BEFORE THE
OHIO ADULT PAROLE AUTHORITY

IN RE: WARREN KEITH HENNESS
Chillicothe Correctional Institution, # A287375

Clemency Hearing: January 10, 2019

APPLICATION FOR EXECUTIVE CLEMENCY

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INTRODUCTION

When the United States Supreme Court reinstated the practice of capital punishment, it did so under the belief that in "extreme cases," where "certain crimes are themselves so grievous" that they constitute "an affront to humanity," and the "only adequate response may be the death penalty." *Gregg v. Georgia*, 428 U.S. 153 184 (1976). This is not such a case. Neither the facts of this crime nor the history, character, and background of Keith Henness compel the imposition of the death penalty.

As with many capital cases that end up before this Board, the State could have insisted from the beginning that a death sentence was the only appropriate penalty and could have refused to even discuss a plea agreement for a life sentence. Here, however, the State was willing to discuss accepting a plea agreement for a sentence less than death. Even though life without parole was not an option at the time of Keith's trial, the State could have demanded that any plea involve the imposition of consecutive sentences. Convictions for aggravated murder, kidnapping, robbery, and an assortment of theft charges, with consecutive sentences imposed, would have ensured that Keith Henness remained in prison for the rest of his natural life. The State did not seek this option either.

Instead, the State was willing to discuss resolving this case with a life sentence with parole eligibility after twenty-three years (Edwards Aff. ¶ 14, Ex. 1), or even a lesser sentence (State's Second Submission 43, 122-23, 178-79 (Bodiker Depo)). If Keith had accepted this deal, the question for this Board today would be whether he should be paroled, not whether he should be executed.

This case was not resolved with a plea agreement for a life sentence because Keith had become so frustrated with his lawyers' failure to investigate and failure to prepare a defense that

he rejected any discussion of a plea agreement that came from his attorneys. Keith maintained his innocence and insisted on going to trial where he was convicted and sentenced to death. Now this Board is in a position it never should have been placed in and must decide to recommend whether Keith lives or dies.

In anticipation of Keith's clemency hearing, this Board conducted an extensive interview of Keith on December 17, 2018. During that interview, Keith strongly stressed his innocence, discussed the poor representation he received at trial and on appeal, and answered many questions about his background and conduct in prison.

This written application expands on many of these topics and identifies the reasons why this Board should recommend the granting of clemency. While many of these reasons warrant clemency in their own right, in combination, they further illustrate the need for clemency. These reasons include:

- Keith has adjusted well to prison life. He would not be a further threat if placed in general population. He has made and will continue to make positive contributions to prison life.

- The abysmal conduct of defense counsel so undermined the proper functioning of the adversarial process that this Board cannot rely on either the trial or penalty phase as having produced a just result.

- The legal system enacted to insure heightened due process for capital defendants in Ohio failed in the case of Keith Henness.

- There is not overwhelming evidence of guilt. Lingering doubt exists as to who killed Richard Myers.

- Principles of equity and fairness call for the commutation of Keith's death sentence due to the extreme sentencing discrepancies in this case.

- Certain crimes, while tragic and deserving of punishment, simply do not warrant the ultimate penalty. In light of several unique facts and circumstances surrounding this case, executing Keith is not the appropriate punishment.

- Keith Henness, the individual, is not among society's worst of the worst. At the time of his arrest, he had no history of violence and was not a person with an escalating history of violence.

- The death-penalty statistics of Franklin County demonstrate that the crime Keith Henness was convicted of was **not** one of the-worst-of-the-worst murders justifying a sentence of death.

For these reasons, this Board should recommend to Governor DeWine that he grant Keith Henness clemency.

REASONS FOR GRANTING CLEMENCY TO WARREN KEITH HENNESS

I. Keith Henness has adjusted well to prison life. He would not be a further threat if placed in general population. He has made and will continue to make positive contributions to prison life.

Keith is a widely respected inmate on death row who has made strong, meaningful connections and contributions both inside and outside of the prison walls. His positive behavior over the last twenty-five years weighs in favor of a positive clemency recommendation.

A. Keith's behavior in the Franklin County Jail was a good indicator of the type of inmate he would be on death row.

Following Keith's arrest, he spent twenty-two months in the Franklin County jail awaiting trial. During that time, Keith was a positive role model to younger inmates who needed guidance. He also helped protect inmates who were physically and mentally weaker. This included acting as a mediator between the younger, smaller inmates and the larger, more aggressive inmates. Keith likewise protected inmates from doing harm to themselves. In addition, Keith looked out for the safety and well-being of the correction officers tasked with overseeing the inmates in the jail.

1. Keith had a positive influence on inmates at the Franklin County Jail.

While Keith was in jail awaiting trial, he routinely broke up fights, protected vulnerable inmates, led Bible studies, and even once stopped a suicide attempt.

Mahlon Muncy was a nineteen-year-old inmate who spent several months in the same cell with Keith. Muncy testified that he benefitted from Keith's guidance. He also witnessed the pro-active measures Keith took to make the jail safer for both inmates and correction officers.

When Muncy got into an altercation with a bigger inmate that led to a fight, Keith stepped in to break it up and "just talked it out with [the bigger inmate]." (Trial Tr. 2551.) The intervention was successful, resulting in the inmate walking away and leaving Muncy alone. (*Id.*) A couple of men returned to the jail from prison and were creating conflicts with other inmates. Sensing the

building tension, Keith talked to a deputy who then had the new inmates moved to another section of the jail before tensions erupted into violence. (*Id.* at 2552.)

Because of actions like this, Keith developed a reputation as somebody who would help smaller, more vulnerable victims. Muncy testified that an inmate in the jail became severely depressed because his wife left him. (*Id.* at 2553.) According to Muncy, the man "was getting ready to hang himself." (*Id.*) Keith intervened, notifying deputies, and "helped stop that." (*Id.*)

Keith was never violent towards other inmates in the jail and spent the much of his time reading the Bible and his legal work. (*Id.* at 2550, 2554-55.) Muncy was grateful for Keith's guidance during a tough time in his life. After Muncy was sentenced and was awaiting transfer to a state prison (his first adult incarceration), Keith offered guidance on what to expect and how to adapt in prison. (*Id.* at 2552.)

Dennis Figaro, another inmate at the jail, shared similar sentiments. Figaro testified that the Franklin County Jail is a pretty "rough" and "dangerous" place. (*Id.* at 2558.)

Keith, however, acted as an antidote to that dangerous environment. Figaro testified that "violence [was] not in [Keith's] psyche" while they were in jail. (*Id.* at 2559.) Keith broke up fights and told the inmates that violent behavior in the jail "ain't worth it." (*Id.* at 2559.) As a result of Keith's actions, their "tank" in the county jail "was one of the quietest" and had "no violence." (*Id.* at 2559.)

Figaro described Keith as an inmate who studied the Bible, went to church, and exercised a lot. (*Id.* at 2557.) If other inmates were willing to listen, Keith engaged with them in his Bible studies. (*Id.* at 2557-60.)

Figaro was young and this was his first time in jail. As he did with Muncy, Keith did his best to teach Figaro how to do his time and how to avoid trouble. (*Id.* at 2560.) Importantly, Keith

asked for nothing in return from the guys he mentored, protected, or otherwise assisted. (*Id.* at 2560.)

Joseph Bohlen, another young inmate struggling to adjust to the county jail, was hopeless and did not care what happened to himself or others. (*Id.* at 2565.) When Bohlen arrived at the county jail, he "had hate on [his] mind." (*Id.* at 2564.) Keith "turned [Bohlen's] attitude around" and made Bohlen believe that there was a better way to go about serving time. (*Id.* at 2565.) There were several times when Bohlen was ready to fight other inmates but Keith broke up the fights, sat Bohlen down, and talked things out with him. (*Id.* at 2565.)

Bohlen also talked about how larger inmates bullied younger weaker inmates and often stole their food. But nothing like that ever happened in their section of the county jail. (*Id.* at 2567-68.) Bohlen attributed the respect and good behavior among the inmates in their "tank" to Keith: "He kept everything down in the cell, talked to everybody." (*Id.* at 2567.)

Keith and Bohlen would pray together as well as read the Bible together and discuss it. (*Id.* at 2565-66.) Bohlen acknowledged that if not for Keith, he would have continued to fight others in jail and in prison. (*Id.* at 2567.)

Keith's influence led Bohlen to be a better inmate in the future. Bohlen went from jail to prison and he tried to use what he learned from Keith "to help" others and talk them out of violence. (*Id.* at 2566.)

2. Correction officers from the Franklin County Jail agreed that Keith was a nonviolent inmate who helped protect them

When Lieutenant Donny Gannon, a correction officer, was a sergeant, supervising the second-shift personnel at the Franklin County Jail, he saw Keith at least three times a week. (*Id.* at 2621-23.) Lt. Gannon did not have any problems with Keith during his twenty-two-month incarceration and was not aware of any other guards who did. (*Id.* at 2623.) Keith and Lt. Gannon

"always got along." (*Id.* at 2626.) While Lt. Gannon was on duty, Keith let him know that another inmate had a "dangerous," sharp piece of broken glass or plastic in his possession. (*Id.* at 2624.) As a result of Keith's warning, the guards were able to remove the weapon from the inmate without incident. (*Id.* at 2624-25.) According to Lt. Gannon, the weapon "was large enough that it would have hurt someone." (*Id.* at 2625.) Even worse, it is "very possible" this weapon could have been lethal if used. (*Id.* at 2625.) Lt. Gannon acknowledged that Keith put his own life at risk by informing Lt. Gannon about the weapon. (*Id.* at 2625-26.)

In twenty-two months at the jail, Keith had only a few minor tickets and one serious one. Although the serious offense was for fighting, the incident involved Keith protecting a smaller, weaker inmate from other inmates. (*Id.* at 2543-44.) According to Corporal Stephanie Theodor, the Franklin County Sherriff's deputy who adjudicated this ticket, Keith was not the aggressor in any way, and he in fact stopped the fighting. (*Id.* at 2544.) Even after being sucker-punched in the face and having to go to the hospital for sutures to his eye, Keith did not fight back against the instigator. (*Id.* at 2544, 2794.) Keith cooperated with the deputies and provided a written statement about the incident. (*Id.* at 2545.) Corporal Theodor was aware of the circumstances surrounding the fight and agreed that Keith had a "good disciplinary record for the amount of time" he was incarcerated. (*Id.* at 2545.) She concluded ultimately that Keith deserved only a verbal warning as he "was standing up for the new, smaller, weaker inmates" and that he had "been in jail eight months with virtually no problems." (*Id.* at 2543, 2794.)

B. Keith Henness's record on death row for 25 years has been exemplary.

The intake form filled out upon Keith's arrival on death row predicted a positive adjustment and noted that Keith has "always made the best" of his time in state custody. (S.O.C.F. Intake

Form, Ex. 2.) Although Keith has not been a perfect inmate on death row, the intake form's prediction has largely held true.

Shortly after his arrival on death row in January of 1994, Keith filled out a job placement survey that asked about the goals he would like to accomplish during his incarceration. With his future uncertain, Keith resolved to make the most of his time in prison and vowed to "do some good." (DRC Job Survey, Ex. 3.) By all accounts and measures, he has done so.

Keith is a productive member of his community with the reputation as a good worker and peacemaker. Just as he did in the county jail, Keith frequently took on a mentor-like role with new inmates. Keith continues to get along well with correction officers and mediates between the inmates and guards who do not get along. (Apanovitch Aff. ¶¶ 5-7, Ex. 4.) Keith's institutional record shows growth and most importantly, it is wholly nonviolent.

1. Keith creates a positive environment on death row by supporting other inmates in need.

Keith has always made a genuine effort to engage with inmates who are struggling in the difficult and stressful environment of prison, and particularly, death row. His willingness to engage with those in need helps the individual inmate and by extension, the death row population as a whole.

To Arthur Tyler, a man who was granted clemency after thirty years on death row, Keith's kindness and generosity always stood out:

> Keith was one of the few inmates who would greet new inmates like this and make them feel welcome. He truly took an interest in people's lives and wanted to make sure they were doing ok.
>
> . . . .
>
> Death row can be a very lonely place and for the most part nobody looks out for anyone but themselves. Keith was different and unique in that he always seemed to be looking out for other people. . . .

> . . . . A lot of the inmates are nice to people because they have to be. Keith was nice because he wanted to be.

(Tyler Aff. ¶¶ 3-6, Ex. 5.)

Brett Hartman, another former death row inmate,[1] recalled that shortly after arriving on death row in 1998, Keith "was one of the first inmates to come to my cell and offer me advice on how to adapt to life on death row and how to survive death row." (Hartman Aff. ¶ 2, Ex. 6.) Keith never asked for anything in return. When Brett asked Keith why he was so welcoming, Keith pulled out the religious pendant he wore around his neck and stated "this is the reason I am helping you." (*Id*. ¶ 4.)

Joe D'Ambrosio spent over two decades on death row before a successful appeal lead to his release in 2010. D'Ambrosio recalls that Keith took on a "brotherly/mentor" like role towards new inmates to explain how things work on death row. This included advice on how to manage commissary money or how to adapt to the various prison rules. (D'Ambrosio Aff. ¶ 9, Ex. 7.)

Keith also shares food with inmates who are in need. Anthony Apanovitch, who spent decades on death row with Keith, recalls that:

> Keith would also help new prisoners by teaching them how to manage their commissary. Or if a prisoner was low on food, Keith would share some of his coffee, soup, or other type of food he had. This may not sound like a big deal, but it was very rare for someone on death row to share food with another prisoner. Most prisoners on death row struggle for anything they can get but Keith was always willing to share what he had with someone who was short on food or other resources.

(Apanovitch Aff. ¶ 5, Ex. 4.) Tyler recalled the same: "If someone was hungry and did not have any money for commissary, Keith would give them his last soup or anything else he was able to

[1]Brett Hartman was executed in 2012. In the last thirty days before Mr. Hartman's execution, he was allowed to select two inmates to spend time with him in the recreation yard. He selected Keith. They had remained friends ever since Keith's initial offer of advice.

share. Keith always seemed to know which inmates around him had less and he would share with them as much as possible." (Tyler Aff. ¶ 5, Ex. 5.)

Another way Keith has worked to benefit his fellow inmates has been to encourage them to deal with the stress of being on death row in a healthy manner. "When new inmates arrived on death row, they were often depressed and rarely came out of their cell. Keith encouraged new inmates to go outside and exercise. He liked to tell them that a 'healthy body means a healthy mind.' Keith would put the new inmates through a good work out to help them relieve stress." (Tyler Aff. ¶ 3, Ex. 5.) Brett Hartman recalled that Keith got him started on an exercise program. They continued this program every day for several years. (Hartman Aff. ¶ 5, Ex. 6.) Keith keeps "guys spirits up" by keeping them active and healthy. (D'Ambrosio Aff. ¶ 9, Ex. 7.)

Over the years, Keith has also encouraged inmates to take up painting. Brett Hartman recalled that "Keith had been working on small paintings and got me interested in painting while we were still at Mansfield." (Hartman Aff. ¶ 6, Ex. 6.) As a result of Keith's encouragement, Hartman devoted a great deal of his time on death row to painting—including painting several murals on death row at the Ohio State Penitentiary and later donated many of his artworks to charities. (*Id*.)

Behavior such as Keith's is far from the norm. Tyler described Keith as "one of a kind" and "a good and caring person." (Tyler Aff. ¶ 2, Ex. 5.) "Keith's behavior helped keep people's spirts up, helped calm people down, and worked to have a positive impact on everyone he was around." (*Id*. ¶ 2.) Tyler saw Keith as a "good person who had a positive impact on my life and many others on death row." When he was released to general population, Tyler missed Keith's "sense of humor and positive influence." (*Id*. ¶ 9.)

Keith's goodwill has not been limited to his fellow inmates. He has also worked to create a more positive, clean, and safe environment for correction officers. In 1999, Keith wrote a letter requesting to be made a permanent porter, citing conversations he had had with correction officers who wanted him to work the block permanently. Keith promised to make the block "safer" and "cleaner" if he was given a full-time porter position: "I don't like living in a nasty block, and it also looks bad whenever a tour comes through and they believe we all live that way." (1.19.1999 Henness Letter, Ex. 8.) In another letter, Keith wrote that he was willing to do "extra work." (9.22.1997 Henness Letter, Ex. 9.) "I honor and respect the 1st and 2nd shift regular officers, and feel I would work well with them." (*Id*.)

2. Keith has earned a positive reputation among fellow inmates and correctional staff as a peacemaker.

Keith has a reputation as a peacemaker on death row. Anthony Apanovitch was incarcerated with Keith for over twenty years. He witnessed Keith act as a protector, peacemaker, and mediator in an environment where those roles were often lacking and sorely needed:

> Keith especially worked to stand up for the younger guys after they arrived on death row. When new inmates arrived on death row, especially the young and weak ones, they were looked at as targets by problem prisoners. Keith would not let anyone get bullied or taken advantage of. If bullies were creating problems with a weak inmate, Keith would get involved and tell them to back off. What could have resulted in a serious fight was often avoided because of Keith calming everybody down.

(Apanovitch Aff. ¶ 4, Ex. 4.)

That Keith would step in to help weaker inmates speaks to one aspect of his character, but that he is well-respected enough to defuse a potential altercation speaks to another. Keith also looked out for the benefit of correction officers.

> If problem prisoners were causing problems with correctional officers, Keith would get involved and usually get them to stop. Keith would tell other prisoners that the correctional officers were

> just there doing a job and did not deserve to be harassed. Occasionally the correctional officers on death row would harass certain prisoners. Keith would also talk to the correctional officers about easing up and leaving the prisoners alone. Actions like this by Keith just helped the prison run a lot smoother. The correctional officers really liked Keith and viewed him as a peacemaker.

(*Id*. ¶ 7.)

In the mid-1990s, death row inmates were transferred from the Southern Ohio Correctional Institution in Lucasville to the Mansfield Correctional Institution. Apanovitch remembers Keith telling the female correction officers at Mansfield that he would protect them from problem inmates and make sure nothing ever happened to them. (*Id*. ¶ 8.)

D'Ambrosio, corroborates Keith's goodwill towards guards and correction officers. D'Ambrosio recalls that Keith "helped to mediate when there were disagreements between inmates." (D'Ambrosio Aff. ¶ 9, Ex. 7.) Additionally, Keith was always "respectful towards guards." If other inmates were angry at prison staff, Keith reminded them that "the guards were just doing their jobs." (*Id*.)

Tyler recalls the efforts Keith took to keep the peace on death row:

> The daily routine of death row often makes people angry to the point where they act out. Inmates get mad at each other, the guards, their families, and life in general. Keith was always good at acting as a peace-maker in these situations. If two inmates were angry at one another, Keith would talk to them both to make sure they did not get into a fight. Keith would ask them to deal with their anger or stress with a good workout in the rec yard with him. Keith was very good at calming people down because he would talk to them like a big brother and would never talk down to anyone. This is the opposite of how a lot of the people on death row act. They often encourage misbehavior or fighting as a source of entertainment.

(Tyler Aff. ¶ 7, Ex. 5.)

Tyler also specifically recalled Keith was "always protective of the inmates who could be taken advantage of." (*Id*. ¶ 6.) These included "the small, the weak, the mentally ill, and the elderly" inmates. (*Id*.)

The goodwill Keith has built up over the years with correctional staff is apparent to those who visit with him today. Doug McCready is a friend of Keith's who visits him regularly. He noted the following:

> When I visit Keith, he is always smiling, cordial and polite with everyone inside the prison. His interactions with the prison staff seem easy and respectful. There have been occasions where I was walking into the visitation area at the same time Keith was being escorted in by the guards. They are always friendly, polite, and joking with one another.

(McCready Decl. ¶ 6, Ex. 10.)

Another friend of Keith's who visits regularly, Kevin Biller, has also noticed that: "Keith is always on good terms with the guards that escort him to and from the visitation area. Keith is always kind and having nice conversations with the guards when they escort him out of the visitation area." (Biller Decl. ¶ 21, Ex. 11.) Mr. Biller also recalls being told by the guards who escort him to and from the visitation area that: "Keith is a mellow inmate who never causes any serious trouble." (*Id*. ¶ 22.)

3. Keith's institutional record over the last twenty-five years is nonviolent.

Keith was arrested for this offense over twenty-five years ago. In that time he has not exhibited a single act of aggression or violence towards his fellow inmates or guards. This complete absence of violence in Keith's record speaks to his character and demonstrates that Keith is not a threat to anyone if removed from death row.

Clemency reports written by this Board illustrate how rare it is for a death row inmate to present a petition for clemency free of fights or violent acts. Examples of this can be found in two

of the Board's most recent clemency reports. In November 2017, this Board noted an applicant's "troubling lack of respect for institutional rules and regulations and an inability to control his own negative impulses." *In re: Alva Campbell Jr., CCI #A354-963*, at 20 (Oct. 20, 2017).[2] More recently, this Board denied clemency in part based on a recent "attack on a fellow inmate" and poor prison conduct as a whole that had never abated in thirty-three years on death row. *In re: Robert Van Hook, CCI #A186-347*, at 20 (June 1, 2018).[3] Clemency reports dating back to 2001 note similar acts of violence on death row.

The opposite is true with Keith. Over a period of twenty-five years in prison, he has never shown any uncontrollable impulses or violent tendencies that have sparked violence.

This is not just an example of an inmate avoiding violence. As discussed above, this is a case where the inmate has worked hard to set an example for other inmates and show them that violence of any kind is not the solution and has taken steps to diffuse and avoid violent confrontations between inmates.

4. Keith's relationship with his faith has flourished in prison.

Father Neil Kookoothe is a Catholic priest from the Cleveland area. After reading an article in the National Catholic Reporter about a death row pen pal ministry, Father Neil followed up by letter and expressed interest in participating in the program. At the time, Father Neil had never visited a prison or even written an inmate. The Carmelite Brother who had written the article wrote back to Father Neil and gave him Keith's name and address. Father Neil wrote his first letter to Keith in 1996 and visited him on death row for the first time later that summer.

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[2] *Available at* https://drc.ohio.gov/Portals/0/Clemency/Death%20Penalty%20Clemency%20Report%20and%20Recommendation-Alva%20Campbell%20Jr.%20A354-963.pdf?ver=2017-10-20-105232-697.

[3] *Available at* https://drc.ohio.gov/Portals/0/Van%20Hook%20Death%20Penalty%20Clemency%20Report%20and%20Recommendation.pdf.

Over the last twenty-two years, Father Neil has continued to visit and write Keith on a regular basis and the two have developed a special friendship. Father Neil describes his role as "a spiritual companion" to accompany Keith "at a very difficult period of his life." (Fr. Kookoothe Aff. ¶ 5, Ex. 12.) The crime Keith was convicted of did not matter to Father Neil because he was focused solely on developing a spiritual relationship. In that regard, their relationship has been a success. Father Neil believes their relationship "has been a real blessing for the two of us." (*Id*. ¶ 17.) Father Neil refers to Keith as one of the best spiritual directors he has ever had and has told him so on a number of occasions. (*Id*. ¶ 16.) During visits the two discuss their faith and pray together, which has led Father Neil "to more personal reflection." (*Id*.)

The empathy Keith has shown has also stood out to Father Neil. During many of their visits, Keith would pass along the names and birthdays of other inmates on death row who did not have much support from the outside world. (*Id*. ¶ 7.) At Keith's request, Father Neil sent these inmates cards on their birthdays or on holidays. (*Id*.) Keith also let Father Neil know if a family member of a death row inmate died, prompting Father Neil to attend the funeral or send a sympathy card. (*Id*. ¶¶ 7, 10.)

Keith even provided comfort and guidance to Father Neil after the priest's mother passed away. Father Neil recalls, "Keith was bothered very much by her death and the grief and sorrow I felt over that. Keith did his best to provide condolences to a friend from behind prison walls. I was very touched by that." (*Id*. ¶ 18.)

