

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Thirteen - Part Two: Clemency and Execution

CLEMENCY

Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

- Alexander Hamilton, THE FEDERALIST NO. 74

I have always found that mercy bears richer fruits than strict justice.

- Abraham Lincoln

A people confident in its laws and institutions should not be ashamed of mercy.

- Justice Anthony Kennedy

Federal and state constitutions and laws give the executive the power to grant pardons or commute a sentence to a lesser one. Section II of Article II of the Constitution says the president has the power to grant reprieves (temporary stays of the sentence) and pardons for offenses against the United States. It does not mention commutations (reductions or suspensions of sentences) specifically, but they come under the pardon power. Most state constitutions establish a similar power.

The power to grant pardons, commutations and reprieves is a broad, unrestricted power of the executive, normally not subject to judicial review. As stated by the Florida Supreme Court:

An executive may grant a pardon for good reasons or bad, or for any reason at all, and his act is final and irrevocable. Even for the grossest abuse of this discretionary power the law affords no remedy; the courts have no concern with the reasons which actuated the executive. The constitution clothes him with the power to grant pardons, and this power is beyond the control, or even the legitimate criticism, of the judiciary.¹

The Court of Appeals for the Sixth Circuit described the power as follows:

The very nature of clemency is that it is grounded solely in the will of the dispenser of clemency. He need give no reasons for granting it, or for denying it The governor may agonize over every petition; he may glance at one or all such petitions and toss them away; he may direct his staff as to the means for considering them.²

1. *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977).

2. *In re Sapp*, 118 F. 3d 460, 465 (6th Cir. 1997); *see also Otey v. Nebraska*, 485 N.W. 2d 153, 166 (Neb. 1992) (holding that the Nebraska Board of Pardons had “unfettered discretion to grant or deny a commutation... for any reason or no reason at all”).

A pardon is an executive forgiveness of crime; commutation or clemency is an executive lowering of the penalty, and a reprieve is a temporary stay of a sentence.

Pardons and commutations are issued in all types of cases. A pardon may be issued even before criminal proceedings commence such as President Ford's pardon of Richard Nixon, or after charges have been filed but before trial, such as President George H. W. Bush's pardon in 1987 of Caspar Weinberger, who was charged with lying to the independent counsel investigating the Iran-Contra affair, and President Clinton's pardon on his last day in office of financier Marc Rich, who had fled the country after being indicted on 51 counts of tax fraud for evading more than \$48 million in taxes and running illegal oil deals. (Critics suggested the pardon was related to the large donations made by Rich's ex-wife to the Clinton Library and the Democratic Party. Rich's pardon was one of 140 issued by Clinton on his last day in office.)

Pardons may be granted with regard to classes of people, such as President Carter's pardon in 1977 of all those who avoided military service in Vietnam by fleeing the country or not registering for the draft.

The President may relieve a person of part of a sentence, but not all of it, such as President George W. Bush's commutation the 30-month prison sentence imposed on Lewis "Scooter" Libby, Vice President Cheney's chief of staff, for perjury, obstruction of justice and lying to investigators, but not the fine of \$250,000 imposed. Despise Cheney's pleas, Bush left office without granting Libby a full pardon.

Pardons may be issued with conditions. In 1971, President Nixon pardoned Teamsters leader Jimmy Hoffa, who was serving a 15-year prison sentence for jury tampering and fraud with the condition that he "not engage in direct or indirect management of any labor organization" until at least March 1980. More recently, Mississippi Governor Haley Barbour commuted the life sentences of two sisters, Jamie and Gladys Scott,

on the condition that Gladys donate a kidney to Jamie, who was on dialysis.³

Pardons may be also issued posthumously to correct injustices that are recognized later.

One of the more interesting presidential commutations is President Truman's commutation in 1952 of the death sentence imposed earlier that year on Puerto Rican nationalist Oscar Collazo, who was one of two people involved in an attempt to assassinate Truman in 1950 – an attempt that left a policeman and Collazo's co-participant dead after a shootout. In 1979, President Carter commuted Collazo's sentence to time served, 29 years in prison.

The pardon and commutation power is not used nearly as often by Presidents today. During the first four years of their presidencies, President Clinton pardoned one in every eight applicants, George W. Bush pardoned one in every 33, and President Obama one in every 50. President Obama granted only one commutation during his first term, but he granted the tenth commutation of his second term on April 15, 2014, when he commuted the sentence of a prisoner who was serving an extra three-and-a-half years due to a clerical error. He has denied 6,596 commutation requests. President Obama commuted eight sentences in December, 2013, of people who were sentenced under severe mandatory minimum sentencing laws. Deputy Attorney General James Cole said the following month at the New York State Bar Association that the commutations were a "first step," and that "there was more to be done." Cole encouraged lawyers to suggest inmates who should be considered for commutations.⁴

3. Barbour said one reason for the commutation was the substantial cost to the state of Mississippi due to Jamie Scott's medical condition. Timothy Williams, *Sisters' Prison Release Is Tied to Donation of Kidney*, N.Y. TIMES, Dec. 30, 2010, at A12.

4. Matt Apuzzo, *Justice Dept. Starts Quest for Inmates to Be Freed*, N.Y. TIMES, Jan. 31, 2014, at A13.

President Obama had issued only 52 pardons by the end of 2013, many of them in cases involving minor offenses committed many years ago, and denied 1,487 pardon requests, more than President Clinton denied during his two terms. George W. Bush pardoned 189 people in his eight years in office.⁵

The president and governors in 14 states have sole authority to grant clemency. In nine states, the governor must have a recommendation of clemency from a board or agency before s/he can commute a sentence. In nine other states, the governor receives a recommendation but is not bound by it. In three states the decision is made by a board or agency other than the governor. Often the membership of those boards include former corrections officials and former prosecutors. In those three states, the governor has no power to grant or deny clemency. Finally, in three states the governor is a member of a board or group that decides whether to grant clemency, but does not have sole authority to grant it.

In the federal system, applications are made to the Office of the Pardon Attorney in the Justice Department, which makes recommendations to the President. President George W. Bush decided at the beginning of his first term to rely almost entirely on the recommendations made by career lawyers in the Office of the Pardon Attorney to take politics out of the process and avoid a repetition of the scandal involving President Clinton's pardon of fugitive financier Marc Rich on his last day in office. Bush followed the recommendations of the pardons office in nearly every case, his aides have said. President Obama has continued the practice of relying on the pardons office.

A former staff attorney in that office has said that presidents have given far too much deference to the pardon attorney's office:

5. See U.S. Department of Justice, Office of the Pardon Attorney, *Clemency Statistics*, <http://www.justice.gov/pardon/statistics.htm>.

Having spent more than 10 years as a staff attorney in that office, I can say with some authority that the prevailing view within the Justice Department is that the pardon attorney's sole institutional function is to defend the department's prosecutorial prerogatives. There is little, if any, pretense of neutrality, much less liberality. On this parochial view, the institution of a genuinely humane clemency policy would be considered an insult to the good work of line prosecutors.⁶

A study by the *Washington Post* and *Pro Publica* found that white criminals seeking pardons have been nearly four times as successful in obtaining pardons than racial minorities. Of George W. Bush's 189 pardons, all but 13 were white. Of President Obama's first 22 pardons, only two were racial minorities. See www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNvQO_story.html.

Commutations in Capital Cases

Between 1976, when the Supreme Court allowed the resumption of capital punishment, and the end of 2013, there were 1,359 executions and 273 commutations.⁷ This rate of granting commutations is substantially lower than in the first half of the twentieth century, when 20 to 25 percent of death sentences were commuted.⁸

6. Samuel T. Morison, *A no-pardon Justice Department*, L.A. TIMES, Nov. 6, 2010.

7. Death Penalty Information Center, "Clemency", available at www.deathpenaltyinfo.org/clemency (listing the clemency grants and the reasons for them). This number does not include technical commutations granted for judicial expediency such as instances in which after a death sentence has been overturned in the courts, the state has asked that the sentence be commuted to life imprisonment because state law would require that the entire case, including guilt and innocence, be tried again.

8. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 262 (1990-91).

Of the 273 post-*Furman* commutations, Illinois Governor George Ryan governor accounts for 171 and four other governors account for 51. Gov. Ryan, who declared a moratorium on executions in 2000 because of concerns raised by the exoneration of 13 people condemned to die in that state, granted four pardons on January 10, 2003, because he concluded the inmates were innocent. The next day, Gov. Ryan commuted the sentences of the 167 inmates remaining on the state's death row, citing the flawed process that led to these sentences.⁹ The number of death sentences invalidated by Ryan was second only to those vacated as a result of the Supreme Court's decision in *Furman v. Georgia*.

Illinois Gov. Pat Quinn commuted 15 death sentences on March 9, 2011, the same day he signed into law a repeal of the state's death penalty statute. Similarly, Gov. Jon Corzine commuted the sentences of the eight people on New Jersey's death row on December 16, 2007, the day before he signed a bill repealing the state's death penalty law. In both states, the death sentences were commuted to life imprisonment without the possibility of parole.

Gov. Richard Celeste of Ohio granted clemency to eight death row inmates in 1991 as he was leaving office. Citing a "disturbing racial pattern" in death sentencing, Celeste stated that he selected cases based on the inmates' crimes, the fairness of sentences, mental health and IQ, and length of time served. Six of those commuted were black and four were women.

Governor Toney Anaya of New Mexico, who said during his campaign for governor in 1982 that he would not allow any executions during his term in office, commuted the sentences of all five men on the state's death row in 1986 before leaving office.

Anaya followed the example of several governors in the pre-*Furman* era who used the commutation power to prevent death sentences from being carried out.

The first and perhaps most controversial was Lee Cruce, an ardent opponent of capital punishment who served as governor of Oklahoma from 1911 to 1915. Cruce commuted 22 death sentences during his four years as governor. One execution took place early in Cruce's term because lawyers for the condemned man did not request clemency.

