counsel to the clemency process in cases involving the imposition of the death penalty. Two examples involve cases in which attorneys were able to establish the applicant's innocence; one involves a case in which attorneys were able to show that the death sentence should not be imposed; and one involves a case in which attorneys were unsuccessful in obtaining clemency. All four illustrate why counsel are so important to the clemency process.

1. The first involves the case of Charles F. Stielow, who was sentenced to death in New York for murder based largely on a purportedly voluntary oral confession that he refused to sign when put in writing. Edwin M. Borchard, *Convicting the Innocent* 245-47 (1932). When Stielow maintained his innocence after his conviction, attorneys discovered new evidence suggesting that another man had committed the crime. *Id.* at 248-250. It was too late for a new trial, however, so "[e]xecutive clemency . . . [was] the only recourse." *Id.* at 250. "[T]he whole matter was fervently presented [by counsel] to Governor [Charles] Whitman," who held a hearing on the case and commuted Stielow's sentence to life imprisonment. *Id.* Upon the discovery of additional exculpatory evidence, the Governor appointed "an experienced criminal lawyer, and a leader of the state bar" to investigate the case. *Id.* at 251. That investigation led to evidence that proved that the description of the shooting in Stielow's alleged confession was "a physical impossibility." *Id.* at 251-52.

Convinced that "there was gross error" in Stielow's conviction, Governor Whitman had him released from the penitentiary "as an innocent man." *Id.* at 253.

2. The recent grants of clemency to Virginia death row inmate Earl Washington, Jr., similarly illustrate how the marshalling and organized presentation of detailed factual information can be of crucial importance to Governors making clemency determinations in capital cases. Mr. Washington is a mildly-retarded man who was convicted of a 1982 rape and murder based largely on his confession while in prison for other offenses. Shortly before his scheduled execution, his attorneys argued that newly-obtained DNA testing raised doubts about whether Washington had committed the crime. *See* Frank Green, *Washington's Death Sentence Commuted New Trial Could Occur If State Law Is Changed*, Richmond Times Dispatch, Jan. 15, 1994, at A1. Governor Douglas Wilder "thoroughly review[ed] the evidence in the case," including hearing testimony where defense counsel presented arguments on Washington's behalf, and "conditional[ly] pardoned" Washington such that he could, upon acceptance of the pardon, receive a sentence of life imprisonment. Statement of Virginia Governor Lawrence Douglas Wilder Granting Conditional Clemency to Earl Washington, Jr., at 3 (Jan. 14, 1994), App. at 9a-10a.

Because Washington had confessed to the crime, however, Governor Wilder did not immediately release him from prison. Attorneys for Washington eventually were able to persuade Governor James Gilmore that "a jury afforded the benefit of DNA

evidence and analysis . . . would have reached a different conclusion regarding" Washington's guilt and thus obtained for Washington an absolute pardon. Statement of Virginia Governor James S. Gilmore, III, Granting Absolute Pardon to Earl Washington, Jr., at 2 (Oct. 2, 2000), App. at 15a-16a. After another man pled guilty to the crimes for which Washington had been convicted, moreover, Governor Timothy Kaine issued a revised pardon that reflected "Mr. Washington's innocence" of the crimes. Statement of Virginia Governor Timothy M. Kaine, Granting Revised Absolute Pardon to Earl Washington, Jr., at 2 (July 3, 2007), App. at 19a.

3. Attorneys can be equally important to the clemency process when the death row inmate's innocence is not established, but a claim is made that capital punishment should not be imposed. This was the case for Anson Avery Maynard, who was convicted of murder and sentenced to death in North Carolina. *Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991). Maynard petitioned Governor James Martin for clemency with the assistance of several attorneys. App, *infra*, at 3a. The Governor heard from "attorneys and witnesses on both sides," as well as family members of both Maynard and his victim. The case required the Governor to "sift[] through a complex mixture of ambiguous evidence, some of which was not available for presentation to the jury which convicted" and "some of which may not have even been admissible in a court of law." *Id.* at 3a-4a. Because there was "reasonable doubt in [the Governor's] mind as to whether the degree of involvement of [Maynard] in the murder of Stephen Henry [was] sufficiently clear to justify the death penalty," he

commuted the sentence to life in prison. *Id.* at 5a. In his decision, Governor Martin praised the efforts of "post-conviction defense counsel . . . to find every shred of evidence to support the petition for clemency." *Id.* at 4a.

