No. A21-0830

STATE OF MINNESOTA

IN SUPREME COURT

Amrey Rahmeto Shefa,

Respondent/Cross-Appellant,

vs.

Attorney General Keith Ellison,
in his official capacity,

Appellant/Cross-Respondent,

Governor Tim Walz,
in his official capacity,

Respondent/Cross-Appellant,

and

Chief Justice Lorie Gildea,
in her official capacity,

Appellant/Cross-Respondent.

BRIEF OF *AMICUS CURIAE* GREAT NORTH INNOCENCE PROJECT

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Statement of *Amicus Curiae*

Amicus curiae Great North Innocence Project of Minnesota (GN-IP) is Minnesota's largest non-profit organization devoted to the exoneration of inmates who were wrongfully convicted and to the prevention of future wrongful convictions. GN-IP primarily serves clients in Minnesota, North Dakota, and South Dakota and is part of a national network of similar organizations that collectively work to raise awareness of and prevent wrongful convictions.[1]

GN-IP's interest is purely public in nature. GN-IP has concerns about the availability of clemency as a robust tool for remedying wrongful convictions in Minnesota. It is GN-IP's position that the Minnesota statutory requirement for unanimity in order for the Board of Pardons to grant clemency violates the Minnesota Constitution and imposes an undue burden on the ability of individuals, including those wrongfully convicted of crimes, to obtain relief from the Board of Pardons.

Introduction

Minnesota's clemency system is not working. Hamstrung by a statutory requirement of unanimity to grant clemency, the Minnesota Board of Pardons has for decades largely abandoned the practice of granting full pardons and commutations. With traditional clemency now mostly a historical relic in Minnesota, the only form of clemency that the Board of Pardons has dispensed with any regularity in recent decades has been the pardon extraordinary,

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, Great North Innocence Project certifies that this brief is written by its counsel of record, and that no party or counsel for a party authored the brief in whole or in part. No person or entity, other than Great North Innocence Project, made any monetary contribution to the preparation of this brief.

a more limited remedy exclusively available to individuals whose sentences have long concluded. Even there, however, the number of grants each year is paltry compared to many states around the country.

The blame for this state of affairs—one that has persisted over multiple decades and numerous officials of different political parties—lies at least in part in the unusual institutional design of Minnesota's Board of Pardons. Minnesota is one of only a small handful of states that delegates matters of clemency to a board consisting of the governor and other high-ranking government officials.[2] Of those, it is the only state that requires unanimity among its board in order to grant relief.

While the Board of Pardons finds its origin in Article V, Section 7 of the Minnesota Constitution, the requirement for unanimity to grant pardons and commutations is a statutory creation, found in Minnesota Statutes Section 638.02, Subdivision 1.[3] As the District Court held below, and as Respondents/Cross-Appellants capably argue in their briefs, this provision is unconstitutional. Among other reasons, this statutory provision is inconsistent with the text of Article V, Section 7 of the Minnesota Constitution, which plainly affords power to the governor that is distinct from the collective power of the Board of Pardons.

In addition to this constitutional infirmity, the unanimity requirement has the effect of creating an unduly high hurdle that an individual seeking a pardon or commutation must clear in order to obtain relief from the Board of Pardons. Clemency determinations entail inherently difficult, and often controversial, decisions that require the exercise of judgment on questions

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[2] The other states are Nebraska, Nevada, and Florida.

[3] The statute also requires unanimity to grant pardons extraordinary, but the constitutionality of that provision is not at issue here. Minn. Stat. § 638.02, subd. 2.

of law, politics, and morality. These questions often involve assessing and weighing competing values in the face of great uncertainty. The predictable result of conditioning any grant of clemency on getting three high-ranking elected officials to agree is that there just will not be that many grants. Indeed, as discussed below, that is exactly what we have seen in Minnesota.

Because the unanimity requirement makes it so difficult to obtain clemency in Minnesota, the clemency system is not able to serve its traditional purposes. Chief among those purposes is to function as a last line of defense against wrongful convictions. Our legal system has always placed a preeminent value on avoiding the conviction and incarceration of innocent people. Benjamin Franklin (raising Sir William Blackstone's famous 10:1 ratio by an order of magnitude) said, "That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved."[4] Thus, many aspects of our legal system, including the slate of protections for criminal defendants set out in the Bill of Rights, are directed toward avoiding that result most noxious to our shared notions of justice: imprisoning an innocent person. Clemency can be and should be part of the legal apparatus protecting against such injustices.