Cruce's first commutation was the sentence of John Henry Prather, a black man, who "had been shaved, bathed, and dressed for his journey into eternity" and was standing before a crowd of hundreds about to be hanged when a dramatic, last-minute call from the governor halted the execution.¹⁰ Cruce commuted the sentence to life imprisonment without the possibility of parole.

Cruce, who had run for governor as "the white man's hope," wrote in a letter after granting commutation, "If Prather had been a white boy, I would have received thousands of letters asking mercy for him. As it is, he's never had an opportunity to make a man of himself. My conscience will not allow him to be hanged."¹¹

One newspaper wrote, "a great many people entertain the conviction that the firm belief among Negroes is that no Negro will be hanged so long as Cruce is governor. This is certain to result in a series of outrages which will result in a race riot."¹² This sentiment was echoed by the Oklahoma Court of Criminal Appeals, which recognized the governor's power to commute sentences but condemned Cruce's practice, saying with regard to it: "[n]othing could more impair the reputation of the state, nothing could be more

9. See James L. Merriner, *THE MAN WHO EMPTIED DEATH ROW: GOVERNOR GEORGE RYAN AND THE POLITICS OF CRIME* (2008). Governor Ryan's statement, "I Must Act," is included later in these materials.

10. Austin Sarat, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* (2005) at 40.

11. *Id.* at 41.

12. *Id.* 41-42.

demoralizing to respect for law, or more highly calculated to incite mob violence[.]”¹³

Mobs lynched 15 men during Cruce’s term. Two of the lynchings took place the same night as the commutation of Prather’s sentence.

Cruce was defeated after one term as governor and never returned to elected politics.

Oregon Governor Robert D. Holmes commuted every death sentence that arose during his term as governor of Oregon (1957-1959). A suit was filed seeking to enjoin Holmes from commuting a sentence. The Supreme Court of Oregon held that the parents of a victim lacked standing to challenge the governor’s power and that the governor had “unlimited power” with regard to commutations and pardons and the courts had no authority to inquire into the exercise of the power.¹⁴ Capital punishment was repealed in Oregon five years later in a referendum by a 60-40 percent margin. The day after the referendum, Holmes’ successor, Gov. Mark Hatfield, who had supported abolition, commuted the sentences of the three people then under death sentence.

Endicott Peabody, as governor of Massachusetts between 1963 and 1965, refused to sign death warrants, supported a bill to repeal the death statute, and recommended the commutation of every death sentence to the executive council. Massachusetts performed the last execution in state history in 1947.

Winthrop Rockefeller, who served as Governor of Arkansas from 1966 to 1970, commuted the death sentences of each of the state’s 15 death-row inmates before leaving office in 1970. Eleven of the 15 were black – six having been sentenced to death for the rape of a white woman. “The records, individually or collectively, of the 15 condemned prisoners bear no relevance to my decision,” Rockefeller stated. “It is purely

personal and philosophical . . . Justice is not served by . . . capital punishment.”

Edmund G. “Pat” Brown, who served as governor of California from 1959 to 1966, wrote a memoir about his experiences in considering commutations of death sentences, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR’S EDUCATION ON DEATH ROW* (1989). During his two terms as governor, Brown commuted 23 death sentences and permitted 36 other people to die in the gas chamber.

Brown described his commutation of the death sentence of a psychologically troubled law student who had killed his lover. The man was eventually paroled and lived a productive life. Brown also acknowledged that political considerations came into play on occasion. Years after denying clemency to one person, Brown wrote that he was still troubled by a key reason for his decision: his desire to avoid alienating a rural legislator whose vote he needed to win passage of a law to raise the minimum wage for farm workers.

By the time Brown’s successor, Ronald Reagan, came into office in 1967, controversy about the way capital punishment was being administered had led to a *de facto* moratorium on executions. Reagan faced only two clemency requests in his eight years as governor – granting one.

There has been one commutation of a federal death sentence imposed in the post-*Furman* era. President Clinton granted clemency to David Ronald Chandler, who was sentenced to death in the Northern District of Alabama, before leaving office in 1991 because of questions of Chandler’s guilt.

For a list of all commutations and pardons and the reasons for them, visit the web site of the Death Penalty Information Center, www.deathpenaltyinfo.org/clemency.

13. *Henry v. Oklahoma*, 136 P. 982, 990 (Okla. Crim. App. 1913).

14. *Eacret v. Holmes*, 333 P.2d 741, 744 (Or. 1958).

**OHIO ADULT PAROLE AUTHORITY,
et al., Petitioners,
v.
Eugene WOODARD.**

Supreme Court of the United States
523 U.S. 272, 118 S.Ct. 1244 (1998)

Rehnquist, C.J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part III, the opinion of the Court with respect to Part I, in which O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined, and an opinion with respect to Part II, in which Scalia, Kennedy, and Thomas, JJ., joined. O'Connor, J., filed an opinion concurring in part and concurring in the judgment, in which Souter, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part.

Chief Justice REHNQUIST announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Part II in which Justice SCALIA, Justice KENNEDY, and Justice THOMAS join.

This case requires us to resolve two inquiries as to constitutional limitations on state clemency proceedings. The first is whether an inmate has a protected life or liberty interest in clemency proceedings, under either *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), or *Evitts v. Lucey*, 469 U.S. 387 (1985). The second is whether giving inmates the option of voluntarily participating in an interview as part of the clemency process violates an inmate's Fifth Amendment rights.

We reaffirm our holding in *Dumschat* that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." The Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon power is committed, as is our tradition, to the authority of the executive. We further hold

that a voluntary inmate interview does not violate the Fifth Amendment.

I

The Ohio Constitution gives the Governor the power to grant clemency upon such conditions as he thinks proper. The Ohio General Assembly cannot curtail this discretionary decision-making power, but it may regulate the application and investigation process. The General Assembly has delegated in large part the conduct of clemency review to petitioner Ohio Adult Parole Authority.

In the case of an inmate under death sentence, the Authority must conduct a clemency hearing within 45 days of the scheduled date of execution. Prior to the hearing, the inmate may request an interview with one or more parole board members. Counsel is not allowed at that interview. The Authority must hold the hearing, complete its clemency review, and make a recommendation to the Governor, even if the inmate subsequently obtains a stay of execution. If additional information later becomes available, the Authority may in its discretion hold another hearing or alter its recommendation.

Respondent Eugene Woodard was sentenced to death for aggravated murder committed in the course of a carjacking. His conviction and sentence were affirmed on appeal, and this Court denied certiorari. When respondent failed to obtain a stay of execution more than 45 days before his scheduled execution date, the Authority commenced its clemency investigation. It informed respondent that he could have a clemency interview on September 9, 1994, if he wished, and that his clemency hearing would be on September 16, 1994.

Respondent did not request an interview. Instead, he objected to the short notice of the interview and requested assurances that counsel could attend and participate in the interview and hearing. When the Authority failed to respond to these requests, respondent filed suit in United States District Court on September 14, alleging that Ohio's clemency process violated his

Fourteenth Amendment right to due process and his Fifth Amendment right to remain silent.

* * *

II

Respondent argues first * * * that there is a life interest in clemency broader in scope than the “original” life interest adjudicated at trial and sentencing. *Ford v. Wainwright*, 477 U.S. 399 (1986). This continuing life interest, it is argued, requires due process protection until respondent is executed.¹⁵ Relying on Eighth Amendment decisions holding that additional procedural protections are required in capital cases, respondent asserts that *Dumschat* does not control the outcome in this case because it involved only a liberty interest. Justice Stevens’ dissent agrees on both counts.

In *Dumschat*, an inmate claimed Connecticut’s clemency procedure violated due process because the Connecticut Board of Pardons failed to provide an explanation for its denial of his commutation application. The Court held that “an inmate has ‘no constitutional or inherent right’ to commutation of his sentence.” It noted that, unlike probation decisions, “pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.” The Court relied on its prior decision in *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1 (1979), where it rejected the claim “that a constitutional entitlement to release [on parole] exists independently of a right explicitly conferred by the State.” The individual’s interest in release or commutation “‘is indistinguishable from the initial resistance to being confined,’” and that interest has already been extinguished by the

15. Respondent alternatively tries to characterize his claim as a challenge only to the application process conducted by the Authority, and not to the final discretionary decision by the Governor. But, respondent still must have a protected life or liberty interest in the application process. Otherwise, * * * he is asserting merely a protected interest in process itself, which is not a cognizable claim.

conviction and sentence. The Court therefore concluded that a petition for commutation, like an appeal for clemency, “is simply a unilateral hope.”

Respondent’s claim of a broader due process interest in Ohio’s clemency proceedings is barred by *Dumschat*. The process respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. The dissent agrees with respondent that because “a living person” has a constitutionally protected life interest, it is incorrect to assert that respondent’s life interest has been “extinguished.” We agree that respondent maintains a residual life interest, e.g., in not being summarily executed by prison guards. However, as *Greenholtz* helps to make clear, respondent cannot use his interest in not being executed in accord with his sentence to challenge the clemency determination by requiring the procedural protections he seeks.¹⁶

* * *

Respondent also asserts that as in *Greenholtz*, Ohio has created protected interests by establishing mandatory clemency application and review procedures. In *Greenholtz*, the Court held that the expectancy of release on parole created by the mandatory language of the Nebraska statute was entitled to some measure of constitutional protection.

16. For the same reason, respondent’s reliance on *Ford v. Wainwright*, 477 U.S. 399, 425 (1986), is misplaced. In *Ford*, the Court held that the Eighth Amendment prevents the execution of a person who has become insane since the time of trial. This substantive constitutional prohibition implicated due process protections. This protected interest, however, arose subsequent to trial, and was separate from the life interest already adjudicated in the inmate’s conviction and sentence. This interest therefore had not been afforded due process protection. The Court’s recognition of a protected interest thus did not rely on the notion of a continuing “original” life interest.

