
**BEFORE THE GOVERNOR FOR THE STATE OF TEXAS
AND
THE BOARD OF PARDONS AND PAROLES**

In re

LESLEY LEE GOSCH,

Applicant.

**APPLICATION FOR REPRIEVE
FROM EXECUTION OF DEATH SENTENCE AND
COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE**

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**APPLICATION FOR CLEMENCY
AND MEMORANDUM IN SUPPORT THEREOF**

Lesley Lee Gosch respectfully submits this application for clemency, requesting that this Board of Pardons and Paroles recommend, and that the Governor grant, a commutation of his sentence of death to life imprisonment. To facilitate this request, Mr. Gosch is seeking a 30-day reprieve so that the Board may fully consider the merits of this Application.

INTRODUCTION

In 1997, the State of Texas executed 37 individuals -- a record in the "modern era" of the death penalty. Almost all of those men requested that the Board grant executive clemency. In not even one case, however, did the Board meet to discuss merits of the application or conduct a clemency hearing, as is common in many jurisdictions that carry out the ultimate penalty.

The Board has a statutory and moral responsibility to fully consider the life of the person whose petition rests before it. Mr. Gosch respectfully requests that the Board fully assume its responsibility, and fully evaluate the request presented.

With the recent changes in the habeas corpus laws, the Board and the Governor's Office must accept a heightened role in the administration of the death penalty. No longer do clemency petitions represent a "last ditch" effort to push aside the conclusions of endless courts that have heard, considered, and dismissed innumerable claims on the merits.

Comparatively speaking, Mr. Gosch's case has hurtled towards next week's execution.

Today, the Governor and the Board are the only forum able to fully consider the ramifications of Mr. Gosch's unique situation. In order to give the matter the consideration

required, Mr. Gosch respectfully requests that the Governor grant a 30-day reprieve to allow the Board to conduct a hearing to consider the matters raised herein.

STATEMENT OF THE CASE

A. The Events Leading To The Murder of Rebecca Patton

On September 18, 1985, Frank Patton, president of Castle Hills National Bank in San Antonio, Texas, received a telephone call at the bank from his wife, Rebecca Patton.¹ When he answered the phone his wife said, "Hi, Frank, there is someone here who wants to talk to you," and then a male voice, unfamiliar to Mr. Patton, took over the line. The unknown male instructed Mr. Patton to gather cash together in a briefcase, and to go directly to the pay telephones at the food court at the North Star Mall in San Antonio. The caller told Mr. Patton that he had precisely 45 minutes to comply with these directions.

After hanging up the phone, Mr. Patton immediately directed a bank cashier to begin gathering the money together, while his secretary called the F.B.I. Seven minutes after the initial extortion call, officers from the Alamo Heights Police Department arrived at the Patton home to find the body of Rebecca Patton lying on the floor of the home. She had been shot fatally in the head.

¹ All factual assertions made in this petition are supported by the trial testimony and exhibits, affidavits, police reports, and other documentation in the possession of counsel for Mr. Gosch. Counsel does not intend to submit all of the available documentation as exhibits in support of this petition as this would be overly burdensome to the Board and the Governor. Documentary support for any factual assertion made in this petition is available upon request.

B. The Events Leading to the Arrests of John Rogers and Lesley Gosch

On September 23, 1985, a group of San Antonio-area bankers held a press conference to announce that they were offering a \$100,000 reward for information leading to the arrest, indictment, and conviction of the person or persons responsible for the murder of Mrs. Patton. Less than two days later, in the early morning hours of September 25, 1985, Stephen Hurst, a 21-year-old friend and roommate of John Laurence Rogers,² was brought to the Alamo Heights Police Department by his uncle, Ned Dreyer, claiming that he had information that would lead to the arrest of the individuals responsible for the crime.

At the police station, Hurst produced the briefcase which he claimed had been given to him for safekeeping by his friend and housemate John Rogers. Inside police found a Ruger .22 caliber automatic handgun, several full boxes and one partially full box of Eley Long Rifle Caliber pistol ammunition, and two silencers which fit the weapon. Subsequent firearms comparison by the Bexar County Firearms Examiner concluded that this handgun was in fact the murder weapon

That morning, Hurst gave a written statement to the Alamo Heights police implicating Rogers and Gosch in the failed extortion plot and subsequent murder of Mrs. Patton. All the information contained in the statement derived from information Hurst had been given by John Rogers. The statement also suggested that both Rogers and

² At the time of these events, Hurst and Rogers shared an apartment at 4411 Gardendale, #12C, in San Antonio.

Hurst had greater roles in the planning and execution of the crime than either one would later admit. Indeed, on the day of Mrs. Patton's murder, Hurst took the day off from work without explanation, an unusual event by his own admission. Hurst's statement, as well as the subsequent statement of John Howells, an associate of Hurst's and Rogers', also revealed that from Wednesday, September 18th, until Tuesday, September 24th, Stephen Hurst and John Howells alternately kept weapons given to them by John Rogers in their possession with knowledge of their connection to the murder of Mrs. Patton yet did not notify the authorities of their existence.

John Howell's statement to police on September 27, 1985, related information that was derived either from Rogers or from Rogers through Hurst. It also revealed that John Rogers had possession of, and demonstrated his technique with the murder weapon before the offense as well as after.

As a result of the information provided by Hurst, the morning of September 25, 1985, officers surrounded Rogers' apartment building. They observed Rogers exiting his apartment, getting into his car, and driving away, and stopped and arrested him a short distance away. They ordered Gosch out of the apartment and also placed him under arrest. The officers seized numerous items from inside Rogers' apartment, including a pair of blue jeans that had been left lying amidst other clothing in the middle of the bedroom floor. A subsequent search of John Rogers' car -- an old, converted yellow taxi cab -- revealed a jacket belonging to Rogers, two black gloves, one of which was found inside the left pocket of the jacket, maps of Central America, and a birth certificate in the

name of "Christin Malford Cotham III."

C. The Prosecutions of John Rogers and Lesley Gosch

On August 13, 1986, John Rogers entered into a plea agreement with representatives from the Bexar County District Attorney's Office and the United States Attorney's Office. Under the terms of that agreement, Rogers agreed to testify against Gosch in exchange for recommendations of a 45-year sentence on the state charges, and a 20-year sentence on the federal charge, to run concurrently. On August 14, 1986, John Rogers gave a written statement to Ken Thuleen, wherein he alleged that Gosch was the one who entered the Patton home and shot Mrs. Patton. He also stated that, according to their "plan," Mr. Gosch was the one who was to kidnap Mrs. Patton, bind her with duct tape, and drive her in her own car to an unspecified location.

On August 26, 1986, the guilt-innocence phase of Mr. Gosch's trial began in Victoria, Texas. The State's evidence was largely circumstantial. The *only* direct evidence that tended to prove that Lesley Gosch was the person who shot Mrs. Patton was that of John Rogers, who had an obvious motive to transfer responsibility to Mr. Gosch in order to deflect suspicion from himself. The only information that Hurst and Howells were able to relate about the offense itself came from things Rogers had told them: that the plan to kidnap Mrs. Patton had gone awry and that "Skipper" had shot her to death.

