BEFORE THE
OHIO ADULT PAROLE AUTHORITY

IN RE: RAYMOND TIBBETTS
Chillicothe Correctional Institution # A363-178

Clemency Hearing Date: June 14, 2018

SUPPLEMENTAL APPLICATION FOR EXECUTIVE CLEMENCY

Submitted by:

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INTRODUCTION

This is a supplemental application for executive clemency submitted on behalf of Ray Tibbetts. Ray is requesting a commutation of his death sentence to life in prison without the possibility of parole. The Parole Board previously held a hearing on January 17, 2017, and recommended a denial of clemency by a vote of 11-1. *In re: Raymond Tibbetts*, CCI #A363-178 (Mar. 10, 2017). Ray's execution was scheduled to take place on February 13, 2018.

On February 8, 2018, Governor Kasich granted Ray a reprieve from his execution until October 17, 2018. (Warrant of Reprieve, Ex. A.) The Governor further requested that the Parole Board conduct a supplemental hearing in Ray's case. (Letter to Chair Imbroglio, Ex. B.) This decision was based on a letter the Governor received from Ross Geiger, who served as one of the jurors at Ray's trial. (*Id.*) In his letter, Mr. Geiger explained that he would not have voted for a death sentence if he had been aware of the substantial mitigation evidence that was available but not presented by defense counsel at trial, and he urged the Governor to commute Ray's death sentence to life in prison without the possibility of parole. (Letter from Ross Geiger, Ex. C.) Mr. Geiger's conclusion about the mitigating evidence that was not provided to him demonstrates that the justice system did not work properly in this case. Ray Tibbetts's death sentence should accordingly be commuted to life in prison without parole.[1]

[1] For the sake of clarity, this supplemental application will refer to Ray Tibbetts and other members of the Tibbetts family by their first names.

I. Mr. Geiger has confirmed that competent representation at trial would have made the difference between life and death in Ray's case.

Throughout his legal proceedings, Ray has consistently argued that he did not have competent representation at the penalty phase of his trial because readily available mitigation evidence was not presented. The Ohio Court of Appeals rejected this argument, finding that the "the jury was substantially informed that Tibbetts had a miserable and cruel childhood." *State v. Tibbetts*, No. C-000303, 2001 WL 303234, at *9 (Ohio App. Mar. 30, 2001). Over the dissent of one judge, a majority of the United States Court of Appeals for the Sixth Circuit likewise found that additional mitigating evidence would not have changed the outcome at trial. *Tibbetts v. Bradshaw*, 633 F.3d 436, 444-45 (6th Cir. 2011). This Board, with one member dissenting, also concluded that better representation would not have made any difference:

> Tibbetts's trial attorneys made the jury aware of his troubled youth and a majority of the Board cannot say, with any reasonable degree of confidence, that the outcome of the trial would have been different had his trial attorneys presented that mitigation evidence in the manner suggested by his current attorneys as opposed to how it was presented by his trial attorneys.

In re: Raymond Tibbetts, CCI #A363-178, at 22.

There can no longer be any question that better representation at Ray's trial would have made the difference between life and death, however. Ross Geiger, one of the jurors from Ray's case, has reviewed the mitigating evidence that was available but not presented at trial, and has concluded that he would not have voted to impose a death sentence if he had been aware of it. In a recent letter to Governor Kasich, Mr. Geiger explained that if the numerous mitigating factors in the case had been brought to his attention, he "would not have recommended the death penalty." (Letter from Ross Geiger, Ex. C, p. 3.) Furthermore, as Mr. Geiger subsequently

stated, he "believed that the death penalty is not a black-and-white issue, but that there are times when it is the appropriate punishment." (Op-Ed by Ross Geiger, Ex. D, p. 1.) Although Mr. Geiger has not forgotten the "gruesome" details of the "horrible crime" he evaluated as a juror, (Letter from Ross Geiger, Ex. C, p. 1), he has nevertheless determined that the death penalty is not warranted in Ray's case. The evidence shows that Mr. Geiger had good reasons for reaching this conclusion.

