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PETITIONS FOR LIFE: EXECUTIVE CLEMENCY IN MISSOURI DEATH PENALTY CASES

*Cathleen Burnett**

Governor Mel Carnahan, You have heard many pleas for mercy. It is a difficult job to weigh and decide issues that determine whether someone will live or die. The case before you is one that warrants your intervention...The courts failed Bert Hunter...The appeals courts failed to do justice to Bert Hunter by not correcting errors made by the plea court.¹

I. INTRODUCTION

Because the death penalty is the ultimate penalty, the question of whether guilty persons are being fairly convicted and appropriately sentenced claims the attention of the public and legal communities alike. Since the death penalty was reinstated in 1976, 87 people have been released from death row, wrongfully convicted of capital murder.² In January of 2000, Republican and pro-death penalty advocate Gov. George Ryan declared a moratorium for Illinois' execution machinery after thirteen persons had been found innocent of their crime and twelve persons had been executed.³ The governor was troubled by the numerous errors and was concerned that an innocent person could be executed.⁴ He appointed a commission to provide recommendations to correct the problems.⁵ Numerous state legislatures also considered moratorium legislation. On September 21, 2000, Illinois Congressman Jesse Jackson, Jr. introduced a bill to impose a minimum seven-year moratorium on all

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1. Clemency Petition for Bert Hunter-CP#81, executed June 28, 2000.

2. Jonathan Alter, et al., *The Death Penalty on Trial*, NEWSWEEK, June 12, 2000, at 24.

3. *Illinois Governor Halts Executions*, Moratorium News (Equal Justice USA, Hyattsville, M.D.), Spring 2000, at 1.

4. James Liebman, Jeffrey Fagan, and Valerie West, *Broken System: Error Rates in Capital Cases, 1973-1995* (Columbia University, 2000) [hereinafter Liebman et al.], at n.10.

5. *Illinois Governor Halts Executions*, *supra* note 3, at 1.

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U.S. executions.⁶

Such efforts to stop executions intensified in 1997, when the American Bar Association's House of Delegates voted 280 to 119 to endorse a halt to implementing the death penalty until states enacted means to ensure fairness and due process in its administration of justice, and to minimize the risk that innocent persons may be executed.⁷ This vote reflected concerns that ineffective defense counsel aggravated systemic prejudices in race and class discrimination, and in cases involving juveniles and persons with mental retardation.⁸ In addition, the ABA resolution stated that the recent federal legislation [Anti-Terrorism and Effective Death Penalty Act of 1996] "dramatically undermines the federal courts' capacity to adjudicate federal constitutional claims in a fair and efficient manner."⁹

Most recently, a study conducted by James Liebman et al. reported overall reversal rates in death penalty cases of 47% and 40% by state and federal courts, respectively, were well within the range of normalcy.¹⁰ Although Liebman et al. concluded that the death penalty system is broken because serious errors exist throughout the majority of states,¹¹ their results could be used by death penalty supporters to endorse the credible job that some appellate courts are doing to detect errors. But what about the other cases that are not reversed? Are there errors that are not being detected? And what about those states in which the reversal rates are below the national average? Are their courts relatively error-free?

The thesis of this article is that low reversal rates mean serious errors are not being detected and corrected. The research will focus on Missouri, which has very low reversal rates of 15% in federal court and 20% in state court.¹² The data to address this question comes from the

6. Federal Death Penalty Moratorium Act of 2000, H.R. 5236, 107th Cong. (2000).

7. *Resolution of the A.B.A. House of Delegates, February 3, 1997*, Summary of Action of the A.B.A. House of Delegates (A.B.A., Chicago, I.L.), February 1997 [hereinafter *Resolution of the A.B.A.*], at 12-13.

8. See Leslie A. Harris, *Report of the American Bar Association, Section of Individual Rights and Responsibilities*, February 1997 [hereinafter *Report of the A.B.A.*], at 11-13 (on file with the *Journal of Law and the Public Interest*).

9. *Report of the A.B.A.*, *supra* note 8, at 3.

10. Liebman et al., *supra* note 4, at Table 6, *State-by-State Comparisons of Rates of Error Detected by All State Courts (State Direct Appeal and State Post-Conviction)* and Table 7, *Percent of Capital Judgments Reviewed on Federal Habeas Corpus in Which Reversible Error Was Found, 1973-1995*.

11. *Id.* at 121.

12. *Id.*

clemency petitions submitted to the governor as the last step in the process of executing the death penalty.¹³ These petitions illustrate the range and magnitude of the claims of legal problems in one state. The clemency petitions provide the most complete and full statement of the condemned's case, because these petitions are the condemned's opportunity to persuade the governor to intervene in the legal process and spare his or her life. Clemency petitions are different from other legal appeals in that the statements are neither limited by evidentiary rules of admissibility nor defined by the procedural requirements of jurisdictional precedent.¹⁴ Nonetheless, these claims are grounded in verifiable facts. Minimally, they raise questions which have been unresolved by the courts. These appeals to the governor are pleas that attempt to tell the petitioner's story in clear and understandable language, to persuade the governor to look into the merits of the claims in the hopes of preventing miscarriages of justice. They are not simple pleas for mercy.