4. An attorney's role in the capital clemency process is critical even when the request for clemency is ultimately denied. An attorney's ability to investigate, frame issues for consideration, and thoroughly present a petition on the applicant's behalf ensures that the decision to apply the death penalty is not made until an inmate has had every opportunity to demonstrate that the sentence is not warranted in his case. When an individual who is facing execution is afforded such representation, it promotes public confidence in the fairness and accuracy of the State's criminal justice system.

The decision of California Governor Pete Wilson denying Thomas Martin Thompson's application for clemency is illustrative. The attorneys in that case had argued for clemency on numerous grounds, including: (1) new evidence that he had not raped the victim, including testimony presented by an accomplice at the accomplice's parole hearing; (2) questions about "the veracity of jailhouse informants"; (3) inconsistent closing arguments made by prosecutors at his and his accomplice's trial, which called into question the State's case; and (4) an *amicus* brief prepared by the attorneys and submitted on behalf of seven former prosecutors and two jurors who expressed their doubts about Thompson's conviction. California Commission on the Fair Administration of Justice, *Clemency in Capital Cases*, Appendix C 15 (June 30, 2008). Governor Wilson specifically noted

"the diligent and skillful efforts" of Thompson's attorneys in handling the application. *Id.* at 21. Although the Governor ultimately rejected the application, the attorneys' skillful representation and the Governor's ten-page, single-spaced statement considering each of the grounds raised ensured that Governor Wilson had thoroughly explored every argument for mercy before the sentence was carried out.

III. Section 3599 Provides A Critical Backstop That Ensures Representation For Capital Defendants In The State Clemency Process.

In some States, funding is available for counsel in clemency proceedings. Where funding is not available, however, federally funded clemency counsel is a backstop that ensures that counsel will be present and that Governors may obtain the information they need to make fully informed clemency decisions in capital cases.

Contrary to the view of the Solicitor General (*see* Br. for U.S. as *amicus curiae*, Pet. Stage, at 11-23), the fact that counsel is appointed by a federal court does not reflect an intrusion on state sovereignty. States have wide discretion in determining how to exercise clemency, *see Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 282 (1998), including absolute control of what role Section 3599 attorneys will play in each case. There is no reason to anticipate that federal courts would seek to intrude on such constitutionally authorized state determinations.

Indeed, the state clemency process significantly benefits when the same attorney who is funded to

represent a defendant in federal habeas proceedings is allowed to continue that representation in the state clemency proceeding. That attorney will almost always have the most complete information bearing on an inmate's petition for clemency – and thus will be in the best position to assist the Governor in making a fully informed decision. Federal funding under Section 3599 thus helps to ensure that state clemency proceedings will continue to serve their historic role as the "fail safe" of state criminal justice systems that employ capital punishment.

CONCLUSION

For the reasons discussed, defense counsel play a vital role in capital clemency proceedings, and federal funding for such counsel helps to ensure that Governors obtain the information they need to make fair and accurate clemency decisions.

Respectfully submitted,

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September 15, 2008

TABLE OF CONTENTS

APPENDIX A

NEWS RELEASE
GOVERNOR BOB TAFT

TAFT RELEASES STATEMENT CONCERNING CLEMENCY FOR STEPHEN VRABEL

COLUMBUS (July 12, 2004) - Today, Governor Bob Taft issued the following statement concerning clemency for Stephen Vrabel:

On March 3, 1989, Stephen Vrabel shot and killed his common-law wife and daughter and placed them in a refrigerator/freezer, where they remained until discovered a month later by a family member. In 1994, he was found competent to stand trial, and a jury convicted him on two counts of aggravated murder with specifications. Since then, Ohio courts have upheld the convictions and the death sentence. On March 19, 2004, following several competency examinations, the trial court granted Mr. Vrabel's request to waive any future appeals.