As discussed in Part I below, clemency has historically played a major role in protecting against wrongful convictions in our legal system, a role that the Board of Pardons unanimity requirement prevents clemency from playing in any meaningful sense in Minnesota. As discussed in Part II below, the available avenues for judicial relief under Minnesota law are an insufficient replacement for an inadequate clemency system. There are whole categories of

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[4] Letter from B. Franklin, to Benjamin Vaughan (Mar. 14, 1785), 9 Albert H. Smyth, *The Writings of Benjamin Franklin* 293, ed. 9 (1906).

wrongfully convicted individuals for whom Minnesota's postconviction regime does not provide relief, including in cases where new evidence of innocence comes to light more than two years after a conviction becomes final and where the evidence of innocence was available at the time of trial. A robust clemency system could provide relief for some of these innocent people who otherwise fall through the cracks. Removing the unanimity requirement would help advance that objective and provide greater protection against wrongful convictions.

Therefore, *amicus curiae* express support for Respondents/Cross-Appellants and request that the Court uphold the District Court's decision finding that the statutory requirement for unanimity to grant pardons and commutations violates Article V, Section 7 of the Minnesota Constitution.

Argument

I. The Unanimity Requirement for Clemency Diminishes the Role of Clemency as a Protection Against Wrongful Convictions.

Clemency has historically served, among other purposes, the essential role in the Anglo-American legal system of protecting against the risk of wrongfully imprisoning individuals for crimes they did not commit. The interpretation of Article V, Section 7 of the Minnesota Constitution that the District Court adopted below best serves to advance this vital historical objective. Conversely, a reading of that constitutional provision that permits a requirement for unanimity among the Board of Pardons to grant clemency risks undermining that historical objective by narrowing the opportunities for wrongfully convicted individuals to obtain relief.

A. Clemency Has Historically Served as a Critical Safeguard Against Wrongful Convictions.

The American concept of clemency for individuals convicted of crimes finds its roots in the English legal system, which vested the clemency power in the Crown as far back as the eighth century.[5] The United States Constitution takes the English system as its model, granting the President the "Power to grant Reprieves and Pardons for Offenses against the United States." U.S. Const. art. II, § 2, cl. 1. In an early U.S. Supreme Court case examining the pardon power, Chief Justice Marshall noted this historical pedigree explicitly:

> As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

United States v. Wilson, 32 U.S. 150, 160–61 (1833). The states, for their part, have split, with some opting to follow this model by vesting the clemency power in the governor, and others pursuing a range of alternative models. As the parties to this litigation have discussed at length, Minnesota initially followed the federal model before moving to a three-member Board of Pardons with the 1896 amendment to the Minnesota Constitution.

Until the last century, a pardon was the exclusive form of relief for a wrongfully convicted defendant in England since there was no right of appeal in criminal cases until Parliament created the Court of Criminal Appeal in 1907.[6] While the United States and most of its constituent states established systems of criminal appeals earlier in time, those courts

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[5] W. Humbert, *The Pardoning Power* 9 (1941).

[6] Atty. Gen.'s Survey of Release Procedures 73 (1939).

tended to direct most of their attention to legal errors such that executive clemency remained an essential remedy for cases of factual innocence.[7] It was only later in the twentieth century that more robust state postconviction regimes began to provide a meaningful judicial outlet for exonerations of wrongfully convicted individuals.