II. CLEMENCY¹⁵

Although the use of executive clemency has dramatically declined since the re-instatement of the death penalty, the U.S. Supreme Court relies upon the executive clemency stage to be the point for the correction of any judicial errors before the ultimate penalty is imposed.¹⁶ In *Herrera v. Collins*, Chief Justice Rehnquist clearly articulated the governor's clemency role, stating that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. In England, the clemency power was vested

13. The petitions used as data for this paper are the 50 clemency petitions submitted to the Governor of Missouri between 1977 and 2000. These petitions are on file with the author. Throughout the article references to statistics regarding clemency petitions refer to these 50 petitions.

14. See, e.g., Daniel Kobil, *The Evolving Role of Clemency in Capital Cases, in America's Experiment with Capital Punishment* 531, 540 (James R. Acker et al. eds., 1998); Hugo Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 257 (1990-91).

15. The legal term 'clemency' refers to an act of leniency in the criminal justice system. In the death penalty system, clemency could be one of three things: a pardon, a reprieve and/or a commutation. A pardon is a complete absolution of guilt for a crime that also releases the prisoner from the penalty for the crime. A pardon rarely occurs in death penalty situations. A reprieve is a stay of execution, granting time in order to do something else, to give time for consideration of other issues, possibly in other jurisdictions. Many governors have a great deal of discretion in shaping what happens during the period of a stay. A commutation of sentence is a reduction of the penalty, usually to a sentence of life without parole. See Kobil, *supra* note 14, at 531.

16. See generally Bedau, *supra* note 14.

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in the Crown and can be traced back to the 700's."¹⁷ He explained that "[e]xecutive clemency has provided the "fail safe" in our criminal justice system... It is an unalterable fact that our justice system, like the human beings who administer it, is fallible."¹⁸ The pressure on the governor to be the "fail safe" increases when the courts limit their intervention in capital cases through procedural barriers. Low reversal rates result in more death penalty cases reaching the governor's desk. The Liebman et al. study indicated that Missouri death penalty cases have reversal rates of at most 20%; a figure significantly lower than the national rates of 40-47%.¹⁹ Liebman et al. suggest that such findings provide a reason to "question the care with which the Missouri... high courts screen for such error."²⁰ Missouri ranks fourth in the nation in the percent of death sentences carried out since the re-instatement of the death penalty.²¹ Since Missouri is a state actively engaged in executions, it provides sufficient material to examine a range of representative issues from which conclusions about death penalty implementation can be drawn. In many ways, Missouri's situation reflects much of what is at stake around the country. Missouri's clemency process is typical of the majority of states (twenty-five of thirty-eight) who permit the Governor to make the clemency decision.²²

The Supreme Court's reliance on executive clemency as part of the normal process in death penalty cases, however, is different from the public's understanding of the clemency process. Ordinarily courts are the last resort in criminal cases and clemency is viewed as applicable to only a few exceptional cases. Because of the disjunction between the public understanding of clemency process and the actual use of the clemency process, the public is unlikely to appreciate the significance of the role of the governor in death penalty cases. Unless there is preparation and explanation to the public about the reasons for commutation, the public will remain hostile to clemency requests. Without public understanding of the clemency process, the governor makes political decisions about granting clemency without taking any leadership for shaping public opinion. Maintaining the status quo lulls the public into a degree of

17. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (citations omitted).

18. *Id.* at 415.

19. Liebman et al., *supra* note 10.

20. *Id.* at 55.

21. *Id.* at n. 238.

22. James Acker & Charles Lanier, *May God-or the Governor-Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. May-June 2000, at 200, 217.

inattention that permits the governor to avoid his responsibility and evade his role as a “fail safe.”

This article reviews the presentation of clemency petitions to the governor when all other avenues to turn back the death penalty are exhausted. These are the cases which were not reversed. We will examine all 50 death penalty clemency petitions which required action by the Missouri governors from 1977-2000 and discuss the systemic problems which remain unresolved by the courts and which face the governor in his role as a “fail safe.” These petitions give the most complete picture of the claims made by the condemned. Such cases are usually made through an attorney. The typical petition includes much information that the sentencer (judge and jury) did not know. The clemency petition has the benefit of including all the investigation that has been done previously. We begin with an overview of the clemency petitions, to provide a sense of what is typical, what issues are common, and which ones pose unique claims.

III. THE CASES

From 1977 through 2000, 162 persons have been sentenced to Missouri’s death row.²³ During this time period, thirty men (19%) and five women (100%) had their death sentences reversed and remanded by the courts before reaching the governor’s desk.²⁴ Three persons on death row were granted stays when the Director of the Department of Corrections said she had cause to believe they had a mental disease or defect, excluding fitness for execution.²⁵ These competency cases are not included in this research because there were no actual clemency petitions that needed action by the governor. The governors of Missouri have considered fifty clemency petitions since 1977. Nationally, the pace of commutations has slowed to average just one per year in recent years.²⁶ However, in Missouri, forty-six of the clemency petitions were

23. Missouri Dept. of Corrections, *Capital Punishment Inmates Since 1979* [hereinafter *Missouri Capital Punishment Inmates*] (on file with the *Journal of Law and the Public Interest*) (capital punishment was reinstated in Missouri in 1977; the first capital punishment inmate was incarcerated in 1979).