All of the other circumstantial evidence presented against Gosch tended to establish, at most, that he was involved with John Rogers in the commission of the

offense, but failed to prove which of the two co-defendants was the "triggerman":

- (1) Gosch knew Frank Patton's identity and occupation;
- (2) Gosch was seen in the vicinity of the offense on the day of the crime in Rogers' company;
- (3) Gosch owned the murder weapon;
- (4) Gosch was arrested at a location where police found clothes containing smears of the same blood type as that of the deceased;
- (5) Gosch had a motive for quickly obtaining a large amount of money; and
- (6) Gosch asked a friend for help in fleeing the country two days after the offense.³

The defense presented no witnesses at the guilt phase of trial.

On September 2, 1986, the jury returned a verdict of guilty.

The punishment phase of the trial began the next day, on September 3, 1985. The prosecution presented evidence that in 1973, Mr. Gosch had been convicted of two prior

³ These are the facts cited by the Court of Criminal Appeals as evidence corroborating John Rogers' trial testimony in its opinion affirming Mr. Gosch's conviction and death sentence. Notably, however, all of this evidence was circumstantial, and susceptible to interpretation that was at least as incriminating of Mr. Rogers as Mr. Gosch. For example, convenience store clerk Sherry Covarrubias identified *both* Gosch and Rogers as men who came into the "Stop and Go" in Alamo Heights; thus, her testimony did nothing to establish who went into the house at 321 Castano. Similarly, while the .22 Ruger turned in by Hurst was eventually traced back to Mr. Gosch, it is uncontroverted that it was in John Rogers' possession both immediately before and after the murder. *See infra*. Likewise, all of the evidence recovered from Rogers' apartment and car were under Rogers' -- or Hurst's -- control, not Gosch's. Finally, while there was evidence of a motive for Mr. Gosch to participate in the offense, there was also evidence that Mr. Rogers had his own motive.

robberies, and that he received probated sentences in each. In 1985, Mr. Gosch had plead guilty to the manufacture and sale of a silencer, and was sentenced on October 25, 1995. Evidence of a small number of unadjudicated offenses were introduced.

The defense presented only two witnesses on Mr. Gosch's behalf: his adoptive father, Wesley Gosch, and a former co-worker, Preston Knodell, who had known Lesley for four years.

The jury returned affirmative answers to the Special Issue questions that same day and the court sentenced Mr. Gosch to die.

After the trial, Stephen Hurst was paid the one hundred thousand dollar reward offered by the banks.

APPELLATE HISTORY

Lesley Lee Gosch was indicted in the 226th District Court of Bexar County, but prosecuted for capital murder in the 24th District Court of Victoria County, Texas on a change of venue. On September 2, 1986, Applicant was convicted of capital murder. Two days later, on September 4, 1986, the jury returned affirmative answers to the two special issues presented, and Applicant was sentenced to death.⁴

On December 18, 1991, Applicant's conviction and death sentence were affirmed

⁴ Pursuant to the requirements of §143.42 of the Texas Administrative Code, attached as Appendix 1 are certified copies of the jury verdict, the judgment and sentence, and the Order setting the current execution date. Certified copies, however, could not be obtained in time for the timely filing of this Application.

by the Texas Court of Criminal Appeals. Gosch v. State, 829 S.W.2d 775 (Tex. Crim. App. 1991). A petition for writ of certiorari was timely filed, and was subsequently denied by the United States Supreme Court on June 28, 1993.

On July 16, 1993, the 226th District Court of Bexar County set an execution date for September 16, 1993. Mr. Gosch was unrepresented by counsel. Despite the efforts of the now-defunct Texas Resource Center to obtain counsel for Gosch and efforts to convince the court that he was entitled to a stay of execution since he was unrepresented, the state courts refused to enter a stay. Preparing papers on Mr. Gosch's behalf only for the purposes of obtaining a stay of execution, the Texas Resource Center filed perfunctory habeas petitions in the United States District Court for the Western District of Texas, the 226th District Court of Bexar County, and the Court of Criminal Appeals. Despite the fact that the Attorney General was agreeing to the entry of an order staying Applicant's execution upon the filing of this petition, all requests for same were denied.

Finally, with Applicant's execution only hours away, the Resource Center then filed a second habeas petition in the United States District Court for the Western District of Texas, stating again that because Applicant had previously been unrepresented, he had not had the opportunity to determine if there were constitutional defects underlying his conviction and death sentence. The federal district court granted a stay of execution with respect to this petition approximately thirty minutes before Mr. Gosch was scheduled to

be executed.⁵

Shortly thereafter, the State successfully sought another execution date for Mr. Gosch, for April 15, 1994. On April 7, 1994, less than one day after the Fifth Circuit's order, undersigned counsel and Edward Shaughnessy of the Bexar County Criminal District Attorney's Office agreed to a proposed scheduling order, although Mr. Shaughnessy would not agree to a stay until an Application had been filed. On April 12, 1994, Applicant timely filed an application for a postconviction writ of habeas corpus. In exchange, Mr. Gosch's execution date scheduled for three days hence was stayed.

After seeking and being granted leave to do so by the state district court, Applicant also timely filed a supplemental and amended application for a postconviction writ of habeas corpus on October 14, 1994. On June 5-7, 1995, the 226th District Court conducted an evidentiary hearing that centered on the allegations raised in Applicant's supplemental application. On May 14, 1997, the 226th District Court entered an Order setting forth its proposed findings of fact and conclusions of law. On September 10, 1997, the Court of Criminal Appeals entered an order denying habeas corpus relief.

After the Court of Criminal Appeals' decision, undersigned counsel contacted Mr. Shaughnessy and received assurances that the State would not seek to have an execution date scheduled before Mr. Gosch had sought and concluded federal habeas corpus

⁵ That petition was later dismissed by the United States Court of Appeals for the Fifth Circuit on the ground that "jurisdiction for habeas corpus petitions for Applicant Gosch lies only in the United States District Court for the Southern District of Texas." Gosch v. Collins, Nos. 93-8635, 93-8780 (5th Cir. April 6, 1994) (unpublished order).

review.⁶ On September 24, 1997, undersigned counsel called Mr. Shaughnessy to discover that, in fact, a hearing in the 226th District Court had been set for Monday, October 6, 1997 for the purpose of setting an execution date.⁷

On October 2, 1997, Mr. Gosch filed a motion with the district court requesting that the court not set an execution date so that Mr. Gosch could initiate federal proceedings without the exigency of an outstanding execution date, noting, that it was both unnecessary and deleterious to fair consideration of his claims in the federal courts. However, at the date setting hearing, the district court denied Mr. Gosch's motion and set an execution date for January 15, 1998.

On November 20, 1997, Mr. Gosch filed a motion for stay of execution with the Texas Court of Criminal Appeals, which was denied on November 21, 1997. On December 8, 1997, Mr. Gosch filed a motion for stay of execution with the United States District Court, which was denied without prejudice on December 16, 1997. On December 17, 1997, the federal district court entered a Scheduling Order mandating that Petitioner file his petition for writ of habeas corpus with this Court no later than December 30, 1997. A motion for reconsideration was filed on December 19, 1997, and

⁶ The recently revised federal statute governing federal habeas corpus review allows one year from the conclusion of state habeas proceedings for the *filing* of a federal habeas petition. See 28 U.S.C. §2252(d). Frequently, a considered, careful review after the petition is filed, including all necessary pleadings by both the Petitioner and the Respondent, requires well in excess of a year, and sometimes two or more.

