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June 24, 2019

Office of Executive Clemency  
4070 Esplanade Way  
Tallahassee, Florida 32399-2450

Re: Request for Clemency for Kevin R. Herrick

Dear Sir/Madam:

I write this letter in full support of Kevin Herrick's application for clemency. I would be happy to be contacted for further information or to be of assistance in any way.

My name is Audrey B. Swank and I worked as a Staff Attorney for the United States District Court for the Middle District of Florida, Tampa Division, from 2000-2006. As a Staff Attorney, I handled all aspects of petitions for writ of habeas corpus assigned to me, from inception to conclusion, for Magistrate and District Judges in the Tampa and Ft. Myers divisions.

I am still a practicing attorney, licensed in Florida, New York, Michigan, and the District of Columbia. I am in private practice now and live and work in Rochester, New York. I am sending this letter because for about 15 years, I have lived with the guilt that I was unable to convince the Magistrate and District Judges assigned to Kevin's case that his petition for writ of habeas corpus should be granted.

Of the myriad cases I handled over the six years I was a Staff Attorney, only once was I convinced that a petitioner was due the relief he sought; not only that, but the petitioner also demonstrated that he was innocent of the charges for which he was convicted and sentenced to life imprisonment. The unique case was Kevin Herrick's. After a thorough review of the case file, I believed Kevin to be factually innocent. However, innocence is not a basis for the grant of a writ of habeas corpus. But, I also believed Kevin was entitled to the writ because, among other reasons, he was deprived of a fair trial, evidence was ignored/lost/misinterpreted/untested, and perhaps most significant, his counsel was horrifyingly

ineffective. I am afraid that after so many years, many details have faded, but I summarize below what I do remember to the best of my ability.

I spent months on Kevin's petition for writ of habeas corpus (Sec. 2254). As I did with every habeas corpus petition, I read every word in the record, trial transcripts, record on appeal, rulings, etc. I knew every detail of the case and was, to my shock, 100% convinced of Kevin's innocence. I was horrified by his case. My belief that Kevin is innocent has not changed in the years since. However, granting a writ of habeas corpus does not rely upon innocence, rather it looks at whether the petitioner's underlying state conviction was legal, were his constitutional rights violated? For example, was counsel ineffective? Was due process followed? Did the petitioner get a fair trial? Importantly, a petitioner must have exhausted his remedies in state court, in other words, he must have jumped through the state post-conviction hoops properly and timely. In Kevin's case, if I remember correctly, his failure (and defense counsel's failure) to timely or properly challenge certain issues on appeal or via post-conviction relief in the state courts prevented him from raising meritorious issues in federal court when seeking the writ of habeas corpus. If the issues were not exhausted in the state courts, regardless of their merit, they could not be entertained by the United States District Court.

Everything that could have gone wrong in Kevin's case did go wrong—beginning with Kevin being at the wrong place at the wrong time, the questionable police investigation and their suggestive and damning “questioning” of the victims (including law enforcement's completely false statements about having discovered the blood-covered weapon in Kevin's room), Kevin's having been in trouble as a teen with the local police and being known to them as a trouble-maker, Kevin's hiring of a defense attorney who would later be revealed to be a drug-addicted alcoholic who was not capable of providing and did not provide the defense Kevin deserved, the procedural mis-steps of the defense attorney during and after trial, sentencing calculation errors, and Kevin's inability to adequately represent himself, *pro se*, in trying to prove his innocence and exhaust his remedies at the state level.

So many years after I first handled this case, I admit my recollection of the facts is faulty. But, what I do remember are the salient details that convinced me so many years ago that Kevin was innocent and that at a minimum, he deserved a hearing to allow him to flesh out the facts he claimed showed he had been deprived of his constitutional rights in the state court proceedings. The magistrate judge agreed and a hearing was held.

The police improperly suggested to the victims that the assailant was Kevin and that is what led to the victims “identifying” Kevin. The police blatantly lied to the victims. Before the police gave the misinformation about Kevin to the victims, each victim had given a physical description that did not match Kevin (nor did either description match the other victim's description of the assailant). Furthermore, according to all witness reports at the time, Kevin was standing outside *with everyone else* when the male victim returned after chasing down the assailant. The landlady and neighbors would have confirmed that if asked—but they were never asked. Unfortunately, Kevin's landlady, with whom Kevin had been living, died before trial, her deposition was poorly done, and the neighbors had no idea that Kevin was even charged and were not contacted as witnesses/alibis. After the trial and verdict, some of Kevin's and the victims' former neighbors reached out to the family to express their shock and dismay and regret that they were not contacted to testify on Kevin's behalf, as they saw him emerge from his apartment, still shaking off sleep, and were standing with him as the male victim returned from chasing the assailant (whom the victim stated had sped off in a car). The male victim had returned from his

footchase of the assailant shouting out a license plate number of the assailant's escape vehicle—there was no indication that the license plate was ever investigated as the police's arrest of Kevin shortly after the attack seemed to have put a halt to any real investigation.