24. *See id.*

25. Cathleen Burnett, *Justice Denied: Clemency Appeals in Death Penalty Cases* (forthcoming 2002). Two others received stays after filing clemency petitions in order to conduct competency hearings. Consequently, three remain on death row until their mental conditions change, three others are waiting for a competency hearing.

26. *Kobil, supra note 14*, at 531.

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denied, with the executions subsequently taking place; two commutations of the death sentence to life without parole were granted.²⁷ Only two received stays of execution.²⁸

During the years 1985-1993, Gov. Ashcroft presided over eight clemency petitions, all but one unsuccessful. There were no commutations under Ashcroft's tenure for a commutation rate of zero. From 1993-2000, Gov. Carnahan received forty-three clemency petitions, which resulted in thirty-eight executions. The only basis for staying an execution under the Carnahan administration was the lack of mental competency of the condemned, though not all mental incapacity claims were successful. Carnahan's commutation rate was 5%. The only two commutations of death sentences to sentences of life without parole resulted when intense media attention was given to a particular case or when the unique situation occurred of a personal face-to-face request by the Pope.²⁹ In both instances, none of the strong legal issues presented in the petitions were acknowledged, indicating that neither the press nor the governor saw systemic errors or weaknesses, but acted only after consideration of extra-legal factors. Democrat Roger Wilson, who completed the Carnahan term of office when Carnahan was killed in a plane crash while campaigning, received one clemency petition and denied it.

IV. THE CLAIMS

Clemency petitions are pleas for justice that are presented to the governor. They present reasons why the governor should want to grant

27. Missouri Capital Punishment Inmates, *supra* note 23. Bobby Shaw and Darrell Mease received commutations. The governor granted Darrell Mease clemency based on the oral clemency petition delivered personally by the Pope, not on the written clemency petition by Darrell Mease's attorney. The petition on behalf of Lloyd Schlup resulted in a stay that permitted further advocacy and subsequent resolution of the case that took him off death row. The stay was issued in order to hold a hearing on competency. One petitioner, Ted Boliek, was given a stay until a three judge panel could rule on the issues, however, the governor never appointed the panel. Boliek remains in a kind of limbo since the governor died before appointing such a panel.

28. Ashcroft did issue a stay of execution for Bobby Shaw on Nov. 25, 1992 to allow a determination of mental condition by the Circuit Court of Washington County when the Director of the Department of Corrections notified Governor Ashcroft that he had cause to believe that Bobby Lewis Shaw had a mental disease or defect, excluding fitness for execution.

29. See *infra* note 27, p. 23. The role of media in winning relief from death row has been a factor in other states as well. See MICHAEL A. MELLO, DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT (1997); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992).

clemency. We call these requests “claims” because they allege a truth that is intended to be so overwhelming that the governor is compelled to agree with the contention and grant the request for clemency. All of the claims in these petitions are factually credible because they rely on evidence which is testable and verifiable. Generally, when claims are being made, the claims-maker will focus on defining a problem without giving much attention to causes.³⁰ It is the aim of the claims-maker to establish the message, create the situation, and frame the debate without worrying about underlying causes.³¹ Claims-makers typically draw from the underlying values of the culture in order to strike a chord of endorsement in the audience at hand.³² In Missouri, a coalition of religious groups files a clemency petition for every condemned person. These citizen petitions are fairly standard, with emphasis on their moral opposition to the death penalty rather than on the specific legal issues involved in the particular cases. Post-conviction Appellate attorneys, on the other hand, include every legal issue that can be brought to bear to undo the scheduled execution. There are a variety of reasons why an attorney might not file a clemency petition with the governor. Lack of time is the most likely explanation.³³

A. Requests

Death row prisoners ask for many kinds of justice from the governor. None ask to be released from prison. Only one asks for a life sentence, implying parole would be a possibility at some later time. All other petitions ask for some combination of punishment transitions that include commutation of their sentence to life without parole. These requests employ the strategy of stopping the execution but giving the governor the option of keeping the prisoner in prison for his entire life. In this way, the request is a politically acceptable option that does not eliminate accountability for the crime committed, but asks that the punishment be adjusted for the particular circumstances of each case. Three petitions (6%) included a request for a pardon in their plea. At least thirteen (25%) petitions request a stay and the convening of a

30. Joel Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem*, 34 SOC. PROBS. 101, 110 (1987).

31. *See id.* at 104-114.

32. *See id.* at 117.

33. However, two unusual situations account for two of the nine coalition petitions: Robert Sidebottom (1995) did not have a lawyer at the time of his execution, and Emmett Nave (1996) requested that his lawyer not make such an appeal.

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board of inquiry. This option would allow the governor to distance himself from appearing to overturn the judicial system and to permit the judicial system to reclaim its faithful responsibilities in the administration of justice. Clearly, petitioners recognize the perceived political difficulty confronting the governor in considering these requests.

One of the mistaken beliefs about prisoner appeals is that they are frivolous petitions with no merit and therefore waste state time and money. As the ABA remarked, “[c]ontrary to popular belief, most *habeas* petitions in death penalty cases do not rest on frivolous technicalities.”³⁴ Here it is demonstrated that the claims for clemency on behalf of death row prisoners are multiple and significant. Historically, clemency has been granted for many different reasons in capital cases.³⁵ Many of these traditional grounds for clemency show up in the clemency petitions submitted to the Missouri governor, but without resulting in the granting of clemency. The number of legal issues raised in the clemency petitions range from one to twenty-one. The two most common claims raised in the Missouri clemency petitions are: (1) ineffective counsel and (2) questions of innocence. These two claims have considerable overlap and are highly correlated.