Thus, pardons play a starring role in earlier examinations of wrongful convictions in the United States. Most notably, Yale Law Professor Edwin Borchard in 1932 published a seminal examination of 65 cases of wrongful conviction.[8] Of the cases Professor Borchard examined, 47 of the defendants were exonerated through a pardon, with the remaining 18 acquitted following new trials. Six decades later, Michael Radelet, Hugo Bedau, and Constance Putnam examined 292 cases involving around 400 defendants wrongfully convicted of capital or potentially capital crimes over the course of the twentieth century. Of those 292 cases, 62 resulted in pardons.[9]

Examining the issue from the opposite angle in 1941, W.H. Humbert reviewed all the presidential pardons between 1881 and 1931 for which the Pardon Attorney in the Department of Justice provided a written recommendation. Humbert catalogued the pardons based on the reasons provided for recommending a pardon, with many of the common reasons sounding in innocence.[10] These included "disclosure of new evidence" (77 pardons), "grave doubt as to justice of conviction" (67 pardons), "insufficient evidence" (53 pardons), "dying confession of real murderer" (109 pardons), "mistaken identity" (3 pardons), "to rectify

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7 *Id.* at 73–74.
8 E. Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (1932).
9 M. Radelet, H. Bedau & C. Putnam, *In Spite of Innocence* 282–356 (1992) (cataloguing cases).
10 W.H. Humbert, *The Pardoning Power of the President* (1941).

mistake in prisoner's commitment" (129 pardons), "conflicting testimony" (4 pardons), "doubt as to guilt" (189 pardons), and simply "innocence" (94 pardons).[11] These numbers do not even begin to account for all of the innocence-related pardons across the states.

Even in recent decades, as judicial postconviction regimes have overtaken clemency as the primary outlet for exonerations, pardons continue to play an essential role in providing relief for those wrongfully convicted of crimes. The National Registry of Exonerations (the "NRE"), which catalogues exonerations around the United States since 1989, lists 86 cases in its database of individuals who were exonerated solely by a pardon.[12] This number substantially understates the role that innocence-related concerns play in the pardon process since, among other reasons, the NRE only includes within its registry pardons based at least in part on *new* evidence of innocence (as opposed to evidence presented at trial or known by the defendant at the time of a guilty plea).[13] Therefore, the NRE would not include cases where the pardon is based at least in part on grave doubts concerning guilt based on evidence that was known at the time of conviction. The role of pardons in such cases is discussed further below in Part II.B.

The U.S. Supreme Court has itself taken note of the key role that pardons have historically played in correcting wrongful convictions. In 1925, the Court recognized that "[e]xecutive clemency exists to afford relief from undue harshness *or evident mistake* in the

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[11] *Id.* at 124 & Table VI. Note that more than reason may have been provided for any given pardon.

[12] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[13] The National Registry of Exonerations, Glossary, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (definition of "Exoneration").

operation or enforcement of the criminal law." *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (emphasis added). The Court gave an extended treatment to this issue in *Herrera v. Collins*, 506 U.S. 390 (1993). In that case, the Court declined to recognize (but did not foreclose the possibility of) a freestanding constitutional claim for relief based on a prisoner's showing of actual innocence without a separate constitutional error. Insisting that the absence of such a judicial avenue for relief would not leave wrongfully convicted individuals without any remedy, Chief Justice Rehnquist, writing for the Court, pointed to the clemency power as being "deeply rooted in our Anglo-American tradition of law, and [] the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411–12. Citing some of the same sources discussed above, the Court stated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system" to remedy wrongful convictions coming out of our judicial system, which, "like the human beings who administer it, is fallible." *Id.* at 415 (quoting K. Moore, *Pardons: Justice, Mercy, and the Public Interest* 131 (1989)).

Thus, it is well established that the pardon has functioned historically as a protection against wrongful convictions across the broader Anglo-American legal system. The clemency power set forth in the Minnesota Constitution arises out of that same tradition. That the citizens of this state in 1896 opted for a model departing in certain respects from the pure executive clemency model of the English and federal systems does not change that. While the Minnesota Constitution, as amended, changed *who* participates in the decision to grant pardons, it in no way represents a rejection of the *purpose* that clemency is meant to serve. To put a finer point on it, we are aware of no authority whatsoever for the notion that anyone in 1896 would have understood the amendment as dispensing with the traditional notion that

clemency's central purposes include serving as a last line of defense against wrongful convictions.

B. Requiring Unanimity Makes Pardons Too Difficult to Obtain and Thus Weakens the Protection Against Wrongful Convictions.