The mitigation testimony that was presented at trial came from a single witness, Dr. Glen Weaver. As Mr. Geiger has explained, "I can only speak for myself but I do not believe I was the only one shocked that day when not another witness was called to offer any mitigating circumstances that might cause the jury to make a determination that execution was not appropriate." (Letter from Ross Geiger, Ex. C, p. 2.) Dr. Weaver's testimony failed to document the truly severe level of abuse and trauma that was present in Ray's childhood.

Dr. Weaver spent a very limited portion of his testimony discussing the abuse that occurred during Ray's upbringing. (Trial Tr. at 1421-24, 1467.) He made vague references to Ray's childhood being "miserable" and "horrible," and stated that Ray's parents engaged in drug and alcohol abuse, (*id.* at 1421-22), but the only specific instance of physical abuse that he referred to was the fact that the children had been tied down to the bed at night. (*Id.* at 1422, 1467.) He explained that Ray and his siblings were placed in foster care because his ten year old sister Suzanne was essentially caring for all of them, and that the foster care placements were "not very happy ones" and "too punitive." (*Id.* at 1422.)

While these generalized allegations may have painted a somewhat troubling picture for the jury, they did not even remotely begin to describe the terrible childhood conditions that Ray and his siblings endured. The jury never heard the following:

•Before the children were removed to foster care when Ray was two years old, the Tibbetts household had been a place of constant violence. (Affidavit of Suzanne Freeman, Ex. E, p. 2, ¶8.)[2] Ray's older sister Suzanne could remember "constantly jumping into the crib to protect the younger children from the extreme violence" of their parents. (*Id.* at ¶6.) On one occasion, their father beat their mother bloody with a fan and a telephone, and then beat Suzanne, as well. (*Id.* at ¶8.) Ray's older brother Rick has confirmed that there was "always chaos" and "fighting and lots of drinking" in their parents' home. (Declaration of Rick Tibbetts, Ex. F, p. 1, ¶5.)

•In their first foster care placement with the Merriman family, the Tibbetts children experienced extreme physical, mental, and emotional abuse. In addition to being tied down to the bed at night, Ray, Rick, their brother George (also known as "Willie"), and their brother Archie would be punished by being forced to stand in the corners of a room until the children's "legs gave out." (Declaration of Rick Tibbetts, Ex. F, p. 2, ¶13.) "We would have to stand and stay awake and they would not let us go to sleep. If you fell to the floor, you were pulled up, slapped around and made to stand some more." (*Id.*) If the Merriman family was eating, the Tibbetts children would be forced to stand and watch. (*Id.* at ¶12.) "None of the foster children

[2] Ms. Freeman's married name was Suzanne Terry when she signed her affidavit.

would be fed, but we would have to stand there and watch while the family ate their meals. You would be so hungry you'd be crying." (*Id.*) If the family was watching television, the Tibbetts children would be forced to turn around and face the wall so they couldn't see the program. (*Id.* at ¶13.)

•When the Tibbetts children were fed, they were not given the same food as the Merriman children. The Merriman children would be fed normal meals, but the Tibbetts children would only be given plain oatmeal, or two slices of cheese between bread. (Affidavit of Suzanne Freeman, Ex. E, p. 3, ¶13.) Human services records even questioned "whether they receive a good nourishing diet" and noted that Mrs. Merriman had been "accused a few times of not adequate [sic] nourishing the children." (Human Services Records, Ex. G., p. 10.)[3]

•The Tibbetts children were severely physically abused by the Merrimans' teenage daughters. This included being kicked down the basement steps, and having their fingers beaten with spatulas and burned on register heaters. (Affidavit of Suzanne Freeman, Ex. E, p. 2, ¶12.) George suffered a broken nose and a concussion while living at the Merriman home, and was burned so badly on one occasion that he had to be hospitalized. (*Id.*; Declaration of George Tibbetts, Ex. H, p. 1, ¶3.) Mrs. Merriman was a heavy drug user and failed to prevent the abuse. (Affidavit of Suzanne Freeman, Ex. E, p. 2, ¶11.)

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[3] Pages 10, 56-57, 60, and 67-69 of the human services records are attached as Exhibit G. The complete records can be found on pages 130-301 of the clemency materials previously submitted by the State on August 5, 2014.