B. Ineffective Counsel

The Sixth Amendment of the U.S. Constitution guarantees each accused effective assistance of counsel at trial. It is a guarantee that is

34. *Report of the A.B.A., supra* note 8, at 11.

35. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 *BUFF. L. REV.* 469 (1996); Hugo Bedau, *A Retributive Theory of the Pardoning Power?*, 27 *U. RICH. L. REV.* 185 (1993); Michael Korengold, Todd Noteboom & Sara Gurwitch, *And Justice For Few: The Collapse of the Capital Clemency System in the United States*, 20 *HAMLIN L. REV.* 349 (1996); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 *TEX. L. REV.* 569 (1991); Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 *N.Y.U. L. REV.* 136 (1964); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 *U. RICH. L. REV.* 289 (1993). The bases used to grant clemency have been: 1. actual proof of innocence; 2. violation of prevailing standards of decency (such as in diminished mental capacity, retardation, intoxication or minority); 3. an express request by the prosecution; 4. guilt is in doubt; 5. proportionality or equity in punishment among equally guilty codefendants; 6. public has shown conclusively albeit indirectly that it does not want any death sentences carried out; 7. a non-unanimous vote by the appellate court upholding a death sentence conviction leaves disturbing doubt about the lawfulness of the death sentence; 8. the statutes under which the defendant was sentenced to death are unconstitutional; 9. mitigating circumstances; 10. rehabilitation of the offender while on death row undermines the rationale for carrying out the death penalty; 11. the death penalty is morally unjustified; 12. fairness of trial (such as in eyewitness testimony, perjury by real killers, confessions).

now taken for granted by the general public, although it was a relatively recent development with the Supreme Court decisions culminating in *Gideon v. Wainwright*.³⁶ There are disputes about which stages of death penalty litigation should be afforded this guarantee of legal representation. Yet here the primary issue is the quality of the trial-level defense; in this matter there is no debate concerning the need for effective representation.³⁷ What constitutes effective assistance of counsel, however, is debated.³⁸ The Supreme Court's standard for ineffectiveness is (1) when the attorney's action (or inaction) was deficient according to prevailing standards and (2) when the outcome of the lawyer's action (or inaction) affected the outcome of the jury deliberation.³⁹ The American Bar Association promulgated guidelines for the performance of counsel in death penalty cases in 1989, and adopted policies to encourage competency of counsel in capital cases in 1979, revised in 1988, 1990, and 1996.⁴⁰

Unfortunately, if clemency petitions are any indication, it would seem that the quality of defense in Missouri death penalty trials is very poor. Overall, in thirty-seven of the fifty cases (74%), attorney issues were raised (see Table 1). Clearly these issues raise questions about the adequacy of counsel representing capital defendants in those cases. Despite the Sixth Amendment, in 24% of the cases, the defendant's trial lawyer had no trial experience with death penalty litigation. The most frequent attorney issue raised was the failure to investigate (in 58% of the clemency petitions). In four cases, trial attorneys called no witnesses. Several petitions indicated that the trial attorneys did not understand the bifurcation of the capital trial, were surprised by the determination of guilt, and unprepared for the sentencing phase. Interestingly, the clemency claims do not spend much time describing the length of trial or of jury deliberation (except in the rare instance). All of the thirty-seven petitions that raise attorney issues raise multiple problems. These claims put forth significant concerns about the quality of trial defense. In fact, according to the petitions, two defense attorneys were later disbarred, and six had conflicts of interest which interfered with the raising of appeals. It is ironic that in criminal cases

36. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

37. Carol Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

38. *Id.*

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

40. *Report of the A.B.A.*, *supra* note 8, at 1.

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with the most to lose (life) legal defense is so tragically incompetent. In the adversarial process the defendant is at a great disadvantage, constitutional protections notwithstanding.

It is well-known that in death penalty cases mitigation evidence is the key to humanizing the defendant and thereby saving his life from the executioner.⁴¹ Juries are less likely to recommend a death sentence if they can empathize with the defendant. The admission of mitigating evidence is especially important given the jury's role in weighing mitigating factors against aggravating factors to determine punishment.⁴² However, according to the clemency petitions, very few Missouri death penalty cases had any mitigation evidence raised during their trials. No doubt this has a lot to do with the experience level of the defense attorney. According to the petitions, only 24% had any mitigation raised during their trials. This trial omission is in contrast to 80% of the clemency petitions that raise mitigating factors in the clemency petition to the Governor—a more than 100% increase.

There are numerous examples of mitigating factors raised in these clemency petitions. One characteristic of the defendant that might provide some sympathy is a positive contribution made by the defendant to the community prior to the crime. In the cases reviewed there were seven Vietnam veterans, (14%) of the total. Other mitigating factors include holding a job, church involvement, volunteer work, or no prior offenses. In twenty-seven (54%) of the cases there was some sort of psychological condition that was raised to the governor as a mitigating circumstance. This information was unknown to the juries in twenty-two of the twenty-seven cases. The psychological conditions could challenge the prosecution's contention of pre-meditation and could directly dispute the defendant's guilt of first degree murder. If the juries had known of these conditions, they might not have convicted the defendant of first degree murder, much less recommended death.