As I said before, if it could go wrong for Kevin, it did. His best witnesses died or disappeared. The police failed to pursue the license plate number the male victim saw on the car that he said the assailant drove away in and was yelling out as he returned to the group (which included Kevin).

Kevin's attorney was a drug-addicted alcoholic who failed Kevin in many ways, not the least was his refusal to acknowledge his failures when we held the hearing on the 2254 habeas petition in federal court. In fact, the court had to have the defense attorney furloughed from prison for the evidentiary hearing, where he was serving time for his umpteenth DUI (with serious bodily injury I believe). The defense attorney arrogantly insisted he could have done no more than he did and that Kevin received a constitutionally fair defense. Considering that Kevin and his family all reported smelling alcohol on counsel's breath during trial and that his behavior was impaired, it is hard to fathom that his judgment was not impaired as well especially after reading the trial transcript and knowing counsel missed the crucial appeal deadline.

My recollection of the trial was that the defense attorney barely put on a defense. He failed to address the police misconduct, failed to contact witnesses who were with Kevin at the very time the male victim was chasing the lone assailant, and other issues I can't recall but rose to a degree that I believed an evidentiary hearing was appropriate and the Magistrate Judge agreed. Counsel also failed to address Kevin's criminal history as a 19-year-old boy whose foolish choices and stupid actions with a friend looked much worse on paper as prior convictions than reality would show and which would eventually cause sentencing calculations that led to life imprisonment.

From a procedural/exhaustion standpoint, I recall that the defense attorney missed appeal deadlines and for many meritworthy issues that could have otherwise been addressed by the District Court, Kevin was unable to prove he had exhausted procedural steps. The sentencing court erred and imposed too many points, leading to a life sentence. If I remember correctly, the sentencing court double-counted certain points, but because the attorney did not timely appeal the issue, it could not be considered by the appellate court. But, the appellate court explained that even if the issue were timely, it would not matter if the record were corrected to remove the double-counting, even though the appellate court agreed that points had been double-counted, because there would be no reduction in the sentence. However, there was *another* erroneous sentencing calculation revealed later; if both issues were timely appealed, and properly addressed by the appellate court, and the record corrected for both sentencing errors, Kevin's sentence would have been much shorter and he would not have been sentenced to life.

I understand that The Clemency Project does not want to hear my opinion that Kevin is innocent. But the problem is, after my exhaustive review of his entire case file as the attorney assigned to Kevin's petition for writ of habeas corpus, including full review of the trial and appeal record, I formed the opinion that Kevin is innocent. I also believe that he did not receive constitutionally sufficient legal representation and as a direct result of the ineffective assistance of counsel, Kevin was convicted of crimes he did not commit. I also believe that police misconduct led to his arrest and the charges for which he was convicted and that uncorrected sentencing errors and his prior convictions led to an undeserved life sentence.

I have never waived from my opinions which were formed after a review of literally every single page of the record available to the federal court at that time. The evidentiary hearing did not change my opinion of his innocence or that he was deprived of his constitutional rights before, during, and after his trial.

I don't know how to write a letter in support of a request for clemency that will help because my position is that KEVIN IS INNOCENT. He should not be in prison. His trial and conviction and post-conviction proceedings have been the single biggest miscarriage of justice I have ever come across in my career and I feel terrible guilt that his one chance at habeas relief failed. Kevin has served almost 30 years and even if he had committed the crimes for which he was convicted, a life sentence is a punishment that does not fit the crimes.

Clemency is defined as "an act of mercy that absolves an individual from all or any part of the punishment that the law imposes." Kevin is deserving of that mercy, because he did not receive a fair trial, did not receive effective assistance of counsel, and was subjected to improper police conduct that led to his being charged with and convicted of crimes he did not commit, for which he was improperly sentenced to life imprisonment. He also is deserving of mercy because he has been an exemplary prisoner, has strived to be and is a good man, has dedicated his life to God and helping others, and has never stopped believing that the truth would one day set him free. Because our justice system has guaranteed that the truth will never set Kevin free, he, his family, his friends, and those like me whose lives he impacted, ask for your mercy.

Sincerely,

Audrey B. Swank, Esq.