It would be a mistake to disregard Keith's faith as nothing more than an insincere pitch to save his life. Father Neil can attest, and will do so in person to this Board, that Keith's faith is not an act and has been an important part of his life dating back over twenty years. Despite his circumstance, Keith has shown compassion, empathy, and faith that drives him to give back to

others. This is not an act. It is genuine, and Father Neil has been witness to it for over two decades. Father also Neil believes that if Keith were granted clemency, he would continue to reach out to others and help in any way he can. (*Id.* ¶ 19.)

5. Keith helped free an innocent man.

Perhaps Keith's most meaningful influence on death row was what he did for former death row inmate Joe D'Ambrosio. When Keith arrived on death row in 1994, he met D'Ambrosio, who had also been sentenced to death. Over time, Keith developed a strong belief that D'Ambrosio was innocent. Keith was able to convince Father Neil, who is also a lawyer, to take an interest in D'Ambrosio's case at a time when no one else would. (D'Ambrosio Aff. ¶¶ 4-5, Ex. 7.)

Father Neil's involvement proved vital. Father Neil started the momentum and investigation that led to D'Ambrosio being granted relief in federal court in 2008 and being released from prison in 2010. (*Id.* ¶¶ 5-6.) The case was covered nationally, by the likes of CNN[4] and the *Washington Post*,[5] with many articles highlighting the contributions of Father Neil.

Both D'Ambrosio and Father Neil credit Keith as being the catalyst that led to Father Neil's involvement and D'Ambrosio's eventual release. For Father Neil, it is important that Keith "knows he had a role to play" in D'Ambrosio's exoneration. (Fr. Kookoothe Decl. ¶ 15, Ex. 12.) Keith "saw an injustice in another man's life" and worked hard to find someone who could make a difference, which led to that man's life being saved. (*Id.*) Simply put by Father Neil: "Without Keith, Joe would still be on Death Row or possibly even executed." (*Id.*)

[4] *Available at* https://www.cnn.com/2014/03/21/us/death-row-stories-dambrosio/index.html.

[5] *Available at* https://www.washingtonpost.com/lifestyle/style/the-priest-the-exonerated-death-row-inmate-and-their-continued-battle-against-the-death-penalty/2016/07/01/7ae4e04a-3ecc-11e6-80bc-d06711fd2125_story.html?noredirect=on&utm_term=.4ba60edfa2a8.

D'Ambrosio concurred, "I owe my life to Keith. If it were not for [Keith], I believe the State of Ohio would have executed me many years ago." (D'Ambrosio Aff. ¶ 8, Ex. 7.)

6. While Keith's record on death row is not spotless, he has far fewer infractions than many who have been before the Board. His behavior over the last twenty-five years demonstrates his ability to adjust well to general population.

In the last eleven years, Keith has been charged with only three infractions, two in 2015 and one in 2018. All three were alcohol-related. Alcohol-related infractions are serious and raise serious problems for the administration of the prison and death row. There are no excuses for consuming alcohol in prison. However, these recent alcohol infractions should not negate or outweigh the positive behavior that Keith has exhibited over the last twenty-five years. These three alcohol infractions are also not so serious as to necessitate a conclusion that Keith would not adjust well in general population.

While Keith offers no excuse for these alcohol violations, it is important to note that he has been living under the daily stress of a pending execution date since November 28, 2012. Since his execution date was set in 2012, Keith has received five reprieves and five new execution dates. During this same time period, Keith's mother has fallen increasingly ill. She has lost her vision and lives with a host of serious chronic illnesses that continue to get worse. (C. Parsons, Aff. ¶ 18, Ex. 13.) In an attempt to relieve stress and anxiety, Keith has occasionally taken to alcohol. This background is being offered solely to put Keith's alcohol abuse and his decision-making process in context and is in no way being offered as an excuse. As Keith indicated at his interview, he takes full responsibility for these infractions.

As noted above, these are the only rules violations Keith has had in over a decade. Examining his record over the past twenty-five years, Keith has never been violent. Many of Keith's older citations are for small amounts of non-threatening contraband, such as a homemade

extension cord, cassette tapes, an altered stereo, or modeling tools used for the wooden miniatures that he made and sent home to his family.

There are two violations in Keith's record that may seem troubling at first glance, but the details reveal that the infractions were less serious than they appear. In 1997, Keith was cited for verbally threatening and disrespecting an officer. (2.20.1997, DRC Report, Ex. 14.) The report accused Keith of clenching his fists and standing in a fighting position while he accused a correction officer of not respecting the constitutional right of freedom of speech. (*Id*.) Keith contested these accusations and stated several witnesses supported his account. (RIB Notice of Appeal, Ex. 15.)

Several inmates testified on Keith's behalf that the incident was severely mischaracterized and that Keith was not intending any threats or disrespect. One testified that the incident as described by the guard "never happened." (Apanovitch Testimony, Ex. 16.) Another testified that "at no time was there loud talking" and in fact "both parties" were laughing. (Campbell Testimony, Ex. 17.) That inmate stated that Keith "did not stand in a fighting stance." (*Id.*) Furthermore, two corrections officer stated that they saw no issue between Keith and the citing officer on the day of this alleged threat. (Officer Testimony, Ex. 18.) The two other officers were present in the block at the time this incident was alleged to have occurred and "knew nothing about it." (*Id*.)

Given the complete absence of violence in Keith's record for twenty-five years, and the statements from inmates and correction officers who support his account, he should be given the benefit of the doubt regarding this incident.

Five years later, in 2002, Keith was cited for having a rope-like item constructed from bed sheets. (11.6.2002 DRC Disposition, Ex. 19.) Keith and Arthur Tyler, "tied some sheets together" to "use them for resistance training." (Tyler Aff. ¶ 8, Ex. 5.) The two had been using "these

braided sheets for different types of pull-ups and resistance work every day for about 6-8 months." (*Id*.) Correction officers knew the purpose of the rope, and one even complemented the duo on their ingenuity. (*Id*.) The rope was confiscated after the two moved to a new block. (11.6.2002 RIB Testimony, Ex. 20.) Neither Tyler nor Keith had any intent to cause harm with the rope (Tyler Aff. ¶ 8, Ex. 5), as was acknowledged in the write-up, which stated that Keith "has been using [the rope] for years in the other death row blocks" and simply "screwed up." (11.6.2002 RIB Testimony, Ex. 20).

While all rules infractions are serious, the absence of violent conduct in Keith's record is rare, and is especially commendable considering the difficult environment of death row and the tumultuous adjustment to death row that most other inmates experience. Keith's record should not raise any concerns about his ability to adjust to general population.

C. Conclusion

Keith's behavior on death row is important to this Board's consideration for several reasons. At trial, the prosecution argued that Keith was merely a "jail-house Jesus," exhibiting good behavior in selfish anticipation of his mitigation hearing. (Trial Tr. 2796.) Keith's behavior over the last twenty-five years on death row demonstrates that the prosecutor was incorrect. The absence of any violent behavior in prison coupled with the absence of any serious violent crimes before being convicted of this offense, is rare among the death row inmates who have come before this board seeking clemency. That the prosecution contemplated a plea deal for around twenty-three-years-to-life, suggests that the State considered him fit for general population as well. (State's Second Submission 139.)

Keith has not been a perfect inmate. He has made mistakes and poor decisions, especially in recent years with alcohol. However, the question of whether the inmate leaving death row would be a further threat in general population in Keith's case is an emphatic no.

II. The abysmal conduct of defense counsel so undermined the proper functioning of the adversarial process that this Board cannot rely on either the trial or penalty phase as having produced a just result.

Due to the extraordinarily high stakes and the irrevocable nature of the death penalty, defense counsel are required to make "extraordinary efforts on behalf of the accused." *See ABA Standards For Criminal Justice: Defense Function, Standard 4-1.2(C), in* ABA Standards For Criminal Justice: Prosecution Function And Defense Function (3d ed. 1993). Yet, in the sixteen months leading up to trial, Keith Henness's attorneys conducted virtually no investigation on their own and they did not hire an investigator or a mitigation specialist to conduct the investigation on their behalf. Defense counsel did not have any meaningful conversations with Keith regarding the evidence against him, the possible sentences he could receive, or the types of evidence or witnesses that could be presented at the penalty phase. This failure to investigate and failure to communicate with their client represent drastic departures from the most basic tenets of capital defense representation.

Given the high stakes of a death penalty trial, counsel's failure to investigate and prepare and their subsequent inadequate performance at trial was wholly unacceptable. Clemency is appropriate to remedy the death sentence that resulted from counsel's glaring deficiencies.

A. Lead attorney David Bodiker refused to investigate or to hire investigators.

On June 30, 1992, attorneys David Bodiker and W. Joseph Edwards were appointed to represent Keith in his capital trial. Trial began in November 1993. (Edwards Aff. ¶ 2, Ex.1.) Despite having sixteen months to prepare, they conducted virtually no investigation prior to trial. (Edwards Aff. ¶ 19, Ex. 1.) Keith repeatedly urged them to investigate the crime scene and to talk to witnesses to disprove the State's theory of the case and prove Keith's defenses. But they never did. (Henness Aff. ¶¶ 6-7, Ex. 21; Edwards Aff. ¶¶ 6, 17-19, Ex. 1.)

In the sixteen months that passed between his appointment and the start of trial, Bodiker logged less than a dozen hours of "investigation." (State's Second Submission 233-57 (Bodiker's billing records)). Bodiker's billing records demonstrate that the "investigation" consisted almost entirely of gathering basic discovery from the prosecutor and police. (*Id.*) None of this time was spent conducting any independent investigation such as locating and interviewing witnesses who counsel knew were going to testify or who had information about the crime that Keith had told them about. (*Id*.)

Bodiker's failure to conduct any independent investigation was compounded by his refusal to hire an investigator or a mitigation specialist to assist in gathering evidence or locating expert or lay witnesses. Bodiker interviewed only one lay witness before trial. (State's Second Submission 53 (Bodiker Depo.).) He met once briefly with Tabatha Henness, Keith's wife and a central witness for the prosecution. Bodiker recalled, "[Tabatha] didn't really tell [him] all that much. And she didn't get into all the things that happened." (*Id*.) Bodiker made no attempt to talk to any other witnesses named by the state or suggested by Keith, or otherwise conduct any investigation. (*Id*.)

Keith continuously implored Bodiker to investigate issues that he believed would help his case. (Henness Aff. ¶ 7, Ex. 21.) Bodiker, on the other hand, despite having done little investigation to support such a conclusion and having done nothing to earn his client's trust, was convinced that Keith should and would accept a plea agreement. (Edwards Aff. ¶ 8, Ex. 1.) There is no record, however, of any plea negotiations with the prosecution occurring until October 1993, fifteen months after counsel were appointed. (*Id.* ¶ 14; State's Second Submission 242.) By the time any plea agreement was discussed, Keith had already developed a deep distrust of Bodiker.

As a result, he "did not want to accept any advice about plea negotiations." (Edwards Aff. ¶ 15, Ex. 1.)

B. Bodiker prevented Edwards from investigating.

Bodiker also prevented his co-counsel, Edwards, from investigating prior to trial because he believed that Edwards was incompetent. (*Id.* ¶¶ 4, 9.) Bodiker, a veteran criminal defense attorney, was the lead attorney on Keith's case. (*Id.* ¶ 4.) At the time, he was in the process of interviewing to become the Director of the Ohio Public Defender's Office. (Graeff Aff. ¶ 3, Ex. 22.) Edwards, on the other hand, was handling his first capital case. (Edwards Aff. ¶¶ 4, 9, Ex. 1.) He naturally looked to the far more experienced Bodiker for guidance on how to proceed in preparing for this capital trial. (*Id.* ¶ 9.) Unfortunately, Bodiker was not interested in teaching Edwards. (*Id.* ¶ 5.) In fact, Bodiker was irritated that Edwards had been appointed as his co-counsel, which he made that abundantly clear to Edwards. (*Id*. ¶¶ 5-10, 20; Henness Aff. ¶ 3, Ex. 21.) In Edwards's nearly 30 years of practicing law, it was one of the most difficult and least productive co-counsel relationships he has ever had. (*Id.* ¶ 20.)

In the first two months after he was appointed, Bodiker, who had met Keith once shortly before he was appointed, did not visit Keith and refused to take Edwards to visit him either. (*Id*. ¶¶ 5-8.) Edwards was anxious to meet Keith. Edwards was also worried that he and Bodiker were losing precious time for trial preparation, so he wrote Bodiker a letter on August 24, 1992, two months after they were appointed, explaining:

> It has been a number of weeks since we met to discuss the [Henness case]. It goes without saying this is a very important case. Even though we have been assigned to this for two months, we have yet to go to the jail to visit Mr. Henness about this matter. I realize that you had a pre-existing relationship to him prior to appointment on this case; however, I have yet to discuss this matter or even meet him. I believe it is very important that I meet Mr. Henness in the near future.

> I also believe we should begin working on the motions in this matter and come to a decision as to whether there are any major alterations to the form motions and any other motions that should be filed which are not standard.
>
> Would you please let me hear from you next week as to a time we can meet and go to the jail to interview Mr. Henness?

(Letter from Edwards to Bodiker, Ex. 23.) Bodiker was angered by the letter. (Edwards Aff. ¶ 8, Ex. 1.) He told Edwards to never send him a letter like that again and ordered Edwards to refrain from working on the case. *Id*.

For fifteen months, the only way that Edwards received updates about the case was if he encountered Bodiker in the courthouse and Bodiker agreed to give Edwards a brief update. (*Id*. ¶ 10.) In these impromptu chats, Edwards asked Bodiker if there was anything that he should be doing to help prepare for trial. (*Id*. ¶ 5.) Edwards was concerned that they were not investigating. He suggested that they should hire an investigator in at least one of these brief meetings at the courthouse, but Bodiker refused. (*Id*. ¶ 18.) The first sit-down meeting between Bodiker and Edwards to discuss trial preparation did not occur until October 1993, fifteen months after their appointment and one month before trial. (*Id*. ¶ 10.)

Bodiker continued to insist that Keith's case was going to end in a plea agreement and that if Edwards tried to get involved, he would jeopardize the plea negotiations that Bodiker claimed to be conducting. (*Id*. ¶¶ 5, 8.) There is no record, however, of any plea negotiations taking place prior to October 1993. (*Id*. ¶ 14.) Nonetheless, Edwards obeyed Bodiker's orders and never conducted any investigation into the State's case or interviewed any witnesses whom Keith suggested. (*Id*. ¶¶ 5, 9, 19.) In fact, Edwards did not investigate any trial phase issues at any time. (*Id*. ¶ 19.)

Bodiker's warnings also succeeded in keeping Edwards from visiting Keith. Jail records show that Edwards met Keith for the first time on September 24, 1992, a month after he had

requested Bodiker introduce him to Keith. (Franklin Cty. Sheriff's Off. Visitor Records, Ex. 24.) According to Edwards, this was not a substantive meeting. (Edwards Aff. ¶ 11, Ex. 1.) Edwards did not visit Keith in the jail again until October 26, 1993, nine days before trial. (Franklin Cty. Sheriff's Off. Visitor Records, Ex. 24.)

Because Bodiker had refused to hire an investigator or a mitigation specialist, Edwards was forced to take over mitigation investigation and preparation because, at that late date, no mitigation specialists would work with the defense team because of the short time remaining until trial. (Edwards Aff. ¶¶ 17, 19, Ex. 1.) Thus, one month before the trial, neither attorney had done any material investigation or preparation for the trial or the penalty phase. The results of the trial were predictable.

C. Keith's dysfunctional team resulted in a poisoned attorney-client relationship that was destined to fail at trial.

The first time Edwards met with Bodiker and Keith, he "immediately recognized that they had a toxic attorney-client relationship." (*Id*. ¶ 12.) Bodiker did not want to listen to anything Keith had to say, and soon Keith would not listen to anything Bodiker had to say. (*Id*.) Keith did not trust Bodiker's legal advice, and Bodiker had disparaged Edwards's capabilities to Keith making Keith distrustful of Edwards as well. (*Id*.)

The defense team from the start was so strained as to be nearly inoperable. In the five months leading up to trial (from May 25 to October 25, 1993), neither Bodiker nor Edwards visited Keith in the jail. (Franklin Cty. Sheriff's Off. Visitor Records, Ex. 24.) Keith did not have any meaningful conversations with either of his attorneys regarding the evidence against him or the possible sentences he could receive or about possible evidence to be presented at the penalty phase. (Edwards Aff. ¶¶ 13-15, Ex. 1; Henness Aff. ¶¶ 8-9, Ex. 21.)

The relationship between Bodiker and Keith became extremely combative. (Edwards Aff. ¶¶ 12-13, 15, Ex. 1; Graeff Aff. ¶ 4, Ex. 22; Henness Aff. ¶¶ 6, 7, Ex. 21.) Bodiker did not like Keith, and he made those feelings clear to Keith. (Edwards Aff. ¶ 12, Ex. 1; Henness Aff. ¶ 6, Ex. 21.) Keith was upset by the failure to investigate or prepare for trial. (Henness Aff. ¶ 11, Ex. 21.) Keith had repeatedly asked Bodiker to investigate aspects of the State's case, including Tabatha Henness's background and the crime scene, but Bodiker refused to conduct any investigation. (*Id*. ¶¶ 6-7; Edwards Aff. ¶¶ 18-19, Ex. 1.) Any suggestions Keith made were rejected outright by Bodiker, who told Keith that Keith was wrong and that Bodiker planned to do things his way, not Keith's way. Bodiker treated Edwards the same as Keith. (Edwards Aff. ¶ 5, Ex. 1.)

D. Defense counsel's lack of preparation was laid bare at trial.

Bodiker's unreasonable refusal to investigate or prepare for trial—instead assuming the case would be resolved in a plea agreement—and Edwards's deference to Bodiker, resulted in a feeble defense presentation at trial. The State relied primarily on two drug-addicted witnesses, Tabatha Henness and Roland Fair, both of whom were involved in the crimes and both of whom had their own motivation for testifying against Keith. There were many avenues for the defense team to attack the State's theory of guilt and establish alternative theories.

Despite this, during the trial phase, the defense did not call any witnesses to testify. Due to counsel's inaction in the sixteen months leading up to trial, they had no witnesses to call, no alternative theories to offer, and no evidence to introduce that countered the State's theory of guilt.

Counsel's anemic performance is even more inexcusable given the lack of direct evidence tying Keith to the murder. As discussed more fully in Section IV of this Application, this is not a case of overwhelming evidence of guilt. Had defense conducted any investigation and had counsel

challenged the State's case at trial, the case for lingering doubt would be even stronger. Instead, the jury found Keith guilty of the aggravated murder of Richard Myers, the aggravating circumstances, robbery, and kidnapping.

E. Bodiker and Edwards moved to withdraw as counsel when mitigation proceedings began due to their irreconcilable differences with Keith.

Penalty-phase proceedings began on January 10, 1994. (Trial Tr. 2446.) That day, Bodiker and Edwards moved to withdraw from the case because they believed the attorney-client relationship had disintegrated to the point where it would be impossible for them to continue to represent Keith. (Motion by Counsel to Withdraw, Ex. 25.) They informed the court that Keith "does not trust counsel, and that he refuses to discuss the conduct of the pending mitigation with them." (*Id.*) Bodiker said the attorney-client relationship at this point was "totally ruptured" and he was no longer communicating with Keith. (State's Second Submission 92 (Bodiker Depo.).)

Bodiker warned the trial judge that Keith's complete rejection of Bodiker and Edwards's efforts to collect and present mitigation evidence made it virtually impossible for them to effectively and zealously represent him within the bounds of the law required by the Code of Professional Responsibility. (Trial Tr. 2451-56.) He emphasized that, due to the breakdown of the relationship between counsel and Keith, the proceedings were constitutionally invalid and "irreparably tainted by the inability of counsel to represent the defendant." (*Id*. at 2454.) Bodiker told the court, "We are literally, by definition, ineffective counsel." (*Id*. at 2451.)

Bodiker stressed that if the court denied the motion to withdraw as counsel, the jury would decide whether Keith lives or dies despite his counsel being ineffective, constrained, and unable to function. (*Id*. at 2453.)

Bodiker continued: "we are entering into the most serious and important aspect of a death penalty litigation where we do not know what is going to happen, nor can we, in effect, properly

represent or communicate with the defendant about that." (*Id*. at 2454.) According to Bodiker, this rift in the relationship would destroy his ability to properly present evidence or make appropriate arguments on Keith's behalf. (*Id*.) Bodiker asked that if the trial court were to err, it should err on the side of caution and appoint new counsel to represent Keith in the penalty phase. (*Id*. at 2455.) He warned that trial court that refusing to replace them would "simply contaminate the whole proceeding." (*Id*.)

Keith agreed and argued to the court:

> I told you during the trial I did not want them. . . . I don't see how if I do not trust [Bodiker] to go through the trial, how do you expect me to trust him here when my life is on the line? . . . [Bodiker] failed to go out and investigate that physical evidence at the scene that I told him to look for. . . . Generally, he gave an attitude [at trial,] don't worry about it. That is it. They haven't proved nothing. . . . As I mentioned earlier, he refused to look for evidence [before trial] that I told him was there. . . . [T]o put it simply, generally, he's made it like he passed his own judgment and he is just kicked back and relaxed and collecting his fee. . . . [Bodiker]'s lied to me. . . . He's refused to look for things I told him to.

(*Id*. at 2461-62.) The motion to withdraw as counsel was denied, however. (*Id*. at 2478-79.)

F. Edwards presented sparse mitigation evidence during the penalty phase.

Counsel did not hire a mitigation specialist to investigate and prepare for the penalty phase prior to trial as was the standard practice. When Bodiker and Edwards finally made an effort to hire a mitigation specialist after Keith had been found guilty, it was too late. No mitigation specialists were able to help. (Edwards Aff. ¶ 19, Ex. 1.)

Counsel had consulted with a psychologist before trial, but the consultation did not involve "much focus in terms of the preparation for mitigation." (State's Second Submission 352, Smalldon Depo.) The majority of the mitigation investigation that was done was done by Edwards

and his secretary, and was conducted only after Keith had been found guilty of aggravated murder. (Edwards Aff. ¶ 21, Ex. 1.)

Compounding counsel's failure to hire a mitigation specialist and investigate mitigation, the trial judge refused to appoint new counsel for the penalty phase and required Bodiker and Edwards to remain on the case. Because their relationship had deteriorated so badly, Keith was essentially representing himself at the penalty phase. Bodiker stated that he could not "assist or make appropriate arguments" on behalf of Keith. (Trial Tr. at 2454.) Bodiker anticipated "a point where we can't really do anything on his behalf." (*Id*. at 2467-68.)

Counsel's request to withdraw was denied, and his predictions of what would happen at the penalty phase held true. When Bodiker was asked about the relevance of certain witnesses, he responded: "I haven't the slightest idea your Honor." (*Id*. at 2659.) Keith called only a handful of witnesses, inmates and guards he knew from the Franklin County Jail. (*Id*. at 2866.)

However, Keith later indicated on the record that he wanted to call more mitigation witnesses during the penalty phase. (*Id*. at 2843.) Specifically, he noted that there were several people who would have testified as past employers. (*Id*. at 2843-44.) He stated that was not even aware that he could call a past employer as a mitigating witness. (*Id*.) "I didn't know that I would have them testify in some way that I wasn't made fully aware of the situation." (*Id*. at 2843.)