•Suzanne and Rick were eventually taken from the Merriman household and returned to their mother, Deanna Tibbetts. (Affidavit of Suzanne Freeman, Ex. E, p. 3, ¶16.) Deanna refused to take Ray and the other younger siblings, however. (*Id*.) Deanna acted like her youngest children "did not exist" and later went so far as to take them out of her will. (*Id*.)

•After finally being removed from the Merriman residence, Ray and George were sent to live with the Oswald family in a second foster home. (Declaration of George Tibbetts, Ex. H, p. 2, ¶5.) As with the Merriman household, Ray and George were subjected to severe physical and mental abuse while placed with the Oswalds. (*Id.* at ¶6.) George has described Mr. Oswald as "an extremely abusive man." (*Id*.) On one occasion, Mr. Oswald tied George up with his arms over his head and threw rocks at him while Ray was forced to stand and watch. (*Id.* at ¶7.) Another time, Mr. Oswald beat Ray and George with a two-by-four piece of lumber and knocked George unconscious. (*Id.* at ¶8.) Mr. Oswald once broke a plate over George's head after George got sick at the dinner table; George remembers Ray "sitting next to me crying when this happened." (*Id.* at p. 3, ¶12.) The children were treated "like slave labor." (*Id.* at ¶11.) George has also alleged that he was repeatedly sexually abused by Mr. Oswald, and that other children in the home were abused, as well. (*Id.* at p. 4, ¶17-18.)

•Ray and George attempted to run away from the Oswald residence on at least three separate occasions, (*id.* at p. 3, ¶10), but instead of investigating the circumstances the children were trying to escape, authorities continually returned them to this abusive environment. (*Id.* at p. 2, ¶8-9.) As George explained in the video that was shown at Ray's previous clemency hearing on January 17, 2017, he feared that he would be beaten if he reported the abuse at the Oswald home.

•While all of the abuse was going on at the Oswald home, Ray and George's parents continued to refuse to have anything to do with them. (*Id.* at p. 3, ¶13-14.) The Tibbetts children desperately hoped for a relationship with their mother, but she consistently rejected the boys. Human services records noted "there has been no parental contact for these boys," (Human Services Records, Ex. G., p. 57), and it wasn't until 1970 that "Ray and Willie received their first letter from their mother in over 9 years." (*Id*. at 60.) As Suzanne recounted in the video that was shown at Ray's previous clemency hearing, Ray once attempted to visit his mother but ended up sleeping on the porch when she refused to let him inside.

Dr. Weaver's vague testimony was clearly inadequate to convey the shocking level of abuse, cruelty, and trauma that Ray and his siblings were subjected to. As Mr. Geiger explained in his letter to Governor Kasich, he is genuinely angry that this information was withheld from him at trial. (Letter from Ross Geiger, Ex. C, p. 3.) He has every right to be. The State of Ohio asked Mr. Geiger to sit in judgment of another person and determine whether they should live or die. The State then deprived Mr. Geiger of crucial information by failing to ensure that Ray was afforded competent representation.[4] We now know that "[t]he reality" for the jurors "seemed to come down to the single question of whether Tibbetts[']s upbringing was such that his life should be spared." (*Id.* at p. 2.) But the inaccurate picture painted for the jurors "seemed to demonstrate that [Ray's] childhood circumstances must not have been that

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[4] As explained in *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980), "the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."

permanently damaging." (*Id*.) As Mr. Geiger now knows, and as Dr. Patti van Eys explained at Ray's previous clemency hearing on January 17, 2017, just the opposite is true.[5]

Other witnesses were available to testify at trial, and they should have been called by defense counsel. Ray's sister Suzanne could have provided detailed testimony about much of the abuse that the Tibbetts children endured, but was told by a defense investigator "that it would be good enough for [her] to simply talk to the Psychiatrist testifying in this case." (Affidavit of Suzanne Freeman, Ex. E, p. 1-2, ¶5.) Dr. Weaver did not even speak with Suzanne until the morning of his testimony. (*See id.* at ¶2, 5; Trial Tr. at 1422.) Mr. Geiger was shocked to learn that Suzanne could have testified but was never called as a witness. (Letter from Ross Geiger, Ex. C, p. 3.) Furthermore, no one from the defense team ever spoke with Ray's brother Rick. (Declaration of Rick Tibbetts, Ex. F, p. 4, ¶25.) There is also no indication that the defense team tried to speak with either George or Archie.