⁷ Due to scheduling conflicts, the date setting hearing was actually held on October 8, 1997.

denied that same day. In all instances Petitioner was requesting a stay not for purposes of delay, but for the entry of a reasonable scheduling order that would allow the timely and orderly progression of Mr. Gosch's first federal habeas review.

In compliance with the federal court order, on December 30, 1997, Petitioner filed a federal habeas petition raising numerous constitutional claims for relief, a Memorandum of Law regarding the application of Drinkard v. Johnson and the Anti-Terrorism and Effective Death Penalty Act of 1996, and a Motion for Stay of Execution. On January 6, 1998, the Respondent filed their response, in which they stated that they did not have a position on Mr. Gosch's Motion for a Stay of Execution. On January 6, Petitioner filed a Motion for Discovery and a Motion for Evidentiary Hearing.

As of the filing of this clemency application, the federal district court has not ruled on Mr. Gosch's pending petition or his motion for a stay of execution. Mr. Gosch is scheduled to be executed on January 15, 1998, exactly one week from today.

STATEMENT OF THE LEGAL ISSUES RAISED ON APPEAL

Mr. Gosch has asserted a number of constitutional challenges to the validity of his conviction and death sentence. The major claims raised include but are not limited to the following:

1. The state knowingly presented false testimony regarding Stephen Hurst's interest in and pursuit of a \$100,000 reward offered for information leading to the arrest, indictment, and conviction of the person or persons

responsible for the murder of Rebecca Patton.

2. The state withheld exculpatory impeachment evidence that Stephen Hurst was interested in and intended to pursue a claim for a \$100,000 reward offered for information leading to the arrest, indictment, and conviction of the person or persons responsible for the murder of Rebecca Patton.
3. Mr. Gosch's trial counsel was ineffective at the guilt phase of his trial for, in part:
 - a. Submitting the denim jeans to state serologist Jayne Nellis for forensic testing, without ensuring the confidentiality of the results, and thereby providing the state with the only physical evidence that allegedly linked Mr. Gosch to the scene of the crime;
 - b. Failing to consult with an expert serologist or F.B.I. serologist Robert Hall, who performed forensic testing prior to Ms. Nellis, and would have told trial counsel that at the time the denim jeans left his hands, there was nothing left to test.
 - c. Failing to conduct the investigation necessary to properly impeach prosecution witness Stephen Hurst with the fact that he intended to pursue the \$100,000 reward;
 - d. Failing to object to the State's use of nine of its fourteen peremptory challenges to strike prospective jurors of color from the venire.
3. Mr. Gosch's trial counsel was ineffective at the punishment phase of his trial through lack of preparation, introduction of inculpatory evidence, and failing to investigate or present available mitigating evidence; and
4. The execution of a death sentence after subjecting Mr. Gosch to repeated, unnecessary execution dates scheduled simply to hasten the process of review constitutes cruel and unusual punishment.

VICTIM IMPACT STATEMENT

As Frank Patton, the husband of the deceased, stated at the time of his wife's death: "I've lost the most precious thing in my life." Surely the impact on him was

tremendous, and nothing within the power of either Mr. Gosch or undersigned counsel can be done to lessen that impact or take away the suffering Mr. Patton has endured.

Mr. Patton appears to be a courageous and resilient individual, who derives much of his strength from his Christian faith. It is this faith that enabled him to not seek revenge against those arrested for his wife's murder. Shortly after the arrest of Gosch and Rogers, in the midst of intense public scrutiny, Mr. Patton publicly stated that "life in prison [for his wife's killers] with no chance for parole would be adequate punishment in my view."⁸

Five years later, Mr. Patton explained in more detail the faith that enabled him to make such statements. In "The Power to Forgive my Wife's Murderer," attached hereto as part of Appendix 2, he recounted his response to reporter's questions reflecting the assumption that he would be seeking the death penalty:

My hope and prayer would be that these men come to know Jesus Christ and be forgiven and have their lives changed . . . who knows? Someday, we may all be in heaven together.

He further wrote:

During this time I suffered an awesome sense of emptiness, but I also became aware of a spiritual consciousness that was not my own. God filled this emptiness in my heart with His love before it could be filled with hate. That is why I could do nothing but forgive the killer and express no hatred.

Undersigned counsel have recently attempted to contact Mr. Patton through a neutral mediator, and he indicated that he did not wish to meet with Mr. Gosch's

⁸ "A Man Who Won't Kill the Scorpion," San Antonio Express News, September 29, 1985, attached hereto as part of Appendix 2.

attorneys. He is currently remarried, and still resides in San Antonio.

REASONS WHY EXECUTIVE CLEMENCY SHOULD BE GRANTED

I. THERE IS SUBSTANTIAL AND COMPELLING EVIDENCE THAT DEMONSTRATES THAT JOHN ROGERS, AND NOT LESLEY GOSCH, FIRED THE FATAL SHOTS THAT KILLED REBECCA PATTON

A. Introduction

A grant of executive clemency is appropriate when the Board and the Governor have substantial reason to believe that the condemned man was less culpable than a co-defendant who has received a more lenient sentence. In recent years, Governors and clemency boards from across the country have granted executive clemency when faced with lingering concerns about the condemned man's guilt, or degree of guilt, for the offense.

For example, in 1992, Governor Douglas Wilder of Virginia commuted the sentence of Herbert Bassette because, "[a]fter a thorough review of the evidence, including evidence . . . which was not before the jury when they rendered their verdict," he could not "in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested to me as Governor to intervene."

Also in 1992, Governor James Martin of North Carolina commuted the death sentence of Anson Maynard, even though "lengthy, prayerful consideration" left him unsure of Mr. Maynard's innocence:

I am not convinced that Anson Maynard pulled the trigger to kill Stephen Henry. Nor am I convinced that Anson Maynard is totally innocent. Since it is not clear to me that he was the murderer, I conclude that the most appropriate use of the power of clemency vested in my office is to decide that the State of North Carolina will not carry out the execution. . . .

It is for cases like this that the power of clemency is given to the governor.

Finally, Governor George Allen of Virginia commuted the death sentence of Joseph Payne -- even though he believed the evidence pointed to Payne's guilt -- because of his concerns about the reliability of some of the evidence in Payne's case.⁹

B. The Texas Appeals Process Does Not Provide A Forum For The Review Of This Ground For Clemency.

In 1994, the Texas Court of Criminal Appeals declared, in State ex rel. Holmes v. Court of Appeals, 885 S.W.2d 389 (Tex. Crim. App. 1994), that claims of actual

innocence based on newly discovered evidence may be brought in postconviction judicial proceedings. The standard announced in Holmes requires the criminal defendant to prove, based on the newly discovered evidence and the entire record before the jury that convicted him, that "no rational trier of fact could find proof of guilt beyond a reasonable doubt." Under the Holmes test, however, the evidence

⁹ Frank Green, Clemency Came With Promises: Payne Vows No New Trial, No Royalties, Richmond Times-Dispatch, Nov. 9, 1996 at B1.

from the record before the jury that convicted the defendant is viewed in the light most favorable to the prosecution. As Judge Clinton pointed out in his dissent in Holmes, because this test incorporates a "sufficiency of the evidence" analysis that is highly deferential to the jury's verdict at trial, this standard is impossible by definition for a criminal defendant with new evidence of innocence to meet:

This is an impossibly high standard of proof. By that I do not mean that as a practical matter precious few applicants will be able to produce new evidence sufficiently compelling to meet the majority's test. By that I mean that it will be impossible by definition for any applicant to meet the test, regardless of how compelling his newly discovered evidence. This is so because any evidence sufficient to support a jury's verdict beyond a reasonable doubt at trial will also be sufficient to support a rational jury's guilty verdict even after adding the most compelling newly discovered evidence to the mix.