Although Mr. Vrabel did not apply for clemency, I directed the Ohio Parole Board to consider his case and provide a clemency recommendation to me. While neither Mr. Vrabel nor his attorneys chose to present evidence at the hearing, the Board nevertheless considered all available evidence. In a unanimous (8-0) opinion, the Board recommended that I not grant clemency. After careful consideration of judicial opinions, recommendations and arguments of the Attorney General's Office, the mental health history of Stephen Vrabel, and other relevant materials, I have

decided not to invoke the power of executive clemency.

Mr. Vrabel is guilty of the murders of Susan and Lisa Clemente, and the aggravating circumstances of his crimes outweigh any mitigating factors. For these reasons, I concur with the decision of the Parole Board and choose not to commute Stephen Vrabel's sentence.

"May God bless the family and friends of Susan and Lisa Clemente."

APPENDIX B

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR

Release: IMMEDIATE Date: January 10, 1992
Contact: Nancy Pekarek Distribution: Statewide
Joanne Latham

GOVERNOR COMMUTES ANSON MAYNARD'S DEATH SENTENCE TO LIFE WITHOUT PAROLE

RALEIGH -- The following is Governor Jim Martin's statement concerning the commutation of Anson Avery Maynard's death sentence to life in prison without parole.

After lengthy, prayerful consideration, I have decided to commute the death sentence of Anson Avery Maynard to life imprisonment without parole. Anson Maynard was convicted of murdering Stephen Henry on June 13, 1981 in Fayetteville, North Carolina. After all appeals were exhausted, the date of January 17, 1992, was set by the courts for the State to carry out the death sentence, and a written appeal for clemency was received by me as Governor of North Carolina on November 22, 1991.

I have heard attorneys and witnesses on both sides, as well as family members of both Stephen Henry and Anson Maynard. I have sifted through a complex mixture of ambiguous evidence, some of which was not available for presentation to the jury

which convicted Anson Maynard, and some of which may not have even been admissible in a court of law.

No physical evidence ties Anson Maynard to the scene of the crime or to the commission of the crime. The only direct witness to testify that Maynard pulled the trigger was Gary Bullard, an admitted participant in the murder who was given immunity from prosecution in return for his evidence and testimony against Maynard. Given the information available at the time, the jury accepted Bullard's version over Maynard's.

After extensive review of all of the claims and counterclaims, I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry. Nor am I convinced that Anson Maynard is totally innocent.

Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the state of North Carolina will not carry out the execution of Anson Maynard. Because it is not clear on the basis of all I have read and heard that Anson Maynard was not the murderer, I conclude that he should remain in prison for the rest of his life.

The record is clear that the courts have done their duty under the powers and procedures of the courts. Law enforcement has done its duty to use the evidence available to support a conviction. The post-conviction defense counsel has worked hard to find every shred of evidence to support the petition for clemency. The Attorney General's office has

worked hard to uncover any information or response supporting the original verdict and sentence. I have done the best I can to reach an understanding of what truth can be found in all this.

I want it clearly understood that my actions do not indicate any tolerance on my part, or of the State of North Carolina, of murder in this state, especially the murder of a person who has indicated a willingness to assist the state through testimony against another person. The willingness of citizens to offer testimony is essential to the prosecution of the guilty and it is a function of government to protect witnesses from harm. Where the evidence is clear, we should not hesitate in carrying forth swift, sure justice, including execution.

I appreciate the efforts of the jury to arrive at the truth. There was much conflicting evidence presented to them in 1981 and we all respect the decision they reached at the time based upon what they saw and heard. It is only with the benefit of additional time, and with information that they may not have had available, that my decision modifies their sentence.