In five of the fifty cases (12%) there were significant issues of mental competency which would forestall execution. This issue of competency was the only factor that seemed to succeed with the governor for commutation or stay. In two of the cases, a stay was granted for further hearings on competency and in one case the death sentence was

41. See generally CRAIG HANEY, *Mitigation and the Study of Lives: On the Roots of Violent Criminality and the Nature of Capital Justice*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 351 (James R. Acker et al. eds., 1998).

42. *Id.* at 358-59.

commuted.

C. Innocence

Newsweek states what is commonly understood by everyone: “[T]he vast majority of those on death row are guilty as hell.”⁴³ And yet, the public is most troubled about executions when the possibility exists of killing a person who is actually innocent of the crime. A random sample of Missouri residents reported that 80% of the respondents said their opinion about the death penalty was affected by the fact that some people executed are later found to be innocent.⁴⁴ The problem of questionable guilt has been a common basis for commutations in other states. In a study of ten states, Radelet and Zsembik report that 13% of the commutations were based upon doubt of guilt.⁴⁵ In Missouri, petitioners in eighteen of the fifty cases (36%) claim they are actually innocent of the crime.⁴⁶ However, questioning the reliability of guilt involves more than questioning whether the convicted person is actually innocent of the crime (see Table 2). Doubts about guilt also include the situation of the person who is given a disproportionate punishment. Another seven (14%) petitioners claim they killed in self-defense and nine (18%) claim they are guilty of a lesser offense than first degree murder. Overall, thirty-four of the fifty cases (68%) raise concerns of either actual or legal innocence.

D. Other Complaints

Mistakes are made in capital cases for other reasons which might be the basis for clemency.⁴⁷ We see several of these errors in the Missouri petitions (see Table 3). Some errors occur during pre-trial investigations, some occur during trial, and some occur at the appellate court level.

1. Police

Police are instrumental in shaping the capital case through their

43. Alter et al., *supra* note 2.

44. *Telephone Survey of Missouri Residents' Opinions on the Death Penalty*, conducted by the Center of Social Sciences and Public Policy Research at Southwest Missouri State University (1999).

45. Radelet & Zsembik, *supra* note 35.

46. The term *actually innocent* refers to persons who were not present at the crime scene or who may have been present, but did not do the killing.

47. *See generally* Gross, *supra* note 35.

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investigations. Radelet, *et al.* highlight cases where the rush to identify a suspect can cause investigators to overlook evidence which points to another suspect.⁴⁸ In the Missouri clemency petitions, police misconduct is one of the less frequently raised issues. Nonetheless, in twelve of the fifty cases (24%) issues concerning police misconduct during the investigation were raised. The most common police issue was the coercion of an unreliable confession. This issue was raised four of the ten cases. In three cases (6%) false testimony by police or prison guards was claimed. All of these claims are grounded in constitutional law and thus raise doubts about the appropriateness of the capital murder conviction.

2. Witnesses

Another source of wrongful conviction can be eyewitness identification. The psychological literature is extensive in its review of the problems associated with the reliability of eyewitness testimony.⁴⁹ Errors are more likely to be uncorrected when there is minimal defense and/or investigation. Later, when the passage of time gives the opportunity to develop a thorough investigation, five clemency cases (10%) present eyewitnesses who say that the condemned is actually innocent of the crime. Notice again that this is typically new information that was not available to the jury at the time of trial.

Another “witness” who is the basis for trial error is the accused whose pre-trial statements are used against him in the trial. In fifteen (29%) of the cases some type of confession was made by the condemned. In four of them, claims of self-defense were given as the motivation for the killing. Three others made confessions but later recanted and blamed police intimidation for their confessions. Two actually pled guilty, and two others admitted they were present for a burglary but were not the killers. In these situations, it is likely that the ineffective trial lawyer did not do the necessary investigation in order to defend the accused against his own statements.

3. Prosecutors

Other than mistakes made by defense counsel, prosecutorial error gave rise to many of the alleged wrongful convictions and death

48. Radelet, *et al.*, *supra* note 29.

49. *See e.g.*, Elizabeth Loftus, *Eyewitness Testimony* (1979).

sentences of these petitioners. It can be that prosecutors are so eager to win the conviction and death sentence that the goal of winning justifies any means.⁵⁰ Whether the prosecutors knew better and chose to ignore the “rules” or simply are not aware of the appropriate procedures is unknown. However, in twenty-two of the fifty cases (44%) there were strong claims made that prosecutors overstepped the line of legitimacy in their zealotry to reach a death sentence. One third of the complaints stated that the prosecutor made inappropriate arguments to the jury which would rise to constitutional significance in twelve of the cases or (24% of the cases). The petitioners argue that this type of excessiveness is not just “harmless” error. If illegitimate, this type of argumentation would be considered unconstitutional because whatever was said would influence jurors in their decision-making.⁵¹ A more clear case of prosecutor misconduct was claimed in nine cases (or 18%) which alleged that the prosecutor withheld exculpatory evidence from the defense.⁵² Another indicator of excessive zealotry is evident in five of the cases (10%) wherein the witnesses clearly were rewarded by the prosecution for giving testimony which served to identify the condemned as the killer. Prosecutors frequently promise plea bargains to informants but are expected to disclose the arrangement to the defense.⁵³

Prosecutors, however, can also be factors in overturning the death sentence when they cooperate in the clemency petition.⁵⁴ In two of the Missouri cases (4%), the prosecutor actually became a new mitigating witness on behalf of the condemned. However, prosecutorial intervention was unsuccessful in these two cases.