The record makes clear that Keith did not understand mitigation and that counsel had never explained the purpose of mitigation or what types of evidence could be presented at mitigation. He was not aware that there are mitigating factors proscribed by statute or that he could present any evidence in mitigation that he chose to present. (*Id*. at 2844-45.) Keith told the trial court, "if I had adequate counsel, like I asked for, they [would have] advised me these were mitigating factors." (*Id.* at 2845.) This was exactly the scenario Bodiker predicted prior to the penalty phase

when he told the judge that any decision Keith makes about mitgation "should be a decision that he makes after some advice. And obviously we are not able to give him that advice." (*Id*. at 2468.)

After the judge blocked the introduction of the additional mitigation witnesses Keith wanted to call, the prosecutor argued to the jury that "there has been no mitigation shown, none whatsoever." (*Id.* at 2781.)

The judge accepted the jury's recommendation of death and laid bare the defense team's failure to present adequate mitigation evidence: "There was precious little given to us in mitigation about the history, character, and background from which positive factors could be deduced." (*Id*. at 2866.)

G. Conclusion

There can be no public confidence in the convictions and death sentence arising from a trial that left Keith essentially unaided by counsel. The representation provided to Keith before and during this capital trial was nowhere near the high level of advocacy that is expected and required in capital cases. In this case it is clear that many critical mistakes were made that essentially left Keith abandoned by his counsel. The resulting conviction and sentence of death does not have the indicia of reliability that are required in such cases.

III. The legal system enacted to ensure heightened due process for capital defendants in Ohio failed in the case of Keith Henness.

The judicial process for sorting out the worst-of-the-worst murderers who are most deserving of society's ultimate punishment functions properly only when the most fundamental components of the adversary system, competent, and zealous representation by counsel and meaningful appellate review, are provided. Keith Henness received none of those.

At trial, Keith was represented by a dysfunctional team of attorneys who conducted no investigation, who refused to work together, and who fought with and refused to listen to Keith. Following his conviction and the imposition of a death sentence that inevitably resulted, the representation Keith received on appeal and in post-conviction was even worse.

Lead trial counsel David Bodiker hand-selected Keith's post-conviction counsel, David Graeff, who not only was a personal friend of Bodiker's but who also had no time or resources to conduct an adequate post-conviction investigation. Post-conviction counsel is charged with raising claims of ineffective-assistance-of-trial-counsel claims and supporting them with evidence. Being a friend of Bodiker's made calling him ineffective difficult, and having no time or resources to investigate made submitting the evidence to support ineffective-assistance-of-trial-counsel claims nearly impossible. Graeff was so taxed by this and other capital work that he failed to even notify Keith that he represented Keith in post-conviction before the petition was filed.

As a result of Graeff's failure, the merits of Keith's claims that trial counsel were ineffective could not be addressed by the courts because they were unsupported by any evidence. The Ohio courts dismissed Keith's appeals for procedural reasons and then denied him permission to further appeal those decisions. Graeff did such a poor job representing Keith in state court that it also foreclosed any opportunity for a merits review during his subsequent federal habeas appeal.

A. Keith's post-conviction petition was the only means available to raise issues concerning the representation that he received at trial.

As explained more fully in Section II of this Application, Keith's trial counsel, neglected virtually all of their duties to investigate. Edwards, co-counsel, conceded that "no trial-phase investigation was ever done." (Edwards Aff. ¶ 19, Ex. 1.) Counsel failed to do virtually any mitigation investigation before trial. Then once Keith was convicted, because the attorney-client relationship had become so toxic, any effort to conduct mitigation investigation was futile.

After Keith was convicted, Bodiker and Edwards filed a motion requesting leave to withdraw as counsel prior to the penalty phase, citing a toxic attorney-client relationship. (Motion by Counsel to Withdraw, Ex. 25.) At a hearing with the judge, Bodiker stated his belief that "we are not able to provide him with the legal assistance required by the 6th Amendment." (Trial Tr. 2451.) The defense team had reached "a point where we can't really do anything" on Keith's behalf, but the trial judge denied the request to withdraw. (*Id*. at 2467-68.) Given what transpired on the record during both phases of trial, there were fertile grounds for a post-conviction claim that defense counsel's representation at the guilt and penalty phases was ineffective under the Sixth Amendment.

To be successful under Ohio law, any challenge to defense counsel's failure to investigate requires the introduction of new evidence separate and distinct from what is contained in the trial record. Claims of ineffective assistance of trial counsel must be supported by new evidence that "must differ in a substantial way – in strength and subject matter – from the evidence" introduced at trial. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005).

The Supreme Court of Ohio has long held that a claim of ineffective assistance of trial counsel supported with new evidence "outside the record" is "not appropriately considered on direct appeal." *State v. Keith*, 79 Ohio St. 3d 514, 536 (1997). Instead, claims alleging the failures

of trial counsel supported by new evidence outside the trial record are "properly considered in a post-conviction proceeding." *State v. Scott*, 578 N.E.2d 841, 844 (Ohio 1989). Since claims of ineffective assistance of counsel cannot be considered on direct appeal because they must be supported by evidence outside the record, the Supreme Court of the United States has acknowledged that post-conviction review "will frequently be the only means through which an accused can effectuate the right to counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986).

The critical claims of ineffective assistance of trial counsel in Keith's case had to be investigated and supported by evidence outside the record, and then raised in a post-conviction petition. Yet in this case, post-conviction counsel failed to conduct any investigation and failed to support his petition with any evidence—waiving those claims and denying Keith any meaningful review of trial counsel's performance.

B. Keith's post-conviction counsel had a conflict that should have prevented him from representing Keith and he was denied sufficient resources or time to investigate and complete the petition.

Ordinarily, the Ohio Public Defender's Office (OPD) represents death row prisoners in post-conviction proceedings. That office assigns two attorneys who meet with the client, conduct an investigation, hire experts, and litigate issues of the denial of the effective assistance of trial counsel in the post-conviction proceedings. However, due to the unique circumstances of this case, Keith was denied the benefit of the OPD resources and experience, provided to virtually all Ohio death row inmates since 1981.

Shortly after Keith was sentenced to death, David Bodiker became the head of OPD. Because Bodiker had been trial counsel for Keith, the entire OPD was conflicted from Keith's case, because OPD was ethically conflicted from litigating claims of ineffective assistance of trial counsel against the head of the office. (Graeff Aff. ¶ 12, Ex. 22.) Thus, OPD and all of its

resources were not available to Keith for his post-conviction litigation. Instead of allowing the courts to assign unconflicted counsel to represent Keith, Bodiker privately pushed his close friend, David Graeff, to file a post-conviction petition for Keith, even though Graeff had not been appointed by any court to represent Keith in post-conviction. (*Id.* ¶ 12.) Graeff had also represented Keith in direct appeal. (*Id.* ¶ 9.)

1. David Graeff had a conflict and should not have represented Henness in his post-conviction litigation.

Graeff's representation of Keith in post-conviction may well have been the biggest impediment to its success. As noted above, following Keith's trial, Bodiker became the new director of OPD, which resulted in the entire office having a conflict preventing OPD from representing Keith in his post-conviction proceedings. This obvious conflict did not stop Bodiker from personally requesting his "good friend" David Graeff to represent Keith in his post-conviction litigation. (Graeff Aff. ¶¶ 3, 12, Ex. 22.) This presented a clear conflict that should have disqualified Graeff.

One of post-conviction counsel's primary obligations is to investigate and present claims demonstrating that the failures of trial counsel contributed to the conviction and sentence of death. Graeff needed to investigate and aggressively litigate claims that Bodiker's numerous failures contributed to the conviction and sentence of death. But because of his friendship with Bodiker, and being hand-selected by Bodiker, Graeff had divided loyalties, which should have prevented him from representing Keith.

Because of his long friendship with Bodiker, Graeff had, on several prior occasions, before and during the trial, heard Bodiker's biased and skewed view of the case directly from Bodiker himself. (*Id.* ¶¶ 3-8). This often occurred during chance encounters in the courthouse. Bodiker

had described to Graeff "serious clashes" and "shouting matches" between Bodiker and Henness that resulted in a "breakdown in the attorney-client relationship." (*Id*. ¶ 4.)

2. Graeff filed the post-conviction petition before he even told Keith that he was Keith's post-conviction counsel.

While it is impossible to know exactly how much his friendship with Bodiker and Bodiker's discussions about his dysfunctional relationship with Keith impacted Graeff's representation, it is clear that Graeff's investigation was virtually non-existent. After agreeing to represent Keith on his post-conviction petition, Graeff never once reached out to or met with Keith prior to filing the petition on Keith's behalf. (*Id.* ¶ 16 & Ex. A.) Graeff failed in his most basic duties on post-conviction—to independently investigate and aggressively litigate claims of the denial of the effective assistance of counsel.

Post-conviction counsel must independently conduct "an aggressive investigation of all aspects of the case" that changes "the overall picture." ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, (2003), Guideline 10.15.1 – Duties of Post-Conviction Counsel. To accomplish this goal, counsel must stay "in close contact with the client." *Id.*

It is clear from the record that the fractured attorney-client relationship between Keith and Bodiker was based on Keith's frustration with Bodiker due to his refusal to investigate the State's case. Without bothering to meet with Keith, Graeff could not have learned the complete context of what led to the fractured attorney-client relationship he was duty bound to investigate. Graeff also failed to retain an investigator or mitigation specialist, or any experts to conduct an investigation. Without conducting an independent investigation, Graeff could not have discovered the evidence that could have been presented had Bodiker investigated for both the trial and penalty phases.

Graeff's failure to meet with Keith also foreclosed any possibility of generating leads for records or witnesses that could have illustrated "a more thorough biography of the client than was known at the time of trial." *Id.* Anything Graeff presented in support of Keith, especially at the penalty phase, would have been more than the jury heard at trial. "The State submits to you there has been no mitigation shown, none whatsoever." (Trial Tr. 2781.) Given the clean slate Graeff had to work with, his failure to make the one hour drive to the Mansfield Correctional Institution to interview Keith is especially egregious.

Because Graeff had not told Keith he was representing him in post-conviction proceedings before filing the petition, much less discussed the petition with Keith, Keith was under the impression that no post-conviction counsel had been assigned. At the same time Graeff was submitting Keith's post-conviction petition, Keith—who had no idea Graeff was his post-conviction attorney—filed a *pro se* motion for Extension of Time to File for Post-Conviction Relief. (*Pro Se* Motion for Extension of Time, Ex. 26.) In this motion, Keith stated that he is "not even sure if [he] will have counsel for [his] petition." (*Id.* ¶ 3.) Keith asked the court, "[i]n the interests of fairness and justice," to grant him time to "adequately petition" the court for post-conviction relief in the first instance. (*Id.* ¶ 6.) Further, Keith asked the court "to appoint new counsel to aid in filing a meaningful petition for relief." (*Id.*) This request turned out to be moot. Keith had no idea that Graeff had filed a petition on his behalf as he had had no communication from Graeff.

3. Graeff had neither the time nor resources to conduct an adequate investigation.

In addition to his divided loyalties and his failure to meet with Keith, Graeff had neither the resources nor the time to investigate and prepare and litigate a petition for post-conviction relief on behalf of Keith.

Graeff did not have the resources of OPD. In addition to counsel, OPD assigns investigators and paralegals to the post-conviction appeal and also provides funds to retain experts that would otherwise be unavailable. No investigators, paralegals, or expert assistance were available to Graeff. Requests for such assistance are universally denied in the post-conviction trial courts of Ohio, but Graeff did not even make such a request. OPD did not provide any of these resources to Graeff either. As a result, Graeff acknowledged that he was unable to "conduct the type of exhaustive investigation" needed to provide factual support for the claims outlined in Keith's post-conviction petition. (Graeff Aff. ¶ 19(b), Ex. 22.)

Even if Graeff had made requests for funding and resources and those requests had been granted, he would still have been ill prepared to file a post-conviction petition due to time constraints imposed by a newly enacted statute of limitations. By the time Graeff agreed to serve as Keith's post-conviction counsel, only three months remained before the post-conviction petition was due:

> Time was an issue. Because the filing deadline was newly set by legislation there was a time crunch for inmates across the State on getting Post-Conviction Petitions filed before the new deadline. Because there was an absolute deadline imposed by the Ohio legislature, there was no possibility of getting additional time to investigate and prepare the Post-Conviction Petition. In addition, I had a very short time to investigate facts outside the record. I was working on his Petition, and, as noted, was already investigating considerable time and energy on Post-Conviction Petitions for other death row inmates, plus others involved in my private practice.

(*Id*. ¶ 19(a).)

By statute, death row inmates convicted before that legislation was passed had until September 21, 1995 (one year), to file a post-conviction petition. But Graeff was not approached by Bodiker to work on Keith's post-conviction until June 1995. (*Id.* ¶ 13.) Graeff also had no

resources and had other capital post-conviction petitions to prepare in the "very short time" period. (*Id.* ¶ 19(a).)

This combination of no resources, no assistance, no money, no communication with the client, and no time to investigate and prepare a petition created a disaster, which resulted in the default of Keith's extensive claims related to trial counsel's failure to investigate his case.

C. The post-conviction petition filed on Keith's behalf failed to raise or support with evidence the many claims of the denial of the effective assistance of trial counsel.

As noted earlier, claims of ineffective assistance of trial counsel raised in post-conviction must be supported by the introduction of new evidence separate and distinct from what is contained in the trial record.

The petition Graeff filed on Keith's behalf was bare-boned and not supported by adequate evidence outside the record. (Pet. to Vacate or Set Aside Judgment, Ex. 27.) The petition did not satisfy the requirements to prove the claims or to preserve the claims for later federal court review. All twenty-four claims listed in the petition lacked necessary detail and evidentiary support from outside the trial record. (Henness Judicial Decisions 57.) Many of the claims were simply boilerplate barely over a page in length that were either inapplicable to Keith or not accompanied by any supporting evidence. (Pet. to Vacate or Set Aside Judgment, Ex. 27.)

The petition, as a whole, was untethered to any evidence outside the record and not tailored in any way to the most obvious and pressing concerns from his trial, namely the failure of his counsel to investigate. The claims in the petition were simply not supported by evidence outside the record— which had the same effect as not raising the claim at all. (Henness Judicial Decisions 57.)

The claim of ineffective assistance of counsel in the petition broadly argued that "counsels' [sic] performance was deficient due to omissions and errors during the course of the trial, including pre-trial proceedings." (Pet. to Vacate or Set Aside Judgment ¶ 167, Ex. 27.)

As with the other claims raised, no evidence outside of the trial record was cited in support. (*Id.* ¶¶ 166-76.) The petition merely included the statement that support for the skeletal claim would be "identified and noted at the evidentiary hearing." (*Id.* ¶ 172.) In order to get an evidentiary hearing under Ohio law, sufficient facts outside the record must be submitted *with the petition* to justify an evidentiary hearing. Graeff's bald statement added nothing. The court noted that not even a sworn affidavit from Keith about counsel's failures, or anything else, was attached. (Henness Judicial Decisions 57.) Of course, Graeff did not attach such an easily obtainable affidavit because he had not spoken to Keith once about the petition before it was filed.

D. The petition filed on Keith's behalf squandered his only opportunity to litigate his trial counsel's failures in state court. Not only did this make the petition subject to dismissal, without a decision on the merits, it also precluded any opportunity of subsequent appellate review.

Filing a boilerplate post-conviction petition with promises of factual support at an evidentiary hearing runs counter to the most basic requirements of post-conviction litigation. Even when it *is* presented, "[e]vidence outside the record itself will not guarantee a right to an evidentiary hearing on a petition for postconviction relief." *State v. Combs*, 100 Ohio App. 3d 90 (1994). Therefore, it was especially irresponsible to rely upon a later evidentiary hearing, without first attempting to satisfy the requirements to have a chance at getting an evidentiary hearing.

It took the State only two pages to respond to the entire petition. (State Memo. Contra, Ex. 28.) The claims raised on Keith' behalf were so weak and unsupported by any evidence that the State did not need to respond to the individual claims. The State argued that because the claims raised were not properly supported by evidence, a review on the merits was unnecessary. (*Id.*)

The trial court agreed with the State and denied post-conviction relief in a cursory four-page opinion without a merits review on any of Keith's claims that he was denied the effective assistance of trial counsel. (Henness Judicial Decisions 55-58.) Keith was faulted for not submitting "sufficient evidentiary materials regarding his claims. Defendant-petitioner has not even, at a minimum, submitted his own sworn affidavit." (*Id.* at 57.)

In denying Henness's petition, the trial court concluded that "it is not necessary for the Court to consider the merits of the defendant-petitioner's ineffective assistance claim, because the claim of error is not based on evidence outside the record." (*Id.*) The trial court held that Keith did not present any "evidence outside of the record that should be considered by the Court for a fair determination of the issue." (*Id.*)

Whatever claims of ineffective assistance of trial counsel that Keith wanted to raise were forever lost because his post-conviction counsel—the "good friend" of lead trial counsel—was denied adequate resources to investigate and litigate the petition and thus failed to support his claims with any evidence in violation of the most basic requirements for post-conviction litigation.

E. The long-term consequences of postconviction counsel's failure: no merits review of claims of ineffective assistance of trial counsel in state or federal court.

1. State court – no merits review

Post-conviction counsel are required to "assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation." ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* (2003), Guideline 10.15.1 – Duties of Post-Conviction Counsel. Therefore, counsel "should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review." *Id.* Keith's post-conviction counsel was duty bound to ensure that legal issues were properly raised and safeguarded for future litigation. ("Because of the possibility that

the client will be sentenced [or put] to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case." ABA Guideline 10.8, Commentary.) Graeff patently failed to do so, and Keith's ineffective assistance of trial counsel claims were procedurally doomed from that point on.

Keith appealed the curt dismissal of his Petition for Post-conviction Relief to the Tenth District Court of Appeals. In response, the State argued that Keith failed to introduce any "significant new evidence that was unknown" during the trial. (Brief of Plaintiff-Appellee at 4, Ex. 29.) The State also pointed out that a "petitioner may not use a petition as a device to discover something to support the petition." (*Id.* at 5.) The Court of Appeals agreed. Although the appellate court did review several arguments against counsel for failing to object, there was no merits review of their failure to investigate either phase of trial. (Henness Judicial Decisions 64.) In fact, the word "investigate" does not appear in the opinion. (Henness Judicial Decisions 59-65 (10th District Court of Appeals Op.).)

Following the Tenth District Court of Appeals' affirmance of the trial court's dismissal of his petition without a merits review of Keith's ineffective assistance of trial counsel claims, Keith filed a discretionary appeal with the Ohio Supreme Court. Again, the State argued that Keith's claims against his trial counsel were not deserving of a merits review because no new evidence was introduced "that was unknown during trial." (Memo. Opposing Jurisdiction at 5, Ex. 30.) The Ohio Supreme Court declined to accept the appeal, foreclosing Keith's final chance to receive a merits review of his ineffective assistance of trial counsel claims in state court. (Henness Judicial Decisions 66 (Ohio Sup. Ct. Entry).)

2. Federal court – no merits review

Keith then filed a petition for writ of habeas corpus in federal court. The habeas petition included claims that Keith had been denied the effective assistance of trial counsel by trial

counsel's refusal and failure to investigate and challenge the State's case at both the trial and penalty phase. (Pet. for Writ of Habeas Corpus, Ex. 31.) In response, the State argued that Keith's claim of ineffective assistance of trial counsel for failing to investigate at the guilt phase was procedurally defaulted and undeserving of a merits review. (Warden's Am. Return of Writ at 16, 27, 30, 33, Ex. 32.) The district court agreed, concluding that Keith procedurally defaulted his claim of counsel's failure to investigate guilt-phase issues. (Henness Judicial Decisions 84.) Keith's habeas counsel did not appeal that ruling. Therefore, there was no merits review on that claim in the federal appellate court.

The federal courts reviewed a limited ineffective-assistance-of-counsel claim for the failures in preparing, investigating, and presenting mitigation. The federal district court reviewed the state direct-appeal claim based only on evidence in the trial record that a conflict had been created by the rift between trial counsel and Keith. (*Id.* at 91.) That claim was narrower than one that could have been raised in post-conviction with outside evidence of trial counsel's failure to investigate mitigation, such as evidence of mitigation evidence that could have been presented at trial but was not. The federal appeals court faulted Keith for failing to provide such evidence, when it denied this claim. (Henness Judicial Decisions at 144.) The court also faulted Keith for constricting what counsel could present at mitigation (*id.*), but in this limited claim, Keith was not able to present evidence that he did not understand what mitigation was because of his fractured relationship with counsel and was not able to show the courts what mitigation evidence he would have presented, had he understood what mitigation was at trial.

3. No merits review in federal court after *Martinez v. Ryan.*

Almost twenty years after Keith was convicted and sentenced to death, the Capital Habeas Unit of the Federal Public Defender's Office was appointed. Keith finally had representation that consisted of attorneys, investigators, paralegals, and access to experts to fully investigate Keith's

case. However, a review of a case after Keith had lost in the federal district court and the Sixth Circuit, presents an assortment of challenges, many that cannot be overcome.

First, conducting a complete investigation twenty years after the crime is very difficult. In this case, several key witnesses were deceased. Roland Fair had died. Sherry Williamson had died. David Bodiker had died. Other witnesses have faded memories. Records had been destroyed. Blood evidence had been destroyed. (Henness Judicial Decisions 100.) Counsel at this stage has no appeal of right in any court, much less any right to discovery.

Second, and even more problematic, all of Keith's issues had either been poorly litigated or defaulted. Federal courts are more interested in finality than substance. Compounding these difficulties was the fact that any new claims brought in court would be subjected to the highest and most restrictive standards under the law.

Nevertheless, in March 2013, Keith filed a motion in the district court to reopen his habeas case. (Motion for Relief from Judgment, Ex. 33.) This motion asked the district court to grant Keith relief from its previous judgment denying his habeas petition seeking a merits review of his claim of ineffective assistance of counsel for failing to investigate guilt-phase issues, one of the claims that the district court had previously dismissed as defaulted. This motion was based on new Supreme Court caselaw that allowed habeas petitioners to have claims heard even though those claims had been defaulted by post-conviction counsel.

From 2012 on, prisoners who filed new habeas petitions have been able to overcome default by demonstrating post-conviction counsel were ineffective. However, because Keith's case had already been decided when this new rule was established, he was required to show "extraordinary circumstances," beyond a change in law, to reopen his case and have the new rule applied. (Henness Judicial Decisions 157-58, 163.)

Despite finding that Keith indeed had a substantial ineffective-assistance-of-trial-counsel claim, the district court nonetheless denied Keith's motion to reopen his habeas case.

> [T]he Court cannot say that Henness' ineffective assistance of trial counsel claim is insubstantial or has no merit, particularly because Bodiker's lack of investigation and prevention of any investigation by Edwards is documented.

(Henness Judicial Decisions 155.)

The district court nevertheless concluded that the new, investigated, and supported claim was different from the claim previously raised in post-conviction, and therefore was not exhausted and would not be decided on the merits—again declining to consider Keith's ineffective-assistance-of-trial-counsel claim on the merits. (Henness Judicial Decisions 158.)

On appeal, the federal appellate court declined to reopen the case, determining that Keith did not establish the extraordinary circumstances needed. (*Id.* at 166.) The court, however recognized that

> Henness has presented evidence showing that his counsel conducted a truncated and incomplete investigation into his case. . . . [C]ounsel did little investigation or preparation for his case. Additionally, their relationship with Henness, as well as between themselves, was filled with difficulties. It is undisputed that Bodiker was lead counsel, and Edwards avers that Bodiker prevented him from performing any significant work on the case until shortly before trial. . . . [D]espite Edwards's suggestion, Bodiker refused to hire an investigator for the case.

(*Id.* at 166.)

F. The judicial process failed Keith.

As the storied history of Keith's case demonstrates, failures of counsel and judicial rules of default prevented him from having a full, fair trial and appeals. Because death is the ultimate punishment, it should be carried out only when the defendant is afforded a full and fair opportunity to defend himself. The death penalty should not be carried out when the condemned does not

receive his due process. Keith never got to fully and fairly present his defense and therefore he should not be executed.