Putting aside the legally troubling question of whether the Holmes standard can ever be satisfied in theory or in practice, the fact is that Holmes does not provide a basis for judicial review of the merits of the ground for clemency that Mr. Gosch advances here. Mr. Gosch's claim is not that there is not or was not "legally sufficient" evidence for a jury to convict him for some degree of involvement in the offense; rather, Mr. Gosch asserts that there is substantial and compelling evidence that strongly indicates that his co-defendant, John Rogers, was more culpable for the offense because he was the one who actually killed Mrs. Patton, and therefore that Mr. Gosch, and not Mr. Rogers (who is serving a life sentence in federal custody), is deserving of a sentence of less than death. It is quite simply beyond the reach of

either the state or the federal judiciary to adjust the sentence imposed on one of two co-defendants in order to correct an imbalance in the severity of the punishments imposed relative to each co-defendant's disproportionate culpability for the offense.

It is true that the propriety or fitness of a lawful sentence is ordinarily a matter within the province of the jury. In this case, there are two reasons why the jury's sentencing verdict should not deter a proper exercise of executive clemency. First, because the jury did not hear all of the evidence in support of Mr. Gosch's claim that John Rogers fired the fatal shots that killed Mrs. Patton, the jury did not have a comprehensive evidentiary basis to reliably conclude whether Mr. Gosch or Mr. Rogers played the more culpable role in the offense. Second, the jury in this case was simply not allowed to take into account the fact that John Rogers would receive a lesser sentence, regardless of what the jury believed each man's role in the offense actually was. As a result, the jury's sentence of death simply does not reflect either what the jury actually believed to be Mr. Gosch's role in the offense, or what the jury believed to be an appropriate sentence given each man's relative culpability for the offense.

Therefore, Mr. Gosch comes before the Board of Pardons and Paroles and the Governor to ask that the fail safe of clemency be extended to him, as the process by which he was convicted leaves at least grave and substantial doubts that he shot Mrs. Patton to death as the prosecution alleged at trial, and the overwhelming weight of the evidence demonstrates that he did not do so. As the following discussion makes

clear, the case for executive clemency in this case deserves the greatest and most serious consideration of the Governor and the Board.

C. There Is A Substantial And Compelling Basis To Believe That John Rogers, And Not Lesley Gosch, Fired The Fatal Shots That Killed Rebecca Patton

1. Unlike the able-bodied John Rogers, Lesley Gosch was physically incapable of carrying out the planned kidnapping of Mrs. Patton

As a preliminary matter, it must be observed that, in contrast to Lesley Gosch, Rogers had the physical capabilities necessary to carry out a plan to abduct Mrs. Patton at gunpoint from her home. According to Rogers' statement and testimony, his and Lesley Gosch's joint plan was for one of them to gain entry to the Patton home, hold Mrs. Patton at gunpoint, bind her with electrical tape, and then drive her to a remote location in her own car where she would be left until the ransom money was paid.

Due to injuries Mr. Gosch sustained in a teenage accident, it is impossible to imagine that he, as opposed to Rogers, would have been chosen to carry out this role in the offense. As a result of the accident, Mr. Gosch lost one of his eyes and his eyesight is so poor in the other eye that he is legally blind. Given this disability, it defies common sense that Gosch and Rogers would have designed a plan that called for Lesley Gosch to drive the victim from the crime scene. Moreover, Gosch also lost the distal phalanges of four of his fingers and the thumb on his left hand, as well as portions of the thumb and index finger of his right hand, from the accident. These disabilities would make it

extremely difficult, if not impossible, for him to brandish a weapon with one hand while binding Mrs. Patton with the other.

2. Witness statements of Virginia Marks and Esther Saavedra identifying John Rogers, but not Lesley Gosch, in the Patton neighborhood prior to the murder

In fact, unknown to the jury that sentenced Mr. Gosch to death, several neighbors of the Pattons gave statements to law enforcement concerning activity they witnessed that they thought might have been related to the crime. On September 30, 1985, Virginia Hartman Marks gave a sworn statement that several days before the murder, at approximately 2:30 p.m., she observed a "beat up taxi with a round faced man driving."¹⁰ When Ms. Marks first noticed the taxi it was parked on the wrong side of the street; she then observed the taxi drive off "very slowly[,] as if the driver was lost," and make repeated drives through the neighborhood. Significantly, however, Marks only observed one man in the car, whom she positively identified from news reports as John Rogers.

Very similar to the observations of Ms. Marks, another neighbor of the Pattons also observed John Rogers alone in the neighborhood shortly before Ms. Patton was murdered. Esther Beatrice Saavedra, who lived across the street from the Patton's home, stated in a sworn statement to police that at approximately 2:45 p.m. on the day of the

¹⁰ In an affidavit submitted by Detective Sergeant Giles Fortson in support of a search warrant for John Rogers' car, Detective Fortson averred that he had spoken with Ms. Marks and "believe[d] her to be a credible source because she is permanently employed, she owns a realty company in the city, and as far as I know her reputation for truthfulness is nothing other than good." At that time, Ms. Marks identified the driver of the vehicle she observed as John Rogers.

murder, she observed a white van parked across the street in front of the Patton residence. She then observed a heavy set white man -- "about 300 pounds, wearing wire rim glasses, a light colored long sleeve shirt and baggy dark colored pants" -- walking "very fast" toward the van.¹¹ Ms. Saavedra had never seen the man before, but she recognized him in the newspaper as the man "the police had arrested for the murder of Ms. Patton."

The observations of these reliable witnesses tend to establish that it was John Rogers, and not Lesley Gosch, who alone went to the Patton home, gained entry, and shot Mrs. Patton to death. Virginia Marks' statement contradicts John Rogers' self-serving trial testimony, in which he claimed that he and Gosch "cased" the neighborhood on numerous occasions together, and that he never did so alone. Ms. Marks, however, plainly observed only Mr. Rogers in the neighborhood, and was able to report to police an unmistakable description of him and his vehicle.

Ms. Saavedra's statement is even more significant, because she observed John Rogers alone in the Patton neighborhood on the day of the crime. Her description of the suspect perfectly matches the physical appearance of John Lawrence Rogers: He weighs more than 300 pounds, wears wire rim glasses, and, by his own admission in his testimony at trial, was wearing a white long sleeve shirt and dark suit pants on the day of the crime. By contrast, Lesley Gosch was of slight build and weighed only

¹¹ This description matches the appearance of John Lawrence Rogers at the time of his arrest.

about 135 pounds, and wore black plastic frame glasses.¹² Again, this provides stark contradiction to John Rogers' trial testimony that Lesley Gosch went alone to the Patton residence on the day of the murder. Ms. Marks, however, did not see Lesley Gosch; she saw, quite unmistakably, John Rogers.

Unfortunately, in part due to a lapse on the part of defense counsel at trial, the jury did not have the benefit of hearing the testimony of either Virginia Marks or Esther Saavedra at trial.