Ohio's clemency procedures do not violate due process. Despite the Authority's mandatory procedures, the ultimate decisionmaker, the Governor, retains broad discretion. Under any analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by respondent. There is thus no substantive expectation of clemency. * * *

Respondent also * * * claims that * * * clemency is an integral part of Ohio's system of adjudicating the guilt or innocence of the defendant and is therefore entitled to due process protection. Clemency, he says, is an integral part of the judicial system because it has historically been available as a significant remedy, its availability impacts earlier stages of the criminal justice system, and it enhances the reliability of convictions and sentences. * * *

* * *

* * * Clemency proceedings are not part of the trial – or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the Executive Branch, independent of direct appeal and collateral relief proceedings. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a final and alternative avenue of relief, clemency has not traditionally “been the business of courts.” * * *

Thus, clemency proceedings are not “an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant.” Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is

granted, he obtains a benefit; if it is denied, he is no worse off than he was before.

III

Respondent also presses on us the Court of Appeals' conclusion that the provision of a voluntary inmate interview, without the benefit of counsel or a grant of immunity for any statements made by the inmate, implicates the inmate's Fifth and Fourteenth Amendment right not to incriminate himself. Because there is only one guaranteed clemency review, respondent asserts, his decision to participate is not truly voluntary. And in the interview he may be forced to answer questions; or, if he remains silent, his silence may be used against him. Respondent further asserts there is a substantial risk of incrimination since postconviction proceedings are in progress and since he could potentially incriminate himself on other crimes. Respondent therefore concludes that the interview unconstitutionally conditions his assertion of the right to pursue clemency on his waiver of the right to remain silent. * * * In our opinion, the procedures of the Authority do not under any view violate the Fifth Amendment privilege.

* * *

Assuming * * * that the Authority will draw adverse inferences from respondent's refusal to answer questions – which it may do in a civil proceeding without offending the Fifth Amendment, we do not think that respondent's testimony at a clemency interview would be “compelled” within the meaning of the Fifth Amendment. It is difficult to see how a voluntary interview could “compel” respondent to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.

Long ago we held that a defendant who took the stand in his own defense could not claim the privilege against self-incrimination when the prosecution sought to cross-examine him. A defendant who takes the stand in his own behalf

may be impeached by proof of prior convictions without violation of the Fifth Amendment privilege. A defendant whose motion for acquittal at the close of the Government's case is denied must then elect whether to stand on his motion or to put on a defense, with the accompanying risk that in doing so he will augment the Government's case against him. In each of these situations, there are undoubted pressures – generated by the strength of the Government's case against him – pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute “compulsion” for Fifth Amendment purposes.

* * *

Justice O'CONNOR, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring in part and concurring in the judgment.

* * *

* * * I believe that the Court of Appeals correctly concluded that some minimal procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.

In my view, however, a remand to permit the District Court to address respondent's specific allegations of due process violations is not required. * * * The process respondent received, including notice of the hearing and an opportunity to participate in an interview, comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings. Moreover, I agree that the voluntary inmate interview that forms part of Ohio's process did not violate respondent's Fifth and Fourteenth Amendment privilege against self-incrimination.

* * *

Justice STEVENS, concurring in part and dissenting in part.

When a parole board conducts a hearing to determine whether the State shall actually execute one of its death row inmates – in other words, whether the State shall deprive that person of life – does it have an obligation to comply with the Due Process Clause of the Fourteenth Amendment? In my judgment, the text of the Clause provides the answer to that question. It expressly provides that no State has the power to “deprive any person of life, liberty, or property without due process of law.”

* * *

I

* * * There is * * * no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.

Nor does *Connecticut Bd. of Pardons v. Dumschat* counsel a different conclusion. In that case the Court held that a refusal to commute a prison inmate's life sentence was not a deprivation of his liberty because the liberty interest at stake had already been extinguished. The holding was supported by the “crucial distinction between being deprived of liberty that one has, as in parole, and being denied a conditional liberty that one desires.” *Greenholtz*. That “crucial distinction” points in the opposite direction in this case because respondent is contesting the State's decision to deprive him of life that he still has, rather than any conditional liberty that he desires. Thus, it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause.

II

* * *

Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. Likewise, even if a State

has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process. Similarly, if a State establishes postconviction proceedings, these proceedings must comport with due process.

The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in those cases.⁷ For “death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) . Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life.

* * *

Counsel in Capital Clemency Proceedings

In *Harbison v. Bell*, 556 U.S. 180 (2009), the Supreme Court held that the statutory language and legislative history of 18 U.S.C. § 3599 demonstrate that counsel appointed under the statute to represent state inmates in federal habeas proceedings are authorized to represent their

7. The Court has recognized the integral role that clemency proceedings play in the decision whether to deprive a person of life. *Herrera v. Collins*, 506 U.S. 390, 411-17 (1993). Indeed, every one of the 38 States that has the death penalty also has clemency procedures. It is, of course, irrelevant that States need not establish clemency proceedings; having established these proceedings, they must comport with due process.

clients in state clemency proceedings and are entitled to compensation for that representation.

Clemency in Texas

In Texas, which carries out the most executions of any state, the Board of Pardons and Paroles, an 18-member body whose members are appointed by the governor for six-year terms, has the power to grant clemency. The governor’s power is limited to the authority to grant a 30-day reprieve. The board approves or denies all clemency applications, and the governor can grant clemency only if the board recommends it.

The Texas board does not hold hearings or meet to discuss applications. Instead, members review cases separately and transmit their votes from across the state. The board operates without guidelines and gives no explanation for its decisions. After two days of hearings on the way the Board operates in 1999, United States District Judge Sam Sparks called the board’s procedures “appalling” and criticized it, writing:

It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal. Legislatively, there is a dearth of meaningful procedure. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient legally sound system. The board would not have to sacrifice its conservative ideology to carry out its duties in a more fair and accurate fashion.

Judge Sparks questioned the credibility of parole board chairman Victor Rodriguez, who was one of twelve board members who testified during the hearing. Citing testimony of board members, he wrote:

It is apparent none of the members read every word on every line of every piece of paper in the clemency application. Only Rodriguez testified that he reads every bit of every file, and his credibility is suspect. Rodriguez hedged too much in his responses, stating the members and he “wade through,” “review,”

and “consider” all materials submitted to them and testified it would not be proper to do otherwise.

Nevertheless, Judge Sparks held that the procedures met the minimal procedural safeguards required by the United States Constitution, saying “This process may not meet normal due process standards, but it does meet minimal procedural safeguards.” The Fifth Circuit summarily affirmed in a *per curiam* opinion, saying that *Woodward* precluded relief. *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343 (5th Cir 1999).

The Court reaffirmed its holding in *Faulder* in *Tamayo v Perry*, 2014 WL 241744 (5th Cir. Jan. 22, 2014). Tamayo challenged, *inter alia*, the Board’s denial of his request to view information submitted in opposition to his application. The Court held that Tamayo had received the “minimal procedural safeguards” required by *Woodward*. Tamayo’s claims that he was mentally retarded and therefore ineligible for execution and that his execution would violate the Vienna Convention on Consular Relations were rejected in another case. Texas executed Tamayo on January 22, 2014.

Before the 1999 legislative session, two bills were introduced that would have required the parole board to consider clemency appeals in public meetings. Then-governor George W. Bush opposed the changes warning that public clemency meetings might create “a chance for people to rant and rail, a chance for people to emotionalize the process beyond the questions that need to be asked.” Both bills died in the legislative session.

Jim Sallans, a lawyer who served in the governor’s general counsel office from 1989 to 1998, and reviewed hundreds of clemency petitions in capital cases, supported the way clemency was handled during that time but said, “Too many clemency petitions were hastily prepared, and poorly written. The attorneys would often call up and ask us for a response, and we would politely tell them that we were doing our best with what little they had submitted.”

Illustrative Case: Commutation of Delaware Death Sentence

An example of a clemency application that was capably handled was filed on behalf of Robert Gattis, who was scheduled to be executed on January 20, 2012, for the killing of his former girlfriend, Shirley Slay. His attorneys filed a petition for clemency with the Delaware Board of Pardons which requested that the Board recommend to Governor Jack Markell a commutation of his death sentence to a sentence of life without the possibility of parole.

The clemency petition provided details of childhood sexual abuse that neither the jury nor the judge knew about at the time of sentencing. As a pre-school child and through adolescence, Gattis was the victim of repeated rapes and molestations by multiple perpetrators, including both male and female family members. The sexual abuse he suffered was part of a pattern of violent incest that spanned generations in his family. Gattis also suffered severe beatings and humiliation at the hands of his step-father and natural father. The clemency petition included statements from four corrections officers who described Gattis’ positive influence on younger inmates, his role as a peacemaker in prison conflicts, and other examples of good conduct.

Ten days before the Board made its recommendation, more than two dozen former judges and prosecutors, 73 faith leaders, and numerous mental health and legal professionals called on it to recommend clemency. The Board made the following recommendation to the Governor by a vote of 4-1:

Recommendation of the Delaware Board of Pardons to Governor Markell Regarding Clemency of Robert Gattis

January 15, 2012

The Board has before it a very difficult decision as a human life hangs in the balance. By a four to one vote, the Board is recommending that Mr. Gattis’s death sentence be commuted, provided

that he agrees to spend the rest of his natural life in prison with no further appeals for relief.

We wish to set forth briefly in writing the essential basis for our recommendation.

The crimes committed by Mr. Gattis were horrific and we find no fault in how this case was handled by the prosecutors and judges involved. We also believe that the family of the victim has good reasons to argue that the sentence of death should be imposed.

State prosecutors and the Slay family are correct to harbor suspicions about some of the testimony on Mr. Gattis's background. The Board weighed heavily that Mr. Gattis did not come forward with the full extent of his sexual abuse until 2009 despite having used elements of a child abuse defense twenty years earlier. In considering the full record, we accept that if even half of what has been submitted about Mr. Gattis's childhood is true, he was victimized physically, emotionally, and sexually by family members who owed him a duty of care. There is evidence in the record that Mr. Gattis complained to medical professionals of mental illness and involuntary violent impulses over a year before Ms. Slay's murder. Although Mr. Gattis knew right from wrong and was guilty of first degree murder, we, in the exercise of conscience required of us as members of this Board, believe that these are sufficiently mitigating facts to warrant consideration for clemency.