IV. There is not overwhelming evidence of guilt. Lingering doubt exists as to who killed Richard Myers. Given this lack of absolute certainty, a positive clemency recommendation is warranted.

There is no excuse for defense counsel's failure to investigate the State's case or Keith's defense or to prepare for trial. Likewise, there is no excuse for ignoring Keith for months at a time with the expectation that Keith would plead guilty when no investigation had been conducted into the State's case. Given Keith's persistent requests that counsel investigate the case and his persistent resolve to go to trial, the failure to conduct any investigation by the defense team is especially egregious. Keith has always maintained that he did not kill or kidnap Richard Myers. Had defense counsel conducted an investigation, they would have obtained evidence undermining the State's star witnesses and also learned that evidence from the crime scene was inconsistent with the State's theory of the case.

Defense counsel's failures were compounded by errors committed by the prosecutors. Prior to trial, the State was in possession of several police reports favorable to Keith's defense that were never turned over to the defense team prior to trial. Then on appeal, evidence from the crime scene that Keith wanted tested was destroyed at the direction of the lead investigator before the defense was able to test that evidence.

Based on these factors, Keith was deprived of his right to a reliable adversarial process. The systemic breakdowns here are especially significant because this is not a case with overwhelming evidence of guilt. Lingering doubt exists as to who shot Richard Myers. The State's evidence against Keith consisted of the word of two drug addicts, Tabatha Henness and Roland Fair, each of whom were implicated in the murders.

Keith, Tabatha, and Fair were all indicted for involvement in Myers's death. All three admitted that they were involved in the theft of Myers's checks and credit cards but all denied

committing the murder. Keith was sentenced to death, but Tabatha and Fair received generous plea agreements for their testimony against Keith and served minimal sentences.

Because there exists lingering doubt as to who killed Richard Myers, a positive clemency recommendation is warranted to permit Keith Henness to demonstrate his innocence of the aggravated murder charge.

A. The State's theory of the crime rested heavily on the testimony of Tabatha Henness and Roland Fair.

After the body of Richard Myers was discovered, the police investigation into his death soon centered on Keith Henness, his wife Tabatha Henness, and Tabatha's longtime friend, Roland Fair. (Trial Tr. 1954-56.) The police had learned that the three had been driving around in Myers's car in the days following his disappearance, forging and cashing Myers's checks at local banks and retail stores, as well as making purchases and cash advances with his credit cards.

When Tabatha and Fair were brought in for questioning about Myers's death, they both admitted that they had been involved in illegally using Myers's checks and credit cards, but they denied being involved in his death. Instead, Tabatha and Fair accused Keith of killing Myers. (*Id*. at 1318-20.) They claimed they were not present for the killing but that Keith told them of his involvement after the fact. (*Id*. at 1542-43.)

Following his arrest, Keith, like Tabatha and Fair, admitted to the police that he was involved in the illegal transactions with Myers's checks and credit cards, but insisted that he had not killed his friend, Richard Myers. (*Id*. at 1329-30.)

Tabatha's testimony was critical to the State's case against Keith. At trial, Tabatha testified that on the day Myers was murdered, she answered a phone call and heard a man on other end ask for Keith. When she asked who was calling, the man said "this is Dick." (*Id*. at 1516.) Shortly after the call, a car driven by a man arrived at their house and Tabatha saw Keith get in the car

with him. Tabatha testified that around two hours after Keith left with Myers, he returned home alone and was in possession of Myers's car, his checks, and his credit cards. (*Id*. at 1524.)

Tabatha further testified that she and Keith were then joined by Fair, and the three of them went to multiple banks to cash checks and get cash advances on Myers's credit cards. Tabatha testified that they also bought merchandise and sold it for drugs. (*Id*. at 1526-32.) Eventually, they also sold Myers's car to a teenage drug dealer. (*Id.* at 1540.)

According to Tabatha, during the time they were driving Myers's car and cashing his checks, Keith claimed Myers was in a hotel room with a prostitute. Eventually Keith's story changed. Tabatha testified that Keith confessed and said he shot Myers in self-defense after a gun was pulled on him. Keith said he dropped the body of Myers in a stone quarry and it would never be found.

In addition to placing Keith with Myers immediately before his death, Tabatha also claimed to have seen Keith in possession of two butterfly knives, a gun, and a wedding band that did not belong to him. Tabatha testified that after returning home in Myers's car, Keith washed a knife in a sink and admitted that the wedding ring came from Myers. According to Tabatha, Keith was very scared and paranoid following the murder. (*Id*. at 1557.)

Following her testimony on direct examination and before she could be cross-examined, Tabatha disappeared for six days. (*Id*. at 1572-73.) She had first gone to visit one friend, and then to "do" four or five bags of heroin with another friend. (*Id*. at 1652-53.) The next day she left for Texas, where she was living with another male companion. (*Id*. at 1621-23.) Her disappearance nearly caused a mistrial, but prosecutors were eventually able to find her and they forced her to come back. (*Id*. at 1624.) Tabatha returned to Ohio, reluctantly. (*Id.*) State officials had to guard her hotel room door to make sure she showed up for court. (*Id*. at 1574.)

The only other evidence linking Keith to the aggravated murder came from Fair. Fair testified that Keith and Tabatha arrived at his apartment driving Myers's car. Fair testified that Keith asked him if he would cash the checks in Keith's possession. Fair testified that Keith told him the owner of the car and credit cards was drunk in a hotel room with prostitutes. Eventually Keith told Fair a different story. According to Fair, Keith never actually said he killed Myers, but did make the remark, "I did not want to do it, he made me do it." (*Id*. at 1715.) Fair also testified that Keith had tried to give him a gold wedding band but he refused it. (*Id*. at 1722.) In addition, Fair said that he saw Keith soaking a knife. (*Id*. at 1700-01.)

The testimony of Tabatha and Fair was critical to the State's case at trial. The key facts the State used to try to show that Keith killed Richard Myers all came from Tabatha or Fair.

It is, however, obvious both witnesses had substantial credibility issues. Both were admitted drug addicts, using crack at the time of the crime; both were closely involved in the crime; and both received substantially reduced sentences for their testimony for the State against Keith.

Around the time of the murder, Tabatha estimated that she was spending $500 a day on crack, heroin, and cocaine. After she was arrested, one of the first questions that Tabatha asked investigators was "If I tell on my husband can I get out of this?" (*Id*. at 1646.) Fair was another crack addict and was a close friend of Tabatha's. He had a long list of his own felony convictions dating back to 1949. (Fair Accurint Report, Ex. 34; Criminal Report, Ex. 35; FBI Documents, Ex. 36.)

When questioned on redirect by the prosecutors about how much he really knew about the crime, Fair admitted that he was no longer certain of anything: "I don't know anything about any killing. Who killed what, I didn't know anything about it. What was used or anything." (Trial Tr. 1825.)

No physical evidence tied Keith to the shooting. Fingerprints and blood samples taken from the crime scene did not match Keith. (*Id*. at 1976-78.) The murder weapon was never found. (*Id*. at 2009.) There were no eyewitnesses. Even though he had a record for thefts and other financial crimes, Keith was 30 years old at the time of trial and had no prior convictions for crimes of violence. The only evidence presented that it was Keith, not Tabatha or Fair, who murdered Richard Myers was the testimony of Tabatha and Fair themselves, and they had agreed to testify in exchange for substantial leniency in sentencing. And Tabatha disappeared for a week before she could be cross-examined, and Fair eventually testified that he was uncertain what happened to Myers. Given these factors, an aggravated murder conviction was far from inevitable.

B. Tabatha and Fair received very lenient sentences, receiving sentences with little to no incarceration for their participation in the crime.

Tabatha pleaded guilty to three counts of forgery and one count of receiving stolen property in the Myers case. (Trial Tr. at 1659.) She was sentenced to one year in prison but was released after only serving six months. (*Id*.) In addition, she was facing a sentence of 5 to 10½ years in prison for unrelated crimes, including the theft of two guns, two counts of weapons under disability, and escape from custody. (*Id*. at 1660-65.) She was sentenced on those counts after testifying against Keith and received a sentence of only six months in prison to be served concurrently with the other one-year sentence. (*Id*. at 1666-67.)

Fair was a longtime friend of Tabatha's and knew her through the drug and prostitution circles in which they were both active. Following Fair's arrest, he was held in the county jail until he testified before the grand jury. Despite Keith's efforts to obtain Fair's grand jury testimony prior to trial, the State refused to turn it over. To this date, Keith's counsel has never seen Fair's grand jury testimony.

Fair had a lengthy criminal record dating back over 40 years to 1949, including a long list of convictions for drug and theft offenses, for which he had been imprisoned. (Fair Accurint Report, Ex. 34; Criminal Report, Ex. 35; FBI Documents, Ex. 36.) Prior to these charges, Fair had also been charged with many other serious and violent felonies such as Robbery (1952), Robbery (1954), Robbery (1959), Robbery (1962), Breaking and Entering (1964), Breaking and Entering (1965), Burglary (1972), Unlawful Possession of a Handgun (1974), Breaking and Entering (1975), Aggravated Assault (1980), and Attempted Murder (1982). (*Id*.) Given his litany of serious prior felonies and his involvement in this crime, as well as his illegal drug use, Fair had a motivation to tell police what they wanted to hear and point his finger at Keith. That way Fair could get leniency and avoid further prison time.

Fair was charged with five counts of forgery for his involvement in Myers's death, but he pleaded guilty to only two and, despite a lengthy criminal record that included convictions for violent acts, received a one-year suspended sentence. (*Id.* at 1320, 1692.)

Keith, on the other hand, was facing a ten-count indictment, including three counts of aggravated murder, with two separate capital specifications, alleging that he committed the aggravated murder during (1) an aggravated robbery and (2) a kidnapping. Keith was also charged with a non-capital firearm specifications, possessing a gun during an aggravated robbery and inflicting (or attempting to inflict) serious physical harm with kidnapping to facilitate the aggravated robbery. (Henness Indictment, Ex. 37.) In addition, Keith was charged with forging three separate checks and a VISA sales slip, and with illegally possessing a firearm as a convicted felon. (*Id.*)

The State entered into discussions with defense counsel concerning a plea of guilty in exchange for a sentence of life in prison with parole eligibility after 23 years or less. (State's

Second Submission 43; Edwards Aff. ¶ 14, Ex. 1.) Keith pleaded guilty to the four forgery counts before trial without any agreement for leniency from the State in exchange. (Trial Tr. 2172-73.) Keith waived a jury trial on the charge of illegally possessing a firearm as a convicted felon, and was later tried and convicted by the court on this count. Ultimately, a plea agreement on the other charges never materialized because of the breakdown in the attorney-client relationship that caused Keith to reject any advice from counsel. It was clear at trial that counsel had not done any investigation into the State's case or developed any defenses. Keith was convicted and sentenced to death.

The State's theory at trial was that Keith acted alone in killing Myers and that Tabatha and Fair only participated in the forgeries and credit card theft after the murder. Because of their supposedly lesser roles, the State justified the enormous sentencing disparities between Keith and his two codefendants. However, the State's only evidence in support of its theory that Keith acted alone in kidnapping and killing Myers came from Tabatha and Fair themselves—and they both received substantial sentence reductions in exchange for their testimony.

C. Tabatha was a violent, unstable person, with the means and motive to kill Myers, yet was given a deal by the State, and ignored in the defense's investigation.

Had counsel examined Tabatha's background, they would have discovered that Tabatha was violent and mentally unstable, with little allegiance to Keith. She also had her own reason for wanting Myers dead: Myers was going to help Keith have Tabatha committed in a mental hospital in West Virginia to overcome her addictions. Tabatha was not only a key witness against Keith, she was also the other prime suspect for Myers's murder.

1. Tabatha was often in possession of guns and knives.

Tabatha was a prostitute and a stripper with a $400-to-$500-a-day crack habit. She had a litany of convictions for receiving stolen property and forgery, among other crimes. (Trial Tr.

1656-66.) Her only source of income was prostitution. (Hilliard Aff. ¶ 3, Ex. 40; Thomas Aff. ¶ 2, Ex. 38.) Tabatha's friend and roommate Theresa Thomas recalled that due to her dangerous lifestyle, Tabatha "regularly carried around a gun." (Thomas Aff. ¶ 3, Ex.38.) Tabatha also carried around a knife and had previously confronted Thomas with it. (*Id.*) Michael Parsons, Keith's stepbrother who had lived with Keith and Tabatha for several months, similarly recalled that "Tabatha always had a gun on her." (M. Parsons Aff. ¶ 9, Ex. 39.) Sherry Williamson, a woman Tabatha had a romantic relationship with, also recalled that Tabatha "always" carried a gun and also regularly carried a butterfly knife. (State's Second Submission 468.)

2. Tabatha was violent and mentally unstable.

Tabatha was described by another acquaintance as "erratic, violent and mentally unstable." (Hilliard Aff. ¶ 4, Ex. 40.) Tabatha's "entire life revolved around crack and heroin and stealing money from people she met on the street." (*Id.* ¶ 3.) "[I]t was not beyond [Tabatha] to get violent and start a fight. Nothing would surprise me about Tabatha given her character." (*Id.* ¶ 6.) Theresa Thomas described Tabatha's personality as "violent, unstable, and paranoid." (Thomas Aff. ¶ 3, Ex. 38.) She also recalled Tabatha telling her a story about stabbing another prostitute. (*Id.*) Even Tabatha's son, Sean, recalled seeing his mother display a "violent temper" when intoxicated. (S. Keith Aff. ¶ 8, Ex. 41.)

Sherry Williamson observed firsthand that Tabatha had a fierce and violent temper. (State's Second Submission 464.) Tabatha once lunged over a couch with a knife and tried to cut Williamson's throat. (*Id.*) "She was going to cut me up." (*Id.*) Tabatha "would just become violent when she didn't get her way." (*Id.* at 465.) Williamson said Tabatha would often "talk shit," wave her gun around, and "pistol-whip" the people she had issues with. (*Id.* at 468.)

Tabatha was violent towards her own self too. She had a history of suicide attempts and hospitalizations for mental health issues, beginning at age 15. (State's Second Submission 417-

19 (Boyd Depo.).) By 1993, she had a half-dozen reported suicide attempts and several hospitalizations at psychiatric treatment centers. (*Id.*) When asked why she attempted suicide, Tabatha stated that she "didn't care anything about living." (*Id.* at 434.)

Tabatha had a motive for killing Richard Myers, and Keith had a reason to want him alive: Myers was going to help Keith have Tabatha committed for mental health treatment and drug rehabilitation—which, according to Fair, Tabatha knew about. (Trial Tr. 1810.) Trial counsel failed to investigate her mental health background before trial, despite the fact that Keith explained his wife's mental and emotional problems to counsel. (State's Second Submission 5.)

Tabatha was an unstable, violent person who had motive to kill Myers. Thus, had this evidence been investigated and had it been presented at trial, it would have countered the picture of Tabatha that the State presented—that she was a troubled young woman who was married to the wrong guy. The jury could have determined that Tabatha was the one who caused the death of Richard Myers death and rejected the aggravated murder charges against Keith.

3. Tabatha confessed to multiple people that she was involved in the murder.

Even a full understanding of Tabatha's troubled and violent background does not necessarily demonstrate that Tabatha or Fair played a more significant role in the death of Richard Myers than either of them claims. Tabatha's erratic and unstable personality, possession of deadly weapons, and history of violence becomes relevant to the question of who killed Myers when considered along with her own motive to eliminate Myers, her own actions, and her inculpatory statements about the murder.

Tabatha made multiple incriminating statements to friends and family that differed substantially from her testimony at trial. According to a police report, shortly after Myers's death, Tabatha told her mother that "she had been involved in a homicide" and that she "had witnessed the murder." (State's First Submission 174-78.)

Sherry Williamson was interviewed under oath. She explained that she met Tabatha while in prison in 1992 and their romantic relationship lasted less than a year. (State's Second Submission 478, 481-83.) During that year, contrary to Tabatha's testimony at trial, Tabatha admitted to Williamson that she was involved in the killing of Myers and that Keith "was taking the fall." (*Id.* at 469.) According to Williamson, "[Tabatha] told me too many details for her not to be there." (*Id*. at 451-52.) Williamson recalled that "the higher [Tabatha] got, the more she talked about her involvement." (*Id.* at 469.) Tabatha told Williamson that "she knew the person who died. She knew what he had [money and credit cards]" and "bragged about it." (*Id.* at 486-87.) Tabatha was afraid to go to prison for Myers's murder and asked Williamson to help her come up with an alibi. (*Id.* at 489.)

Williamson also knew about Tabatha's relationship with Robert Curtis, the man who testified at trial to support Tabatha's testimony against Keith. According to Williamson, Curtis would defend Tabatha "on anything, didn't matter how wrong she was. He didn't care what she did. Robert Curtis would walk to hell for her." (*Id.* at 475) Williamson also revealed that in exchange for protection from Curtis, Tabatha would do sexual favors for him. (*Id.*)

Williamson did not know Keith and therefore did not have any strong connection to or motive to help Keith. The absence of any loyalty to or ties of any kind to Keith enhances the credibility of her sworn testimony.

Theresa Thomas also recalled being interviewed by the police following the arrests of Tabatha and Keith. Thomas told the police "that Tabatha Henness was definitely involved in the murder and if anyone did something like this, it would be her." (Thomas Aff. ¶ 14, Ex. 38.) The first time Thomas saw the car that belonged to Richard Myers, "Tabatha was driving it alone." (*Id.* ¶ 10.) Prior to their arrest, Thomas was driving in Richard Myers's car with Tabatha and

remembered that she "stopped at a gas station, took out a bag, and threw the bag and its contents into a dumpster." (*Id.* ¶ 11.) Tabatha also told Thomas that she took "a big chunk" out of Richard Myers. (*Id.* ¶ 12.) Thomas had the impression that the police did not like her because she was hurting their case. (*Id.* ¶ 15.)

A few months after Tabatha and Keith were arrested, Theresa Thomas ran into Tabatha in Columbus. Tabatha was out on bond. Tabatha told Thomas that she intended only to rob Richard Myers, but "things went bad." (*Id*. ¶ 16.) Thomas never told the police about this conversation because it was clear to her "by this point that the police were only concerned with Keith so I thought it would be a waste of time trying to talk with them about Tabatha again." (*Id*.)

Sean Keith, the son of Tabatha and Keith, also has explained that he believed his mother was involved. A school counselor who had interviewed Sean explained in a letter to Keith: "Sean told me that his birth mother's false testimony resulted in your receiving the death penalty, and he feels a responsibility to get her to change her story. It is hurtful to Sean to be put in this position because he is only eleven years old." (Letter from Marthanne Manion, MA to W.K. Henness, Ex. 42.) Growing up, Sean often asked his uncle, Gary Keith (Tabatha's brother), about why his father was on death row: "When I asked Gary about my father and what had happened, he told me that my mother was not telling the whole truth." (S. Keith Decl. ¶ 4, Ex. 41.) Sean tried to speak directly to Tabatha but it was "frustrating because [his] mother never told [him] the same story twice. [He] always thought that that if her story was always changing, she was probably lying to [him]." (*Id.* ¶ 5.) Tabatha explained to Sean that if she had not testified against Keith, she would have been charged with murder herself. (*Id.* ¶ 9.)

D. Defense counsel never conducted any investigation into the crime-scene evidence that was inconsistent with the State's theory.

In addition to raising issues concerning the involvement of Tabatha and Fair in the actual murder, an investigation into the crime scene would have bolstered Keith's defense. As counsel acknowledged in closing argument: "everything in [the State's] case is contingent upon their [(the prosecutors')] assertion that somehow [Myers is] tied up beforehand." (Trial Tr. 2323.) Nonetheless, no one ever investigated the crime-scene evidence.

Had such an investigation been conducted, the defense would have discovered that the crime-scene evidence was inconsistent with the State's theory of the case. Specifically, defense counsel would have been able to explain to the jury that the body of Richard Myers was tied up, and the incision made to the neck, after death. (Rini Aff. ¶¶ 6-7, 9, Ex. 43.) Significantly, Rini concluded that Myers's hands were bound and head gagged *after* death. (*Id.*) This expert evidence would have undermined the prosecution's theory of the murder and supported Keith's version that Myers was dead after Tabatha and the Cubans shot him and that the hands and feet were tied later.

E. Police reports compiled during the investigation demonstrate that there is an absence of absolute certainty that Keith Henness murdered Richard Myers.

Informational summary reports compiled by the Columbus Police Department during their investigation of the murder of Richard Myers contained evidence favorable to Keith and supported his claims that others murdered Myers. As these informational summary reports were never disclosed, defense counsel, the trial judge, and the jury never knew about this information that would have enabled the defense to undermine the State's theory.

These include:

- Informational Summary 21 (State's First Submission 108-09)–Report indicates that Keith was helping Theresa Thomas and her husband move to a different location only about two to three weeks before the murder of Richard Myers. Tabatha Henness was

not with them at the time. According to the report, Tabatha was either in New York or Detroit, with some people, possibly Cubans, trying to buy large amounts of cocaine.

- Informational Summary 31 (State's First Submission 174-78)–Report indicates that Tabatha Henness told her mother that "she had been involved in a homicide" and that she "had witnessed the murder." Tabatha Henness also told Connie Parsons (Keith's mother) that she "knew someone had been killed because [Tabatha] witnessed the murder." Keith also told his mother in a call that he had information about the murder but was afraid his "family will be hurt" if he provides it.

- Informational Summary 36 (Ex. 44 (Ex. 3 to Bodiker Depo.))–Report indicates that Keith's mother received a threatening letter dated May 16, 1992 from Akron, Ohio, which said "tell your son we are serious."

- Informational Summary 37 (Ex. 45 (Ex. 4 to Bodiker Depo.))–Report indicates that a copy of the letter and envelope discussed in Informational Summary 36 along with a notation that both items had been analyzed and neither Keith's fingerprints or handwriting were present.

- Informational Summary 39 (State's Second Submission 232)–Report indicates that Keith had contacted a narcotics agent on March 7, 1992, to get his help in getting Tabatha Henness away from a man (Ivan Cabera) for whom she was running large quantities of drugs.

In their depositions in federal court, Bodiker and Edwards testified that the defense had never received these Informational Summaries from the State. (State's Second Submission 78-89, 195-97, 205-06.) These Informational Summaries would have provided the defense valuable ammunition to undermine the credibility of the State's witnesses, shift the motive and blame away from Keith, and establish reasonable doubt about who actually killed Richard Myers. Both Edwards and Bodiker explained later that the suppressed evidence would have been helpful in developing their defense. Bodiker noted that the information contained in the summaries provided support for a "possible alternative explanation as to what happened." (State's Second Submission 87.) Edwards explained that Informational Summary 31 "would have been extremely important" because, if it had been provided to the defense, it would have revealed "grounds [for] cross-examining Tabatha" and would have enabled the defense to "probably call[] Connie Parsons as a

witness to impeach [Tabatha]." (State's Second Submission 197.) Bodiker stated that because he and Edwards were never provided these summaries at trial, they "received no information in discovery at all from the prosecutor, police, regarding Cubans or regarding any alternative theories of what happened." (State's Second Submission 87.)

This evidence would have been even more impactful if considered alongside the testimony of Sherry Williamson, who recalled that Tabatha "went where all the big guys were that had drugs." (*Id*. at 457.) This included Cubans. (*Id*.) Consistent with Keith's interview with this Board, Williamson also recalled that Tabatha would "screw [the Cubans] all over and have them all looking for her." (*Id*. at 458.) Theresa Thomas similarly recalled that Tabatha was very involved with "a bunch of Cubans" at a drug house. (Thomas Aff. ¶ 5, Ex. 38.) According to a veteran Columbus Police Officer, in the early 1990s, there was a Cuban gang in Columbus that was "definitely trying to get a piece of the action in the streets." (Davidson Aff. ¶ 7, Ex. 46.)