There is reasonable doubt in my mind as to whether the degree of involvement of Anson Avery Maynard in the murder of Stephen Henry is sufficiently clear to justify the death penalty. For that reason, I have commuted Anson Maynard's death sentence to life in prison without parole. It is for cases like this that the power of clemency is given to the governor.

– End –

APPENDIX C

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM THESE PRESENTS SHALL COME - GREETINGS:

In accordance with the powers granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, **Lawrence Douglas Wilder**, do hereby reach the following conclusions and render the following conditional pardon:

Earl Washington Jr., was brought to trial in the Circuit Court of the County of Culpeper for the murder of Rebecca Lynn Williams with premeditation subsequent to the commission of rape. He was tried by a jury of his peers and found guilty as charged and it fixed his punishment at death. On March 20, 1984, at a sentencing hearing in which the probation officer's report was considered, the **Honorable David F. Berry** entered a final order imposing the death sentence. Since that time, the defendant's case has gone through numerous appeals both within the courts of the Commonwealth and the United States. No court before which an appeal has been presented has granted the complete relief that **Earl Washington, Jr.** has sought.

A review of the record of the trial and of the appeals that were taken demonstrate that **Earl Washington, Jr.** received a fair trial and his appeals were well presented and considered. Recently, newly discovered evidence has become

available as the result of initiatives of the Attorney General's Office. It is clear from precedent in past cases and based upon discussion with the Attorney General's Office and counsel for **Earl Washington, Jr.** that there are no provisions under Virginia law whereby such newly discovered evidence can now be considered by the courts. Accordingly, the review of and consideration of such evidence can be made only by the Office of the Governor, and it is this Office that is the sole entity that has the authority and power to decide upon its merits and, if appropriate, intervene into and prevent the execution of **Earl Washington, Jr.**

Earl Washington, Jr., through counsel, has petitioned my Office with the request that I invoke the clemency powers granted to me under Article V, Section 12 of the Constitution of Virginia, grant him clemency in the form of an absolute pardon, and allow him good time for the time he has served on two consecutive fifteen year sentences he received for statutory burglary and malicious wounding after pleading guilty to same in the Circuit Court for the County of Fauquier on May 1, 1984. The pleas of guilt were the result of a plea bargain concerning six indictments which included two counts of malicious wounding, two charges of robbery, one charge of rape, and one charge of breaking and entering. The charges involved three different victims.

The newly discovered evidence was the result of DNA testing of biological samples that had been taken from the body of the victim in the case for which he received the death penalty. These samples were tested by the Virginia Division of Forensic Science. The results were discussed with **Dr. Paul**

B. Ferrara, Director of the Division. He confirmed that alleles (DNA characteristics) matching the victim, her husband, and **Earl Washington, Jr.** were found during the testing process. In addition, however, an allele was discovered which matched none of these persons. That raises a substantial question because the victim in dying declaration stated that she was attached by a lone black man whom she did not know. Defense argues that that person could not have been **Earl Washington, Jr.** because the unaccounted for allele does not match him and that proves that the contributor of that allele had to belong to the attacker. Defense counsel supports this by pointing to the trial testimony rendered by a reputable and competent doctor who testified that the biological materials he sampled had to have been deposited within between one and twelve hours of the victim's death. Defense argues that there was no other opportunity for the unaccounted for allele to have been deposited in that time period other than by the attacker.

Even with this new evidence, however, questions continue to remain concerning the independent validity and strength of other evidence, including the confession of **Earl Washington, Jr.** His defense counsel argues that his confessions are of no merit because he is mentally retarded and he was led into the confessions by the police who conducted the investigations. Nevertheless, a review of the trial evidence, including the confessions of **Earl Washington, Jr.** reveals that he had knowledge of evidence relating to the crime which it can be argued only the perpetrator would have known. The United States Court of Appeals for the Fourth Circuit discusses the specifics of this

knowledge and confirms that he "knew so much about this crime that a jury could afford his confessions substantial probative weight." *Washington v. Murray*, No. 92-4008, slip op. at 10 (4th Cir. Sept. 17, 1993). See also *Id.* at 10-11 for the Court's review of that evidence.