¹² In addition, according to John Rogers' testimony at trial, Gosch was wearing blue jeans and a dark t-shirt on the day that Mrs. Patton was killed. Thus, Ms. Saavedra's description of the suspect seen in the Patton neighborhood does not match the appearance of Lesley Gosch in any respect.

3. Observations of witnesses that John Rogers', but not Lesley Gosch's, was in possession of the murder weapon and other instrumentalities of the crime both before and after the murder

Third, John Rogers was closely linked to the murder weapon, the .22 Ruger, both before and after the crime occurred, as well as to other instrumentalities of the offense.

Both Stephen Hurst and John Howells observed Rogers in possession of the handgun before and after Patton's murder, and on one occasion witnessed Rogers fire the weapon into a pile of magazines. Thus, Howells stated that "about one week before the murder," he was visiting Hurst at the apartment he shared with John Rogers when *Rogers removed a .22 pistol with a silencer from a box and shot the weapon into some magazines that were on the floor*. The only persons present at the time were Rogers, Hurst, and Howells. In a statement provided to police on October 7, 1985, Hurst confirmed Howells' account of the incident in which Rogers fired the .22 handgun into a pile of magazines. According to Hurst, Rogers asked him to retrieve a box from his car and bring it inside the apartment, which Hurst did. Rogers then removed a gun with a black silencer from the box and fired it into the magazines. According to Hurst, the box was about three feet long and a foot wide and had the word "Flowers" stenciled on it in black letters.

Hurst's observation of this box in Rogers' apartment is a critically important fact. According to Rogers' trial testimony, Gosch used the "flower" box to pose as a delivery man on the day of the murder, as a ruse to gain entry to the Patton residence. Hurst, however, observed the flower box in Rogers' possession prior to the murder; again, no

one other than John Rogers ever claimed to see Gosch in possession of this instrumentality of the crime.

After the offense was committed, Rogers gave both witnesses instructions as to the disposal of the weapons, directing them to put them in "deep freeze." Before Hurst left, Rogers instructed him to watch the local news on television that night. Hurst then took the briefcase to Howells' apartment, where they together watched the news; they also opened the briefcase and found several handguns, two silencers, and ammunition inside.

In the days following the murder, Hurst and Howells each had repeated contacts with John Rogers -- but never Lesley Gosch -- concerning the weapons. On several occasions, Rogers asked Hurst and Howells to return the briefcase to him, or to retrieve a weapon from the briefcase and return it to him. On each occasion, Hurst and Howells complied with Rogers' requests. At no time did either Hurst or Howells have any contact with Lesley Gosch, or even observe him in John Rogers' presence.

4. Evidence was seized from John Rogers' and Stephen Hurst's apartment, and from Rogers' car, which was apparently related to the murder

Finally, all items of evidence that the prosecution alleged were linked to the offense were found in either Rogers' apartment or his car, and none could be conclusively linked to Mr. Gosch.

For example, law enforcement officers seized numerous items from inside Rogers' apartment, including several more guns, ammunition, and a gun cleaning kit. In the bedroom, a pair of blue jeans was seized that had been left lying amidst other clothing in

the middle of the floor. In addition, law enforcement seized a pair of gloves from Rogers' car, and the prosecution later attempted to suggest at trial that Mr. Gosch wore them when he entered the Patton's house in an effort not to leave any fingerprints. However, there was absolutely no evidence to link the gloves -- one of which was found in Rogers' coat pocket -- to Mr. Gosch. In fact, Mr. Gosch is an unlikely candidate for such gloves, for the obvious reason that he is missing fingers on both hands. In contrast, Rogers tried the gloves on while on the stand, and they fit him perfectly.

5. Considered together and in light of the weak circumstantial evidence presented against Mr. Gosch at trial, there is a substantial and compelling basis to conclude that John Rogers, and not Lesley Gosch, fired the fatal shots that killed Rebecca Patton

In conclusion, the vast weight of the evidence supports the conclusion that John Rogers, and not Lesley Gosch, "cased" the Patton residence prior to the murders, went to the Patton residence and gained entry to the home, and then shot Mrs. Patton to death. Indeed, according to Rogers' own testimony at trial, he attempted to recruit Stephen Hurst to collect the ransom money, he called the residence several times on the day of the murder to make sure that Mr. Patton was at work, and he made arrangements with his friends Stephen Hurst and John Howells to hide the weapon. All of his own acknowledged activities on the day of the murder and the days preceding it strongly suggest that John Rogers played a much greater role in the offense that he admitted in his testimony.

Particularly when compared with the weak circumstantial evidence presented against Mr. Gosch at trial, there is every reason to believe that Mr. Gosch's and Mr. Rogers' respective roles in the offense were diametrically opposite to what John Rogers claimed. On this basis, it is Mr. Gosch and not Mr. Rogers who is deserving of a sentence less than death. Only by granting executive clemency can the Board and Governor redress this manifest injustice.

II. INCARCERATION HAS ENABLED MR. GOSCH TO DEVELOP QUALITIES AND TALENTS THAT WERE INHIBITED BY THE DISRUPTIVE CHILDHOOD THAT LED TO HIS INVOLVEMENT IN THE EVENTS SURROUNDING MRS. PATTON'S DEATH.

Cognizant of the numerous clemency applications received each year by this Board, it is difficult to imagine what will make each reader take notice, to note that there is an individual before them who deserves the Board's full attention and consideration. Lesley Gosch is indeed unique among the death row population. However, the facts that make him so are neither shocking nor striking, and thus require careful consideration and attention.

Mr. Gosch has spent eleven years on death row, and has changed enormously during that time. It is a question, however, of what he has changed back to, not what he has become. Mr. Gosch always had the seeds of a gentle, brilliant, and caring person. Unfortunately, these characteristics were not encouraged by those responsible for his upbringing. Instead, abuse and isolation and forced cruelty combined with Lesley's

innate personality to compel a complete withdrawal, and to render him susceptible to other, more powerful forces - both those of his grandfather and of John Rogers. Thus, he was drawn into an inept world of attempted crimes schemed and fashioned by Rogers, who exacted his revenge on Mr. Gosch by setting him up for the actual murder of Rebecca Patton in exchange for statements given by Gosch ten years earlier implicating Rogers in an aggravated robbery.

Ironically, the time Mr. Gosch has spent on death row has rehabilitated him as a human being. Far away from the influence of his grandfather, or Rogers, Lesley has been able to develop in the direction to which he naturally tends: spirituality, generosity, empathy, an enormous array of astounding artistic talents and voracious appetite for knowledge, particularly regarding eastern philosophies, patience, equanimity, and a quirky and humble sense of humor.¹³

In short, the combined events of Mr. Gosch's childhood left very few options for the progression of his life during the time he spent in the "free" world. His incarceration has allowed him the space and time to develop as a person who is eminently worth having in society. It is this progression that deserves the consideration of the Governor and the Board, and that counsel have attempted to map out below. As much as one can encapsulate the course of a human life in ten pages or less, this is Mr. Gosch's.

¹³ Whenever an inmate gets close enough to an execution date, he is required to do a "pre-execution summary" with Captain West of T.D.C. In 1994, when Mr. Gosch came so close to execution, he went through one of these sessions. As is routine, Captain West asked Mr. Gosch what he wanted done with his body after the execution. "Resuscitated," Mr. Gosch replied.