Three other factors, not specific to the Gattis case alone, also weigh heavily in the decisions of Board members. For all four of us, we are concerned that our death penalty statute permits the imposition of death on the basis of a non-unanimous verdict. In the Gattis case, two jurors who heard the trial in its entirety twenty years ago, both of whom were prepared to impose the death penalty if appropriate, would not do so.

Second, some of us share a concern about the disparity in the sentences that are meted out in serious murder cases. In our time on the Board of Pardons, we have considered other clemency

requests arising from domestic disputes that resulted in brutal murders similar in some respects to the case before us. Though the crimes of Mr. Gattis are more serious, in those other cases, persons convicted not only were permitted to live but will likely one day be released from prison. The sentencing disparity in these cases has become too great and offends a moral sense of proportionality.

Finally, one of us believes even more fundamentally that once a prisoner has been incapacitated and poses no threat of future harm to society, then there is no moral justification for taking his life. When the taking of life is not required as a matter of self-defense, that member believes that one cannot ethically or morally take that act.

We also take into account the reality that Mr. Gattis is not an unusually problematic prisoner, although he is far from a model one. Within the structured setting of a prison, one thing emerges indisputably from the record: Mr. Gattis does not pose a threat of violence within the prison setting and is not regarded as dangerous by the Department of Correction. He appears to be viewed as a constructive prisoner by some of the correctional employees who have worked with him over the years, and is not a security threat.

The recommendation for clemency was a very close call for several of us. One factor that made the decision so difficult is that Mr. Gattis did not take full responsibility for intentionally killing Ms. Slay until earlier this month, leaving doubt as to his contrition. Given that, and to ensure that the Slay family and the public do not have to go through this painful process again, we condition our recommendation for mercy, on the following: 1) Mr. Gattis shall forever drop all legal challenges to his conviction and sentence, as commuted; 2) Mr. Gattis shall forever waive any right to present a future commutation or pardon request and agree to live out his natural life in the custody of the Department of Correction.

The Governor Acts

Governor Jack Markell commuted the death sentence on January 17 to life without parole, stating: “Even if one were to discount certain of the allegations of sexual abuse recently alleged by Mr. Gattis (as the Board did), the fact remains that Mr. Gattis’s family background is among the most troubling I have encountered... My decision is among the most difficult I have had to make in all my years in public service. But in light of the Board’s unprecedented decision and the reasons set forth above, I believe it is the correct one under the circumstances.”

I Must Act

Statement of Governor George Ryan of Illinois, January 11, 2003.

The following are excerpts from the text of Gov. George Ryan’s speech at Northwestern University College of Law announcing the commutation of 167 death sentences.

Four years ago I was sworn in as the 39th Governor of Illinois. That was just four short years ago; that’s when I was a firm believer in the American System of Justice and the death penalty. I believed that the ultimate penalty for the taking of a life was administered in a just and fair manner.

Today, three days before I end my term as Governor, I stand before you to explain my frustrations and deep concerns about both the administration and the penalty of death. It is fitting that we are gathered here today at Northwestern University with the students, teachers, lawyers and investigators who first shed light on the sorrowful condition of Illinois’ death penalty system. * * * They freed the falsely accused Ford Heights Four, they saved Anthony Porter’s life, they fought for Rolando Cruz and Alex Hernandez. They devoted time and effort on behalf of Aaron Patterson, a young man who lost 15 years of his youth sitting among the

condemned, and LeRoy Orange, who lost 17 of the best years of his life on death row.

It is also proper that we are together with dedicated people like Andrea Lyon who has labored on the front lines trying capital cases for many years and who is now devoting her passion to creating an innocence center at De Paul University. You saved Madison Hobbey’s life.

Together you spared the lives and secured the freedom of 17 men – men who were wrongfully convicted and rotting in the condemned units of our state prisons. What you have achieved is of the highest calling. Thank You.

Yes, it is right that I am here with you, where, in a manner of speaking, my journey from staunch supporters of capital punishment to reformer all began. But I must tell you – since the beginning of our journey – my thoughts and feelings about the death penalty have changed many, many times. * * *

* * * I must confess that the debate with myself has been the toughest concerning the death penalty. I suppose the reason the death penalty has been the toughest is because it is so final – the only public policy that determines who lives and who dies. * * * I have received more advice on this issue than any other policy issue I have dealt with in my 35 years of public service. I have kept an open mind on both sides of the issues of commutation for life or death.

I have read, listened to and discussed the issue with the families of the victims as well as the families of the condemned. * * * I may never be comfortable with my final decision, but I will know in my heart, that I did my very best to do the right thing.

Having said that I want to share a story with you:

I grew up in Kankakee which even today is still a small midwestern town, a place where people tend to know each other. Steve Small was a neighbor. I watched him grow up. He would

babysit my young children – which was not for the faint of heart since Lura Lynn and I had six children, five of them under the age of three. He was a bright young man who helped run the family business. He got married and he and his wife had three children of their own. Lura Lynn was especially close to him and his family. We took comfort in knowing he was there for us and we for him.

One September midnight he received a call at his home. There had been a break-in at the nearby house he was renovating. But as he left his house, he was seized at gunpoint by kidnappers. His captors buried him alive in a shallow hole. He suffocated to death before police could find him.

His killer led investigators to where Steve's body was buried. The killer, Danny Edward was also from my hometown. He now sits on death row. I also know his family. I share this story with you so that you know I do not come to this as a neophyte without having experienced a small bit of the bitter pill the survivors of murder must swallow.

* * *

The other day, I received a call from former South African President Nelson Mandela who reminded me that the United States sets the example for justice and fairness for the rest of the world. Today the United States is not in league with most of our major allies: Europe, Canada, Mexico, most of South and Central America. These countries rejected the death penalty. * * *

* * * In Illinois last year we had about 1000 murders, only two percent of that 1000 were sentenced to death. Where is the fairness and equality in that? The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't think so but in Illinois it makes a difference. You are five times more likely to get a death sentence for first degree murder in the rural area

of Illinois than you are in Cook County. Where is the justice and fairness in that – where is the proportionality?

The Most Reverend Desmond Tutu wrote to me this week stating that “to take a life when a life has been lost is revenge, it is not justice. He says justice allows for mercy, clemency and compassion. These virtues are not weakness.”

“In fact the most glaring weakness is that no matter how efficient and fair the death penalty may seem in theory, in actual practice it is primarily inflicted upon the weak, the poor, the ignorant and against racial minorities.” That was a quote from Former California Governor Pat Brown. He wrote that in his book – *Public Justice, Private Mercy* he wrote that nearly 50 years ago – nothing has changed in nearly 50 years.

I never intended to be an activist on this issue. I watched in surprise as freed death row inmate Anthony Porter was released from jail. A free man, he ran into the arms of Northwestern University Professor Dave Protesse who poured his heart and soul into proving Porter's innocence with his journalism students.

He was 48 hours away from being wheeled into the execution chamber where the state would kill him.

It would all be so antiseptic and most of us would not have even paused, except that Anthony Porter was innocent of the double murder for which he had been condemned to die.

After Mr. Porter's case there was the report by *Chicago Tribune* reporters Steve Mills and Ken Armstrong documenting the systemic failures of our capital punishment system. Half of the nearly 300 capital cases in Illinois had been reversed for a new trial or resentencing.

Nearly Half!

Thirty-three of the death row inmates were represented at trial by an attorney who had later

been disbarred or at some point suspended from practicing law.

Of the more than 160 death row inmates, 35 were African American defendants who had been convicted or condemned to die by all-white juries.

More than two-thirds of the inmates on death row were African American.

Forty-six inmates were convicted on the basis of testimony from jailhouse informants.

I can recall looking at these cases and the information from the Mills-Armstrong series and asking my staff: How does that happen? How in God's name does that happen? I'm not a lawyer, so somebody explain it to me.

But no one could. Not to this day.

Then over the next few months, there were three more exonerated men, freed because their sentence hinged on a jailhouse informant or new DNA technology proved beyond a shadow of doubt their innocence.

We then had the dubious distinction of exonerating more men than we had executed. Thirteen men found innocent, 12 executed.

[T]here is not a doubt in my mind that the number of innocent men freed from our Death Row stands at 17, with the pardons of Aaron Patterson, Madison Hoble, Stanley Howard and Leroy Orange [granted by Gov. Ryan the day before].

That is an absolute embarrassment. Seventeen exonerated death row inmates is nothing short of a catastrophic failure. But the 13, now 17 men, is just the beginning of our sad arithmetic in prosecuting murder cases. During the time we have had capital punishment in Illinois, there were at least 33 other people wrongly convicted on murder charges and exonerated. * * *

How many more cases of wrongful conviction have to occur before we can all agree that the system is broken?

* * * I have conducted private group meetings, one in Springfield and one in Chicago, with the surviving family members of homicide victims. Everyone in the room who wanted to speak had the opportunity to do so. Some wanted to express their grief, others wanted to express their anger. I took it all in.

My commission and my staff had been reviewing each and every case for three years. But, I redoubled my effort to review each case personally in order to respond to the concerns of prosecutors and victims' families. This individual review also naturally resulted in a collective examination of our entire death penalty system.

I also had a meeting with a group of people who are less often heard from, and who are not as popular with the media. The family members of death row inmates have a special challenge to face. I spent an afternoon with those family members at a Catholic church here in Chicago. At that meeting, I heard a different kind of pain expressed. Many of these families live with the twin pain of knowing not only that, in some cases, their family member may have been responsible for inflicting a terrible trauma on another family, but also the pain of knowing that society has called for another killing. These parents, siblings and children are not to blame for the crime committed, yet these innocent stand to have their loved ones killed by the state. As Mr. Mandela told me, they are also branded and scarred for life because of the awful crime committed by their family member.

Others were even more tormented by the fact that their loved one was another victim, that they were truly innocent of the crime for which they were sentenced to die.