F. Potentially exonerating evidence was destroyed.

The State destroyed evidence discovered at the crime scene that, at the very least, would have provided highly relevant information about the events surrounding Richard Myers's death. Blood evidence was recovered at the crime scene but never subjected to DNA analysis. Initially, the police wanted to analyze this evidence because it could show how many people were at the crime scene and whether someone other than Richard Myers had been injured. Despite the potential importance of this evidence, the lead detective (Clarence Sorrell) instructed the crime lab not to conduct the blood grouping analysis necessary to determine its full significance. After Keith's trial, but while state appellate and post-conviction proceedings were still pending, the same evidence was destroyed at the direction of Detective Sorrell.

Detective Sorrell testified in a deposition that he initially ordered the crime lab to conduct blood group analysis on the sample, but never received the results. (State's Second Submission 745-47, 753.) Detective Sorrell conceded that the evidence was so significant that he could not imagine that he would have done nothing when the lab failed to send him the results as he requested. (*Id*. at 756-57.) Typically, he would have resubmitted the sample for analysis, yet there is no evidence this was ever done. (*Id.* at 758, 763.) Contrary to his testimony, however, the crime lab log notes that Detective Sorrell actually instructed the lab not to conduct the blood group analysis he had previously requested. (*Id.* at 818 (March 31, 1992 Lab Notes) ("No action taken per Sorrell on blood evidence").) Then, two years after Keith's conviction, Detective Sorrell ordered the crime lab to destroy the blood sample. (*Id*. at 796-97, 819; Property Disposition Form (Exhibit to Sorrell Depo.), Ex. 71.) He issued this order despite his clear understanding of the significance of the blood sample and despite having never received the results of the analysis. (*Id.* at 757.)

These events culminated in the destruction of vital evidence that would have enabled Keith to challenge the State's case at trial or in post-conviction. Detective Sorrell admitted that the evidence was important in determining who was present at the crime scene and whether someone besides Myers was injured that night. (*Id.* at 794, 799.)

Because the evidence was destroyed, there is no way to be certain exactly what the blood group analysis would have revealed, only that it would have been probative of Keith's theory of the case – that he had been shot at the scene as well as Myers. Upon his arrival to death row in 1994, officers did note that Keith had a bullet scar on his left shoulder. (S.O.C.F. Admission Form, Ex. 47.) It could have provided the evidence Keith and defense counsel to demonstrate that Keith's version of events, that Tabatha and her Cuban companions had killed Myers, was indeed accurate.

By failing to follow through with their initial plan to analyze the blood evidence and later destroying that, the Columbus Police Department significantly impeded Keith's ability to support his defense that Tabatha and the Cubans had killed Myers.

G. The cumulative effect of the errors in this case raises grave doubts about the propriety of putting Keith Henness to death.

Despite defense counsel's failure to investigate, the State's case against Keith Henness was far from airtight. The murder weapon was never found. There were no eyewitnesses. No forensic evidence linked Keith to the murder scene. There is no question that Keith was involved in this crime in some capacity. Keith pled guilty to the theft charges surrounding the stolen car, checks, and credit cards. However, he has always maintained he did not shoot and kill Richard Myers. As he explained to the Board during his interview, Keith was surprised by Tabatha and the Cubans in the water treatment plant, was shot in the shoulder during the melee, and participated in cashing checks and stealing money from Myers's credit card accounts after Myers was shot and killed. (See Statement of Keith Henness, Ex. 72.)

The State's evidence and arguments to the contrary are far from conclusive. There was simply not overwhelming evidence of guilt presented by the State. Instead, testimony from two witnesses who participated in the crimes served as the anchor for the State's case on essentially every key fact needed to convict Keith of murder. These witnesses, Tabatha Henness and Roland Fair, were readily impeachable. Both were admitted drug addicts; both had long histories of violent criminal activity; and both received substantially reduced sentences in exchange for their testimony against Keith. Tabatha also had a motive to kill Myers herself.

If defense counsel had done their job prior to and at trial, there would have been additional issues to explore. Tabatha's version of the events could have been contradicted by her own words and actions.

The State's failure to disclose multiple police informational summaries and to preserve key evidence is particularly problematic given that defense counsel did not conduct any independent investigation of their own, including following up on suggestions by Keith prior to trial. This suppressed information would have brought potential defenses to counsel's attention and allowed them to develop further evidence undermining the State's narrative regarding Tabatha and who killed Myers.

This collective information likely would have also created doubt about whether Keith was guilty of committing the aggravated murder of Myers. Prior to trial, the State proposed a plea to non-capital murder and a sentence of 23 years to life, or even less. (Edwards Aff. ¶ 14, Ex. 1; State's Second Submission 43, Bodiker Depo.)

If defense counsel had conducted an investigation and learned about the police reports prior to trial, it is possible a plea deal more favorable to Keith could have been reached.

The argument that the jury heard all of this evidence, rejected it, properly convicted Keith of aggravated murder, and sentenced him to death fails to take into account the evidence and information that was not disclosed by the State and not uncovered by trial counsel. This Board is not bound by any previous decision from a jury or court.

H. Keith never had the opportunity to engage in productive plea discussions with counsel and he never made a knowing, informed decision regarding any possible plea agreement.

Keith consistently implored David Bodiker to investigate the State's case against him. When Bodiker refused to do so, he lost faith in his defense counsel. Keith never truly engaged in discussions with defense counsel about a plea agreement that would have made him eligible for parole in approximately twenty years because, when plea discussions began on the eve of trial, a toxic relationship had developed between Keith and Bodiker causing Keith "to doubt any legal

advice Bodiker gave." (Edwards Aff. ¶ 13, Ex. 1.) According to Bodiker's co-counsel, Joe Edwards, "[b]y October 1993," when plea negotiations began, "the attorney-client relationship . . . had broken down to the point that Henness appeared to have no trust in Bodiker and as a result, did not want to accept any advice about plea negotiations." (*Id.* ¶¶ 14-15) Edwards himself could not step in to advise Keith because "Bodiker had also given Henness the impression that [Edwards] was not really capable of being Henness's attorney. Henness was told by Bodiker that [Edwards] did not know what [Edwards] was doing. So while [Edwards] got along with Henness, Henness did not think of [Edwards] as his attorney." (*Id.*) Despite advice from Edwards that Bodiker should remove himself from Keith's case, Bodiker refused at the guilt phase because of possible professional embarrassment. (*Id.* ¶ 16.) During the trial, Keith openly and repeatedly expressed his frustration with his attorneys for not challenging the State's case and not conducting any investigation.

Even though Keith has consistently maintained his innocence of the murder of Richard Myers, he would have been eligible for parole already had he agreed to the plea terms the prosecution indicated it was willing to accept. (*Id.* ¶ 14; State's Second Submission 43.)

If Bodiker would have investigated, and then been able to engage in productive, genuine discussions with Keith about the relative weight of the State's evidence and the evidence the defense could present, Keith may have been willing to plead guilty to avoid the death penalty. But because those discussions never occurred, Keith never had the opportunity to make a knowing, informed decision about any possible plea agreement.

I. Conclusion

Due to defense counsel's failures at both phases of trial, the jury here did not have a complete picture of how the murder was committed during the trial phase or a complete picture of

Keith's life history, character, and background when it imposed a death sentence. In addition, Keith was unable to give due consideration to the evidence against him and whether to agree to a plea. Keith is asking this Board to recognize that principles of equity and fairness and proportionality call for the commutation of his death sentence due to the extreme sentencing discrepancies between his sentence of death and the very lenient sentences handed out to the two people who also played a role in the murder of Myers. Keith received death, while Tabatha and Fair served less than a year in prison combined, despite their lengthy records and involvement in this crime. Clemency is appropriate to partially remedy these extreme sentencing disparities.

Keith is not asking this Board to vacate his conviction. The question before this Board is what recommendation—life or death—to provide to Governor DeWine. Given the high stakes and the lack of absolute certainty that Keith murdered Richard Myers, a recommendation for clemency and a sentence short of death is warranted.

V. Statistics from Franklin County demonstrate that the crime Keith Henness was convicted of was not one of the-worst-of-the-worst murders justifying a sentence of death.

A. The murder of Richard Myers was not among the-worst-of-the-worst.

Although every murder causes severe loss to the family of the victim and the community as a whole and is deserving of severe criminal punishment, only the worst of the worst—those most violent, heinous aggravated murders of the most vulnerable victims—should make the perpetrator eligible for the ultimate punishment of death. The murder of Richard Myers, while a senseless tragedy, was not such a murder.

Keith was convicted of the drug-motivated killing of Myers and was sentenced to death in 1994. The murder of Richard Myers when compared to other murders in Franklin County is not among the-worst-of-the-worst. It is, like the vast majority of aggravated murders in Franklin County, deserving of a lengthy prison sentence, but not a sentence of death. Keith was sentenced to death, not because of the heinousness of the crime, but because of the failures of his trial counsel and their failure to investigate and prepare for trial. As is detailed elsewhere in this Application, these failures led Keith to deeply distrust his trial counsel and any legal advice they gave him–especially about negotiating or accepting a plea offer that would have resulted in a life sentence. This section focuses on the fact that this murder simply does not qualify as one of the-worst-of-the-worst murders in Franklin County that demanded a sentence of death.

The basic facts of the murder of Richard Myers are presented in this Application, in the materials submitted by the State, and by Keith in both his interview with the Board and in his statement.

The statistics below demonstrate that it was not one of the-worst-of-the-worst murders when compared to all the other murders in Franklin County. This single murder does not demand

a sentence of death. An examination of the other sentences for defendants indicted on aggravated murder charges in Franklin County demonstrates that this murder is in fact less aggravated than many for which a sentence of life sentence was imposed.

None of this analysis absolves Keith of responsibility for this crime, but this analysis puts this crime in perspective and demonstrates that a death sentence is unduly harsh in this instance—indeed, it is an anomaly. Keith, like 99% of other defendants convicted of aggravated murder in Franklin County over the same period, was not deserving of a sentence of death.

B. Death sentences in Franklin County are extremely rare.

Since the reinstatement of the death penalty in Ohio in 1981, 18 men have been sentenced to death for aggravated murders committed in Franklin County:

- William Wickline (sent'd 1985)
- John Glenn Roe (sent'd 1985)
- Lee Seiber (sent'd 1986)
- Warren Waddy (sent'd 1987)
- Mark Burke (sent'd 1990)
- Kevin Scudder (sent'd 1990)
- Carl Haight (sent'd 1992)
- W. Keith Henness (sent'd 1994)
- Jerry Hessler (sent'd 1996)
- Alva Campbell (sent'd 1997, re-sent'd 2001)
- Kareem Jackson (sent'd 1998)
- Ulysses Murphy (sent'd 1998)
- David Braden (sent'd 1999)
- Jonathon Monroe (sent'd 2002)
- Michael Turner (sent'd 2003)
- James Conway (sent'd Feb. 2003 + Oct. 2003)
- Robert Bethel, Jr. (sent'd 2003)
- Caron Montgomery (sent'd 2012)

Nine of those sentenced to death in Franklin County were convicted of multiple aggravated murders. The remaining nine, including Henness, were convicted of a single aggravated murder:

- John Glenn Roe
- Lee Seiber

- Warren Waddy
- Mark Burke
- Kevin Scudder
- Carl Haight
- W. Keith Henness
- Alva Campbell
- Ulysses Murphy

Four of these nine convicted of a single aggravated murder have already received lesser sentences:

- Lee Seiber—commuted to life-without-parole in 1991
- Mark Burke—resentenced to 30-years-to-life in 2009
- Carl Haight—resentenced to 20-years-to-life in 1995
- Ulysses Murphy—resentenced to 20-years-to-life in 2008

That leaves five men who were convicted of a single aggravated murder whose death sentences were not overturned or commuted:

- John Glenn Roe, sentenced 1985, executed in 2004
- Warren Waddy, sentenced 1987, no execution date set yet
- Kevin Scudder, sentenced 1990, no execution date set yet
- W. Keith Henness, sentenced 1994, execution date of February 13, 2019
- Alva Campbell, sentenced 1997, died in prison in March 2018

Even among this limited group, the murder of Richard Myers does not qualify as one of the worst-of-the-worst. The following are brief descriptions of the aggravated murders committed by Roe, Waddy, Scudder, and Campbell:

John Glenn Roe planned to rob a 7-Eleven store, but abandoned his original plan and instead, followed a young mother driving home from the 7-Eleven. Roe drove up next to her, pointed a gun at her, and forced her to pull over. Roe then robbed her and took her to the woods where he choked, possibly sexually assaulted, and then shot and killed the young woman. The

body was not found for six weeks. The jury foreman said to newspapers after the trial, that "the randomness of [the crime] makes it gut-wrenching."

Warren Waddy, over the period of several weeks, broke into the homes of three different women, bound them, and ransacked their belongings. One woman was raped, one woman stabbed and choked, and finally he killed the third woman – who was only twenty-two. After binding her hands and legs, Waddy strangled her to death with a jump rope. In addition to the aggravated murder, Waddy was charged with multiple counts of aggravated burglary, kidnapping, rape, attempted rape, aggravated robbery, and felonious assault among other felonies.

Kevin Scudder was asked to drive a 14-year-old female acquaintance home. Instead, he attempted to rape her, stabbed her over 40 times, and then dumped her body in a secluded field. Scudder also had a lengthy criminal history of violence, including a charge of rape of a 17-year-old girl.

Alva Campbell had a lengthy record of violent criminal offenses including attempted murder and murder. Prior to committing his capital crime, Campbell served over twenty years before being paroled. Following that incarceration, he was arrested in Franklin County for a series of armed robberies and burglaries in 1996. He faked paralysis and while being transported grabbed a deputy's gun, beat the deputy, escaped, kidnapped a 19-year-old man in his truck outside the courthouse, drove around with the man in his truck for over two hours, before shooting him and killing him.

Comparing the crimes of these five offenders, the murder of Richard Myers, while inexcusable, is not an aggravated murder of the same degree of maliciousness or randomness as the other four. The crimes committed by Waddy and Scudder involved a great degree of violence and pain, as well as sexual assault. In addition, Roe, Waddy, and Scudder murdered young women

or girls. Furthermore, Waddy, Roe, and Campbell killed strangers, chosen at random. Scudder, Waddy, and especially Campbell, had extensive records involving violence. Finally, according to the State's theory, only the murder in this case was motivated by drug addiction—specifically, the State alleged that Keith committed this crime to feed his crack addiction.

Keith was therefore sentenced to death for a single aggravated murder that was not of the same degree of severity or aggravation as the four others sentenced to death in Franklin County for a single aggravated murder. In this way, the crime Keith was convicted of does not qualify as one of the-worst-of-the-worst and should not have made him eligible for a sentence of death.

C. 194 of 196 defendants indicted for aggravated murder from 1990 to 1995 in Franklin County received a sentence less than death.

The crime Keith was convicted of is not one of the-worst-of-the-worst when compared to the other contemporaneous aggravated murders in Franklin County for which the defendants did not receive a sentence of death. Consideration of the life sentences imposed on similarly situated defendants is "an essential part of any meaningful proportionality review." *Walker v. Georgia,* 129 S. Ct. 453, 454 (2008) (Mem.) (Stevens, J., Statement Regarding Denial of Certiorari).

Keith was indicted for this murder in 1992. From 1990 to 1995, there were 196 indictments for aggravated murder in Franklin County, including 109 with capital specifications. Of those, only two received sentences of death: Jerry Hessler, who killed four people in a mass shooting spree that included the death of a five-year-old and severe injuries to several others; and Keith.

Thus during the relevant period, 98% of those indicted for aggravated murder in Franklin County with capital specifications (hereinafter Capital Defendants) did not receive the death penalty; 99% of those indicted for aggravated murder with or without capital specifications during this period did not receive the death penalty (hereinafter Aggravated-Murder Defendants). The tables below demonstrate, of those indicted from 1990-1995, 33% of convicted Capital Defendants

will have already been released by Keith's execution date, while 72% will have been eligible for parole by then. And by 2025, 87% of convicted Capital Defendants from Franklin County will have been eligible for parole.

For all defendants indicted from 1990 to 1995 on aggravated-murder charges, not just those with capital specifications, the percentage released and eligible for parole increases: 44% of convicted Aggravated-Murder Defendants have been or will be released by Keith's execution date, while 83% will have been eligible for parole by that date; by 2025, 91% will have been eligible for parole.

Table 1. **Parole Eligibility for Convicted Capital Defendants in Franklin County (1990-1995)**

Year	Capital Indictments*¥	No conviction	Died while incarcerated	Data Set of Convicted**	Death Sentences	Released (as of Feb 2019)	Percent released (as of Feb 2019)	Eligible for parole by Feb 2019	Percent released/ eligible for parole by Feb 2019	Eligible for parole by 2025	Percent released/ eligible for parole by 2025
1990	15	1	0	14	0	1	7%	8	64%	4	93%
1991	22	7	1	14	0	7	50%	3	71%	1	79%
1992	22	3	1	18	1	6	33%	6	67%	4	89%
1993	13	2	1	10	0	5	50%	3	80%	1	90%
1994	24	7	1	16	0	3	19%	8	69%	1	75%
1995	13	1	1	11	0***	5	45%	5	91%	1	100%
Total	**109**	**21**	**5**	**83**	**1**	**27**	**33%**	**33**	**72%**	**12**	**87%**

Table 2. **Parole Eligibility for Convicted Aggravated-Murder Defendants in Franklin County (1990-1995)**

Year	Aggravated Murder Indictments*	No conviction	Died while incarcerated	Data Set of Convicted**	Death Sentences	Released (as of Feb 2019)	Percent released (as of Feb 2019)	Eligible for parole by Feb 2019	Percent released/ eligible for parole by Feb 2019	Eligible for parole by 2025	Percent released/ eligible for parole by 2025
1990	29	2	2	25	0	9	36%	11	80%	4	96%
1991	44	9	3	32	0	18	56%	10	88%	1	91%
1992	41	12	1	28	1	12	43%	10	79%	4	93%
1993	20	4	1	15	0	6	40%	7	87%	2	93%
1994	35	11	2	22	0	8	36%	8	73%	1	77%
1995	27	7	2	18	0***	8	44%	9	94%	1	100%
Total	**196**	**45**	**11**	**140**	**1**	**61**	**44%**	**55**	**83%**	**12**	**91%**

*Excludes indictments of Lucasville Riots cases because those crimes were not committed in Franklin County.

¥Excludes minors who were indicted with capital specifications but were ineligible for the death penalty because of their age.

**Excludes those not convicted on any charge (e.g., found not guilty, nolle prosequi) or who died while incarcerated. Those who died before release were excluded because it cannot be fairly determined if they would have been released when eligible for parole.

***Jerry Hessler was sentenced to death but died while his appeals were pending, before his conviction was final, so he is excluded.

These statistics demonstrate that from 1990 to 1995, both Capital and Aggravated-Murder Defendants, who were convicted of crimes similar to or more aggravated than Henness, not only received sentences less than death, but for the most part were given sentences making them eligible for parole within 20-25 years. Brief descriptions of many of these contemporaneous crimes demonstrate that the murder in this case is comparable to other murders committed by perpetrators who have already been released, or who are, or will soon be, eligible for parole.

1. Capital Defendants convicted of killing multiple victims who received a sentence less than death.

First, of Capital Defendants indicted between 1990 and 1995 who were convicted of killing multiple victims, only Jerry Hessler received a sentence of death. The following are examples of those multiple-victim Capital Defendants who received a sentence less than death.

- In 1990, Capital Defendant Craig Breeze killed Michael and Judith Casserly and attempted to kill Patricia Casserly while committing an aggravated burglary of their home. Breeze, admitted that he embezzled $33,000 as Treasurer of Local 62 of GCI, but denied involvement in the killing. Michael Casserly, the Secretary of Local 62, had confronted Breeze about the embezzlement hours before he and his wife were shot several times in the head in their home. Their daughter, Patricia Casserly, 23, was shot in the head and chest while she was lying in bed. Breeze was tried and convicted on four counts of aggravated murder with three death-penalty specifications (escaping detection, felony murder, and multiple murders) and a firearm specification for each count. He was also convicted of two counts of attempted aggravated murder and one count of aggravated burglary. The jury declined to impose the death penalty and the judge sentenced Breeze to 30-years-to-life on each of the two merged counts of aggravated murder, as well as additional years for the other convictions. Breeze will be eligible for parole in 2065.

- In 1992, Capital Defendant Michael Pendergrass entered a home where three people were watching television and began shooting at them. Two of them were killed, Sylvester Blackwell and Marcine Mulligan, and the third, Lloyd Ross, was wounded. Motive was unclear, but it may have been that Mulligan, who worked at OSU Hospitals with Ross and Pendergrass, owed Pendergrass $30-50. Pendergrass will be eligible for parole in 2023.

- In 1992, Capital Defendant Green Rogers shot and killed his ex-girlfriend, Dorothy Owens, and her new boyfriend, Harold Ferrell. Rogers also wounded Owens's 13-year-old son. Rogers saw Ferrell's truck outside of Owens's house, and stormed into the bedroom shooting Ferrell in the nose and the neck as Ferrell was putting on pants. Rogers then fired at Owens as she

scrambled for the door, wounding her son and shooting her in the back, killing her. Rogers had served four years for manslaughter when he was younger for shooting his stepfather and was on probation at the time of the 1992 crime. Rogers received two 15-years-to-life sentences for the murders, plus 8-15 years for felonious assault and 3 years for a firearm specification. Rogers died in prison.

- In 1992, Capital Defendant Daniel Houser beat to death two female acquaintances, Stephanie Tussey and Lori Charles, with a baseball bat and/or hammer. Tussey's body was found nude on the living room floor, and Charles's body was found partially clad on the stairwell. Houser attempted to rape at least one of the women. He will be eligible for parole in 2024.

- In 1993, Capital Defendants Joseph McCarthy and Anthony Acquista met the son of David and Carolyn Fogle in prison. The Fogles agreed to give McCarthy a job and a place to live. At the time, Acquista was on probation for a previous aggravated burglary. However, McCarthy and Acquista decided to rob and kill them. First they attacked Mrs. Fogle; Acquista held her down while McCarthy strangled her with a dog leash. When she did not die, McCarthy stabbed her in the back. They attacked Mr. Fogle in his garage, bound him with ropes and metal stays, struck him in the head with a wrench, and put duct tape over his mouth torturing him to give them his ATM code. But he gave them the wrong one. They tried unsuccessfully to use Mr. Fogle's ATM card and when they came back, McCarthy stabbed Mr. Fogle three times and then Acquista stabbed him once in the chest. McCarthy entered a plea. Under the plea agreement, McCarthy would have been eligible for parole in 2030.[6] Acquista went to trial and was found guilty of six counts of aggravated murder including two death-penalty specifications (escaping detection and multiple murders), as well as two counts of both aggravated robbery and kidnapping. He was sentenced to concurrent terms of 20-years-to-life for the aggravated murders plus 10-to-25 years for the remaining convictions. Acquista's next parole hearing is in 2028.

2. Aggravated-Murder and Capital Defendants convicted of killing one juvenile victim who received a sentence less than death.

Another category of aggravated murders that generally receives the most severe sentences and are considered the most aggravated are those involving the murder of a child. However, not one defendant indicted from 1990 to 1995 convicted solely of killing a child received a death sentence. In fact, the longest prison term for any Aggravated-Murder or Capital Defendant who murdered one child was that of George Willis Jones, who will be eligible for parole in 2027.

[6] McCarthy was subsequently found guilty of possession of a deadly weapon while incarcerated. He was sentenced to another 13 years for that offense and will now be eligible for parole in 2043.