As Sixth Circuit Judge Moore explained in her dissent in Ray's federal case, "had Tibbetts's family and friends testified, the evidence regarding Tibbetts's childhood abuse would have come directly from individuals who experienced the same abusive environment as Tibbetts," and such testimony "as to what Tibbetts endured certainly would have had a greater impact on the jury than just listening to Dr. Weaver mention Tibbetts's childhood abuse vaguely and in passing." *Tibbetts*, 633 F.3d at 456 (6th Cir. 2011) (Moore, J., dissenting). Indeed, Mr.

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[5] Additional information on this subject can be found in Dr. van Eys's report that was previously submitted as Exhibit E to Ray's January 10, 2017 application for executive clemency, with her specific conclusions about the permanent damage from Ray's developmental experiences on pages 14-19 of the report.

Geiger has cited the "ineptitude of the defense team in not calling" Suzanne to testify at trial as a reason for mercy in this case. (Letter from Ross Geiger, Ex. C, p. 4.)

Under Ohio law, a single juror can prevent the imposition of a death sentence. *See, e.g., State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, at ¶212. As a result, Mr. Geiger's assessment of the mitigation evidence confirms what Ray has been alleging ever since his death sentence was imposed: he did not have competent representation at the penalty phase of his trial, and better representation would have made all the difference. The Parole Board should therefore recommend to the Governor that Ray Tibbetts's death sentence be commuted to life in prison with no possibility of parole.

II. The prejudice that resulted from defense counsel's failures was compounded by misleading statements made by the prosecution during the sentencing phase of trial.

In addition to being prejudiced by the clearly inadequate representation he received, the reliability of Ray's death sentence was also severely undermined by the conduct of the prosecution at trial. As Mr. Geiger explained in his letter to Governor Kasich, the "prosecutors dismantled mitigating circumstances based on the argument that lots of people with troubled childhoods do not become murderers. They also strongly implied that [Tibbetts'] siblings turned out fine." (Letter from Ross Geiger, Ex. C, p. 2.) In a subsequent statement, Mr. Geiger also noted that the prosecutors argued that "Mr. Tibbetts' placement in foster care was the best thing that ever happened to him." (Op-Ed by Ross Geiger, Ex. D, p. 3.)

Mr. Geiger's recollection of what happened at trial is correct. While questioning Dr. Weaver on cross-examination, the prosecution stated:

> Now, I sat here, and you kept indicating that he had this terrible childhood. *I've reviewed those records extensively, and I've looked at it, and I don't know where you got that from, because I have not seen one reference in that entire record to anything about a terrible childhood.* Now, at age four he was considered to be dependent by Human Services, and he was removed, and he and his brother went to the Oswald home, where they stayed until he was age 14, and was a wonderful placement throughout that entire period. There is nothing in the department - - and the jury is going to have these records in which for almost *from four to age 15, for like 11 years, he was in a wonderful placement.* He got As and Bs in school. *He did wonderfully. Had a wonderful time. He was happy and everything else.* Now, you're saying this is a terrible childhood. Those are the formative years, and during those years he was extraordinarily happy; is that correct?

(Trial Tr. at 1466-67 (emphasis added).)

The prosecution continued to make misleading statements during closing argument:

> He's talked about a bad childhood. Read the records. Read the records. Yes, he had some problems. Yes, his mother and father gave him up at an early age. But *he had a whole stretch, a long period of time when he had that his life was fine*, I mean, despite that.

(*Id.* at 1529 (emphasis added).)

> Bad childhood. He blamed his mother and father for what he's doing here today. He blamed the Oswald, his family who raised him for ten years, gave ten years of their life to help him out, they are somehow at fault.

(*Id.* at 1530.)

> He talks about this predisposition to fail. You know who else was taken out of that family and put into these foster homes? His sister, this successful realtor.