A. How Lesley Gosch Came To Death Row On The Ellis Unit

1. Childhood

Lesley Lee Gosch, the only son born to 16-year-old Rose Mary Hale and 17-year-old Ronald Dean "Duke" Tontz, came into the world an unwanted child. According to family members, Rose Mary's and Duke's marriage was a "spur of the moment" affair; no one is sure whether it preceded or followed Lesley's conception. In any event, it is certain that neither of his biological parents were willing or prepared to assume the responsibility of raising and caring for a child. Duke is remembered in family anecdotes and photographs as a teenage James Dean -- handsome and intelligent, but restless and bored with school, preferring to spend his time drinking, carousing, and racing "hot rods." Rose Mary, on the other hand, met Duke after years of narrow and repressive upbringing in which she had been pressed into working at her family's dry-cleaning business on weekends and after school. Duke's carefree and somewhat reckless attitude and lifestyle had refreshing appeal to Rose Mary, and the couple began to date.

Before the birth of their child, the young couple moved to Great Bend, Kansas, where Lesley's future uncle, Lep Hickerson, promised to provide employment for Duke as a truck driver. Once in Kansas, Rose Mary fell into a deep depression that worsened after she gave birth to her son. Indeed, Rose Mary had been attracted to Duke because he offered an escape from a stultifying routine; now the unwanted baby again forced her into an unhappy isolation which caused her to react to the child with petulance and, sometimes, with frightening and irrational violence. Relatives of the family report

numerous accounts of incidents in which Rose Mary's unhappiness spilled into physical abuse directed toward her son Lesley. One of the more lurid of these anecdotes is memorialized in the "Social Summary" accompanying Mr. Gosch's records with the Texas Department of Corrections. According to those records:

On 11-4-86, a social services family interview was conducted with the inmate's adopted father, Wesley Gosch, from San Antonio, Texas. Mr. Gosch stated that the inmate was born on June 8, 1955 in Great Bend, Kansas and he is an only child. Mr. Gosch ... further revealed that the inmate's natural mother tried to kill the inmate as an infant as she threatened to flush him down the toilet.

Other family members also recall evidence of abuse and neglect. Lesley's maternal aunt, Enid Hickerson, reports that she never saw Rose Mary show affection toward Lesley and believes that Lesley was regularly physically abused by his mother while his father was away. She recounts an occasion when the baby was taken to the family doctor for treatment of his leg, and several broken ribs were also discovered. According to Ms. Hickerson, Rose Mary became afraid after the leg-twisting incident of what she might do to Lesley; concerned she might kill him.¹⁴ After only six months, it was clear that Rose Mary and Duke did not even pretend to care for Lesley any longer. A protracted court battle ensued over who was to assume responsibility for Lesley's upbringing. The Hales wanted Rose Mary to keep Lesley, but Rose Mary and Duke had already signed an affidavit stating they no longer wanted to care for him and

¹⁴ The adult Lesley Gosch, thirty-nine years later, still cannot use this leg properly.

were willing for Duke's mother and stepfather, the Gosches, to do so. Eva Gosch (née Tontz), Lesley's paternal grandmother, also vied with them for the child; she had, through her sister Enid, been closely watching the situation in Great Bend from San Antonio and now wanted to intercede. Eva's husband, Wesley Gosch, desired a son. The Gosches quickly won custody of Lesley, due to Rose Mary's and Duke's willingness to surrender him¹⁵ and Rose Mary's worsening mental instability.¹⁶

Despite this early turbulent history of physical abuse and neglect, Lesley Gosch is remembered by family members as an exceptionally gentle child. According to his aunt Enid, he would not allow her to kill insects. "He would say, 'They hadn't hurt anyone, so leave them alone,'" Ms. Hickerson recalled recently.

Ms. Hickerson also remembered an incident which is in many aspects emblematic of the difficulties Lesley Gosch faced during his formative years and their consequences on his adulthood. Lesley's adoptive father, Wesley Gosch, was a master gunsmith who was determined to introduce his son to guns when he was still a child. When Wesley gave the then five-year-old boy a rifle, Lesley ignored it and played with his other toys. Several years later, Wesley took Lesley deer hunting. When they returned home, Lesley

¹⁵ Neither of Lesley Gosch's parents had any involvement with the upbringing of their son after custody had been assumed by Eva and Wesley Gosch. Indeed, Rose Mary Hale did not even know of her son's death sentence until a chance mention of it in a Christmas card she received in 1993. Lesley's natural father, Duke Tontz was killed in a car crash in 1960, likely while drinking.

¹⁶ When Wesley and Eva retrieved Lesley, family members report, the infant's legs had been scalded with hot water.

went directly to his room, crying. Ms. Hickerson asked him what was wrong. A deer had come into range, Lesley told her, and he had refused to fire on it; his grandfather then threatened to whip him if he didn't shoot the next deer that came along. When the next deer one appeared, after more threats from Wesley, Lesley shot and killed the deer. According to Ms. Hickerson, the young boy was upset that he had killed the animal and said it hadn't hurt anyone and didn't deserve to die; he told her he was disgusted by his grandfather's insistence that he kill it, but felt he had no choice.

Eva's health steadily declined over the years due to cancer; she wished that Ms. Hickerson would raise Lesley, but Wesley Gosch was violently opposed to the idea. Virginia Fultz, a neighbor who babysat for Lesley, remembers him as "lost in the shuffle" throughout all this internecine feuding. And yet Lesley achieved significantly in a variety of areas and somehow maintained a tenuous stability with his grandfather.

It becomes clear in retrospect, however, why Eva Gosch wanted her sister's family to raise Lesley. Wesley Gosch was a sadistic, tyrannical braggart who sought to dominate and control those around him in order to prop up his own inflated ego. By the time Lesley came into his life, Wesley suffered from constant pain from rheumatoid arthritis due to injuries he had received from a plane crash when he was in the army; the arthritis soon eroded his means to support himself and made him totally dependent on Lesley's help to wash and dress.

Wesley physically abused Lesley at a very early age. Family members, for example, recall seeing Lesley's arms "covered with bruises" after a visit to San Antonio.

On one occasion, recounts Lesley's aunt Enid, Wesley kicked Lesley "so hard he flipped over," when Wesley became angry at Lesley's failure to pick up his clothes -- a chore that he was not even expected to do at such a young age. Ms. Hickerson observed Wesley telling Lesley that he would "beat you good" and routinely threatening to whip him.

Lesley's protection against Wesley's physical brutality was his grandmother Eva, who attempted to protect him from his adoptive father's wrath. Eva too bore the brunt of Wesley's abuse, though it took the form in her case of mental, rather than physical, assaults. Yet as cancer progressively consumed her body, Eva became increasingly less able to serve as a protector.¹⁷ Even in the hospital, bedridden and wasted, Eva still wished to divorce Wesley. She also wanted to retain control over Lesley -- and to rescue him from his grandfather's overbearing control -- by sending him back to Oklahoma with Enid Hickerson. She died, however, leaving 11-year-old Lesley in the hands of Wesley Gosch.