The provision under Minnesota Statutes Section 638.02, Subdivision 1 requiring a unanimous vote from the Board of Pardons to grant clemency imposes an unduly high bar that limits the ability of clemency to serve as a potent remedy for wrongful convictions. If the text and structure of the Minnesota Constitution imposed such a result, then, absent a constitutional amendment, that policy's shortcoming would be something we would simply have to accept. As it is, however, the relevant constitutional provisions point in exactly the opposite direction, for the reasons set forth at length in the District Court's decision below and in Respondents'/Cross-Appellants' briefs. Thus, we are left with a statute that both violates the text of the Constitution and weakens a core purpose of clemency as traditionally understood in our legal system.

The result of that unconstitutional statute is that clemency of any type is exceedingly rare in Minnesota, and full pardons and commutations have become practically non-existent. The chart in the appendix to this brief reflects for each year from 1992 to 2020 the number of applications for pardons/commutations[14] and pardons extraordinary received by the Board of Pardons, the number of each that were granted each year, and the resulting grant rates. As the data in that chart reflect, full pardons and commutations have been almost entirely unavailable in Minnesota for the past three decades. 2020 represents an extreme outlier in that there were

[14] The Minnesota Board of Pardons Annual Reports for most years do not distinguish between pardons and commutations in their presentation of the application statistics.

two commutations and one pardon granted, the only such grants in the period covered. Indeed, the pardon of Maria Elizondo was the first full pardon granted in Minnesota since 1984, and it came with a serious price tag: she was required to first pay over $15,000 in restitution, an amount that likely would have remained out of reach but for the sympathetic facts of her case driving a successful GoFundMe campaign.[15]

The only one of the three 2020 grants that involved a claim of innocence—and the only one involving a crime of violence—was the highly publicized commutation of Myon Burrell.[16][17] Notably, that case did not require the agreement of all three members of the Board of Pardons since Chief Justice Gildea recused herself from consideration of that matter.[18] That such a rare result occurred when the unanimity requirement was functionally suspended

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15 B. Bierschbach, "Minnesota Officials Grant State's First Full Pardon in More Than 35 Years," Star Tribune (Jan. 25, 2021), https://www.startribune.com/minnesota-officials-grant-state-s-first-full-pardon-in-more-than-35-years/600014913/. Ms. Elizondo originally received a conditional pardon in December 2020 requiring her to first pay outstanding restitution. Once that amount was paid, she was granted a full pardon in a special meeting of the Board of Pardons in January 2021. *Id.*

16 C. Xiong & L. Sawyer, "Board of Pardons Commutes Myon Burrell's Sentence, Release from Prison," Star Tribune (Dec. 16, 2020), https://www.startribune.com/board-of-pardons-commutes-myon-burrell-sentence-calls-for-immediate-release-from-prison/573399171. The third grant in 2020 was for Kelli Caron, who was convicted on charges related to possession of methamphetamine. She was not released but instead transferred to federal prison to serve a federal sentence that was running concurrently. K. Featherly, "Woman Receives Rare Commutation of Sentence," Minnesota Lawyer (June 18, 2020), https://minnlawyer.com/2020/06/18/woman-receives-rare-commutation-of-sentence.

17 The third grant in 2020 was for Kelli Caron, who was convicted on charges related to possession of methamphetamine. She was not released but instead transferred to federal prison to serve a federal sentence that was running concurrently. K. Featherly, *supra* note 16.

18 C. Xiong & L. Sawyer, *supra* note 16.

is itself strongly suggestive that the unanimity requirement is largely responsible for the fact that the grant rate for full pardons and commutations since 1992 stands at a miniscule 0.79%.

The only form of clemency granted with any regularity in Minnesota is the pardon extraordinary, a statutory form of relief available to individuals who have completed their sentences plus five years (or ten years for violent crimes) and have demonstrated that they are "of good character and reputation." Minn. Stat. § 638.02, subd. 2. The effect of a pardon extraordinary is to relieve the individual of most effects of a criminal conviction, with the exception that the conviction remains on the person's criminal record for purposes of future legal proceedings. *Id.* Of course, the required waiting period means that this form of relief, by definition, can do nothing to protect against wrongful convictions and is not designed to address credible claims of innocence made by people who are in prison. Even pardons extraordinary are handed out relatively sparingly, with an average of fewer than 16 grants per year since 1992 (440 grants over the course of 19 years).