4. Judges

Judges control the courtroom during a trial by making rulings concerning legal procedures, the admission of evidence, and issuing instructions to the jury. In fourteen of the cases (28%) judicial conduct was an issue later raised as a source of mistaken conviction and/or capital sentencing. A peculiarity in Missouri is that when a jury is unable to

50. Radelet, *et al.*, *supra* note 29.

51. *See State v. Stringer*, 897 P.2d 1063 (Mont. 1995).

52. *See Brady v. Maryland*, 373 U.S. 83 (1963).

53. *See Hoffa v. U.S.*, 385 U.S. 293 (1966).

54. *Abramwitz & Paget*, *supra* note 35 (reporting that one basis for granting clemency has been the intervention of the prosecutor in joining the clemency request).

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decide between life without parole or death, the judge may impose death.⁵⁵ Given that Missouri judges are subject to the political process by retention elections, it is not surprising that in each of the four cases in which the jury could not decide punishment, the judge imposed death. This reality relates to the broader question of public opinion, politics, and why the clemency process has been so unsuccessful in Missouri.

5. Appellate Courts

Traditionally, the role of the appellate courts is to recognize trial errors and provide remedies for those errors. Research indicates that this role of appeal is significant as in some states up to two-thirds of the cases have been overturned at these higher levels.⁵⁶ As stated above, 35 of the 162 Missouri death penalty sentences were reversed, about a 21% reversal rate.⁵⁷ The automatic review of the proportionality of sentences has been the subject of criticism for the court's narrow definition of comparison cases.⁵⁸ In this study, ten clemency petitioners (20%) made the claim that their sentence was disproportional to the sentences received by other perpetrators. Another factor the governor might consider is whether or not the condemned had a central role in the crime. In sixteen petitions (31%) the claim was made that the punishment was disproportional to the condemned's participation in the crime.

There are other ways that the appellate courts may themselves become the issue. In twenty-nine cases (57%) there were claims that the appellate court made errors in the interpretation of law or in applying procedures. In fact, twenty-two of the cases (43% of the total clemency petitions), where procedural bars did not permit consideration of substantive matters, resulted in executions. Six of those twenty-two were due to decisions of the U.S. Court of Appeals for the Eighth Circuit to retroactively apply the Anti-Terrorism and Effective Death Penalty Act of 1996.⁵⁹ These legal issues are particularly difficult for the governor to resolve as the clemency petitions ask him to directly overturn the judiciary. One technique to bolster the legitimacy of one's

55. MO. REV. STAT. §565.030 (2000).

56. Liebman et al., *supra* note 4, at 55, Table 5.

57. Capital Punishment Inmates since 1979, *supra* note 23.

58. See Ellen Suni, *Recent Developments in Missouri Criminal Law: Homicide*, 50 UMKC L. REV. 440 (1982); see also MO. REV. STAT. §565.035 (2000).

59. The Eighth Circuit is the only Federal Circuit Court to interpret the law to apply retroactively to death penalty cases.

claim is to refer to appellate judges who might agree with one's contention. In twenty-two of the petitions (43%), legal dissent by appellate judges indicating their disagreement with lower court decisions as well as with their peers was invoked. Clearly, reasonable persons will disagree when the law is at issue, but, at the least, judicial disagreement would indicate that the governor has a difficult matter to decide. Such dissent could also serve to brace the governor against negative public opinion should he choose to commute the death sentence.

V. DISCUSSION

Across these many issues there is considerable overlap, suggesting that multiple errors pervade the administration of justice in death penalty litigation. Seventy-two percent of the Missouri clemency petitions included new information, which had not been evaluated by any tribunal, to be presented to the governor. As stated above, allegations of inexperienced defense attorneys who do not conduct the most elementary investigation, and thereby miss available mitigating evidence, have grave consequences. Additionally, some prosecutors withhold exculpatory information and make questionable deals with witnesses which are not uncovered until well after the trial. A governor is extraordinarily reluctant to overturn a jury's decision.⁶⁰ Overturning the jury's decision in the face of no new information would appear to usurp the citizenry of their contribution to the administration of justice. But can the jury's decision be the "correct" decision if it did not have full and complete information during the trial on which to base the decision? The basic contention in the clemency appeals is that the new information would change the outcome of the jury deliberations had it been available and admissible at the time of trial. Because court rules bar the submission and consideration of relevant information if discovered too late, this new information has most likely not been considered by any judicial body.⁶¹ Typically, the new information is developed when an investigator is hired by a post-conviction attorney. The clemency petitions cite several different types of new information (see Table 4). In all these cases, the death row prisoners claim the new information would have made a difference in the trial outcome. Because court rules have made new information extremely difficult to admit, the governor,

60. See Edmund G. (Pat) Brown & Dick Adler, *PUBLIC JUSTICE, PRIVATE MERCY* (1989).

61. In Missouri the convicted person has 90 days within which to present new information to the court.

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with no limitation on what information he considers, is the only recourse for this issue.