(*Id.* at 1555.)

> His brother, successful.

(*Id.* at 1556.)

> The fact of the matter is, the best thing that ever happened to him was being put in a foster home, because he did get care and love there. And it's in these reports.

(*Id.*)

These statements were extremely misleading. First, despite the prosecution's assurances that the human services records would show that the Oswald home was a "wonderful placement," the records actually demonstrate that the Oswalds were eventually regarded as unfit foster parents, with one caseworker concluding that they "shouldn't get any more kids." (Human Services Records, Ex. G., p. 68.) The same caseworker noted that the "total lack of feeling these people show is quite overwhelming." (*Id.*at 67.) The records also show that Mr. Oswald was prone to physical violence, and that he beat George with a belt resulting in bruises and cuts. (*Id.*) Furthermore, the caseworker found that at age 17, Ray was still struggling with issues that had resulted in part from "a bad foster placement." (*Id.* at 69.) Defense counsel could have used the records to rebut the prosecution's false depictions, but Ray's attorneys had conducted such a poor mitigation investigation that neither they nor Dr. Weaver were able to counter the prosecution's mischaracterizations of the facts.

The prosecution's misleading representations also would have discouraged the jurors from finding the evidence of abuse and trauma in the records themselves. Defense counsel made no effort to analyze the materials or highlight important portions of them for the jury. They simply deposited close to two hundred pages of difficult-to-decipher materials—many of which had been photocopied into illegibility—on the jury in a single exhibit. It was neither realistic nor feasible for the jurors to navigate these records on their own; the records pertained to multiple adults, children, and placements, and spanned more than a decade-and-a-half of

time. As Judge Moore recognized in her dissent, "it hardly constitutes a reasonable investigation and mitigation strategy simply to obtain Human Services records from the State, then dump the whole file in front of the jury without organizing the files, reading them, eliminating irrelevant files or explaining to the jury how or why they are relevant." *Tibbetts,* 633 F. 3d at 450 (Moore, J., dissenting) (citation and internal quotation marks omitted).

Second, the prosecution's suggestion that Ray's siblings became successful and well-adjusted adults despite a similar upbringing was clearly false. George Tibbetts was in prison for a sex offense at the time of Ray's trial. (George Tibbetts Corrections Record, Ex. I.) He had previously served a prison sentence for aggravated assault in the 1980s. (George Tibbetts Corrections Record 2, Ex. J.) Rick Tibbetts pled guilty to a felony stolen property offense in Florida before Ray's trial took place. (Rick Tibbetts Corrections Record and Florida Docket, Ex. K.) Archie had been to prison for aggravated robbery. (Stanley A. Tibbetts Corrections Record, Ex. L.)[6] In addition, as previously documented in the video shown at Ray's January 17, 2017 hearing before this Board, Archie subsequently committed suicide when he was 44 years old. Rick has struggled with drug abuse and has been in and out of jail. He is currently unemployed and lives in a transient motel. Suzanne married an abusive husband at the age of fifteen, and has struggled with mental and physical illness. George continues to receive treatment for serious mental health issues.

[6] Archie's full name was Stanley Archie Tibbetts.

Mr. Geiger is therefore correct that the prosecution misled him at trial. As he explained in his letter to Governor Kasich, he would not have voted for a death sentence if he had known the truth. (Letter from Ross Geiger, Ex. C, p. 3.) The "[p]ages of relevant information concerning details of the abandonment, foster abuse, re-abandonment and that it began before Tibbetts was even two years old" and "[t]he revelation that the prosecutors got it wrong if not lied about Tibbetts siblings having normal lives" are among the issues "of great concern" to him as a juror who served on the case. (*Id*.) These mischaracterizations have contributed to Mr. Geiger's "deep concerns about the trial and the way it transpired" because they would have made a difference in his recommendation as a juror. (*Id*. at 1, 3.)[7] The Parole Board should accordingly recommend that Ray Tibbetts's sentence be commuted to life in prison with no possibility of release.

III. As Mr. Geiger has noted, society's contemporary understanding of the risks posed by opioids provides an additional reason for granting clemency.