Minnesota is substantially stingier with clemency than many other states, including a number of states that are commonly viewed as much less progressive on criminal justice matters. In Alabama, for example, there have been an average of over 600 pardons *per year* over the past decade, more than the combined number of pardons in Minnesota over the past 29 years.[19] The corresponding rate for Georgia during the same period is about 640 pardons per year.[20] While these states admittedly have larger prison populations than Minnesota, those

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[19] This number is calculated based on the data included in the Annual Reports for the Alabama Bureau of Pardons and Paroles for fiscal years 2010-2011 through 2019-2020, https://paroles.alabama.gov/resources/annual-reports.

[20] This number is calculated based on the data included in the Annual Reports for the Georgia State Board of Pardons and Paroles for 2011 through 2020,

differences do not come close to accounting for the differences in annual clemency grant rates being up to 40 times that of Minnesota.[21]

To the extent one accepts that a system in which clemency is regularly granted advances the ends of justice, Minnesota's system is arguably the worst of all worlds. Unlike states like Alabama and Georgia that have created independent boards to make pardon decisions outside the glare of politics, the structure of the Minnesota Board of Pardons does little to insulate the decisions from politics. The Board consists of three of the most high-profile elected officials in the state government (as opposed to semi-anonymous appointees), and the Board is not large enough that any of its members could take much refuge in the fact that it was a group decision should the recipient of clemency reoffend and generate inevitable public outrage. So the Board does not provide meaningful political cover, and at the same time makes pardons automatically more difficult by virtue of requiring all three actors to agree. The result is that each of the three members have veto power. As such, it is not difficult to see why full pardons and commutations have become the black swan of Minnesota law.

Of course, requiring a simple majority vote to grant clemency would do nothing to address the political pressures inherent to the present arrangement. It would, however, meaningfully lower the hurdle for obtaining clemency since an applicant would only need two votes instead of all three. An examination of Nebraska's clemency procedures is informative

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https://pap.georgia.gov/office-communications-news-publications-and-events/publications/annual-reports.

[21] As of the end of 2018, Minnesota's prison population was 10,101, whereas Alabama's was 26,841 (2.66x Minnesota) and Georgia's was 53, 647 (5.31x Minnesota). U.S. Dep't of Justice, Nat'l Inst. Of Corrections, State Statistics Information, https://nicic.gov/projects/state-statistics-information.

on this point. Nebraska's basic structure is similar to Minnesota's in that involves a three-person pardon board (the governor, attorney general, and secretary of state).[22] In Nebraska's case, however, a grant of clemency only requires a simple majority of the board. Neb. Rev. Stat. Ann. § 83-1,130(3). In terms of the volume of pardon grants, Nebraska compares favorably to Minnesota with an average of about 80 pardons per year between 2002 and 2017.[23] That is five times Minnesota's rate in a state with about half the prison population of Minnesota.[24] Adjusting for the size of their respective prison populations, Nebraska's rate of pardons granted per year would be about ten times that of Minnesota. It stands to reason that the absence of a unanimity requirement in Nebraska is a substantial contributor to Nebraska's higher volume of pardons.

Therefore, in addition to the unanimity requirement for a pardon being incompatible with the text and structure of the state Constitution, that requirement creates an unduly high burden for a person to obtain a pardon. The result is that Minnesota grants very few pardons of any type and almost no full pardons of the type that could provide meaningful protection against wrongful convictions.

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[22] That Nebraska's pardon board is populated entirely from executive branch officials is not a meaningful distinction with Minnesota's Board of Pardons (which includes a representative of the judiciary in the Chief Justice) because Nebraska, like Minnesota, does not have a unitary executive. Instead, the attorney general and secretary of state are elected separate from and are independent of the governor. Nebr. Const., art. IV-1. Therefore, while the precise composition differs slightly, both Minnesota and Nebraska have boards comprised of three high-ranking, independent elected officials.

[23] Restoration of Rights Project, 50-State Comparison: Pardon Policy & Practice, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2.

[24] As of the end of 2018, Nebraska's prison population was 5,491. U.S. Dep't of Justice, Nat'l Inst. Of Corrections, State Statistics Information, https://nicic.gov/projects/state-statistics-information.