I have thoroughly reviewed the evidence in the case, the petition that has been submitted on behalf of **Earl Washington, Jr.**, the interviews my Office has had with the prosecutor, the detective who is most knowledgeable about the case, **Dr. Ferrara**, the forensic scientist, other knowledgeable persons, all of the orders and opinions of the various courts for both the Commonwealth and the United States, and the results of the hearing wherein defense counsel presented its case to this Office. It is also a matter of common knowledge that I have been subjected to significant pleas from a number of members of the General Assembly as well as persons from across the United States and other parts of the world to grant the request of **Earl Washington, Jr.** While they have been sincere and well meaning in their expressions of concern on behalf of the petitioner, it is clear that the large majority do not enjoy a grasp of the specific facts in this case. Accordingly, while I appreciate these expressions of opinion, as I have stated on other occasions, I must be ever mindful that the powers granted to the Governor by the Constitution cannot be implemented based upon popular appeal, nor can such a decision be implemented in a manner that sacrificially abridges the law. To the contrary, it must emanate from a thorough review of each case, be based upon the evidence presented, and rest its authority upon established principles of law.

Moreover, a governor must remain cognizant of the precept that the powers granted must me carefully husbanded in order to assure that they not meet with abuse.

In reaching my decision on the issue of clemency in this case, once again I have recognized the sanctity normally extended to each branch of government and the inherent obligation to maintain the dignity accorded to the separation of powers.

Taking into consideration all of the foregoing, I am of the opinion that the newly discovered evidence interjects an important element into the case which neither the jury that tried the case nor the courts which have reviewed it since the trial have had the opportunity to consider. Had that opportunity arose, I am of the opinion that their opinions as to the appropriate conclusion may have been different.

NOW THEREFORE, in light of the foregoing I have determined that, while there are those who enjoy reasoned and conscientious minds who may differ, I am the one who must reach the ultimate decision; accordingly, based upon all of the foregoing I do hereby grant **Earl Washington, Jr.**, the following **CONDITIONAL PARDON:**

(1) I acknowledge that statutory language exists to the effect that those persons sentenced to death are not eligible for parole if their sentence is commuted to life imprisonment. Notwithstanding this factor, as I have stated on previous occasion, I do not view such language as a constraint to the powers granted to me by the Constitution under

Article V, Section 12. I have concluded that the powers granted to me supersede any direct or implied attempt to restrict such powers through a statutory enactment. Accordingly, I hereby commute the sentence of death for the capital murder conviction to life imprisonment with the right of parole. His parole eligibility shall be determined by the appropriate authorities. When making that determination they shall consider both the thirty year sentence he is now serving for unrelated offenses, as well as, the offense for which he originally received the death penalty and which I am now commuting.

(2) The capital punishment commutation is conditioned upon **Earl Washington, Jr.** maintaining good conduct and cooperating with Virginia Department of Corrections officials; accordingly, if at any time during his imprisonment he shall be guilty of a felony, including the attempt to escape, this commutation shall be rendered null and void and revised to the extent that he shall thereafter serve a life sentence without parole, unless such misconduct on his part leads to a sentence from a court that dictates a more stringent sentence; and

(3) I do hereby further implement my clemency powers to the extent that nothing contained herein is to be deemed to preclude **Earl Washington, Jr.** from taking advantage of the opportunity to present the aforementioned new evidence and have his case retried from the inception under new provisions for newly discovered evidence which I encourage the General Assembly to adopt at its 1994 Session. I acknowledge the fact that such a

retrial could result in an outcome that is either more or less stringent than this clemency order, including the potential of an outcome in which the sentence of death could be ordered. Accordingly, in the event of such a retrial, the verdict that results and the sentence that is imposed in the event of finding of guilty shall supersede this grant of executive clemency.