It does not appear that the stays or commutations that were granted had anything to do with the merits of the issues raised by the petitioners. The four stays that were granted were given for the purpose of addressing questions of mental competency. However, it is hard to distinguish those cases which received stays from those cases raising the same claim but without receiving a stay. On the other hand, the two commutations of death sentences by Carnahan were ones that had the benefit of outside influences of the Pope (Darrell Mease) and a Time Magazine article (Bobby Shaw), which generated unusual public support. Bobby Shaw was the subject of a Time Magazine article, national coverage which brought to the public's attention the significance of this case.⁶² The governor received an extraordinary amount of mail on behalf of commutation.⁶³ However, as the murder victim was a prison guard, the enormous protest by Department of Corrections personnel against the Governor's commutation probably eliminated the impact of media attention in future cases. National and international interest has not made an impact on the governor's deliberation since then. In the case of Darrell Mease, the commutation was the direct result of a personal face-to-face request by the Pope which was granted before the clemency petition was reviewed. This too was a unique occurrence because letters from the Pope did not receive the same response.⁶⁴ After both commutation cases, there was widespread condemnation of the governor's decision which, without a doubt, had a negative impact on subsequent clemency requests (especially so for a governor with future political aspirations). There were no significant differences between Republican or Democratic governors. All turned a deaf ear on the serious administration of justice flaws alleged in the clemency petitions.

VI. CONCLUSIONS

The American Bar Association stimulated abolition efforts in February, 1997, when its House of Delegates concluded that "fundamental due process is now systematically lacking in capital cases" and "it should now be apparent to all of us in the profession that the

62. J. Willwerth, *The Voices Told Him to Kill*, TIME, June 7, 1993, at 46.

63. Burnett, *supra* note 25.

64. Burnett, *supra* note 25.

administration of the death penalty has become so seriously flawed that capital punishment should not be implemented without adherence to the various applicable ABA policies.”⁶⁵ The ABA documented serious flaws in legal representation and has recommended corrections, to no avail.⁶⁶ States consistently under-fund the defense of persons accused of capital crimes even as they bolster prosecution resources.⁶⁷ Coupled with this abysmal representation, the dilemma has been intensified as the Supreme Court has taken away any recourse to correct errors. As the American Bar Association stated,

In fact, the Supreme Court has denied death row prisoners the very opportunities for raising constitutional claims that the ABA has insisted are essential. Prisoners have not been entitled even to a single stay of execution to maintain the status quo long enough to complete post-conviction litigation. The federal courts typically have refused to consider claims that were not properly raised in state court, even if the failure to raise them was due to the ignorance or neglect of defense counsel. And prisoners have often not been allowed to litigate more than one petition, even if they have offered strong evidence of egregious constitutional violations that they could not have presented earlier.⁶⁸

At the U.S. Supreme Court level there has been a movement away from consideration of the death penalty issues. “What the Court set up was a series of trapdoors where any procedural wrong step, no matter how trivial, resulted in a petitioner forfeiting his claims.”⁶⁹ For example, one inexperienced Missouri lawyer lost the opportunity to raise significant and substantive issues in the appeals when the page limit of the appeal was exceeded, and as a result Milton Griffin El was executed without consideration of three meritorious claims.⁷⁰ The Court’s shift away from death penalty review has resulted in its relinquishment of constitutional protections and in permitting executions without recognizing, much less correcting, these serious systemic flaws. In addition, the legislative gutting of the Habeas Corpus law further aggravates the Court trends.

65. *Report of the A.B.A.*, *supra* note 8, at 1.

66. *Id.* at 10.

67. A. Paduano & C.S. Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991); Stephen Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 SANTA CLARA L. REV. 1069 (1996).

68. *Report of the A.B.A.*, *supra* note 8, at 10.

69. Edward Lazarus, *Closed Chambers* 503 (1998).

70. Burnett, *supra* note 25.

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In so doing, the conservatives changed the habeas process from a broad opportunity for federal courts to remedy constitutional violations by state officials into an exitless maze shielding those officials from federal scrutiny even when they had clearly violated the Constitution.⁷¹

Thus, the clemency process is so important because the appeals process is inherently flawed in terms of what most persons would consider its primary function of dispensing justice. Legal definitions of what is technically right has almost nothing to do with the common sense notions of what is right, fair, and relevant in the eyes of most people. Most people expect that the condemned has had his day in court, with a fair trial and an adequate lawyer. Most people believe that the jury has complete information from which to make a decision. Most people expect the police and the prosecutors to be honest in their attempts to convict the guilty. Most people expect that judges are neutral decision-makers. Most people expect that the appeals courts will consider the substantive issues rather than simply denying the appeal based on procedural rules. This study demonstrates that the criminal justice system is not correcting itself. To summarize the major points arising from an analysis of the content of the clemency petitions: 63% raise a claim of innocence; 73% claim ineffective assistance of counsel; 43% claim prosecutorial misconduct; 57% claim the appellate courts erred in their interpretation of the law or in applying procedures; 43% of the clemency petitions indicated dissent by appellate judges with some decision; and 53% of death row prisoners had a psychological problem which would mitigate their first degree conviction.