II. Avenues for Judicial Relief Under Minnesota Law Are Not Alone Sufficient to Protect Against Wrongful Convictions.

The currently available avenues for judicial postconviction relief in Minnesota cannot fully compensate for the absence of a clemency system that provides meaningful protection against wrongful convictions. While Minnesota law does provide certain paths for innocent people to have their convictions overturned, those paths leave significant gaps that a more robust clemency regime might be able to fill, at least in part. Among other limitations, Minnesota law makes it extremely difficult to pursue postconviction relief where new evidence comes to light more than two years following the completion of direct appeals. Moreover, the postconviction statute does not assist those whose guilt is in grave doubt based on evidence that was previously available.

A. Minnesota Law Imposes High Barriers to Postconviction Relief Where New Evidence of Innocence Is Discovered More than Two Years After The Conviction Is Final.

First, the Minnesota postconviction statute is unforgiving toward individuals for whom evidence of innocence comes to light more than two years following completion of the individual's direct appeal. To pursue a claim based on newly discovered evidence outside that two-year window, a petitioner must show not only (1) that the evidence could not previously have been discovered with due diligence, is not cumulative, and is not for impeachment purposes (fairly standard requirements), but also (2) that the evidence "establishes by a clear and convincing standard that the petitioner is innocent." Minn. Stat. § 590.01, subd. 4(b)(2). It is this second requirement that makes the Minnesota statute substantially more demanding than many other states' postconviction statutes.

As a point of comparison, the South Dakota postconviction statute (tracking the language of the parallel federal provision in 28 U.S.C. § 2244(d)(1)(D)) provides that one of the potential triggers for its two-year statute of limitations is "[t]he date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." S.D. Codified Laws § 21-27-3.3(4). Thus, if there is new evidence that provides the basis for a claim, the petitioner gets two years to bring the claim. Unlike Minnesota, there is no additional requirement that the new evidence prove the petitioner's innocence by a clear and convincing standard. Our neighbors in the other direction, Wisconsin, are even more friendly toward postconviction claims, with *no* statute of limitations. Wis. Stat. § 974.06.

The extra requirement of showing that the new evidence provides clear and convincing proof of innocence is no small hurdle. "Under the clear and convincing standard, the proffered evidence must be unequivocal, intrinsically probable, and free from frailties." *Rhodes v. State*, 875 N.W.2d 779, 788 (Minn. 2016) (citing *Gassler v. State*, 787 N.W.2d 575, 583 (Minn. 2010)). This standard is markedly more demanding than the preponderance of the evidence standard, which applies in most civil matters and "requires that to establish a fact, it must be more probable that the fact exists than that the contrary exists." *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004). Thus, even if a petitioner has bona fide newly discovered evidence, and that evidence demonstrates it is more likely than not that petitioner is innocent, Minnesota law will not even allow that petitioner to proceed with a postconviction claim outside the two-year window (regardless of the merits of that claim) unless the petitioner can satisfy the higher clear and convincing standard.

On its face, the Minnesota statute appears to offer a separate path forward for claims outside the two-year window where "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). Notwithstanding that facially broad language, this Court has made clear that "the interests of justice are implicated only in exceptional and extraordinary situations." *Carlton v. State*, 816 N.W.2d 590, 607 (Minn. 2012) (quotation omitted). While the Court has not offered a definitive list of the factors to be considered, it has articulated a nonexclusive list of factors that inform this determination, including:

> (1) whether the claim has substantive merit; (2) whether the defendant deliberately and inexcusably failed to raise the issue on direct appeal; (3) whether the party alleging error is at fault for that error and the degree of fault assigned to the party defending the alleged error; (4) whether some fundamental unfairness to the defendant needs to be addressed; and (5) whether application of the interests-of-justice analysis is necessary to protect the fairness, integrity, or public reputation of judicial proceedings.

Id. (citing *Gassler*, 787 N.W.2d at 586–87). The Court has made clear that "the factors identified in *Gassler* do not form a rigid test," that "courts are not required to examine each *Gassler* factor in every case," and that "[d]ifferent factors may be dispositive in the unique circumstances of each case." *Id.* at 608. Nevertheless, these factors have provided the framework for the Court's analysis in subsequent cases examining the "interests of justice" exception to the two-year statute of limitations.