It was at this meeting that I looked into the face of Claude Lee, the father of Eric Lee, who was convicted of killing Kankakee police officer Anthony Samfay a few years ago. It was a



Governor George Ryan speaking at Northwestern Law School, Jan. 11, 2003

traumatic moment, once again, for my hometown. A brave officer, part of that thin blue line that protects each of us, was struck down by wanton violence. If you will kill a police officer, you have absolutely no respect for the laws of man or God.

I've known the Lee family for a number of years. There does not appear to be much question that Eric was guilty of killing the officer. However, I can say now after our review, there is also not much question that Eric is seriously ill, with a history of treatment for mental illness going back a number of years.

The crime he committed was a terrible one – killing a police officer. Society demands that the highest penalty be paid.

But I had to ask myself – could I send another man's son to death under the deeply flawed system of capital punishment we have in Illinois? A troubled young man, with a history of mental illness? Could I rely on the system of justice we have in Illinois not to make another horrible mistake? Could I rely on a fair sentencing?

In the United States the overwhelming majority of those executed are psychotic, alcoholic, drug addicted or mentally unstable. The frequently are raised in an impoverished and abusive environment.

Seldom are people with money or prestige convicted of capital offenses, even more seldom are they executed.

* * *

I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life.

* * *

If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?

And in almost every one of the exonerated 17, we not only have breakdowns in the system with police, prosecutors and judges, we have terrible cases of shabby defense lawyers. There is just no way to sugar coat it. There are defense attorneys that did not consult with their clients, did not investigate the case and were completely unqualified to handle complex death penalty cases. They often didn't put much effort into fighting a death sentence. If your life is on the line, your lawyer ought to be fighting for you. As I have said before, there is more than enough blame to go around.

I had more questions.

In Illinois, I have learned, we have 102 decision makers. Each of them are politically elected, each beholden to the demands of their community and, in some cases, to the media or especially vocal victims' families. In cases that have the attention of the media and the public, are decisions to seek the death penalty more likely to occur? What standards are these prosecutors using?

* * * [P]rosecutors in Illinois have the ultimate commutation power, a power that is exercised

every day. They decide who will be subject to the death penalty, who will get a plea deal or even who may get a complete pass on prosecution. By what objective standards do they make these decisions? We do not know, they are not public. There were more than 1000 murders last year in Illinois. There is no doubt that all murders are horrific and cruel. Yet, less than 2 percent of those murder defendants will receive the death penalty. That means more than 98% of victims families do not get, and will not receive whatever satisfaction can be derived from the execution of the murderer. Moreover, if you look at the cases, as I have done – both individually and collectively – a killing with the same circumstances might get 40 years in one county and death in another county. I have also seen where co-defendants who are equally or even more culpable get sentenced to a term of years, while another less culpable defendant ends up on death row.

In my case-by-case review, I found three people that fell into this category, Mario Flores, Montel Johnson and William Franklin. Today I have commuted their sentences to a term of 40 years to bring their sentences into line with their co-defendants and to reflect the other extraordinary circumstances of these cases.

* * *

For years the criminal justice system defended and upheld the imposition of the death penalty for the 17 exonerated inmates from Illinois Death row. Yet when the real killers are charged, prosecutors have often sought sentences of less than death. In the Ford Heights Four Case, Verneal Jimerson and Dennis Williams fought the death sentences imposed upon them for 18 years before they were exonerated. Later, Cook County prosecutors sought life in prison for two of the real killers and a sentence of 80 years for a third.

What made the murder for which the Ford Heights Four were sentenced to die less heinous and worthy of the death penalty twenty years later with a new set of defendants?

* * *

Several years after we enacted our death penalty statute, Girvies Davis was executed. * * * One State's Attorney waived his request for the death sentence when Davis' first sentencing was sent back to the trial court for a new sentencing hearing. The prosecutor was going to seek a life sentence. But in the interim, a new State's Attorney took office and changed directions. He once again sought and secured a death sentence. Davies was executed.

How fair is that?

* * *

What are we to make of the studies that showed that more than 50% of Illinois jurors could not understand the confusing and obscure sentencing instructions that were being used? What effect did that problem have on the trustworthiness of death sentences? * * *

* * *

As I came closer to my decision, I knew that I was going to have to face the question of whether I believed so completely in the choice I wanted to make that I could face the prospect of even commuting the death sentence of Daniel Edwards – the man who had killed a close family friend of mine. I discussed it with my wife, Lura Lynn, who has stood by me all these years. She was angry and disappointed at my decision like many of the families of other victims will be.

I was struck by the anger of the families of murder victims. To a family they talked about closure. They pleaded with me to allow the state to kill an inmate in its name to provide the families with closure. But is that the purpose of capital punishment? Is it to soothe the families? And is that truly what the families experience?

I cannot imagine losing a family member to murder. Nor can I imagine spending every waking day for 20 years with a single minded focus to execute the killer. The system of death in Illinois is so unsure that it is not unusual for cases to take 20 years before they are resolved. And thank God.

If it had moved any faster, then Anthony Porter, the Ford Heights Four, Ronald Jones, Madison Hobley and the other innocent men we've exonerated might be dead and buried.

But it is cruel and unusual punishment for family members to go through this pain, this legal limbo for 20 years. Perhaps it would be less cruel if we sentenced the killers to [prison] to life, and used our resources to better serve victims.

My heart ached when I heard one grandmother who lost children in an arson fire. She said she could not afford proper grave markers for her grandchildren who died. Why can't the state help families provide a proper burial?

Another crime victim came to our family meetings. He believes an inmate sent to death row for another crime also shot and paralyzed him. The inmate, he says, gets free health care while the victim is struggling to pay his substantial medical bills and, as a result, he has forgone getting proper medical care to alleviate the physical pain he endures.

What kind of victims services are we providing? Are all of our resources geared toward providing this notion of closure by execution instead of tending to the physical and social service needs of victim families? And what kind of values are we instilling in these wounded families and in the young people? * * *

* * *

* * * Many people express the desire to have capital punishment. Few, however, seem prepared to address the tough questions that arise when the system fails. It is easier and more comfortable for politicians to be tough on crime and support the death penalty. It wins votes. But when it comes to admitting that we have a problem, most run for cover. Prosecutors across our state continue to deny that our death penalty system is broken – or they say if there is a problem, it is really a small one and we can fix it somehow. It is difficult to see how the system can be fixed when not a single one of the reforms proposed by my Capital

Punishment Commission has been adopted. Even the reforms the prosecutors agree with haven't been adopted.

So when will the system be fixed? How much more risk can we afford? Will we actually have to execute an innocent person before the tragedy that is our capital punishment system in Illinois is really understood? * * *

* * *

“There is no honorable way to kill, no gentle way to destroy. There is nothing good in war. Except its ending.”

That's what Abraham Lincoln said about the bloody war between the states. It was a war fought to end the sorriest chapter in American history – the institution of slavery. While we are not in a civil war now, we are facing what is shaping up to be one of the great civil rights struggles of our time. * * *

Our own study showed that juries were more likely to sentence to death if the victim were white than if the victim were black – three-and-a-half times more likely to be exact. We are not alone. Just this month Maryland released a study of their death penalty system and racial disparities exist there too.

This week, Mamie Till died. Her son Emmett was lynched in Mississippi in the 1950s. She was a strong advocate for civil rights and reconciliation. * * * Mamie's strength and grace not only ignited the civil rights movement – including inspiring Rosa Parks to refuse to go to the back of the bus – but inspired murder victims' families until her dying day.

Is our system fair to all? Is justice blind? These are important human rights issues.

* * *

* * * In 1976, four years after [the Court] had decided *Furman*, Justice Blackmun joined the majority of the United States Supreme Court in

deciding to give the States a chance with these new and improved death penalty statutes. There was great optimism in the air.

This was the climate in 1977, when the Illinois legislature was faced with the momentous decision of whether to reinstate the death penalty in Illinois. I was a member of the General Assembly at that time and when I pushed the green button in favor of reinstating the death penalty in this great State, I did so with the belief that whatever problems had plagued the capital punishment system in the past were now being cured. I am sure that most of my colleagues who voted with me that day shared that view.

But 20 years later, after affirming hundreds of death penalty decisions, Justice Blackmun came to the realization, in the twilight of his distinguished career that “the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake.” He expressed frustration with a 20-year struggle to develop procedural and substantive safeguards. In a now famous dissent he wrote in 1994, “From this day forward, I no longer shall tinker with the machinery of death.”

* * *

The Governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the Governor to issue reprieves, pardons and commutations. Our Supreme Court has reminded inmates petitioning them that the last resort for relief is the governor.

At times the executive clemency power has perhaps been a crutch for courts to avoid making the kind of major change that I believe our system needs.

Our systemic case-by-case review has found more cases of innocent men wrongfully sentenced to death row. Because our three year study has found only more questions about the fairness of the sentencing; because of the spectacular failure to reform the system; because we have seen justice delayed for countless death row inmates

with potentially meritorious claims; because the Illinois death penalty system is arbitrary and capricious – and therefore immoral – I no longer shall tinker with the machinery of death.

I cannot say it more eloquently than Justice Blackmun.

The legislature couldn’t reform it.

Lawmakers won’t repeal it.

But I will not stand for it.

I must act.

Our capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates.

* * * [T]he people of our state have vested in me to act in the interest of justice. Even if the exercise of my power becomes my burden I will bear it. Our constitution compels it. I sought this office, and even in my final days of holding it I cannot shrink from the obligations to justice and fairness that it demands.

There have been many nights where my staff and I have been deprived of sleep in order to conduct our exhaustive review of the system. But I can tell you this: I will sleep well knowing I made the right decision.

* * *

In the days ahead, I will pray that we can open our hearts and provide something for victims’ families other than the hope of revenge. Lincoln once said: “I have always found that mercy bears richer fruits than strict justice.” I can only hope that will be so. God bless you. And God bless the people of Illinois.