At trial, Dr. Weaver explained that Ray had achieved a period of sobriety before the offenses in this case occurred, but that he had been prescribed opioids following a work injury;

[7] Sixth Circuit Judge Moore also pointed to the prosecution strategy to support her opinion that Ray's defense was constitutionally insufficient. As she explained, "it is important to remember one of the State's tactics during the penalty phase" was to attempt "to undermine the mitigation value of Tibbetts's abusive childhood by implying that the defense was fabricating any mention of such abuse." *Tibbetts*, 633 F.3d at 456 (Moore, J., dissenting). But "had counsel relied on first-hand accounts about Tibbetts's abusive home and foster-care placements, the State would have been unable to challenge so readily the little evidence of Tibbetts's abusive childhood that was conveyed." *Id.*

this led Ray back to drug and alcohol addiction. (Trial Tr. at 1425-27.)[8] As Mr. Geiger explained in his letter to Governor Kasich, "at the time the drugs argument did not carry much weight because we were not aware of the very real problem of prescribing opioids to people with addictive behaviors. As we now know in Ohio too well opioids can quickly lead to seriously grave consequences when not prescribed properly." (Letter from Ross Geiger, Ex. C, p. 3-4.)

Governor Kasich has recently spoken on numerous occasions about the severe threat posed by the opioid epidemic, and the need to ensure that prescriptions are given in a responsible manner. (Ludlow, *Kasich hopes pill limits will cut addiction*, The Times Reporter (Aug. 31, 2017), Ex. M.) Last fall, Dr. Bob Stinson wrote a letter to the Governor noting the parallels between Ray's case and cases resulting from the current opioid crisis; this letter was included in the materials Mr. Geiger reviewed before writing to the Governor. As Dr. Stinson explained:

> [Ray] was doing well and suffered a work injury. He was inappropriately prescribed narcotic pain medications from a doctor he trusted. He spiraled out of control, lost everything, and ended up homeless. He ended up hospitalized just four months prior to his offenses and he admitted at that time that he was out of control and didn't know what to do. Two months later and less than two months before his offenses, he was found lying in a river bank, intoxicated, homeless, depressed, anxious, hallucinating, delusional, paranoid, and suicidal. He admitted AA was not working for him and he did not know how to stop his drug use. He was hospitalized again, where he attempted to hang himself. Nonetheless, he was discharged upon completing brief detoxification without further treatment. Less than a month later,

[8] This issue was also discussed in detail at Ray's previous clemency hearing on January 17, 2017, and additional information can be found in the report of Dr. Bob Stinson that was submitted as Exhibit K to Ray's previous application for executive clemency.

> the offenses occurred while he was under the influence of drugs and alcohol. Mr. Tibbetts never received the substance use or mental health treatment he was so desperately in need of.

(Letter from Dr. Bob Stinson, Ex. N, p. 2.)

As Mr. Geiger noted, the current opioid crisis has brought these risks to everyone's attention. They were not as widely understood by the public at the time of Ray's trial, however. Mr. Geiger has stated that "if we had an accurate understanding of the effects of Mr. Tibbetts' severe drug and alcohol addiction and his improper opioid prescription, I would have voted for life without parole over death." (Op-Ed by Ross Geiger, Ex. D, p. 2.)

The Parole Board and Governor are uniquely positioned to consider the mitigating fact of Ray's inappropriate opioid prescription in conjunction with the contemporary medical understanding of the depth and complexity of the opioid epidemic. For this additional reason, this Board should recommend that Ray Tibbetts's sentence be commuted to life in prison with no possibility of parole.

IV. Clemency has been granted in similar circumstances in other jurisdictions.

Granting clemency under the circumstances presented by Ray's case would not be unprecedented. While serving as Governor of Arkansas, Mike Huckabee considered a similar situation in the case of Bobby Ray Fretwell. Before Fretwell's execution, one of the jurors who had served at trial came forward with concerns about the fairness of the proceedings that had resulted in the death sentence, including the quality of representation that the defendant received. (Barnes, *Death-Row Inmate Spared After Juror Makes Plea*, The New York Times (Feb. 6, 1999), Ex. O.) Governor Huckabee agreed that clemency was warranted, finding that the juror's

concerns "'provided sufficient doubt as to the veracity' of the defense counsel." (*Id.*) The Governor further explained:

> This man has done a courageous deed, coming forward to admit what he views as a mistake and to correct what he perceives as an injustice . . . . The death penalty is irreversible. We cannot afford to make a mistake. To carry out the death penalty in this case would be a mistake.