When Eva died, a long, dark period of Lesley's life began. Wesley isolated Lesley from other children and from other family members. The beatings grew more severe, with Wesley employing belts, electrical cords and anything else that was handy. Perhaps most importantly, Lesley's view of the world was placed wholly in the hands of an individual who was beset with paranoid and grandiose fantasies. Wesley Gosch descended into complete madness before his death, but witnesses comment upon his

¹⁷ By the time she died, one of Eva's legs had broken in two places because it had been rotted by cancer, and it was held in place by a sleeve rather than a splint; another family member estimates that Eva died weighing no more than 40 or 50 pounds.

irrational distrust and retelling of tall stories from Lesley's childhood.¹⁸

In any case, Lesley had begun to withdraw into a lonely, autistic fantasy world. Ms. Fultz remembers his flat, unaffected behavior at Eva's funeral, a woman he loved dearly. She also recalls a "haunting" quality about him as a child, because he seemed so removed. Lesley's distance and imaginative life, constructed as bulwarks from the chaos which had surrounded him from birth, found a hothouse atmosphere in his life with Wesley.

Yet somehow Lesley managed to develop intellectually and spiritually in the midst of this abuse, isolation, and unreality. In 1969, his long-time involvement in scouting culminated in his receipt of the coveted Eagle Scout award. Raised by his grandfather in the Mormon faith, Lesley also held several junior positions within the church hierarchy. In high school, he was involved in ROTC. From an early age, Lesley had evinced an interest in science and performed complex experiments. He continued to grow in his knowledge of physics and eventually enrolled at the University of Texas, San Antonio. Randall Wroblewski, a friend of Mr. Gosch's from this time, recalls how Lesley would explain complex ideas in such a way that they became clear to him.

2. Adulthood and the beginnings of Mr. Gosch's encounters with the legal system

But Lesley's social inexperience and inability to deal with the real world made him

¹⁸ It is very possible that Mr. Gosch himself suffered from some form of Post-Traumatic Stress Disorder; many of his delusions centered around the army trying to "cheat" him out of benefits that he believed were rightfully his.

prone to other, more pernicious friends as well. Like Randy Wroblewski, John Laurence Rogers, a high school friend, also depended on Lesley's tutoring skills, and in return schooled Lesley Gosch in his first troubles with the law. In November 1974, Rogers, taller and almost double Mr. Gosch's size, induced Lesley to take part in the armed robbery of two area pharmacies. Mr. Rogers received a ten-year prison sentence in the Texas Department of Criminal Justice for his part in the robberies, while Mr. Gosch was put on probation. The court's action on the two cases was determined in large part by the testimony of a pharmacist who stated that Mr. Gosch prevented Mr. Rogers from shooting him during the robbery.¹⁹

As a condition of the probationary sentence he received for the robbery, Mr. Gosch was ordered to undergo psychological counseling. At that time, Dr. Betty Lou Schroeder, a court-appointed psychologist, conducted a screening evaluation of Mr. Gosch and diagnosed him with a schizoid personality disorder.²⁰ According to Dr. Schroeder's report, Mr. Gosch required "[a]n extreme need for structure and preciseness in his

¹⁹ This important example illustrates Mr. Gosch's lifelong habit of forbearance in stressful situations. Mr. Wroblewski has commented upon Mr. Gosch's admirable restraint when dealing with his grandfather. For example, he recalls one occasion on which Lesley called him to take him out in his car so that he could "cool off" before an argument with Wesley erupted into violence. This was apparently a common pattern in the household.

²⁰ The DSM-II definition for this disorder reads in part as follows: "This behavior pattern manifests shyness, over-sensitivity, seclusiveness, avoidance of close or competitive relationships, and often eccentricity. Autistic thinking without loss of capacity to recognize reality is common, as are daydreaming and the inability to express hostility and ordinary aggressive feelings. These patients react to disturbing experiences and conflicts with apparent detachment."

environment verified morbid anxieties and perhaps may be traced to unmet dependency needs as a child."

In 1977, Lesley was involved in a catastrophic accident which inflicted severe physical and emotional damage to him. While experimenting with a method to stabilize the highly volatile chemical lead azide, he inadvertently upset a sample of the chemical and it exploded.²¹ At the time, he was employed handling ballistics, and medical records indicate that Lesley explained he was trying to make a safer explosive at the time of the accident. As a result, Mr. Gosch lost several digits, was completely blinded in one eye, seriously damaged the other and induced in the surviving eye a condition called scotoma, in which an opaque region in his vision will grow and then ebb.

Common sense tells us that Lesley Gosch's injuries would have made him more isolated, vulnerable and prone to being led. In fact, he passed several years without legal troubles before and after the accident. When John Rogers returned from prison, however, he began again to draw Lesley into a criminal plot. Thus, Randall Wroblewski recounts that Rogers would call Lesley using a code name to avoid detection by Wesley Gosch, with whom he had fallen into disfavor since the robberies, so that he could allegedly plan Ms. Patton's murder. It is clear from this chain of events that John Rogers instigated the conversations which may have lead to Ms. Patton's death.

At the time of his arrest, Lesley was taking some initial first steps, if sometimes

²¹ As investigators later learned, explosives were not an uncommon element of the Gosch household -- Wesley Gosch kept quantities of gunpowder, for example, in the house to charge shotgun shells, a practice he had learned from his impoverished family.

misguided, to escape from his grandfather's control. Medical records reflect that Wesley Gosch would not leave Lesley in peace even when he was convalescing after the explosion. Afterwards, Lesley had found a girlfriend, Georgina Morejon,²² and set up an independent household with her after an abortive attempt to live at his grandfather's. Having been brought up in an atmosphere where guns were a fact of everyday life, Mr. Gosch's misadventure which resulted in his federal prosecution, is understandable if not excusable.

Lesley's alleged involvement in the death of Rebecca Patton proceeded out of a web of circumstances and developmental disadvantages which began at birth. The complete absence of bonding during his childhood made him vulnerable in later life to misguided and pernicious attachments. Wesley Gosch, the major parent figure in Lesley's life, upset the natural roles of parent and child such that the adolescent Lesley became his caretaker, as well as the object of constant physical and emotional abuse. As a result, Lesley Gosch retreated into a childhood world of fantasy, partially constructed of his grandfather's fascination with guns and fueled by his own mechanical and scientific curiosity. Befriended by other boys on the social margins who shared his developing interest in weapons, Lesley was drawn into criminal activity by his high school friend John Rogers and because of his need to escape from Wesley Gosch's abusive and domineering influence. This need and susceptibility, unreflective of Mr. Gosch's true

²² Ms. Morejon died in a car accident in Mexico in May, 1986.

nature, however, was specific to a time in Mr. Gosch's life that has long since passed.

B. Who Lesley Gosch Is Today

Since his incarceration, Mr. Gosch has blossomed. He has been on death row for over ten years. During that time, sheltered from the pernicious influences of his grandfather, and for the first time able to direct and control his own development, he has become a person worthy of our esteem regardless of whether he is measured against his neighbors on the row, or any of us in the free world.

In the decade that he has resided at the Ellis Unit, Lesley has only incurred two disciplinary infractions, that by any measure are entirely inconsequential, if not laughable. He is considered an ideal inmate, and serves in the privileged role of trustee. He has become an extremely talented artist and craftsman, and has produced pen and ink drawings and oil paintings that are stunning in their detail and accuracy,²³ flutes copied from those created by early American Indians, and an absolutely realistic recreation of a Viking ship, accurately reproduced down to the number of movable oars that emerge from its side.²⁴ He reads voraciously, and is particularly interested in books on ancient history and eastern philosophy. He speaks five languages.