Posthumous Pardons

At least 106 individuals have been granted posthumous pardons, including 12 individuals who were executed, according to a study by Stephen Greenspan, Clinical Professor of Psychiatry at the University of Colorado. Reasons for the pardons included doubts about guilt, biased or unfair legal proceedings, a change in political, moral or legal climate, and as recognition of exemplary character.

Executive Order by Gov. Bill Ritter, Jr. Granting Pardon to Joe Arridy

Pursuant to the authority vested in the Governor of the State of Colorado by Article IV, Section 7 of the Colorado Constitution, I, Bill Ritter, Jr., Governor of the State of Colorado, hereby issue this Executive Order granting a posthumous pardon to Joe Arridy

I. Background

In 1937, Joe Arridy was convicted of one count of murder. He was sentenced to death and executed by lethal gas at the Colorado State Penitentiary on January 6, 1939. Granting a pardon is an extraordinary remedy and granting a posthumous pardon is a particularly extraordinary remedy. The tragic conviction of Mr. Arridy and his subsequent execution merit such relief based on the most compelling circumstances imaginable: The great likelihood that Mr. Arridy was, in fact, innocent of the crime for which he was executed and his severe mental disability at the time of his trial and execution.

[I]t is unlikely that Mr. Arridy had any involvement in the murder of Dorothy Drain. Mr. Arridy had an I.Q. of 46. At ten years of age, he was committed by the Pueblo County Court to the State Home and Training for Mental Defectives in Grand Junction . On August 8, 1936, he ran away with some other boys from the institution and jumped on a train. On August 24, 1936, Sheriff George Carroll of Cheyenne, Wyoming, reported that Mr. Arridy had confessed to the murder and sexual assault of 15-year-old Dorothy Drain, who was killed in Pueblo sometime in the night or

early in the morning on August 15 or August 16, 1936. Indeed, there was compelling evidence that Mr. Arridy was not even in Pueblo at the time of the murder.

The confession, which only Sheriff Carroll heard, was full of contradictions and inaccuracies. Worse, the confession was clearly false, including statements that he acted alone and that he killed her with a blunt instrument instead of a hatchet, which was conclusively proven to be the case. On August 20, 1936, Frank Aguilar was arrested at Ms. Drain's funeral in Pueblo, and he was also charged with her murder. Faced with the inconsistencies and inaccuracies in Mr. Arridy's initial confession, Sheriff Carroll obtained a second false confession in which he changed his story to indicate that he was with Mr. Aguilar when he murdered her instead of acting alone as he stated in his first confession. Mr. Aguilar had, however, always maintained that he had never met Mr. Arridy. During his own trial, Mr. Aguilar confessed his guilt to his attorney. In fact, the murder weapon, which was a hatchet with distinctive notches in the blade that matched Ms. Drain's wounds, was found in Mr. Aguilar's home hidden in a basket covered by rags. At an insanity hearing, Mr. Arridy testified that he had never seen a hatchet and did not even know what a hatchet was. Mr. Aguilar was found guilty at trial, and he was executed on August 17, 1937.

Although it does not relate to his innocence, the facts surrounding Mr. Arridy's execution were nothing short of appalling. In a sworn affidavit, Dr. B.L. Jefferson, who was the Superintendent of the State Home and Training School for Mental Defectives at Grand Junction, Colorado, opined that Mr. Arridy "has the mind of a child of not to exceed six and one-half years of age and was not capable of giving either a dependable confession or of testifying and defending himself on the witness stand."

Mr. Arridy's actions on death row demonstrate all too clearly the accuracy of Dr. Jefferson's evaluation. The warden referred to him as the "happiest man to ever live on death row." He happily spent his days playing with a toy train and

a toy automobile. Mr. Arridy clearly had no idea that he was about to be executed by the State of Colorado. For his last three meals, he requested nothing but ice cream – exactly what any child would do if they were told that they could eat anything they wanted. Father Albert Schaller, O.S.B., affirmed that he did not understand that he was going to die. In light of his intellectual disability, Father Schaller determined that under Catholic doctrine he should administer last rites to Mr. Arridy as if he was a child. During the administration of these last rights, Mr. Arridy complied with Father Schaller’s request for him to put down his toy train and say prayers. Devastatingly, Father Schaller had to lead him through the Lord’s Prayer two words at a time, for that is all that Mr. Arridy could remember.

This posthumous pardon is not being viewed solely through the lenses of 2011 norms. Numerous people at the time found it unconscionable that Mr. Arridy was sentenced to death. Gail Ireland, who went on to become the Colorado Attorney General, agreed to represent Mr. Arridy *pro bono* after his conviction. Throughout his representation of Mr. Arridy, Mr. Ireland obtained at that time an unprecedented number of stays of his execution from the Colorado Supreme Court – all by 4-3 votes. Notably, every time Mr. Arridy was informed that his execution had been stayed he showed no reaction and merely continued to play with his toys. Chief Justice Bakke made the following statement in an opinion denying one of Mr. Arridy’s appeals:

[A]cknowledgment should be made of the commendable effort on the part of defendant’s counsel and others to save Arridy from the death sentence. We are aware that such effort was prompted by the highest motives which move the hearts and minds of men, but until such time as the race, in its evolutionary process, can work out a more intelligent solution of cases such as is here presented, it remains the duty of the courts only, to safeguard the rights of the defendant and see that he has a fair and impartial trial under the law of the state

as it now is, not under what we wish it might, or should, or may be at some time in the future.

Arridy v. People, 82 P.2d 757, 761 (Colo. 1938).

Fortunately, the law has evolved in just the manner contemplated by Justice Bakke. Under current law it would be unconstitutional to execute a person such as Mr. Arridy. In 2002, the United States Supreme Court ruled in *Atkins v. Virginia* that “executions of mentally retarded criminals are ‘cruel and unusual punishments’ prohibited by the Eighth Amendment.” 536 U.S. 304, 311-12 (2002). The Court stated in an earlier case that the “basic concept underlying the Eight Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning for the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356U.S. 86, 100-01 (1958).

Pardoning Mr. Arridy cannot undo this tragic event in Colorado history. It is in the interests of justice and simple decency, however, to restore his good name. Granting this pardon demonstrates that Colorado has, in fact, matured in its understanding of mental disability.

II. Grant of Clemency

Joe Arridy be and hereby is granted a full and unconditional pardon of the above described conviction. GIVEN under my hand and the Executive Seal of the State of Colorado this seventh day of January, 2011.

Bill Ritter, Jr.
Governor

The request for Arridy’s pardon was brought to Gov. Ritter by Colorado attorney David A. Martinez, who has spent years researching the case.

EXECUTION

Lethal injection is the primary method of execution in the United States today, replacing hanging, the firing squad, the gas chamber and electrocution. Some states that have changed from these other methods to lethal injection still retain the former method as an option.

Lethal injection was first proposed as a means of execution by Oklahoma's state medical examiner, Jay Chapman, on May 11, 1977. After his proposal was approved by an anesthesiologist, the Oklahoma legislature adopted it as the state's means of execution.

The original protocol called for an intravenous saline drip to be started in the prisoner's arm, into which were introduced sodium thiopental (also known as Pentothal®), an ultra-short action barbiturate, which rendered the prisoner unconscious; pancuronium bromide (also known as Pavulon), a non-depolarizing muscle relaxant, which causes complete, fast and sustained paralysis of the skeletal striated muscles, including the diaphragm and the rest of the respiratory muscles (this would eventually cause death by asphyxiation); and potassium chloride, which interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. As will be discussed, lethal injection has not been without its problems and one of the drugs became unavailable, resulting in changes to the protocols in many states.

Texas switched from electrocution to lethal injection on August 29, 1977. Texas was the first state to use lethal injection to carry out an execution when it put Charles Brooks, Jr. to death on December 7, 1982.

Challenges to lethal injection raised various questions about whether it was as humane as its advocates suggested and whether the people who carried out the lethal injections were qualified to do so. United States District Judge Jeremy Fogel brought executions to a halt in California when he ruled in *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D.Cal. 2006), that the state's method of

execution violated the Eighth Amendment's ban on cruel and unusual punishment. Evidence presented in the case indicated a high number of botched executions at San Quentin, where executioners administered lethal drugs to inmates in a small, dimly lit former gas chamber. Questions also surfaced about executioners' training and qualifications. Lawyers for the inmates found that the leader of the lethal injection team had previously been suspended for smuggling drugs into the prison.

In Missouri, it was discovered in 2007 that Dr. Alan R. Doerhoff, the physician who administered the doses of chemicals during state executions was dyslexic and had previously admitted "sometimes giving inmates smaller amounts of anesthesia than the state had said was its policy." The doctor had been sued for malpractice more than 20 times, denied staff privileges by two hospitals and reprimanded by the state Board of Healing Arts for failing to disclose the lawsuits to a hospital where he was treating patients. Doerhoff testified that executions in Missouri had taken place in the dark, an execution team working by flashlight, and that the execution team routinely consists of "nonmedical people," for whom the day of the execution is "the first time probably in their life they have picked up a syringe . . . so it's a little stressful for them to be doing this."¹ A nurse on the execution team had a criminal record and was on probation. The Missouri legislature passed a law prohibiting disclosure of such information.

***Baze v. Rees* (2008)**

The Supreme Court granted review of a challenge to lethal injection brought by two inmates on Kentucky's death row, Ralph Baze and Thomas C. Bowling. They argued that there was a risk that the sodium thiopental would not be properly administered, resulting in excruciating pain when the other two chemicals were administered. The pancuronium bromide could cause slow asphyxiation by paralyzing the lungs

1. Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES, Feb. 11, 2007.

and potassium chloride would cause burning and intense pain as it circulated throughout the body before stopping the heart. However, because the inmate would be paralyzed by the pancuronium bromide, he would not be able to indicate that he was in pain.

A splintered Supreme Court upheld the procedure in *Baze v. Rees*, 553 U.S. 35 (2008). Chief Justice Roberts, joined by Justice Kennedy and Justice Alito, concluded that the petitioners did not establish that the risk of pain from improper administration of the drugs was so substantial or imminent as to amount to an Eighth Amendment violation and that a constitutional violation was not established because some risks could be eliminated by adopting alternative procedures.