(4) Before this conditional clemency grant will become effective, **Earl Washington, Jr.**, must accept its terms on or before 5:00 P.M. on January 14, 1994, by signing this document at the place designated for his signature. If he rejects this grant, either in whole or in part, the entire grant is revoked and, thereby, will be null and void and the sentence of the Circuit Court for the County of Culpeper will be carried out when so ordered by that court.

Given under my hand and the Lesser Seal of the Commonwealth at Richmond, this 14th day of January in the year of our Lord one thousand nine hundred and ninety-four and the 218th year of the Commonwealth of Virginia.

/s/ Lawrence Douglas Wilder
Governor of Virginia

{SEAL}

By the Governor:

/s/
Secretary of the Commonwealth

ACCEPTANCE OF THE CONDITIONAL PARDON

I, **Earl Washington, Jr.**, hereby accept the above **CONDITIONAL PARDON** with the conditions therein set forth.

Signature: /s/ Earl Washington Date: 1/14 , 1994

State of Virginia
County of Mecklenburg, to-wit:

Subscribed and sworn to before me this 14 day of January.

APPENDIX D

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM PRESENTS SHALL COME - GREETINGS:

1. In May of 1983, in Fauquier County, Earl Washington was arrested for breaking and entering the home of Mrs. Helen Weeks, a 73-year-old woman, stealing a gun and money from her, and brutally beating her with a chair after she awoke to discover him in her house. He also shot his brother with the gun he stole from Mrs. Weeks. As a result of those crimes, Washington pled guilty to a statutory burglary and malicious wounding and he was sentenced to a 30-year prison term (two consecutive 15-year prison terms) for those offenses.

2. While Washington was in custody for those criminal offenses, he was questioned about the rape and murder of Mrs. Rebecca Williams a year earlier in Culpeper County. Washington confessed to raping and murdering Rebecca Williams in her apartment on June 4, 1982.

3. Based on Washington's confession and other corroborating evidence, Washington was tried and convicted of the capital murder and rape of Rebecca Williams and sentenced to death.

4. Ten-years later, Governor L. Douglas Wilder reviewed new DNA tests of samples taken from the victim and Washington. The DNA test results were

inconclusive but did not exonerate Washington. In light of that new information, Governor Wilder commuted Washington's death sentence to life in prison with the possibility of parole.

5. On June 1, 2000, I directed the Virginia Division of Forensic Science to perform further DNA tests on evidence taken from the apartment of Mrs. Williams and her body. The purpose of these tests was to apply the most technologically advanced scientific methods to the evidence available in an effort to confirm or disprove Earl Washington's presence in the apartment of Rebecca Williams on June 4, 1982.

6. Since June 1, 2000, the Virginia Division of Forensic Science has proceeded to perform the DNA tests on all known and available evidence.

7. According to the results of the new DNA tests, Washington is excluded from semen taken from Mrs. Williams' body and his DNA could not be located elsewhere in the apartment.

8. The DNA results further revealed the semen of another person on a blue blanket taken from the scene of the crime. The DNA from semen on the blue blanket matched the DNA of a convicted rapist. However, the DNA on the blue blanket did not match the DNA of the sole sample of semen taken from Mrs. Williams' body. As a result, the Division of Forensic Science could not confirm the DNA found on the blue blanket was Rebecca Williams' rapist.

9. In my judgment, a jury afforded the benefit of the DNA evidence and analysis available to me

would have reached a different conclusion regarding the guilt of Earl Washington. Therefore, upon careful deliberation and review of all of the evidence, as well as the circumstances of this matter, I have decided it is just and appropriate to intervene in the judicial process by granting Earl Washington an absolute pardon for the capital murder and rape of Rebecca Williams.

NOW, THEREFORE, in accordance with the authority granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, I, James S. Gilmore, III, Governor of the Commonwealth of Virginia, do hereby grant unto Earl Washington an Absolute Pardon from the convictions of rape and capital murder handed down by the Circuit Court of Culpeper County on March 20, 1984.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 2nd day of October in the year of our Lord Two Thousand and the 225th year of the Commonwealth of Virginia.