The low reversal rates clearly do not indicate the absence of serious error. Rather, the low reversal rates mask the serious systemic flaws in the criminal justice system. We have seen the significance of the issues that face the governor. The U.S. Supreme Court's hands-off approach to death penalty cases is underlined by Justice O'Connor in her concurrence in *Herrera v. Collins*: "throughout history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency."⁷²

As conceived by the U.S. Supreme Court, the governor is to be a fail-

71. Lazarus, *supra* note 69.

72. *Herrera v. Collins*, 506 U.S. 390, 421 (1993).

safe in the judicial system, correcting mistakes which have occurred in and through the judicial system. This study demonstrates that the clemency process is non-functional. Rather than legal considerations which should be the basis for clemency, the clemency decisions appear to rest on extra-legal political considerations of influence. Not only does the governor not act as a fail-safe, but he ignores the systemic flaws that pervade the criminal justice system. By taking these clemency claims seriously, we see that rather than “preventing a miscarriage of justice” the governor’s inaction compounds the injustice and buries the problems, without addressing any solutions to prevent the recurrence of errors. Mistakes and errors remain uncorrected and become hidden costs in the effort to maintain the appearance of justice in the legal system. Because there is no attempt to verify the claims in the petitions, these questions are literally buried. Given the lack of information publicly available, there is no possibility of changing the public’s “get tough” mood toward crime and punishment. Since the governor is primarily a political position, it is unreasonable to expect the governor to be the fail-safe. Unless the criminal justice process is restored to its integrity, when we execute people we do violence to our own system of justice.

Table 1. Claims of Ineffective Counsel*

| Claims | Frequency | Percent |
|--|-----------|---------|
| Failure to investigate | 29 | 58 |
| Lack of training or experience in capital litigation | 12 | 24 |
| Lack of client consultation | 2 | 4 |
| None available for appeals | 1 | 2 |
| Disbarred | 2 | 4 |
| Conflict of Interest | 6 | 12 |

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| | | |
|---------------------------------------|----------|----|
| No witnesses called | 4 | 8 |
| Trial Mistakes | <u>7</u> | 14 |
| Total Claims | 63 | |
| | | |
| Missing Claims of Ineffective Counsel | 13 | 26 |
| Total Petitions | 50 | |

* Percentages exceed 100% because some petitions have multiple claims.

Table 2. Claims of Innocence

| Claims | Frequency | Percent |
|--------------------------------------|-----------|-----------|
| Actual Innocence | 18 | 36 |
| Self Defense | 7 | 14 |
| Lesser Offense | <u>9</u> | <u>18</u> |
| Total | 34 | 68 |
| | | |
| Petitions with No Claim of Innocence | 16 | <u>32</u> |
| Total Petitions | 50 | 100 |

Table 3. Other Claims

| Police Issues* | Frequency | Percent |
|---|-----------|----------|
| Confession coerced, unreliable | 4 | 8 |
| Police/guards' false testimony | 3 | 6 |
| Suggestive photo ID | 1 | 2 |
| Denial of attorney during interrogation, lineup | 3 | 6 |
| Search/seizure | <u>1</u> | <u>2</u> |
| Total | 12 | 24 |
| | | |
| Petitions without Police Issues | 40 | 80 |
| Total Petitions | 50 | |

* Percentages exceed 100% because some petitions have multiple claims.

| Witness Issues* | Frequency | Percent |
|-----------------|-----------|---------|
| False statement | 15 | 30 |
| Not called | 18 | 36 |

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| | | |
|----------------------------------|----------|----------|
| Eyewitness says he's innocent | 5 | 10 |
| Not interrogated properly | <u>3</u> | <u>6</u> |
| Total | 41 | 82 |
| | | |
| Petitions without witness issues | 23 | 45 |
| Total petitions | 50 | |
| | | |

* Percentages exceed 100% because some petitions have multiple claims.

| Prosecutor Issues* | Frequency | Percent |
|---|-----------|----------|
| Deal with witness | 5 | 10 |
| Withheld evidence | 9 | 18 |
| Argument to jury | 12 | 24 |
| Timely notice | 1 | 2 |
| Peremptory strikes to exclude black veniremen | 2 | 4 |
| Surprise witness | <u>1</u> | <u>2</u> |

| | | |
|-------------------------------------|----|----|
| Total | 30 | 59 |
| | | |
| Petitions without prosecutor issues | 28 | 57 |
| Total petitions | 50 | |

* Percentages exceed 100% because some petitions have multiple claims.

| Appeal Court Issues* | Frequency | Percent |
|--|-----------|----------|
| Interpretation of law | 10 | 20 |
| Procedural bar | 21 | 42 |
| proportionality review | 5 | 10 |
| Other | <u>3</u> | <u>6</u> |
| Total | 39 | 78 |
| | | |
| Petitions without appellate court issues | 21 | 41 |
| Total petitions | 50 | |

*Percentages exceed 100% because some petitions have multiple claims.

Table 4. New Information

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| Source of New Information | Frequency | Percent |
|--|-----------|---------|
| Prosecutor withheld information | 9 | 18 |
| New witness is available to support | 23 | 45 |
| New mitigating evidence discovered | 32 | 63 |
| Discovery that witnesses made false statements | 15 | 29 |
| New eyewitness supports innocence | 5 | 10 |
| Prosecutor becomes a new mitigating witness | 2 | 4 |