(Smith, *Juror Protest Gets Man's Death Sentence Commuted*, Contra Costa Times (Feb. 6, 1999), Ex. P, p. 2.)

In addition, as a reporter noted earlier this year, "In 2008, the Oklahoma governor spared death row inmate Kevin Young based on the recommendation of the state parole board. The board heard recorded statements from jurors who said they didn't want to sentence Young to death but didn't receive clarification when they asked whether Young would be eligible for parole if sentenced to life without parole." (Welsh-Huggins, *Ohio juror voted for death 20 years ago, now seeks mercy*, The Columbus Dispatch (Feb. 5, 2018), Ex. Q, p. 2; *see also* McNutt & Bisbee, *Governor spares 2nd killer's life*, The Daily Oklahoman (Jul. 25, 2008), Ex. R, p. 2.).)

Mr. Geiger has considered the mitigating evidence that was available but not presented at trial, and has concluded that he would not have voted for a death sentence if he had been aware of it. As in the Arkansas case, to carry out the death penalty in Ray's case would be a mistake, and as in Oklahoma, clemency would be appropriate to remedy a breakdown in the trial process. Ray Tibbetts's sentence should likewise be commuted to life in prison with no possibility of parole.

V. Executive clemency is both the appropriate and the only available remedy.

Ray's legal appeals concluded before Mr. Geiger came forward, and strict procedural bars would impede a court's ability to consider claims based on testimony from Mr. Geiger. In addition, Ohio law imposes substantive restrictions on the admissibility of a juror's post-trial assessment of new evidence. *See State v. Grafton*, Portage App. Nos. 90-P-2207, 90-P-2228, 1991 WL 216970, at *6-7 (Oct. 25, 1991).

Executive clemency provides a failsafe in cases where the judicial system cannot remedy an injustice. As the United States Supreme Court has explained, clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (internal quotation marks omitted). Because clemency is the only avenue by which Ray can obtain relief from his death sentence now, and in light of the clear injustice that would result from allowing Ray's execution to proceed under the present circumstances, this Board should conclude that clemency is warranted, and recommend that Ray Tibbetts's sentence be commuted to life in prison without the possibility of parole.

VI. The Parole Board should recommend that Ray Tibbetts's sentence be reduced to life in prison with no possibility of parole.

Mr. Geiger has no doubt that Ray "is guilty and has forfeited forever his right to freedom." (Letter from Ross Geiger, Ex. C, p. 3.) The question before this Board does not concern Ray's freedom, however. It is instead about his life. Mr. Geiger has come forward "to explain how [he] believe[s] the trial process was not well served in this case" because, had he known of the mitigating evidence presented at Ray's previous clemency hearing, he would not have recommended a death sentence. (*Id*. at 1.)

Mr. Geiger's conclusion is not based on second thoughts or a change of heart. Rather, after evaluating the evidence that was available and should have been presented to Ray's jury, Mr. Geiger has determined that he would not have voted for the death penalty if he had known then what he knows today. (*Id*. at 3-4.) As he explained to Governor Kasich, "If the death penalty is reserved for the 'worst of the worst,' that is murderers that truly have no potential for redemption, then I ask you grant mercy to Tibbetts." (*Id*. at 3.)

Clemency is appropriate and it would serve the interest of justice. It would remedy the failure of Ray's defense counsel, correct the error caused by the misleading statements made by the prosecution, and protect the integrity of a justice system entrusted with making life-or-death decisions based on the guarantees of a fair process and accurate information. This Board should therefore recommend that Ray Tibbetts's sentence be commuted to life in prison without the possibility of parole.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Supplemental Application for Executive Clemency was electronically delivered to the following:

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on this 7th day of June, 2018.

/s/ Jacob A. Cairns
Jacob A. Cairns