- In 1991, Capital Defendant Joseph Lumpkin shot and killed an 18-month-old girl, Keiaria King, and injured two others. Lumpkin came to a woman's apartment demanding money. When a person at the apartment slammed the door in his face, Lumpkin started shooting through a wall and a door and hit King and two others. He was also convicted of shooting a 2-year-old in a car in a separate incident, but that child survived. Lumpkin's next parole hearing is in 2023.

- In 1991, Aggravated-Murder Defendant Tommy Elliot Clyburn, 28, shot and killed 14-year-old Charles Allen after Allen and a couple of friends confronted Clyburn for throwing a brick through the window of a house. Clyburn threw one of Allen's friends down the stairs so Allen proceeded to run away, but Clyburn shot Allen in the back before he could escape, killing him. Clyburn pled guilty to voluntary manslaughter and was sentenced to 10-to-25 years in prison plus an additional 3 years for a gun specification. Clyburn has already been released from prison.

- In 1991, Capital Defendant George Willis Jones held up a man with a gun outside a convenient store, obtaining only a few dollars. Seventeen-year-old Travis Williams then approached Jones and attempted to buy drugs from him but when Williams could not pay, Jones shot and killed him. Concurrently, Jones was convicted of aggravated robbery in another case. Jones went to trial and was convicted on all counts, including aggravated murder with the felony-murder death-penalty specification for aggravated robbery. He was sentenced to 30-years-to-life for the aggravated murder, in addition to other 10-to-25 years for two counts of aggravated robbery and two 3-year-terms for firearm specifications. He will be eligible for parole in 2027.

3. Aggravated-Murder and Capital Defendants convicted of killing one adult victim who received a sentence less than death.

In all the indictments for aggravated murder between 1990 and 1995, with the exception of Keith Henness, no defendant received the death penalty for cases involving the death of one adult. In fact, most defendants in these types of cases will have been eligible for parole by the time of Keith's scheduled execution. The following examples of these one-adult-victim cases demonstrate that the crime for which Keith was convicted was certainly not the most violent or most aggravated of these killings even though Keith received the most severe sentence.

- In 1990, Capital Defendant Mark Nyros bludgeoned an elderly man, William Johns, in his home. Nyros beat and stabbed Johns 26 times before embarking on a shopping spree with Johns's credit card. He was caught when security guards at a jewelry store noticed blood on his hands. Nyros will be eligible for parole in 2023.

- In 1990, Capital Defendant Daniel Spitler, discovered that there was $17,000 in a medical building when his friend, the janitor, took him into one of the offices. Some days after, Spitler returned to steal the $17,000 when he was surprised by Norman Brofford. He shot Brofford in the neck and face. When arrested Spitler had $12,000 in cash in his apartment and he had recently bought a motorcycle and car. Spitler went to trial and was found guilty of two counts of aggravated murder—including the capital specifications of escaping-detection and felony murder for both aggravated robbery and burglary—along with one count each of aggravated robbery and aggravated burglary. The jury declined to impose the death penalty, and the court sentenced him to 30-years-to-life for the merged count of aggravated murder concurrently with 10-to-25 years for the other two counts, plus a 3-year-term for the firearm specification. He will be eligible for parole in 2022.

- In 1990, Capital Defendant James Sparks was given a ride to his father's apartment by his acquaintance, Yolanda Seward. Once there, Sparks and Seward smoked crack. Sparks pulled a knife on Seward and ordered her to take off her clothes. When she refused, he stabbed and killed her. Sparks then slashed the leg of a witness to the murder. While fleeing, he robbed a cab driver at knifepoint. Sparks pled guilty to aggravated murder and the capital specifications. He was sentenced to 20-years-to-life plus a concurrent sentence of 8-to-15 years. He was also sentenced for aggravated robbery on a man at an ATM in Bexley. Sparks's next parole hearing is in 2023.

- In 1990, Capital Defendant Robert Moore and his cousin Gary Moore robbed a convenience store. They entered at closing, forced owner Adel Batlouni, an acquaintance of Robert, to crawl into a walk-in cooler on his hands and knees, where Robert shot him in the back of the head. Gary turned himself in and told police that his cousin was the shooter. Robert was convicted of aggravated murder with a capital specification, aggravated robbery, and a gun specification and sentenced to 30-years-to-life. Robert will be eligible for parole in 2020.

- In 1990, Capital Defendants Brent Toles and Dean Jordan, Jr. broke into and committed burglary at 62-year-old Frank Jones's home then hours later robbed and beat Jones, who died a few weeks later. Both Toles, who was tried and convicted of murder and sentenced to 15-years-to-life, and Jordan, who received a sentence of 7-to-25 years as part of a plea agreement, have already been released from prison.

- In 1991, Capital Defendant Louie Pace went to Ronald Wingo's apartment and stabbed him to death. Pace then wrapped Wingo in a carpet and stuffed him in the closet. Pace stole Wingo's car and television. Pace, who received a sentence of 15-years-to-life for murder and 5-to-25 years for aggravated robbery, has already been released from prison.

- In 1992, Capital Defendant Joseph D. Reynolds III, who was homeless, beat to death Stanley Webb Jr. after Webb refused to give him money. Police found Webb's van with Reynolds's personal belongings in it. Reynolds pled guilty to involuntary manslaughter and aggravated

robbery and was sentenced to 10-to-25 years plus 5-to-25 years. He has already been released from prison.

- In 1992, Capital Defendant Paul M. Monroe shot Robert Shannon in the head and then set his car on fire (with Shannon in it). Shannon was still alive when the fire was set. Monroe, who was sentenced to 15-years-to-life plus 3 years as part of a plea agreement, has his next parole hearing in 2022.

- In 1992, Aggravated-Murder Defendants Ernest Hillmon and Kevin Gunnell entered an apartment looking for Emanuel Beman. When they found him, Hillmon pointed his 9 mm pistol at Beman and ordered Beman to surrender his watch. After getting the watch, Hillmon shot Beman in the head, killing him. Hillmon is currently engaged in parole proceedings. Gunnell is out of prison.

- In 1992, Capital Defendant Terrell Shanklin was stealing a microwave and television from his mother, Diann Shanklin, likely to get money for crack. She caught her son in the act and Terrell beat her with a table leg, killing her. Shanklin pleaded guilty to the lesser included offense of murder. Terrell Shanklin has been released from prison.

- In 1992, Capital Defendant David Scott Harmon said he picked up Lisa Luke who was hitchhiking. Harmon said that they had consensual sex. Afterward Harmon threw her shorts out the window and Luke slapped him. He slapped back, pushed her out of the car and rammed her with the vehicle, pushing her up against an embankment, then dragged her back onto the road and ran her over 4 or 5 times. Harmon was convicted of aggravated murder and capital specifications and sentenced to 30-years-to-life. Harmon will be eligible for parole in 2020.

- In 1992, Capital Defendant Robert Harris and two teenage friends were walking together when they noticed Sharon Smeltzly's minivan parked outside her family store. When the three knocked on the store's front door, Smeltzy answered. Harris then forced his way inside at knifepoint and he and his friends robbed her. They took a VHS machine, guns, and antique swords, and loaded the goods into Smeltzy's minivan. The three then ordered Smeltzy to drive them in the van. Eventually, the three ordered Smeltzy to stop and get out of the van. When she did, Harris shot her in the back with a shotgun. Harris was convicted of aggravated murder and capital specifications and sentenced 30-years-to-life, plus 3 years for a firearm specification. Harris will be eligible for parole in 2025.

- In 1992, Capital Defendant Robert Allen McClellan was asked to drive Octavia Ray, his cousin's girlfriend, home from a party. Her body was found two hours later with three gunshot wounds in the head. McClellan had robbed her of her jewelry and her leather coat and raped her. McClellan was on probation for attempted rape at the time. McClellan was convicted of murder and a gun specification for a sentence of 15-years-to-life plus 3 years. His next parole hearing is in 2021.

- In 1992, Tim Yeager, an assistant manager of Red Lobster, was completing paperwork at 1:00 a.m. when Capital Defendant Mark Johnson and another man smashed a window in the restaurant, then reached in and unlocked the restaurant's door. After entering the restaurant, Johnson shot Yeager in the head and the chest, killing him. Johnson was convicted of aggravated murder, aggravated burglary, and aggravated robbery plus a gun specification. Johnson's next parole hearing is in 2021.

- In 1992, Capital Defendant James Robert Morris and an accomplice saw Joseph Larger on the street and invited him in their car. After Larger entered the car, the two beat him, demanding he give them money. Morris started driving off with Larger and his accomplice in the back of the car. Then Morris switched places with his accomplice so that Morris could get in the back seat and beat Larger while his accomplice drove. Eventually they stopped the van, and Larger was forced outside the car, where he was repeatedly kicked in the head. Larger's body was then dumped elsewhere. The deputy coroner described the attack as "the most severe he has ever seen." Morris, who was not indicted until 1995, went to trial and was convicted of involuntary manslaughter and has already been released from prison.

- In 1993, Capital Defendant Luster Morrison paid $7,000 for what turned out to be candle wax in a drug deal set up by DeJuan Taylor. In retaliation, Morrison, with his brother, Lamar, and their 17-year-old friend, abducted Taylor at gunpoint. They then tortured him for hours—stripping him, blindfolding him, beating him, urinating on him, and parading him in front of his sister's home for ransom—before beating him to death. Luster Morrison went to trial and was convicted of murder. Luster and Lamar Morrison both have their next parole hearings in March 2019.

- In 1993, Aggravated-Murder Defendant Solomon Sheridan stabbed his wife 11 times with a foot-long metal rod just hours before her life insurance policy expired. He drove her body to a parking lot of a nearby shopping center and left the car with her in it. Sheridan went to trial and was convicted of aggravated murder. Sheridan's next parole hearing is in 2027.

- In 1993, Capital Defendant Joseph Nabinger and an accomplice went to a crack house, bound and blindfolded five people inside with duct tape, and robbed them of jewelry. This was likely an act of retaliation for something done to Nabinger a week earlier. Nabinger and his accomplice walked two of the captured, James Wilson and his girlfriend, Rochelle Richardson, out of the house to a car. As they led the couple out, blindfolded and hands were bound with duct tape, they shot Wilson five times in the back and arms, killing him. They also shot Richardson five times, but she survived. The owner of the crack house, Clifton Bell, was killed the day he was to testify before the grand jury. Nabinger was implicated in five other murders in Detroit but not convicted—several witnesses had been killed or had disappeared. Nabinger went to trial and was convicted of two counts of aggravated murder, with two capital specifications—felony murder and multiple murders—as well as two counts of aggravated murder without capital specifications, three counts of kidnapping, and two counts of aggravated robbery. The jury declined to sentence Nabinger to death, and the court imposed a

sentence of 30-years-to-life for aggravated murder with capital specifications consecutive to 10-to-25 years for the other aggravated murder, in addition to shorter consecutive sentences for the other convictions. He will be eligible for parole in 2054.

- In 1994, Capital Defendant William Madry had been given a job by business owner Tom Robinson. Madry went to the shop to rob Robinson for crack money. He then beat him to death and stuffed his body in a freezer. Madry stole Robinson's truck and checkbook, and forged a $425 check. He was convicted of aggravated murder. He will be eligible for parole in 2024.

- In 1994, Capital Defendant Wayne M. Knotts broke into his neighbor's apartment to steal money to buy crack. The neighbor, Ronald Fultz, surprised Knotts during the burglary and the two fought. Knotts stabbed Fultz repeatedly with a knife. Knotts was convicted of aggravated murder, aggravated robbery, and aggravated burglary. Knotts will be eligible for parole in 2031.

- In 1994, Capital Defendant Tyrone Martin, wearing a ski-mask, approached local high school coach Vincent Smith, who was painting the outside of his rental property, and demanded money. They struggled and Martin shot Smith twice, killing him. Martin was convicted of aggravated murder with capital specifications and sentenced to 30 years-to-life. Martin will be eligible for parole in 2024.

- In 1995, Capital Defendant Gregory Allen Dawson had drinks with his neighbor Mary Jones, then Dawson stabbed her to death and stole her stereo equipment. Dawson was convicted of murder and burglary. Dawson's next parole hearing is in 2022.

- In 1995, Capital Defendant Thomas C. Harris, Jr. owed retired Columbus police Sgt. Mount Vernon Johnson more than $1000 in gambling debts. After Johnson let Harris in his house, Harris shot Johnson in the back of the head. Then Harris took $900 from Johnson's pockets to use to buy crack. Harris pled guilty to aggravated murder with a gun specification and capital specifications and was sentenced to 20-years-to-life plus 3 years. Harris's next parole hearing is in 2027.

- In 1995, Aggravated-Murder Defendant James Robert Farley had a dispute with a friend, Clint Farley (no relation), over a $50 debt. James attacked Clint from behind, stabbing him twice with a Swiss Army knife. Farley went to trial and was found guilty of aggravated murder. Farley's next parole hearing is in 2021.

- In 1995, Richard Hayes beat and killed 69-year-old Donald Pierce in Pierce's apartment as he robbed him for money to buy crack cocaine. Hayes was also accused in another robbery that occurred around the same time in which he struck the victim in the head. Hayes has already been released from prison.

D. Franklin County defendants indicted in other years who committed particularly heinous crimes but were not sentenced to death.

Apart from the contemporaneous examples of Aggravated-Murder and Capital Defendants receiving sentences less than death, there are those in periods before and after 1990-1995 who committed violent killings of multiple people, of young women or children, and/or involving sexual assaults, who did not receive the death penalty. These serve as more examples that the aggravated murder of which Keith Henness was convicted does not qualify as the rare worst-of-the-worst murder demanding or necessarily deserving of the death penalty.

- In 1985, Capital Defendant Larry Joe Powers was in the basement of Charlotte Golden's home late at night, drinking with Charlotte, her ex-husband Gary Golden, and their friend Thomas Kicas. Charlotte noticed there was a gun next to Powers and that he had his hand on it. Charlotte asked Powers why he had a gun, and he said "Maybe I'm a hit man." Gary then asked Powers to put the gun away, but instead, Powers jumped up and shot and killed Gary Golden and Thomas Kicas. Charlotte ran upstairs and escaped before Powers could shoot her. Powers went to trial and was found guilty of aggravated murder. Powers was sentenced to a total of 53 years-to-life, and died while incarcerated.

- In 1986, Capital Defendant James Rattler, while being placed under arrest for past traffic violations, seized Columbus Police Officer Gordon Rich's service weapon and shot him three times, twice in the head. Rattler fled the scene, but car trouble soon left him stranded. After Rattler's flight, Officer Rich struggled back to his cruiser to report the shooting. He died 90 minutes later. Rattler was sentenced to 30-years-to-life plus 3 years for a gun specification. He will be eligible for parole in February 2019, the same month Keith Henness is scheduled to be executed.

- In 1988, Capital Defendants and brothers Mark and Robert Lawwell were hired by Nancy Flaherty to kill her husband Patrick. They broke into the Flahertys' home while Mr. Flaherty was home alone; they then beat Mr. Flaherty in the face and stabbed him repeatedly. They also robbed him. The brothers pleaded guilty and were both sentenced to 30-years-to-life. As part of their plea agreement, they agreed to testify against Mrs. Flaherty, but they refused when called at her trial. Their next parole hearings are scheduled for 2023.

- In 1989, the naked body of John Johnson, a nine-year-old boy, was found in a pool of blood in a Columbus alley. He had been stabbed eight times. Capital Defendant William Hartley lured the boy away from his neighbor's house with the promise of a bike. Hartley then kidnapped and raped Johnson. Johnson's blood was found on a pair of Hartley's jeans.

Hartley had previously been convicted of felonious assault and attempted rape. Johnson went to trial and was found guilty of aggravated murder and the death penalty specifications of felony murder rape and kidnapping. The jury declined to impose death. He was sentenced to 30-years-to-life for the aggravated murder and 15-to-25 years on the separate rape and kidnapping charges. Hartley died while incarcerated.

- In 1989, Capital Defendant Eddie Fair, a part-time janitor at Friendly's Ice Cream restaurant, went in the restaurant while fellow employee, 21-year-old Elizabeth Nunamaker, was closing up. In an apparent robbery, Fair bludgeoned Nunamaker then dragged her body into the cooler where he sodomized her and stabbed her 28 times, then finally slit her throat. Fair went to trial and was convicted of aggravated murder with death specifications, of aggravated robbery and kidnapping and the separate crimes of aggravated robbery and kidnapping. Judge David L. Johnson called the crime "one of the most vicious, brutal killings I know about," but the jury declined to impose the death penalty. Fair was sentenced to a total of 50-years-to-life and died while in prison.

- In 2003, Capital Defendant Vernon Spence planned to rob a house near OSU's campus because he knew one of the residents was a small-time marijuana dealer. Spence and two accomplices forced their way into the residence brandishing guns, and demanding marijuana and cash. Upon obtaining five pounds of marijuana and $70 in cash, Spence and his two accomplices used stereo wire to tie up the three individuals who had been in the home: two male residents, Arron Grexa (23) and Eric Hlass (22), and Grexa's girlfriend, OSU student Kayla Hurst (21). After the three were tied up, Spence's accomplices left with the drugs. Spence stayed behind and shot the three captives in the back of their heads, killing them. Spence went to trial and was convicted of three counts of aggravated murder plus capital specifications. The jury returned a sentence of life without the possibility of parole.

- In 2003, Capital Defendant Joseph Bowers robbed, raped, and beat to death Toni Miller while her 10-year-old daughter was in the next room. The case was unsolved for years until Bowers's DNA was collected by law enforcement during his incarceration for drug offenses, and it matched DNA found at the scene of Miller's murder. Bowers was sentenced to life without the possibility of parole.

- In 2004, five-year-old Emily Rimel disappeared. Capital Defendant Lindsey Bruce was living with Rimel's mother at the time. When Rimel's mother woke up one day, she found both Bruce and her daughter gone. Bruce was first convicted of kidnapping of Rimel because her remains could not be found. When Rimel's skull was found in a creek over a year later, Bruce was charged with and convicted of Rimel's aggravated murder, as well as tampering with evidence. Bruce went to trial and was convicted of aggravated murder plus capital specifications. He was sentenced to life without the possibility of parole by the jury.

- In 2016, Columbus police officers descended upon Capital Defendant Lincoln Rutledge's apartment to serve a felony warrant. Rutledge opened fire on the SWAT team trying to arrest him killing Officer Steven Smith. During a standoff, Rutledge continued to shoot at officers in their armored vehicle and also shot through the floorboards at officers in his basement who were trying to turn off utilities. In addition to the aggravated murder conviction with specifications, Rutledge was also convicted on two counts of attempted murder of other police officers, four counts of felonious assault against police officers, and one count of aggravated arson. Rutledge went to trial and was convicted of aggravated murder plus capital specifications. He was sentenced to life without the possibility of parole by the jury.

- In 2017, Capital Defendant Brian Golsby kidnapped Reagan Tokes, an Ohio State University student. Tokes was walking to her car after getting off work when Golsby approached her with a gun. He forced Tokes to withdraw money from an ATM machine. Golsby then drove Tokes to a secluded park where he first raped and terrorized her before shooting her dead. At the time of the Tokes murder, Golsby was on parole for convictions from a previous attempted rape and robbery; he had also committed six violent armed robberies before the murder of Tokes against six other female victims after stalking them. Golsby was found guilty of aggravated murder with six specifications, including repeat violent offender. Golsby was also convicted of rape, kidnapping, aggravated robbery, tampering with evidence, and having a weapon under disability. He was sentenced to life without the possibility of parole by the jury.

E. Conclusion

Keith Henness was convicted of the senseless murder of Richard Myers. To the Myers family this murder was undoubtedly the most painful and the worst-of-the-worst. But in the greater context of the community of Franklin County and Ohio, the murder that Keith was convicted of is not one of the-worst-of-the-worst murders for which the death penalty must be reserved.

Most Franklin County defendants who committed murders of a similar degree of aggravation, i.e. a single murder, were sentenced to life imprisonment. Many of those have already been released from prison, and most of the remaining defendants have already become eligible for parole or are eligible for parole in the near future.

Many Franklin County defendants convicted of committing far more brutal and heinous aggravated murders—including multiple murders and murders of children—were sentenced to life

in prison. In many cases, those defendants have become eligible for parole or have been released from prison.

Because sentencing—especially death sentencing—must be proportional, the above analysis demonstrates that the death sentence imposed on Keith is an anomaly. It is far more severe of a sentence than sentences imposed on defendants committing similar or more severe murders. The death sentence imposed on Keith is disproportional to the sentences imposed for similar or even far more aggravated murders in Franklin County and indeed Ohio.

To insure that this disproportionate sentence of death is not carried out, Keith asks this Board to recommend clemency because his sentence of death is an anomaly compared to the sentences imposed for similar and far more aggravated murders in Franklin County.

VI. Keith Henness is not among society's worst of the worst.

Under long held American law and values, the penalty of death must be reserved for "the worst of worst" and should not be an available punishment for all murderers. The worst-of-the-worst characterization not only applies to the most shocking and horrific crimes, it also applies to the criminal defendants who are deemed the most culpable and morally reprehensible and least deserving of society's mercy. This latter determination can be made only after looking at the complete history, character, and background of the offender.

As explained in the previous section of this Application, the murder of Myers, while inexcusable, was not in the category of the-worst-of-the-worst murders, requiring the death penalty. After reviewing Keith's life history, it is also clear that he is not such a depraved human as to be deserving of society's most severe punishment. Psychologist James P. Reardon, Ph.D., who has over forty years of experience, including three years with the Adult Parole Authority, concludes that Keith has redeeming value and would continue to contribute to society if not executed. (Reardon Rpt. 9-10, Ex. 49.)

Keith did not endure the extreme violence, neglect, and abuse that many on death row endured. Throughout his childhood and adolescence, however, Keith was ignored and neglected by both of his parents. (*Id.* at 4-5.) Keith has borne the scars of being ignored and neglected throughout his adulthood. (*Id.*) Keith struggled in life and found himself on the wrong side of the law on multiple occasions. Keith has served time in prison for nonviolent offenses prior to being convicted and sentenced to death for the aggravated murder of Richard Myers.

Despite these shortcomings, there are marked differences between Keith and the many of those on death row who have received negative recommendations from this Board. Keith does not

present a life of escalating and ongoing violence. Just the opposite is true. For the most part, he was described as caring, peaceful, hardworking, insightful, intelligent, and funny.

Keith is by no means perfect, but he has exhibited many traits of a decent and good man throughout his life and continues to do so today. Based on Keith's complete life history, he should not be counted among society's worst of the worst. (Reardon Rpt. at 9-10.)

A. Keith's life before death row

1. Keith was a neglected child raised in poverty in rural Ohio.

Keith was the third child born in four years to Alfred and Connie Henness. When Keith was an infant, his parents separated, and they divorced by the time he was two. (C. Parsons Aff. ¶ 3, Ex. 13.) Connie retained custody of Keith and his two older sisters, Tina and Jaina. (C. Parsons Aff. ¶ 5, Ex. 13.) A home visit report before Keith started school described their house as "very small and compact." (Head Start Home Visit Report, Ex. 70.) Connie was described as a single mother of three with wages from her job and child support of less than $100 a week. (*Id.*)

Keith's mother was a troubled woman who, according to her own family, "believe[d] her own lies" and "lived in a world of her own." (Ashcraft Decl. ¶¶ 10, 24, 35, Ex. 50.) Whatever Connie "imagined became her truth" and "nothing was ever her fault." (*Id.* ¶ 24.) She was also described as an "extremely nervous individual who smoked cigarettes constantly." (Head Start Home visit report, Ex. 70.) A social worker for Head Start who visited the home suggested that anyone who interview Connie "be careful because some of her facts seem rather fantastic." (*Id.*) Connie suffered two "major nervous breakdowns" while raising Keith. (DRC Family History Report, Ex. 51.)