/s/ James S. Gilmore III
Governor

{SEAL }

Attest:

/s/ Anne O. Petera
Secretary of the Commonwealth

APPENDIX E

COMMONWEALTH of VIRGINIA
Executive Department

TO ALL WHOM THESE PRESENTS SHALL COME - GREETINGS:

1. On June 4, 1982, Rebecca Williams was raped and stabbed in her home in Culpeper, Virginia, and died a short time later in a local hospital. At an autopsy, various samples were taken. Additional evidence was collected from the crime scene at the Williams home.

2. Approximately a year later, Earl Washington, Jr., was in custody for other crimes for which he was convicted and sentenced to prison. He was questioned about Ms. Williams' rape and murder and he eventually confessed to those crimes.

3. Based on the confession and other evidence, Mr. Washington was tried and convicted of the capital murder and rape of Mrs. Williams and sentenced to death.

4. Ten years later, Governor Lawrence Douglas Wilder requested and was presented with DNA tests of samples taken from Mrs. Williams, Mr. Washington, and other physical evidence from the crime scene. The DNA tests did not exonerate Mr. Washington, but cast doubt on whether he had committed the crimes against Mrs. Williams. In light of that new information, Governor Wilder commuted

Washington's death sentence to life in prison with the possibility of parole.

5. In 2000, Governor James S. Gilmore, III directed the Virginia Division of Forensic Science to perform further DNA tests on evidence taken from Mrs. Williams' body and her residence. These tests were conducted with more advanced DNA technology that had been developed since the time of Governor Wilder's review.

6. According to the results of these DNA tests, it became evident that the semen taken from Mrs. Williams' body was not that of Mr. Washington and his DNA also could not be located elsewhere in the Williams residence.

7. The DNA results further revealed the semen of another person on a blue blanket taken from the crime scene. The DNA from that semen matched the DNA of a convicted rapist, Kenneth Tinsley. However, at the time, it appeared that the DNA on the blue blanket did not match the DNA of the sole sample of semen taken from Mrs. Williams' body, thus making it possible that there were at least two perpetrators of the crime.

8. Based on this information, Governor Gilmore granted Mr. Washington an absolute pardon on October 2, 2000, on the limited grounds that a reasonable jury would not have convicted him based on the evidence as it was then known.

9. In 2004, Dr. Edward Blake conducted new and more sophisticated DNA tests at Mr. Washington's request and expense. These DNA tests revealed that

the DNA sample from Mrs. Williams' body and the DNA that was found on the blue blanket from the crime scene both belonged to Kenneth Tinsley.

10. The reliability of Dr. Blake's DNA testing in this case was confirmed by an external audit of the Division of Forensic Science ordered by Governor Mark R. Warner.

11. In April 2007, Kenneth Tinsley pled guilty to the rape and murder of Rebecca Williams. He was sentenced to two life terms in addition to the two life terms he was already serving for a previous rape and robbery conviction.

12. Based on DNA evidence and analysis now available, and the conviction of Kenneth Tinsley for the murder and rape of Mrs. Williams, it is now evident that Mr. Washington was and is innocent of the crimes against Mrs. Williams. Therefore, upon careful deliberation and review of all of the evidence, as well as the circumstances of this matter, I have decided it is just and appropriate to grant this revised absolute pardon that reflects Mr. Washington's innocence of the rape and capital murder of Mrs. Williams.

NOW, THEREFORE, I Timothy M. Kaine, Governor of the Commonwealth of Virginia in accordance with the authority granted to me as Governor of Virginia under Article V, Section 12 of the Constitution of Virginia, do hereby grant unto Earl Washington, Jr., this revised Absolute Pardon from the convictions of rape and capital murder handed down by the Circuit Court of Culpeper County on March 20, 1984.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 3rd day July in the year of our Lord Two Thousand and Seven and the 232nd year of the Commonwealth of Virginia.

/s/ Timothy M. Kaine
Governor

{SEAL}

Attest:

/s/ Katherine K. Hanley
Secretary of the Commonwealth