Justice Stevens concluded in a concurring opinion that the lethal injection procedures did not violate the Eighth Amendment under the Court's precedents. However, concluded that imposing the death penalty constitutes the pointless and needless extinction of life with only negligible social or public returns.

Justice Thomas, joined by Justice Scalia, concluded in a concurring opinion that the Eighth Amendment was violated only if a punishment is deliberately designed to inflict pain and that Kentucky's lethal injection protocol was adopted to make executions more humane.

Justice Breyer also concurred, concluding that neither the record nor readily available literature established sufficient grounds to believe that Kentucky's lethal injection method created a significant risk of unnecessary suffering.

Justice Ginsburg, joined by Justice Souter, dissented, expressing the view that Kentucky's execution protocol lacked basic safeguards used by other States to confirm that an inmate was unconscious before injection of the second and third drugs and that the case should be remanded with instructions to consider whether Kentucky's omission of those safeguards posed an untoward,

readily avoidable risk of inflicting severe and unnecessary pain.

Issues regarding lethal injection did not end with the decision in *Baze*. Some executions have been badly botched. States have had difficulty in obtaining the drugs used to carry out lethal injections and have resorted to obtaining drugs from compounding pharmacies, which are not regulated by the food and drug administration. They have tried new drugs with, in some cases, disastrous results.

There continue to be issues about lethal injection procedures, approval of new protocols under state administrative procedure acts, and issues arising from state laws that have made every aspect of lethal injection secret – the identities of the drugs used, the pharmacies that provide them, and the people who prescribe and administer the drugs, as well as the procedures involved in carrying out executions.

The California Department of Corrections and Rehabilitation built a new lethal injection chamber at San Quentin Prison and rewrote its execution protocol. Among the changes was an added step, in which lethal injection team members would gently shake an inmate after they gave him or her a sedative to make sure sleep had set in before they administered a painful, heart-stopping drug. Marin County Superior Court Faye D'Opal threw out that protocol in December, 2011, saying the state violated its own rule-writing process when it failed to adequately consider public comment on the process. The judge noted that one of the state's experts recommended the use of a single drug as superior to the three-drug protocol adopted by the Department. The state appealed that ruling.

Governor Jerry Brown subsequently instructed the Department to pursue a single-drug protocol. Lawyers for the state say it has complied. During previous hearings, a consultant to the Department testified that the state had written and tested at San Quentin a single-drug protocol. But it is not apparent when the Department would begin the

official rule-writing process that would allow that protocol to become a law.

Ohio's Attempt to Execute Romell Broom, Sept. 15, 2009

5:08 a.m.: Broom awakens for the day.

5:51 a.m.: Broom is escorted to the shower.

6:27 a.m.: Broom eats breakfast of cereal.

8:07 a.m.: The chemicals used in Ohio executions – thiopental sodium, pancuronium bromide and potassium chloride – are delivered to the death house.

9:31 a.m.: Execution preparations put on hold while the 6th Circuit Court of Appeals considers appeal request.

12:28 p.m.: Broom eats a lunch.

12:48 p.m.: The 6th Circuit declines to review the appeal. Execution scheduled to begin at 1:30 p.m.

1:24 p.m.: First round of lethal drugs is destroyed.

1:31 p.m.: Replacement drugs are delivered to the death house.

2:01 p.m.: Medical team enters holding cell and begins trying to insert IVs.

2:30 p.m.: Unable to find a usable vein, team leaves the cell to take a break.

2:42 p.m.: Team members back in cell trying again.

2:44 p.m.: Prisons director Terry Collins tells the medical team to take another break.

2:49 p.m.: Broom wipes his face with a tissue, appears to be crying.

2:57 p.m.: Broom asks that his attorney, Adele Shank, be allowed to watch.

Around 3 p.m.: Tim Sweeney, an attorney also representing Broom, sends a letter to Ohio Supreme Court Chief Justice Thomas Moyer asking the court to stop the execution on the grounds that Broom is suffering cruel and unusual punishment.

3:04 p.m.: Attorney Shank speaks with prisons lawyer Austin Stout, who informs her execution policy does not allow lawyers to have contact with inmates after the execution process has started.

3:11 p.m.: Execution team members say they are having problems keeping a vein open because of Broom's past drug use.

3:33 p.m.: Attorney Shank is taken to the witness viewing area.

4:07 p.m.: Collins consults with Ohio Gov. Ted Strickland and the Ohio attorney general's office.

4:24 p.m.: Gov. Strickland issues one-week reprieve.

The correctional officers encountered so much difficulty in finding a suitable vein for the lethal injection that, after an hour, Broom attempted to assist them by moving on his side, sliding the rubber tubing up and down his arm, and flexing his fingers. A vein was found, but it collapsed as the technicians inserted a saline solution. Broom's assistance did not help, and he turned on his back and covered his face with both hands. He appeared to be in distress and wiped his eyes. The executioners attempted to use the veins in his legs and he grimaced. One member of the team patted him on his back. Finally, the executions gave up their attempts, indicating they needed a break.

After two hours, Prison Director Terry Collins contacted Governor Ted Strickland who issued the reprieve. Collins thanked Broom "for the respect

he showed the execution team and for the way in which he handled the difficulties.”

Broom filed suit in the United States District Court of the Southern District of Ohio seeking to prevent the state from attempting to execute him again and received a stay of execution. The Court of Appeals for the Sixth Circuit and Gov. Ted Strickland issued stays and reprieves for two other inmates who were scheduled to be executed.

In his statement regarding the reprieves, Gov. Strickland stated that the Ohio Department of Rehabilitation and Correction had diligently researched a range of potential back-up or alternative procedures to avoid the problems encountered in the attempt to execute Broom, but that more research and evaluation was necessary before one or more procedures could be selected and that training and other preparation would be required in order to incorporate any new procedures into the Department’s lethal injection protocol.

Broom remains on Ohio’s death row.

The Search for a Solution and More Botched Executions

In response to the failed execution, Ohio made two changes to its execution procedure. First, it changed from the three-drug protocol it and other states had been using, to a single drug, sodium thiopental – the first of the three drugs normally used – in an amount sufficient to cause death. Second, it announced that if a suitable IV site cannot be attained or maintained, an intramuscular injection would be used instead. Instead of being injected straight into the blood stream, the drug is injected into the muscle, which results in a much longer death and causes a greater amount of pain than one done intravenously. There is also a chance of the needle hitting a pain receptor and the injected drug can cause a severe reaction in the area.

Ohio announced that the new procedures would be in place in time for the execution of Kenneth

Biros, scheduled for December 18, 2009. A pending challenge to Ohio’s lethal injection procedures was declared moot. Biros was executed using the one-drug protocol on that date.

Washington followed Ohio and adopted a one-drug protocol in March, 2010. It used only sodium thiopental to execute Cal Brown on September 10, 2010.

The European manufacturers of sodium thiopental, objecting to its use in lethal injections, made it virtually impossible to obtain. Ohio corrections officials, upon being unable to obtain sodium thiopental, switched to pentobarbital, an anesthetic commonly used to euthanize animals, which causes unconsciousness followed by cardiac arrest. Ohio executed Johnnie Batson using a single dose of pentobarbital on March 10, 2011.

However, the manufacturers of pentobarbital also objected to its use in executions and made it harder to obtain. Ohio ran out of it and used a combination of midazolam, an anti-anxiety drug in the same family as Valium, and hydromorphone, a powerful narcotic derived from morphine, to execute Dennis McGuire on January 16, 2014.²

A court gave its approval to the combination, overruling lawyers for McGuire who had argued that the drugs could cause “air hunger,” a struggle for breath that, the lawyers said, could result in “agony and terror.” In persuading the court to allow the use of the drugs, Thomas Madden, an Ohio assistant attorney general, argued that although there are constitutional protections, “you’re not entitled to a pain-free execution.”³

When the drugs were administered, McGuire first appeared to be unconscious, but then started struggling, his stomach heaving, a fist clenching, while he made gasping, snorting and choking

2. Erica Goode, [After a Prolonged Execution in Ohio, Questions Over ‘Cruel and Unusual’](#), N.Y. TIMES, Jan. 18, 2014, at A12.

3. *Id.*

sounds. The execution took about 25 minutes from the time the drugs were started to the time death was declared. U.S. District Judge Gregory Frost later stayed any further executions in Ohio to give the state time to implement a new lethal injection procedure.⁴

The same day, Oklahoma executed Michael Lee Wilson, who took part in the murder of a co-worker, using a cocktail of pentobarbital from a compounding pharmacy; vecuronium bromide, a paralytic; and potassium chloride to stop the heart. Wilson's last words, coming about 12 seconds after the injections were administered, were, "I feel my whole body burning."

Oklahoma planned to execute Clayton D. Lockett on April 29, 2014, by injecting him with midazolam, a sedative which was intended to render him unconscious, followed by vecuronium bromide, a paralyzing agent that stops breathing, and then potassium chloride, which stops the heart. However, the injections failed to kill Lockett in what was described as a "chaotic and disastrous" botched execution.⁵

The midazolam was administered at 6:23 p.m. Ziva Branstetter, an editor at *The Tulsa World* who witnessed the execution, described what happened:

6:36 p.m. Lockett kicks his right leg and his head rolls to the side. He mumbles something we can't understand.

6:37 p.m. The inmate's body starts writhing and bucking and it looks like he's trying to get up. Both arms are strapped down and several straps secure his body to the gurney. He utters another unintelligible statement. Defense Attorney Dean Sanderford is quietly crying in the observation area.

4. Jeremy Pelzer, [Ohio's death-penalty moratorium extended until next January](#), Northeast Ohio Media Group, Aug. 11, 2014.