Connie always put herself first, even above Keith and her other children. (Ashcraft Decl. ¶ 9, Ex. 50.) She was "chronically neglectful," often leaving Keith and his siblings to fend for themselves for long stretches while she was partying with friends. (*Id.* ¶¶ 21-23, 37.) Connie

"abandoned her kids for her own selfish lifestyle." (*Id.* ¶ 23.) Often, when Alfred would go to pick Keith up for the weekend, Connie was unable to find Keith and had no idea where he was. (*Id*. ¶ 9.)

Keith was constantly being uprooted and Connie moved the kids between Frankfort, Chillicothe, and Columbus. (*Id.* ¶¶ 36-37.) He was also shuffled back and forth between his mother and father, who ran households at two extremes: Connie provided no structure or discipline and Alfred was very strict. (*Id.* ¶ 36.)

Connie's sister, Susie, babysat the children for Connie frequently, starting when Susie was only eight years old. (*Id.* ¶ 21.) According to Susie, Connie would sometimes sleep with three to four different men a week. (*Id.* ¶ 20.) Connie would regularly have sex with the men in front of Keith. (Reardon Rpt. 4, Ex. 49.)

Connie has been married a total of five times. (Ashcraft Decl. ¶ 38, Ex. 50.) Shortly after she divorced Alfred Henness, Connie married Larry Clarkson with whom she had two more children. (*Id.* ¶ 38.) Clarkson was a severe alcoholic. (*Id.* ¶ 38.) Connie and he spent their time together in bars while the children stayed home alone. (*Id.* ¶¶ 22, 38.) They often became intoxicated and fought in front of the children. (*Id.* ¶ 38.)

Before Keith was of school age, Connie moved the family to a high-crime area in Columbus so that Keith's younger half-sister could be treated for a heart condition at the children's hospital. (Reardon Rpt. 4, Ex. 49.) Connie lied to Susie and said that she had a new babysitter for the kids in Columbus. When Susie decided to check in on the kids, she found Keith and his sisters alone at night, while Connie was nowhere to be found. (Ashcraft Decl. ¶ 22, Ex. 50.)

Keith's other stepfathers either ignored Keith, or treated him poorly. (C. Parsons Aff. ¶ 3, Ex. 13.) Keith recalls how he would regularly go camping overnight alone when he was a child.

(Biller Decl. ¶ 15, Ex. 11.) Even when Keith was very young, he would leave home for a few days by himself; no one was involved enough in Keith's life to even notice he was missing from the house. (*Id*.)

This neglect and abandonment that permeated Keith's childhood and adolescence. (Reardon Rpt. 4-5, Ex. 49.)

Intermittently, Alfred Henness took the children to his home where he and his new wife attempted to provide structure and stability. (Ashcraft Decl. ¶¶ 34, 36-37, Ex. 50.) This worked out well for Keith's sisters, but Alfred treated Keith badly. (C. Parsons Aff. ¶ 6, Ex. 13.) Alfred even told Keith that he was not Keith's biological father. (*Id*. ¶ 5; Reardon Rpt. 5, Ex. 49.)

Children such as Keith, whose primary parent goes through multiple divorces face many developmental hurdles. "They must come to terms with not only the breakdown and breakup of their parents' first marriage, but also the loss of newly acquired stepparents and stepsiblings with whom they may have developed emotional attachments." *Multiple Divorces Strain Kids*, DivorceSource.com (Sept. 9, 2015).[7] These problems are compounded because the new relationships often require moving to new homes and cities, uprooting the children even further. Sociologist Virginia Rutter recognized, "As children grow up under these circumstances, they are more likely to lose the opportunity to develop secure social networks and skills that kids from more financially secure families – and less disrupted families – find easier to gain." (*Id.*)

In many ways, Keith was essentially raising himself at a very young age. He grew up without guidance or affection from his father and was thrown to the side and rejected when his mother found other men to occupy her time. (Ashcraft Decl. ¶ 20, Ex. 50; C. Parsons Aff. ¶ 6, Ex. 13.) Despite the troubling circumstances of his upbringing, elementary school records indicated

[7]*Available at* https://www.divorcesource.com/blog/multiple-divorces-strain-kids/.

that Keith was "very intelligent for his age" and "extremely likable" and had "a nice personality." (Adena Elementary Records 11, Ex. 52.) He was a very loving and often wanted hugs. (Ashcraft Decl. ¶ 27, Ex. 50.)

Because he suffered from hyperactivity, "[m]ultiple records, including school records, indicate that Keith had significant difficulty in school despite being intellectually fairly bright. He was sent to a specialist who put him on both Ritalin and Librium for periods to help with his ADHD." (Reardon Rpt. 4, Ex. 49; *see also* 1983 DRC Classification Work Sheet at 2, Ex. 53.)

In addition to struggling with hyperactivity at school, Keith was desperate for attention at home and acted out to get atatention. Keith began using alcohol and smoking marijuana before he was ten. (Health Recovery Services Records, Ex. 54.) His father believes that this and all of Keith's other childhood mischief was for one purpose: to get attention. (Ashcraft Decl. ¶ 8, Ex. 50.) "Keith was a bright child but did not receive any of the guidance and support from either parent that would have permitted him to become a successful functioning adult." (Reardon Rpt. 5, Ex. 49.)

2. Following this disruptive childhood, Keith struggled to get on the right track as a teenager and young adult.

The chaos of his mother's home, the neglect and abandonment, and the instability, all led to his desperate search for attention, and all had a lasting effect on Keith. (Aschraft Decl. ¶¶ 20, 23, Ex. 50.) As a teenager, Keith made many bad choices that had him at odds with both his father and the law. As with many troubled children, Keith's struggles led him to abuse drugs and alcohol. As a teenager living with his father, Keith began to do drugs with kids in the neighborhood. (Ashcraft Decl. ¶¶ 13-14, Ex. 50.) Eventually Keith dropped out of high school in the 11th grade. (Health Recovery Services Records 5, Ex. 54.)

Keith would misbehave to get attention, knowing he would be caught. Once, Keith's stepmother bought a hunting gun and Keith took it. When Alfred asked for it, Keith simply went up in the woods where he had it hidden and gave it back. (Ashcraft Decl. ¶ 11, Ex. 50.) Keith stole things just to steal them. When he was a juvenile, he took his father's car and drove to Virginia before being caught and returned to Ohio. (1983 DRC Classification Work Sheet, Ex. 53.) He was also charged with being an unruly child for running away from home which placed him in the juvenile court system. (*Id*.) Being put in the juvenile justice system made Keith believe that no one in his family—especially his father—cared about him. (Ashcraft Decl. ¶ 25, Ex. 50.)

Keith was placed on probation. (1983 DRC Classification Work Sheet, Ex. 53.) He was soon caught using illegal drugs in a violation of the terms of his probation. (*Id*.) Keith was ordered into a residential drug treatment program. (*Id*.) During the month he spent at Bassett House, a drug treatment and counseling program, in 1981, Keith told counselors "about the fact that he couldn't understand why he couldn't control his drug use." (Health Recovery Services Records 9, Ex. 54.) Keith was frustrated at his inability to quit using drugs on "will power alone." (*Id*.)

At the time of his admission, Keith was drinking heavily and abusing numerous illegal drugs as well as over-the-counter drugs such as valium and Percodan; his drug and alcohol abuse had started before he was ten years old. (*Id*. at 17.) Leading up to this treatment, Keith had been arrested three times in two years—all while Keith was under the influence of drugs and/or alcohol. (*Id*. at 5.)

As a teenager, Keith acknowledged in counseling sessions that family turmoil "triggered his desire to get high." (*Id*. at 8.) Keith admitted to being depressed. (*Id*.) Keith talked about his parents' divorce and stated that he felt as if he "didn't belong" with his family, because his father denied paternity and his mother was never around. (*Id*. at 12.) Keith avoided a counseling session

designed to explore the origins of his drug use because of the "painful feelings that accompany this exploration." (*Id.* at 14.)

Keith started this program "with a positive attitude" but soon began to resist treatment, which led to his removal from the program, when he engaged in a fight in which both juveniles "were equally responsible for provoking." (*Id.* at 22, 25.) Because Keith left drug treatment program without permission from the juvenile court, he was placed in the Buckeye Youth Center for six months. (1983 DRC Classification Worksheet, Ex. 53.)

3. Keith's struggles with drugs, alcohol, and the law continued as an adult, leading to three relatively short incarcerations.

In 1982, Keith was indicted on felony charges of burglary and grand theft, which resulted in his first prison sentence. (Ross Cty. Indictment, Ex. 55.) These are obviously serious charges on their face, but this crime was rooted in family dysfunction.

Keith was accused of burglarizing his father's home, where Keith had been living, and stealing a .22 caliber rifle he had frequently used to go hunting. (Oct. 26, 1982, Motion to Reduce Bond, Ex. 56; Bill of Particulars, Ex. 57.) Keith believed these charges would be quickly resolved. As his attorney noted in the motion to reduce bond, "this is not hard-core theft." (Motion to Reduce Bond, Ex. 56.) Keith's actions, it was argued, "may be no more than a misunderstanding or an interfamilial squabble." (*Id.*) However, Keith's father insisted on pressing charges and was prepared to testify against his son. (Praecipe for Subpoena, Ex. 58.) As a result, the prosecutor would not drop the charges. Only nineteen years old and unable to afford bond, Keith spent over six months in the Ross County Jail awaiting the completion of proceedings against him. (Judgment Entry of Sentence, Ex. 59.)

Keith pleaded guilty to both felonies, burglary and grand theft. (Plea of Guilty, Ex. 60.) The prosecution agreed not to object to minimum concurrent sentences. (*Id.* at 3.)

A pre-sentence psychological evaluation of Keith recognized that "it would appear that he has been maladjusted most of his life." (Ross Cty. Psych. Eval., Ex. 61.) During the evaluation, Keith "put a lot of emphasis upon the poor relationships between his parents and himself." (*Id*.) The evaluator also determined that Keith was "clearly hyperkinetic." (*Id.*) Hyperkinesia is similar to ADHD and is characterized as a state of excessive restlessness, impulsivity, and a short attention span.[8]

Keith was sentenced to two years in prison for the burglary conviction and one year for the grand theft conviction, and was transferred to the Ohio State Reformatory on April 6, 1983. (Judgment Entry of Sentence, Ex. 59.) While awaiting sentencing, Keith also pleaded guilty in Pickaway County to passing bad checks. (2.17.1983 Journal Entry Changing Plea, Ex. 62.) He received a sentence of one year to run concurrent with his Ross County conviction. (3.31.1983 Entry, Ex. 63.) He was paroled in November 1983, shortly after turning twenty.

4. In his twenties, Keith struggled to get his life in order. He was arrested multiple times for nonviolent theft offenses.

When Keith was released from prison, he was a twenty-year-old high school dropout, a convicted felon, with a serious untreated addiction to drugs and alcohol. He struggled with hyperactivity, a condition that made everyday life situations more challenging than they were for others, and with substance abuse. As a convicted felon, Keith also faced a host of sanctions and disqualifications that placed additional burdens on him as he attempted to readjust to society.

Given these circumstances, Keith's chances of leading a normal, productive life decreased dramatically. Keith's father "noticed a huge difference" in Keith after he returned home from prison, and Alfred attributed that to sobriety. (Aschraft Decl. ¶ 17, Ex. 50.) But things went

[8]*Available at* www.nimh.mih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd/index.shtml.

downhill when Keith started abusing substances again. (*Id.*) Within five months of his release, Keith was "drinking frequently and heavily" and soon found himself in trouble with the law again. (6.28.1984 Forensic Evaluation, Ex. 64.) On May 17, 1984, Keith was arraigned in Pike County, Ohio on charges of Breaking and Entering, Receiving Stolen Property, and Grand Theft arising out of theft of nine chainsaws. (*Id*.) Keith admitted to drinking on April 12, 1984, the day the crime occurred. (*Id.*)

Several months after being arrested, Keith attempted suicide by slitting his wrist with a razor blade. (Pike Cty. Offense Report at 4, Ex. 65.) There were five cuts on Keith's forearm approximately 1½ to 2 inches long. (*Id*.) Sixty-five stitches were required to close the wounds. (*Id*.) Keith received no counseling or psychological treatment following this attempt.

This suicide attempt prompted multiple evaluations to determine Keith's competence and sanity. An evaluation conducted on August 15, 1984, noted that Keith "explained that he felt that he would have no life left that he could resume following a long prison term." (8.15.1984 Forensic Evaluation Ex. 66.) Keith eventually pled guilty to Receiving Stolen Property. (10.19.1984 Entry, Ex. 67.) On October 19, 1984, Keith was sentenced to six months in prison. (*Id*.)

All of these convictions were for nonviolent monetary crimes, all of which Keith has stated he has no excuse for and deeply regrets.

Keith was furloughed in April 1985, but he violated by leaving without permission and failed to return. Another poor decision Keith entirely regrets. "When Keith talks about his earlier convictions, he refers to himself as stupid and expresses sadness and regret." (McCready Decl. ¶ 12, Ex. 10.)

5. Following his release from prison in 1990, Keith was motivated and determined to get his life on the right track.

Between 1985 and 1987, Keith met and fell in love with Tabatha Keith, a troubled woman who was escaping abusive relationships, and who also had a troubled relationship with her family. In 1987, Keith was sentenced to prison for three years because he absconded from furlough in 1985. He was arrested in February 1987 just days after their oldest son Sean was born. While incarcerated, Keith had deep with regret for leaving his family. While Keith was incarcerated, Tabatha became addicted to crack and heroin, lost custody of their son, and resorted to prostitution for income. (Hilliard Aff. ¶ 3, Ex. 40; Thomas Aff. ¶ 2, Ex. 38.)

In 1990, when he got out of prison he was determined to get his life in order and his son back. (Hilliard Aff. ¶ 2, Ex. 40.) He married Tabatha, and they lived in their own apartment, and he owned a new truck. (*Id.*) Keith was "motivated." (*Id.*) Keith drove all over the Columbus area applying and interviewing for jobs. (*Id.*) He came home and talked to friends and family about how his interviews went. (*Id.*) He was ultimately successful in obtaining full-time employment. Keith was very excited in the direction his life was going. (*Id.*)

Those who knew Keith had positive things to say about him. Keith helped Theresa Thomas and her husband move into their new apartment. (Thomas Aff. ¶ 7, Ex. 38.) Another friend, Kim Hilliard, recalled that if Kim ever had any problems with his car, "Keith was willing to help in any way he could." (Hilliard Aff. ¶ 1, Ex. 40.) Keith also helped Kim find his dog when it was stolen out of his backyard. (*Id.*)

Tabatha's family "thought highly of Keith." (G. Keith Decl. ¶ 2, Ex. 68.) He was respectful of Tabatha and helped around the house on their visits to West Virginia. (*Id.*) On one such trip, Keith spent two days helping her parents put in a new driveway. (*Id.* ¶ 7.) "The only payment Keith received was a balony [sic] sandwich." (*Id.*)

During this period, Tabatha's brother, Gary Keith, moved to Columbus to live with Keith and Tabatha. (*Id.* ¶ 3.) Keith got Gary a job at the factory where he worked. (*Id.*) Keith was a supervisor and Gary's boss. (*Id.* ¶ 4.) Gary said that Keith "was a very hard worker and led by example." (*Id.* ¶ 4.) When Keith's truck broke down and they had no way to get to work, Keith woke Gary up two hours early and they walked several miles to the factory together. (*Id.* ¶ 5.) During the time Gary lived with Keith, Keith was committed to working, paying bills, and treating Tabatha well, despite Tabatha's drug abuse. (*Id.* ¶ 6.) Gary recalled Keith had a great sense of humor, but "at the same time [Keith was] serious about helping out the people in his life." (*Id.* ¶ 8.)

Keith lent a hand to his stepbrother, Michael Parsons, during this time as well. Keith invited Michael to live with Keith and Tabatha for a few months. (M. Parsons Aff. ¶ 6, Ex. 39.) When Michael needed a job, Keith got Michael a job working at the company where Keith worked; Keith was a supervisor with at least 20 people working under him. (*Id.* ¶ 4.) Keith always made sure the employees worked well together. (*Id.*) If there were arguments between coworkers, Keith was "very good at resolving those disputes." (*Id.*) Keith was also generous with others, helping colleagues whenever he could. (*Id.* ¶ 5.) He loaned people money and gave people rides. (*Id.* ¶ 2.) Keith was "considerate," "kind," "loving," had "a great sense of humor," and went "out of his way to help anyone in need." (*Id.* ¶¶ 2, 5.) Michael got to know Keith well, understood his personality, and saw someone with "a good heart and a good mind." (*Id.* ¶ 10.)

"At the same time Keith was getting his own life back in order, he was also trying to motivate his wife, Tabatha, to do the same." (Hilliard Aff. ¶ 3, Ex. 40.) Keith loved Tabatha and wanted her to get sober. (M. Parsons Aff. ¶ 7, Ex. 39.) But "[a]ll Tabatha cared about were drugs." (Id. ¶ 7.) Tabatha was "the wild one" (G. Keith Decl. ¶ 9, Ex. 68), "the dominant personality" of

the couple, and manipulative. (Hilliard Aff. ¶ 5, Ex. 40.) She would scream at Keith for drug money and "get violent" if she did not get money. (M. Parsons Aff. ¶ 8, Ex. 39; Thomas Aff. ¶ 4, Ex. 38.) Tabatha "was always strung out on drugs," and she "resisted Keith's efforts to [help her] stay clean." (Hilliard Aff. ¶ 3, Ex. 40.) She would "disappear[] for days at a time" on "drug binges" and steal the money Keith had saved from working. (M. Parsons Aff. ¶ 6, Ex. 39.) Tabatha's "entire life revolved around crack and heroin and stealing money from people she met on the street," mainly prostitution. (Hilliard Aff. ¶¶ 3-4, Ex. 40; *see also* Thomas Aff. ¶ 2, Ex. 38.) Looking back at their relationship, their friend noticed that "Keith loved Tabatha very much but all she loved was drugs." (Hilliard Aff. ¶ 3, Ex. 40.) That same friend described Tabatha as "erratic, violent, and mentally unstable" (*Id.* ¶ 4), while another said she was "very violent, unstable, and paranoid," even once threating that friend with a knife (Thomas Aff. ¶ 3, Ex. 38).

Tabatha was involved in a lot of illegal activity, but she would get protection from the Columbus police. (Thomas Aff. ¶ 6, Ex. 38; Hilliard Aff. ¶ 7, Ex. 40.) Both Keith and Tabatha had purchased drugs from Cubans in the neighborhood who ran a drug house, but Tabatha was "a lot more involved" than Keith. (Thomas Aff. ¶ 5, Ex. 38.)

At the time of Richard Myers murder, Keith was trying to raise money to get Tabatha to West Virginia for rehab, while Tabatha continued to steal money for drugs. Trying to help Tabatha proved too much for Keith: he ultimately succumbed to drug use too, and to committing forgery, theft, breaking and entering, and receiving stolen property as well as participating in this crime. (1991 Arrest Record, Ex. 69.)

When Gary Keith, Tabatha's brother, heard Keith had been arrested for murder he was "blown away." (G. Keith Decl. ¶ 10, Ex. 68.) He "could never imagine Keith being capable of a violent crime towards anyone." (*Id.* ¶ 10.) Michael Parsons was also "stunned" and "assumed

there had to be a mistake." (M. Parsons Aff. ¶ 10, Ex. 39.) He "could not imagine Keith killing someone." (*Id.* ¶ 10.) "From working and living with Keith," Michael knew Keith as someone who "was all about resolving disputes, making things work out, and helping people." (*Id.* ¶ 10.)

B. Keith's life as a death row prisoner has been positive, productive, and nonviolent.

Over the last twenty-six years, Keith has been a positive, productive, and nonviolent inmate. Keith's institutional record is addressed extensively in Section I of this Application. That section shows that Keith's institutional record constitutes an independent ground for a positive clemency recommendation. It is also relevant to demonstrate that Keith is not among society's worst of the worst.

Keith's positive behavior in prison is consistent with how he was remembered by those who knew him best when he was free. As he was trying to get his life together on the outside, he was always willing to help those in need: his friends, coworkers, and family. In prison, Keith has consistently shown empathetic behavior and worked hard to make life easier for his fellow inmates on death row, but also for correction officers and prison staff. Though the opportunities to help are limited when confined to death row, Keith has made a positive impact on others while incarcerated and will continue to do so if he is not executed.

Of everyone in Keith's family, he has always been closest with his mother, Connie. Despite the circumstances of his childhood, Keith has forgiven his mother and loves her very much. She is in poor health and struggles because she cannot see Keith as much as she would like. When Keith was moved to Chillicothe Correctional Institution, visiting became easier for his mother because she lives nearby in Frankfort, Ohio. (C. Parsons Aff. ¶ 18, Ex. 13.) Connie's health has deteriorated, however, and she is now unable to visit the prison. Keith, however, calls regularly to check on her and he sends her cards and artwork that he has created. (*Id.* ¶¶ 18-19.) Keith "goes

out of his way to make [his mother] happy," even from prison. (*Id.* ¶ 18.) Connie says he Keith has had a hard life but "has a good heart." (*Id.* ¶ 18.) Connie loves her son, wishes for him to be granted clemency, and will continue to support him if he is. (*Id.* ¶ 19.) If her son were to be executed, she feels as though part of her would die with him. (*Id*. ¶ 19.)

Keith's son, Sean Keith, has never had the opportunity to get to know his father very well. (S. Keith Decl. ¶ 10, Ex. 41.) They do write and Keith tries to be a part of his son's life the best he can from death row. (*Id.*) Sean wishes that his father be granted clemency so that he could visit him and stay a part of his life. (*Id.*)

Keith also stays in touch with his stepbrother, Michael Parsons. "Even though we are not related by blood, Keith is still close to me and looks at me like I am his little brother. And I continue to look at Keith as my older brother." (M. Parsons Aff. ¶ 12, Ex. 39.)

Keith remains a positive force in the lives of other friends and acquaintances. Doug McCready began visiting Keith on a regular basis through an initiative at his church called "Ministry of Presence." (McCready Decl. ¶ 2, Ex. 10.) The program was designed not to be religious, but to create an opportunity for men on death row to connect with men from the outside to have everyday conversations and help the condemned man "feel like a human being for a short period of time." (*Id.* ¶ 4.)

Doug has spent over 175 hours visiting with Keith and they "have developed a strong relationship." (*Id.* ¶ 10.) Keith always asks about Doug's family and has mailed Doug some of his paintings and an incredible cross. (*Id.* ¶ 7.) And at Keith's request, Doug has sent flowers to Connie for Mother's Day. (*Id.* ¶ 7.) During their visits, Doug finds Keith to be "engaging, genuine, thoughtful, and compassionate." (*Id.* ¶ 8.) Keith is often reflective about his troubled childhood

and becomes very emotional when he talks about what an impact his upbringing had on him. (*Id.* ¶ 8.)

Doug also knows that "Keith is very sincere about working to become a better human being." (*Id.* ¶ 10.) For example, the four-day Kairos religious program had a profound effect on Keith. (*Id.* ¶ 10.) The program's mission is to inspire incarcerated men to become impactful and productive citizens. (*Id.* ¶ 10.) Keith talks about how the program has made him think more clearly and become more productive in his own life. (*Id.* ¶ 10.)