The Court's decision in *Gassler* demonstrates just how demanding the standard can be for invoking this exception. There, the Court held that the "interests of justice" exception did not apply even though (1) there was no dispute concerning the substantive merits of petitioner's underlying claim, (2) petitioner had not previously had any opportunity to have

that claim heard, and (3) the delay in filing was attributable to the FBI, not the petitioner. 787 N.W.2d at 587. Notwithstanding those factors, the Court pointed to the "substantial admissible evidence of [petitioner's] guilt admitted at trial" and concluded that the admission of problematic evidence forming the basis for petitioner's claim did not "result[] in a trial so fundamentally unfair to [petitioner] as to require us to act to protect the integrity of the judicial process." *Id.*

To contrast, the Court reached the opposite conclusion in a case the next year, *Rickert v. State*, 795 N.W.2d 236 (Minn. 2011). There, however, the petitioner and his counsel took the necessary steps to request essential transcripts well within the limitations period but, for reasons outside their control, did not receive them until two days before the deadline. *Id.* at 241–42. The narrow line of reasoning in *Rickert* would do nothing for a petitioner who did not even discover the relevant facts until outside the two-year window. Moreover, the Court clarified in a subsequent case, *Sanchez v. State*, that application of the "interests of justice" exception is based on "the *reason* the petition was filed after the 2-year time limit . . . , not the *substantive claims* in the petition." *Carlton*, 816 N.W.2d at 557 (emphasis in original).

Thus, while the Court's framework for considering the "interests of justice" exception under *Gassler* and subsequent cases is sufficiently open-ended to allow petitioners to advance credible arguments, there is no question that it is a demanding standard. Therefore, whether a petitioner seeks to overcome the two-year statute of limitations through newly discovered evidence or through the "interests of justice" exception, there is in either case a high hurdle to clear. Those hurdles make Minnesota's postconviction statute more demanding as compared to many other states. They also leave a substantial body of cases in which judicial

relief is out of reach but that could present strong candidates for pardons. Those cases are less likely to result in pardons under Minnesota's current statutory scheme given how difficult the unanimity requirement makes it to get a pardon.

B. Minnesota Postconviction Law Generally Does Not Provide Relief Where the Key Evidence of Innocence Was Previously Available.

Second, whatever opportunities for postconviction relief may exist for petitioners who are able to successfully advance claims based on newly discovered evidence, that relief generally will not be available for individuals for whom there is compelling evidence of innocence but where that evidence was previously available. These individuals, swept up in the law's general deference in favor of finality, may be strong candidates for pardons, particularly where grave doubts concerning guilt are combined with other elements of injustice.

As a general matter, Minnesota courts will not hear claims on postconviction review that were or could have been raised previously. Thus, in the frequently cited *Knaffla* case, this Court held that "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 243 N.W.2d 737, 747 (Minn. 1976). The same rule applies where a claim could have been but was not brought in an earlier postconviction proceeding. *Pearson v. State*, 3891 N.W.2d 590, 597 (Minn. 2017).

Thus, where an individual upon direct appeal did or could have challenged the sufficiency of the evidence to sustain a conviction, that person will not be able to later point to that same body of evidence to support a postconviction claim. Of course, once a jury has reached its verdict, Minnesota law imposes a high standard for reversing that conviction on

appeal based on sufficiency of the evidence. A Minnesota court considering a claim of insufficient evidence on appeal will view the evidence "in the light most favorable to the conviction" and "assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). Applying that lens, the appellate court will only reverse for insufficient evidence where no jury "could reasonably conclude that the defendant was guilty of the charged offense." *Id.* at 25–26. Therefore, in all but the most extreme cases, trial functions as the last meaningful opportunity for a defendant to contest factual guilt.

The result is that there are inevitably cases with compelling evidence of innocence within the trial record itself (which the appellate court must assume the jury disbelieved) that nevertheless survive appeal. Judicial relief through the postconviction process is unlikely to be available in such cases where the individual does not subsequently discover substantial new evidence. It may still be the case that the evidentiary record from trial leaves grave doubts as to the individual's factual guilt that make that person a compelling candidate for clemency.