5. Erik Eckholm, [One Execution Botched, Oklahoma Delays the Next](#), N.Y. Times, April 29, 2014.

6:38 p.m. Lockett is grimacing, grunting and lifting his head and shoulders entirely up from the gurney. He begins rolling his head from side to side. He again mumbles something we can't understand, except for the word "man." He lifts his head and shoulders off the gurney several times, as if he's trying to sit up. He appears to be in pain.

6:39 p.m. The physician walks around to Lockett's right arm, lifts up the sheet and says something to [Oklahoma State Penitentiary Warden Anita] Trammell. "We're going to lower the blinds temporarily," she says. The blinds are lowered and we can't see what is happening. Reporters exchange shocked glances. Nothing like this has happened at an execution any of us has witnessed since 1990, when the state resumed executions using lethal injection.⁶

* * *

The blinds were never reopened. Department of Corrections Director Robert Patton announced at 6:56 that the execution had been stopped because of a "vein failure." Ten minutes later, at 7:06, Lockett was pronounced dead in the execution chamber from a heart attack.⁷

The following July 23, it took Arizona even longer – almost two hours – to bring about the death of Joseph Wood. Witnesses said he gasped and snorted like "a fish on shore gulping for air" for much of that time before eventually dying. Death should have occurred within 15 minutes of

6. Ziva Branstetter, *Eyewitness account: A minute-by-minute look at what happened during Clayton Lockett's execution*, *Tulsa World*, http://www.tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article_f7764efc-d036-11e3-af7e-0017a43b2370.html

7. *Id.*

administration of the lethal drugs.⁸ Arizona Senator John McCain said the procedure was tantamount to torture.

Wood, has sought information about how he would be executed and secured a stay of execution at the Ninth Circuit Court of Appeals, *Wood v. Ryan*, 2014 WL 3563348 (9th Cir. No. 14–16310, July 21, 2014), but it was vacated by the Supreme Court, 2014 WL 3600362 (No. 14A82, July 22, 2014), and he was put to death.

Arizona officials claimed that Joseph Wood was “brain dead” during the execution and felt no pain. However, prominent medical experts strongly disagreed. David Waisel, associate professor of anesthesia at Harvard medical school, said a person who is brain dead will stop breathing unless kept alive on a ventilator. “There is no way anyone could ever look at someone and make that kind of diagnosis. He was still breathing, so he was not brain dead. This is an example where they threw out a term that has a precise medical definition, but they didn’t know what it means.” Dr. Chitra Venkat, clinical associate professor of neurology and neurological sciences at Stanford University, said, “If you are taking breaths, you are not brain dead. Period. That is not compatible with brain death, at all. In fact, it is not compatible with any form of death.” Waisel expressed no view on whether or not America should practice the death penalty, but said: “If we are going to have the death penalty – one of the most solemn things the state can do – then it has to be done perfectly. If states cannot do it perfectly, then they should not do it.”⁹

8. Mark Berman, [Arizona execution lasts nearly two hours; lawyer says Joseph Wood was ‘gasping and struggling to breathe’](#), WASHINGTON POST, July 23, 2014; Andrew Cohen, [The disturbing lessons of Arizona’s un-American execution](#), THE WEEK, July 24, 2014.

9. Ed Pilkington, Amanda Holpuch & Tom Dart, [Experts decry ‘failed experiment’ with new death penalty drug combinations](#), THE GUARDIAN, July 25, 2014.

The response of some states to botched executions has been to make every aspect of the execution process secret. The laws prohibit disclosure to those who are going to be executed, the media and the public the identity of the pharmacy that provides the drugs, the names and qualifications of the people who carry out the executions, and, in some cases, the drugs that will be used.

A group of death row inmates in Missouri challenged the lethal injection procedures in that state. The federal judge presiding over the case ordered its Department of Corrections to disclose to counsel for the inmates the identities of the physician who prescribes the chemical used in Missouri executions, the pharmacist who compounds the chemical, and the laboratory that tests the chemical for potency, purity, and sterility. The Department sought writs of mandamus from the Eighth Circuit to prevent disclosure of the information.

After a three judge panel of the Eighth Circuit issued a writ of mandamus prohibiting discovery of the identity of the physician, but declined to prohibit disclosure of the identities of the pharmacy and the laboratory, the full Court, sitting *en banc*, held that writs mandamus should issue to vacate the orders requiring discovery of all three identities because the inmates had failed to state a claim entitling them to relief. Their complaint was deficient, the Court said, because they had not alleged “that a different lethal-injection protocol, or a different method of execution (*e.g.*, lethal gas, electrocution, or firing squad), is more humane” or “a purposeful design by the State to inflict unnecessary pain.” *In re Lombardi*, 741 F.3d 888, 895-96 (8th Cir.) (*en banc*), *rehearing denied*, 741 F.3d 903 (2014).

Judge Bye, joined by Judges Murphy and Kelly, dissented, expressing the view that the majority placed “an absurd burden on death row inmates.”

The pleading standard advanced by the majority would require the prisoners to identify for the Director a readily available alternative method for their own executions.
* * * The challenge of proposing a readily

available alternative method seems nearly impossible if the prisoners are denied discovery and, thus, unable to ascertain even basic information about the current protocol.

Id. at 900.

After Missouri changed its compounding pharmacies a week before a scheduled execution, the Eighth Circuit again refused to allow disclosure of the drugs. Judge Bye, dissenting from denial of rehearing *en banc*, said, “Missouri has again, at the eleventh hour, amended its procedure and again is ‘using [a] shadow pharmac[y] hidden behind the hangman’s hood’ and ‘copycat pharmaceuticals’ to execute another death row inmate.”¹⁰ Arguing that the pharmacy could be “nothing more than a high school chemistry class,” he wrote:

Because Missouri has again changed its procedure for executions, even the most well-trained and well-intentioned pharmacist may be unable to properly test compounded pentobarbital in such a short amount of time. Missouri is actively seeking to avoid adequate testing of the alleged pentobarbital, which raises substantial questions about the drug’s safety and effectiveness. Although there were concerns with previous laboratory testing, at least some laboratory testing was conducted. Now, Missouri has provided no indication any testing of the new product has occurred.¹¹

The Georgia Supreme Court upheld laws making all aspects of executions “state secrets” in *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014), over the dissent of Justice Benham who wrote:

10. *Zink v. Lombardi* (regarding Michael Taylor execution), No. 14-1388, ECF ID 4127211 at 4 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting), (quoting *Zink v. Lombardi*, No. 13-3664, ECF ID 4108311, at 15 (8th Cir. Dec. 23, 2013) (*en banc*) (Bye, J., dissenting). See also Adam Liptak, *Deciding if Inmates Get to Know How They’ll Be Executed*, N.Y. TIMES, Mar. 10, 2014.

11. *Zink v. Lombardi* (regarding Michael Taylor execution), No. 14-1388, *supra* at 3 (Bye, J., dissenting).

[T]his State is on a path that, at the very least, denies Hill and other death row inmates their rights to due process and, at the very worst, leads to the macabre results that occurred in Oklahoma [in the Clayton Lockett case]. There must be certainty in the administration of the death penalty. At this time, there is a dearth of certainty namely because of the scarcity of lethal injection drugs. Georgia’s confidential inmate state secret statute does nothing to achieve a high level of certainty. Rather, the law has the effect of creating the very secret star chamber-like proceedings in which this State has promised its citizens it would not engage.

Id. at 807 (Benham, J., dissenting).

U.S. Attorney General Eric Holder commented on the secrecy, saying, “for the state to exercise that greatest of all powers, to end a human life, it seems to me, just on a personal level, that transparency would be a good thing, and to share the information about what chemicals are being used, what drugs are being used.”¹²

Dr. Marc Stern, a former assistant secretary of healthcare for the Washington Department of Corrections, described the difficulty of eliminating problems with lethal injections:

Although its foundation is in medical science, lethal injection is not a medical procedure: it has no therapeutic value, and it is not taught in medical school. A “successful” lethal injection would require the training and expertise of a medical professional. Finding and accessing a vein – especially in someone who is older, obese or has abused drugs – can be challenging. Choosing a proper medication dose for a patient, monitoring medication administration and its effects, and making necessary course corrections need the expertise of a professional. But legitimate medical

12. Gwen Ifill interview, *Holder: DOJ needs Congress’ support to reduce immigration backlog*, PBS (transcript), July 31, 2014).

procedures are subject to scientific study, open discussion among peers, training, supervisory oversight and improvements in technique. Lethal injection will never benefit from these safeguards for one critically important reason: it violates medical ethics.¹³

Dr. Stern acknowledged that some medical professionals are willing to anonymously participate in the process. “However,” he wrote, “we will continue to risk botched executions because they are conducted in a scientific vacuum.”¹⁴

Chief Judge Alex Kozinski of the Ninth Circuit has called for a return to the firing squad because of the many difficulties with lethal injection. He pointed out that historically, “executions were carried out by means designated for that purpose alone: electric chairs were the most common, but gas chambers, hanging and the occasional firing squad were also practiced.” However, “in the late 1970s, states began moving away from these traditional methods of execution and towards using drugs as execution tools.”¹⁵

Whatever the hopes and reasons for the switch to drugs, they proved to be misguided. Subverting medicines meant to heal the human body to the opposite purpose was an enterprise doomed to failure. * * *

* * * Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful – like something any one of us might experience in our final moments. * * * But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the

state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive – and foolproof – methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. And the electric chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time. There are plenty of people employed by the state who can pull the trigger and have the training to aim true. The weapons and ammunition are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply. And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose other than destroying their targets. Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn’t be carrying out executions at all.¹⁶

13. Max Stern, [*I was told to approve a lethal injection, but it violates my basic medical ethics*](#), THE GUARDIAN, Aug. 6, 2014.

14. *Id.*

15. *Wood v. Ryan*, 2014 WL 3563348 (9th Cir. No. 14–16310, July 21, 2014) (Kozinski, C.J., [dissenting](#) from denial of rehearing *en banc*) at 3-4.

16. *Id.* See also Patt Morrison, [Judge Alex Kozinski on bringing back firing squads: No, I wasn’t kidding](#), L.A. TIMES, July 30, 2014.