Despite moving to Colorado for work, Doug has continued to visit Keith and maintain contact with him. (*Id.* ¶ 3.) When Doug visits, Keith "is always smiling, cordial, and polite" with everyone inside the prison. (*Id.* ¶ 5.) Doug has observed that Keith's relationship with the guards seems "easy and respectful." (*Id.*)

Doug and Keith "talk about everything you can imagine," including reading, technology, fishing, and current events. (*Id.* ¶ 6.) Doug appreciates how open and direct his conversations with Keith are. (*Id.* ¶ 11.) His conversations with Keith have made Doug reflect on the finality of all our lives and now he strives to be more open and direct with his own friends and family. (*Id.* ¶ 11.) Doug is a well-educated, successful, religious, family man and has enough life experience to say he truly believes that Keith, as the man he is today, is deserving of clemency. (*Id.* ¶ 15.) Doug is "proud to call [Keith] a friend." (*Id.*)

Another successful and devoted family man, Kevin Biller, regularly emails and visits Keith. (Biller Decl. ¶¶ 1, 6, Ex. 11.) Kevin lives in Columbus and visits once or more a month depending on his schedule. (*Id.*) Although they met because of an ad in a church newsletter, their visits are not religious. (*Id.* ¶ 7.) Instead, they "focus on [their] common humanity." (*Id.* ¶ 9.)

They discuss deep feeling about life and existence, their childhoods, cars, building things, music, and TV. (*Id.* ¶ 9.)

The two share a comfortable familiarity that lets them speak with no pretension. Kevin shares personal things with Keith, and Keith gives him good advice. (*Id.* ¶ 19.) He always feels better on his drive home than he did on his drive there. (*Id.* ¶ 19.) Keith has strong insights into human nature. (*Id.* ¶ 20.) Keith has met Kevin's wife, who is a pilot, and they really clicked. (*Id.* ¶ 13.) Kevin believes his 40-year marriage is actually stronger because of his talks with Keith. (*Id.* ¶ 20.)

Correction officers have told Kevin that Keith is "one of the good guys" and a "mellow inmate who never causes any serious trouble." (*Id.* ¶ 22.) Based on what Kevin has seen firsthand, he "can tell [that Keith] likes serving as a mentor to younger inmates." (*Id.* ¶ 24.) Kevin's life experience of running a business and raising four children with his wife of forty years has taught him about charcter. (*Id.* ¶ 27.) Kevin knows Keith "is a very genuine human being" and "very compassionate." (*Id.*) "[I]t is obvious to" Kevin that Keith "works very hard to be a good citizen" while in prison." (*Id.*) Kevin is willing to speak on Keith's behalf at the clemency hearing because he believes so strongly in his request for clemency. (*Id.*)

Keith also has a very close relationship with a priest, Father Neil Kookoothe who states that:

> I have now known Keith for almost twenty years. He continues to introduce me to many other death row inmates in the cells around him. On a number of occasions, I have told Keith that he is probably the best spiritual director I have ever had. I don't think he understands what I mean by that, and I don't expect him to. But visiting Keith on death row and writing to the other inmates he introduces me to always leads to more personal reflection.

(Fr. Kookoothe Decl. ¶ 15, Ex. 12.)

Father Neil describes his friendship with Keith as a blessing thanks to the comfort Keith has provided to him in tough times. When Father Neil's mother died, "Keith was bothered very much by her death and the grief and sorrow I felt over that. Keith did his best to provide condolences to a friend from behind prison walls." (*Id.* ¶ 17.) Father Neil was "very touched" by sorrow and empathy. (*Id.*)

Based on what Father Neil has seen over the last twenty years, he believes Keith is an ideal candidate for clemency. Keith has shown "compassion and empathy that drives him to give back to others." (*Id.* ¶ 18.) At the conclusion of their visits, Father Neil always prays with Keith. "When I leave, I always place my hands over Keith's head and pray for him. Keith always says that is the highlight of his visit because he feels the power of God through my blessing." (*Id.* ¶ 16.)

If Keith is granted clemency, Father Neil believes "he will continue to reach out to others and help in any way he can." (*Id.*) This positive assessment from a priest who has counseled with Keith for over twenty years and who has worked with other death row inmates for whom he has not come forward with such an assessment or appeared before this Board should carry a substantial weight.

C. Keith is deserving of clemency.

Keith's life history is replete with the type of evidence that courts have repeatedly said is relevant to the jury's assessment of a defendant's moral culpability. Shuffled back and forth between a mother who married five different men and a father who denied paternity, Keith's development was stunted. He displayed signs of extreme anxiety at a very young age. This upbringing undoubtedly led to depression, mental health struggles, and poor coping mechanisms, which in turn led to his drug and alcohol abuse. These collective factors considered with the

serious suicide attempt while still a teenager demonstrate the long-term effects of the neglect and abandonment of his childhood.

Keith did not have as violently traumatic or dysfunctional a childhood as other applicants who have come before this Board. Nevertheless, Keith suffered the long-term effects of the chaotic and neglectful childhood throughout his adult life and his adult relationships—especially his devotion and dependence on his wife Tabatha. (Reardon Rpt. 5, Ex. 49.)

It is also important to recognize that the jury in this case heard none of this evidence. As evidenced by the prosecutor's closing remarks, Keith's history and background is not cumulative to anything the jury heard and weighed. "As the there is no mitigation in this case. It is not there. So the weighing process becomes very simple." (Trial Tr. 2782-83.)

It would have taken only one juror to see that Keith was a human being with a long history of issues and struggles and was deserving of mercy, to prevent Keith from being sentenced to death. Had a complete picture of Keith been presented, it is more likely than not that he would not have received a death sentence. The sentence of death in this case is more a product of an uninformed jury than a determination that Keith is among society's worst of the worst.

Putting aside the crime for which he was sentenced to death, Keith's behavior throughout his adult life has been consistently nonviolent, as opposed to others who have come before this Board and have displayed "a disturbing propensity to engage in extreme and senseless violence."[9] Regardless of what level of culpability the Board places on Keith for this crime, it is clear based on Keith's behavior as a free man and as an incarcerated inmate, that this murder represents an aberration in an otherwise nonviolent life. (Reardon Rpt. 9, Ex. 49.) Keith's history of nonviolent

[9]Alva Campbell Jr. Death Penalty Clemency Report at 19-20.

behavior before and after this crime should weigh in favor of clemency—the same as a lifetime of escalating violence weighs against a recommendation for clemency.

Dr. Reardon examined previous personality tests and administered his own, and found no specific basis for diagnosing Henness with antisocial personality disorder. Keith is not a cold-blooded, hardened criminal with a long history of escalating violence. There is no question that Keith has made mistakes in his life. But it is also clear, as Dr. Reardon concludes, that Keith is not among the worst of the worst deserving of society's ultimate punishment. (*Id*. at 9.) Keith's life has redeeming value and can make positive contributions to society, even behind bars. (*Id.* at 10.) Keith Henness is deserving of mercy and a sentence less than death is appropriate.

VII. The State's willingness to accept a plea and a proper proportionality review demonstrate that neither the crime in this case nor Keith are one of "the worst of the worst" demanding a sentence of death.

The murder of Richard Myers was a tragic and senseless crime—especially for his family. As explained in Sections V and VI above, however, neither the murder nor Keith himself fall within the narrow category of the most heinous and reprehensible murders or defendants for which the death penalty is reserved:

> [W]ithin the category of capital crimes, the death penalty must be reserved for "the worst of the worst." *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568. ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (*quoting Atkins v. Virginia*, 536 U.S. 304, 319, (2002))). One object of the structured sentencing proceeding required in the aftermath of *Furman* [*v. Georgia*] is to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty, and **the essence of the sentencing authority's responsibility is to determine whether the response to the crime and defendant "must be death."**

Kansas v. Marsh, 548 U.S. 163, 204 (2006) (Souter, Stevens, Ginsburg, and Breyer, JJ., dissenting) (emphasis added) (citation omitted).

This case, while falling within the category of crimes where a sentence of death *may* be imposed under Ohio law, is not within the "narrow category of the most serious crimes" demanding that a sentence of death *must* be imposed. The sentence of death imposed on Keith is more the result of arbitrary factors than the an evaluation that the murder in this case is the exceptional few that demands a sentence of death or that Keith is one of the worst-of-the-worst offenders for whom a sentence of death is the only appropriate sanction.

Of the 196 persons indicted for aggravated murder in Franklin County from 1990 to 1995, 194 of them received sentences less than death. Only Keith and Jerry Hessler (who killed four people and wounded several others) were sentenced to death. (*See* Section V of this Application.)

Yet the facts of this crime do not suggest that this murder was more aggravated than the 194 cases during the same period where life sentences were imposed. While all murders shock the conscience to some degree, this murder—in the greater context of all murders in Franklin County or Ohio—does not shock the conscience to the degree that demands a sentence of death, when compared to the other 195 aggravated murders from the same time period.

In addition to having ineffective counsel, some arbitrary factors contributed to Keith receiving this disproportionate sentence. For one, Keith was sentenced to death under the felony-murder capital specifications. Legal experts in Ohio have recognized that the felony-murder capital specifications that made Keith eligible for the death penalty are applied to many cases in which a death sentence may not be warranted. The felony-murder specifications fail to narrow the category of murders eligible for death penalty as required by the United States Constitution. Another factor that resulted in the arbitrary application of the death penalty here is that the Supreme Court of Ohio has failed in its statutory duty to conduct a meaningful proportionality review by comparing cases in which death was imposed to similar cases in which a life sentence was imposed to ensure the death sentence is applied only in the worst-of-the-worst cases. That failure has permitted Keith to be sentenced to death where hundreds of other similar cases in the same county resulted in a sentence less than death.

Proof that a sentence of death is not demanded here is demonstrated by the fact that the State offered to resolve the case with a sentence of life with parole eligibility after twenty years. The deterioration of the attorney-client relationship caused by counsel's failure to investigate prevented Keith from receiving the legal advice he was entitled to in order to make a knowing and informed decision whether to accept a plea agreement. Because neither the crime here nor Keith

are the worst of the worst for which the death penalty is reserved, Keith's sentence should be commuted to a life sentence.

A. The capital specifications of felony murder that made Keith eligible for death sentence are over applied and do not genuinely narrow death-penalty cases to the worst of the worst.

The Supreme Court has recognized that not all murders are created equal. There is no question that all murders, including that of Richard Myers, are shocking and senseless. This particular killing was not of that small percentage of murders that so shocks the conscience that imposition of a sentence of death is the only appropriate sentence. Here, there was a single victim rather than multiple victims; this did not involve the murder of a law enforcement officer or prison guard; this did not involve the murder of a witness to silence the witness; this did not involve the murder of a child; this was not a murder for hire; Keith is not a serial killer; and this did not involve a sexual motivation or assault. This was an apparently drug-motivated murder that was elevated to a capital offense by application of Ohio's overly broad felony-murder capital specifications.

The Supreme Court recognized the need for statutorily narrowing the group of defendants who could receive the death penalty: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). The Court later explained: "To avoid this constitutional flaw" of an arbitrary and capricious death sentence "an aggravating circumstance *must genuinely narrow* the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (emphasis added).

Keith was eligible for the death penalty because the jury found him guilty of two felony-murder capital specifications: that the murder occurred during the course of an aggravated robbery and during the course of a kidnapping. The purpose of capital specifications in Ohio's sentencing scheme is to provide statutorily defined criteria that separate the "worst of the worst" from all other crimes, thus narrowing the class of defendants eligible for a sentence of death. However, the widespread use of felony murder as an aggravating circumstance used to elevate ordinary murder cases to aggravated murders eligible for the death penalty has been widely criticized because they encompass an overly broad category of murders, failing to narrow those death-eligible cases to the worst-of-the-worst murders, involving the worst-of-the-worst class of defendants.

Justices of the Supreme Court of Ohio as well as the Joint Task Force have called for the elimination of the felony-murder specification. When the Ohio General Assembly redrafted the current capital punishment scheme in 1981, statutory capital specifications in Ohio Rev. Code § 2929.04(A) were included in order to limit the discretion of the sentencing jury and prevent arbitrary and capricious death sentences, as required by the United States Constitution. Former Ohio Supreme Court Justice Paul Pfeifer was one of the primary authors of the revised death penalty law in 1981 when he was a state senator: "We set out to enact a law that would give prosecutors the capability to seek capital punishment for the absolute worst offenders." Paul E. Pfeifer, Opinion, *Retire Ohio's Death Penalty*, Cleveland Plain Dealer, Jan. 26, 2011.[10]

Since then, however, Justice Pfeifer and other justices of the Supreme Court of Ohio have frequently been critical of the overuse of the felony-murder capital specification by prosecutors across the state to obtain death sentence for murders that were **not** the worst of the worst. *See State v. Brinkley*, 105 Ohio St. 3d 231 (2005) (Pfeifer, J., dissenting); *State v. Twyford*, 94 Ohio St. 3d

[10]*Available at* https://www.cleveland.com/opinion/index.ssf/2011/01/retire_ohios_death_penalty_pau.html.

340, 372 (2002) (Pfeifer, J., dissenting); *State v. Nields*, 93 Ohio St.3d 6 (2001) (Pfeifer, J., dissenting). The late Justice Craig Wright concluded that Ohio's felony-murder specification does not sufficiently narrow the class of murderers eligible for the death penalty sufficiently to pass constitutional muster. *State v. Sneed*, 63 Ohio St.3d 3, 20 (1992) (Wright, J., dissenting).

The felony-murder specification provides little guidance to sentencing juries who must distinguish between those who deserve death and those who do not. *State v. Murphy*, 91 Ohio St. 3d 516, 561 (2001) (Pfeifer, J., dissenting). The specification fails to sufficiently limit the number of offenders who are eligible for the death penalty. *Id*. Justice Pfeifer held that the felony-murder specification was inappropriate in Murphy's case because, Murphy was not the "hard-core criminal" envisioned by the General Assembly when it created the death penalty statute and was death eligible because he stole a gold chain as an afterthought. *Id*. In other words, neither Murphy nor his crime were the worst of the worst.[11] The same is true for Keith and the murder in this case. (*See also* Sections V and VI of this Application.)

Recently the Joint Task Force to Review the Administration of Ohio's Death Penalty[12] in its Final Report and Recommendation of April 2014[13] concluded that felony murders did not narrow the application of death penalty to the worst of the worst and recommended that the felony-murder specification be eliminated:

> Based upon data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders, further finding that such specifications result in death verdicts 7% of the time or less when charged as a death penalty

[11]On September 15, 2011m this board unanimously recommended clemency for Joseph Murphy. On September 26, 2011, Governor John Kasich commuted Murphy's sentence to life without parole.

[12]The Joint Task Force was a joint project of the Supreme Court of Ohio and the Ohio State Bar Association to address issues raised by the 2007 American Bar Association Ohio Death Penalty Assessment Report.

[13]*Available at* https://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf.

> case, and further finding that removal of these specifications will reduce the race disparity of the death penalty, **it should be recommended to the legislature that the following specifications be removed from the statutes: Kidnapping, Rape, Aggravated Arson, Aggravated Robbery, and Aggravated Burglary**.

Joint Task Force to Review the Admin. of Ohio's Death Penalty, *Final Report and Recommendation* 14 (2014) (emphasis added). If that recommendation were followed, Keith would no longer be eligible for the death penalty.

B. Keith Henness is not one of the worst of the worst.

Just as not all murders are created equal, not all persons convicted of murder are equal. The Supreme Court has recognized that even within the narrowed class of those murders eligible for the death penalty, there must be virtually unlimited discretion granted to the jury to decline to impose a sentence of death:

> We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.
>
> . . . . But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett v. Ohio, 438 U.S. 586, 604–06 (1978).

There are legitimate questions in this case that remain unanswered. No one can say with absolute certainty that Keith Henness killed Richard Myers. (*See* Section IV of this Application.)

Lingering doubt exists as to whether Keith or Tabatha Henness and her drug dealing acquaintances killed Myers.

However, even if this Board believes that Keith committed this crime, he is still not one of the worst of the worst for which a sentence of death is the **only appropriate** punishment. He did not previously commit or attempt to commit murder; he did not kill or attempt to kill more than one person; he has no record of crimes of violence (his prior record involved financial crimes—not crimes of violence); he was a model and helpful prisoner in the Franklin County Jail prior to trial; and he has been a model and helpful prisoner for twenty-five years on death row. (*See* Section I of this Application.)

C. The State was willing to offer Keith a plea agreement prior to trial.

Prior to trial, the State entered into discussions with Keith's counsel to resolve the case with a plea agreement, contemplating that Keith would plead guilty in exchange for a sentence of life imprisonment with parole eligibility after approximately twenty years. (State's Second Submission 43, 122-23, 178-79 ("My understanding was that the state was offering what I would call diminished ag murder with a gun spec, which would have been pre-July 1st, 1996 law, which means that it would have been a 23 to life. And based on the good time and everything, he would have gone to the board in 14 plus three years. So he would have gone to the board in 17 years."); Edwards Aff. ¶ 14, Ex. 1.) By offering a sentence of life imprisonment with parole eligibility after serving twenty or so years, the State recognized that neither Keith nor this murder were the worst of the worst that demanded a sentence of death.

Under Ohio law at that time and based upon the amount of time he had spent in jail prior to trial, Keith would have been eligible for parole in approximately seventeen years. (State's Second Submission 178-79.) Such a significant reduction of the potential sentence from death to

parole eligibility in seventeen years demonstrates that this case and this defendant simply do not fall within that category that demands a sentence of death.

This was not a factor that either the jury or the courts were aware of when assessing whether a sentence of death was appropriate here. Plea discussions cannot be presented to the jury for its consideration. Because of that, the possibility of a plea agreement to a life-with-parole sentence was not a part of the record before the jury, or any of the courts that reviewed the case. In addition, in conducting its statutorily mandated proportionality review, the Supreme Court of Ohio does not consider whether the State had indicated it would have accepted a plea for a life sentence.

Members of this Board have recognized that the State's willingness to enter a plea agreement with a life sentence weighs in favor of a positive recommendation for clemency. In the clemency report on John Eley, #A198-441, dated June 19, 2012, three members cited the State's offer of a life sentence as one inter-related factor in favor of a recommendation of clemency: "Eley failed to cooperate at any level with his attorneys, which led him to reject a plea deal that was in his best interest." (Eley Clemency Report 16, Ex. 48.) Those three members of the Board further concluded, "The prosecution was willing to accept a punishment of less than death. The retributive needs of the state to condemn this very serious crime can be met with a punishment of life imprisonment without parole." (*Id.* at 17.) John Eley's death sentence was commuted to life without parole by Governor John Kasich on July 10, 2012.

As is explained in more detail elsewhere in this Application, similar to John Eley, Keith Henness had lost all faith in his trial counsel prior to trial because of their refusal to conduct any investigation and because they failed to meet with him for months at a time. Because defense counsel was not communicating with him and not doing anything to advocate on his behalf, Keith lost trust in them and rejected any advice that came from them about a plea agreement. (*See*,

Edwards Aff. ¶¶ 14-15, Ex. 1.) Had Keith accepted the plea agreement, the question before this Board today would be whether Keith should be paroled—not whether he should be executed. As with Eley, this Board should recognize that there were factors present that prevented Keith making an informed and knowing decision regarding a plea agreement.

D. Proportionality

When the Ohio General Assembly reinstated the current capital punishment scheme in 1981, it enacted a system of proportionality review that mandated the Supreme Court of Ohio compare the sentences of all cases involving similar crimes, which meant the court should compare those cases in which death was imposed with those in which ***life*** sentences were imposed if the crimes in those cases were similar. The court, however, has long ignored its duty to perform proportionality review and compares cases in which death was imposed exclusively with other cases in which death was imposed—ignoring similar cases in which a sentence less than death was given.

The General Assembly envisioned that the role of the court was to determine whether the death penalty in a particular case was appropriate and proportional given the death penalty's role in our "overall system of justice." *State v. Simko*, 71 Ohio St.3d 483, 502 (1994) (Pfeifer, P., dissenting). However, the court has failed to engage in any actual proportionality review of death-sentence cases that encompasses similar cases in which a life sentence was imposed to ensure that only the most heinous of crimes are being punished by death. *Id*. at 500-01.

Here, the Supreme Court of Ohio limited its proportionality review of Keith's death sentence to listing three other cases where the capital specifications of aggravated robbery and/or kidnapping resulted in a death sentence. (Henness Judicial Decisions 34.) This unbalanced review provided no credible insight into whether the death sentence imposed in this case, with the specific

facts and circumstances present, was excessive or disproportionate to the penalty imposed in similar cases.

Comparing similar crimes is the best way to determine whether a sentence is proportional. The appropriate inquiry for the courts to consider proportionality is for it to determine "whether there were 'similarly situated defendants' who had ***not*** been put to death because that inquiry is an essential part of any meaningful proportionality review." *Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Mem.) (Stevens, J., Statement Regarding Denial of Certiorari). "That approach" was appropriate because "quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Id.* at 454-55.

Because the Supreme Court of Ohio has failed to conduct a meaningful proportionality review, this Board is in a unique position to view the facts of this crime from a fundamentally different perspective than what the jury and appellate courts had before them. This Board will be the first government body to engage in a proportionality review that considers defendants similarly situated to Keith who received a sentence less than death, something the authors of the death penalty law in 1981 envisioned the Supreme Court of Ohio doing.

In *State v. Green*, 66 Ohio St.3d 141 (1993), Justice Pfeifer noted that "[t]he obvious purpose of the statute's proportionality language is to ensure that a death sentence is fair *in comparison to the penalty received by other persons committing like crimes*." *Id.* at 156 (Pfeifer, J., dissenting); *see also State v. Simko*, 71 Ohio St. 3d 483, 501 (1994) (Pfeifer, J., and Moyer, C.J., dissenting) ("To rely completely on the crimes of others [sentenced to death] in determining whether the death penalty is proportionate in a given case demeans our responsibility to review each case individually.").

Keith's sentence of death is disproportional to the sentences imposed on those who committed similar crimes—or in many instances, those who committed far more heinous aggravated murders—across the State and in particular in Franklin County. (*See* Section V of this Application.)

A favorable recommendation for clemency would rectify the disproportionality of the sentence imposed on Keith Henness.

E. Conclusion

The collective circumstances here weigh in favor of clemency for Keith Henness. Under any assessment, this murder, while tragic for the family of Richard Myers and the community as a whole, is not among the worst of the worst murders that so shocks the conscience that a sentence of death is demanded. Nor is Keith one of the worst-of-the-worst for whom a sentence of death is the only appropriate punishment. Keith has no record of crimes of violence; he was a model and helpful prisoner in the Franklin County Jail; and he has been a model and helpful prisoner for twenty-five years on death row.

The State recognized that neither this crime nor Keith was one of the-worst-of-the-worst because the State proposed a plea agreement that would have resulted in a life sentence with parole eligibility. Had Keith had effective counsel and taken that agreement, he already would have been eligible for parole. Offers of life sentences do no occur in the worst-of-the-worst cases. Keith's deteriorating relationship with his counsel prevented him from discussing or accepting a plea agreement that would have been in his best interest.

Finally, Keith's sentence of death is disproportionate to the many life sentences imposed in similar or far more aggravated cases. This case is not the most aggravated case in the 194 of

196 aggravated murder cases in Franklin County from 1990 to 1995 that received sentences less than death. A commutation of Keith's death sentence will help to rectify this disproportionality.

THE GOVERNOR SHOULD GRANT CLEMENCY

Keith recognizes that the commutation of a death sentence is an extraordinary act by the governor. But it is clearly within the power of this Board to recommend this relief in exceptional circumstances. For the reasons stated in this application, Keith respectfully requests that this Board issue a favorable recommendation for clemency to the Honorable Mike DeWine.

CERTIFICATE OF SERVICE

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

Jamie O'Toole, Ohio Parole Board

Brenda Leikala, Capital Crimes Unit, Ohio Attorney General's Office

Steven Taylor, Franklin County Prosecutors Office.

Matthew Donahue, Ohio Attorney General's Office (as Counsel for incoming Governor DeWine)

on this 3rd day of January, 2019.

/S/ *David C. Stebbins*
David C. Stebbins
Counsel for Warren Keith Henness