These individuals may be particularly strong candidates for clemency if, in addition to a grave doubt concerning guilt, there are other elements of potential injustice. A non-exhaustive list of such considerations in favor of clemency might include:

- The individual received a weak legal defense at trial, even if nothing counsel did rose to the level necessary to support a claim for ineffective assistance of counsel.
- The individual was very young at the time of the alleged crime.
- The individual received a particularly long sentence compared to others convicted of similar crimes.
- The individual, prior to the alleged crime, experienced extreme and/or repeated trauma.

In addition to these and similar factors, an individual might be an even stronger candidate for a pardon if that person has demonstrated strong personal character and good behavior while incarcerated. Yet such individuals may find no opportunity for judicial relief. A robust clemency system, on the other hand, can provide relief to those people who fall through the gaps.

The December 2020 commutation of Myon Burrell's sentence is, in certain respects, a perfect illustration of this concept. Burrell was convicted of first-degree murder and sentenced to life in prison after 11-year-old Tyesha Edwards was struck and killed by a stray bullet in Minneapolis on November 22, 2002. *State v. Burrell*, 772 N.W.2d 459, 461 (Minn. 2009). It is generally agreed that the intended target of the shooting was a rival gang member named Timothy Oliver. *Id.* at 461–62. Burrell was convicted largely on the basis of Oliver's eyewitness identification of Burrell and a slate of jailhouse informants who claimed that Burrell had confessed or made otherwise incriminating statements to them in jail. *Id.* at 462–65. Shortly before Burrell received his commutation, an independent panel released a report examining the integrity of Burrell's conviction as well as the length of the sentence.[25] In that report, the independent panel illuminated reasons to doubt the accuracy of the evidence on which he was convicted. [26] The report also pointed to affirmative evidence of Burrell's

[25] K. Findley, et al., *Report of the Independent Panel to Examine the Conviction and Sentence of Myon Burrell,* (Dec. 2020), https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/2020-12-02-burrell-report-master.pdf.

[26] *Id.* at 16–42.

innocence, including statements from the two other individuals who admit to having been involved that one of them, Ike Tyson, was the shooter and that Burrell was not present.[27]

While the Board of Pardons was clear that, in commuting Burrell's sentence from life in prison to time served, it was not making an express determination concerning his innocence, the evidence of factual innocence played a major role in Burrell's application for relief[28] and, as discussed above, in the independent panel's report.[29] In Burrell's case, along with evidence of strong character and good behavior in prison, the major favorable consideration that moved the Board of Pardons was Burrell's young age at the time of the crime (16).[30] In his remarks in support of the commutation, Governor Walz made clear that he was particularly moved by the science demonstrating that the adolescent brain continues to develop well into someone's 20s, a finding that calls into question the practice of imposing extremely long sentences on young people who have not yet reached full cognitive development.[31]

While Myon Burrell's case was unusual in terms of the degree of media coverage it received, there is no reason to believe his case is unique in terms of combining substantial evidence of innocence with other elements of injustice. Such cases will often run into insurmountable procedural obstacles in court, but they can be strong candidates for clemency. If this Court finds the unanimity requirement to be unconstitutional, then such individuals are more likely to obtain relief from the Board of Pardons.

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27 *Id.* at 32–35.
28 C. Xiong & L. Sawyer, *supra* note 16.
29 K. Findley, et al., *supra* note 25.
30 C. Xiong & L. Sawyer, *supra* note 16.
31 C. Xiong & L. Sawyer, *supra* note 16.

Conclusion

For the foregoing reasons, *amicus curiae* Great North Innocence Project respectfully urges this Court to rule in favor of Respondents/Cross Appellants, affirm the decision of the District Court below, and hold that Minnesota Statutes Sections 638.01 and 638.02, Subdivision 1, by imposing a requirement of unanimity to grant clemency, violate Article V, Section 7 of the Minnesota Constitution.

Dated: August 23, 2021

Respectfully submitted,

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Certificate Of Brief Length

I hereby certify that this brief conforms to the requirements of Minnesota Rule of Civil Appellate Procedure 132.01, subdivisions 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief, including headings, footnotes, and the appendix, is 6,587 words. This brief was prepared using Microsoft Word 2017.

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Certificate Of Service

I hereby certify that on the 23rd day of August, 2021, I served the **Brief of *Amicus Curiae* Great North Innocence Project** by E-MACS e-service or via certified mail-return receipt requested upon aforementioned counsel of record.

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