Aside from his talents, Lesley expends a great deal of energy reaching out to and

²³ Two examples of these drawings are attached hereto as part of Appendix 5. As Mr. Gosch is legally blind, these drawings are done with his face almost one inch from the paper, and require in infinite amount of patience and skill.

²⁴ As Gary Trial, a friend of Lesley's for over ten years, states: "[h]e can find goodness in his surroundings and then express that feeling through his artwork. His talents would be wasted if you allow him to be executed." See Appendix 3.

assisting others, both on death row and outside. For a while he began a jewelry “business”, paying others on the row to make earrings and necklaces sold in the free world. He used the profits to compile “welcome” bags for newly arriving inmates, which included such sundries as toothpaste, toothbrush, comb, and various other personal sundries often forgotten. Employing his intellect, he assists other inmates in understanding the legal morass through which their cases are proceeding, and helps them to draft legal motions or letters to attorneys.

Lesley’s positive characteristics - and their latency from childhood - are testified to by the numerous letters in support submitted with this Application. See Appendix 3. Mr. Jared, a retired Air Force Colonel who Lesley knew through his church, states unequivocally that Lesley is “intelligent, kind and caring.” Id. Preston Knodell, a retired philosophy professor who has known Lesley for over two decades, verifies that he is “a person of high moral standards.” Id. Eva Gallego, a childhood friend and neighbor, states that Lesley is a “kind hearted . . . [and] a giving and caring person.” Id.

Friends who have come to know him since his incarceration in Huntsville bear out the testimony of those who knew Lesley at an earlier time. Major Katherine Cox, who has counseled and come to know Lesley over the past eight years, states without hesitation that Lesley is “an intelligent, philosophical, and deeply spiritual individual. . . Of all the people I have counseled on death row, Mr. Gosch is by far the most spiritual and philosophical.” Id. Sister Joy Elder, a nun from Wales who has come to know Lesley through correspondence and occasional visits over the past five years, states “[h]e

has spent eleven years reflecting at great depth and I feel that he is one of the wisest and holiest men that I have met.”²⁵

It is difficult, if not impossible, to convey on paper a person’s worth. What is set forth above can only give a first impression of who Mr. Gosch is and has become since the beginning of his residency on death row. Understandably, this Board may view such assertions with skepticism. Undersigned counsel submits that they are in all respects true. If anyone is deserving of clemency on the grounds that he bears no threat to society, but, instead, has an immense amount to offer, it is Mr. Gosch.

²⁵ Numerous letters in support of Lesley, requesting that this Board and Governor Bush commute his sentence, have also been submitted by many Europeans concerned and frightened by Texas’ frequent implementation of the death penalty, and particular concerned by the facts of Applicant’s case. See Appendix 4.

CONCLUSION

The evidence introduced against Mr. Gosch at his capital trial provided no conclusive proof that he was the individual that shot Rebecca Patton. Subsequent investigation has revealed that the evidence that purported to place him at the scene of the crime is, in the most generous analysis, false. The evidence, considered as a whole, leaves at the very least grave and substantial doubts that he shot Mrs. Patton to death as the prosecution alleged at trial, and the overwhelming weight of the evidence demonstrates that he did not do so. As a result, the case for executive clemency in this case deserves the greatest and most serious consideration of the Governor and the Board.

The circumstances that led to Mr. Gosch's involvement with John Rogers and the events surrounding Mrs. Patton's death were the culmination of a childhood that rendered Mr. Gosch prey to pernicious influences, and completely inhibited the positive development of an enormous array of talents and valuable human characteristics. Since his incarceration, Mr. Gosch has been able to grow into what he should have had a chance to become in the free world: generous, humane, enormously talented artistically, and deeply spiritual. It is no small feat accomplishing such growth on death row. Nonetheless, he has done so with grace and humility. He deserves a chance to live.

REQUEST FOR RELIEF

On behalf of Lesley Lee Gosch, undersigned counsel respectfully petitions the Texas Board of Pardons and Paroles for a recommendation to the Honorable George Bush, Governor for the State of Texas, to commute Mr. Gosch's sentence of death to life imprisonment, and respectfully petition the Board and the Governor for a 30-day reprieve of Mr. Gosch's January 15, 1998 execution date to allow the Board to convene a hearing to consider evidence and argument in support of this application.

Respectfully submitted,

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**BEFORE THE GOVERNOR FOR THE STATE OF TEXAS
AND
THE BOARD OF PARDONS AND PAROLES**

**In re
LESLEY LEE GOSCH,
Applicant.**

**SUPPLEMENT TO
PREVIOUSLY FILED APPLICATION FOR REPRIEVE
FROM EXECUTION OF DEATH SENTENCE AND
COMMUTATION OF SENTENCE TO IMPRISONMENT FOR LIFE**

**Submitted by: Raoul D. Schonemann
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Counsel for Lesley Lee Gosch

**SUPPLEMENT TO
PREVIOUSLY FILED APPLICATION FOR CLEMENCY
AND MEMORANDUM IN SUPPORT THEREOF**

Lesley Lee Gosch respectfully submits this Supplement to his previously filed Application for Reprieve From Execution of Death Sentence and Commutation of Sentence to Imprisonment for Life, requesting that this Board of Pardons and Paroles recommend, and that the Governor grant, a commutation of his sentence of death to life imprisonment. To facilitate this request, Mr. Gosch is seeking a 30-day reprieve so that the Board may convene a hearing in order to fully and fairly consider the merits of this Application.

Mr. Gosch respectfully submits this supplement to bring to the attention of the Governor and the Board and Pardons and Paroles several important developments that have occurred since he filed his application for clemency in January:¹

I

First and foremost, *Mr. Gosch has recently learned that his co-defendant John Laurence Rogers, originally sentenced to 45 years imprisonment for his part in the murder of Rebecca Patton, will be released from prison in June, less than two months after Mr. Gosch is scheduled to be executed for the same offense. Although the prospect of Rogers' imminent liberty calls attention to the manifestly disproportionate sentences that each co-defendant*

¹ Mr. Gosch was recently informed by the Board of Pardons and Paroles that the vote previously taken on the clemency application he submitted in January is considered "moot" in light of the stay of execution issued by the U.S. Supreme Court on the eve of Mr. Gosch's scheduled execution. Thus, he is resubmitting his original application, along with this supplement setting out recent developments pertinent to the issues raised.

received for his conviction in this case, it is particularly indefensible in light of the substantial evidence, detailed at length in Mr. Gosch's previously filed application for clemency, that indicates that it was John Rogers, and not Lesley Gosch, who fired the fatal shots that killed Mrs. Patton:

- (1) **Unlike the able-bodied Rogers, Lesley Gosch was physically incapable of carrying out the planned kidnaping of Mrs. Patton.** According to John Rogers' testimony at trial, he and Gosch planned for one of them to gain entry to the Patton home by posing as a flower delivery man, hold Mrs. Patton at gunpoint, bind her with electrical tape, and then drive her to a remote location in her own car where she would be left until the ransom money was paid. As a teenager, Gosch was involved in an accident in which he lost an eye and was left with such poor eyesight in the other eye that he is legally blind. Given this disability, Mr. Gosch could not have backed a car out of the Patton driveway without knocking over the mailbox much less driven it through traffic on the busy roads and highways of San Antonio. It is simply inconceivable that the two co-defendants would have devised a plan that called for Lesley Gosch, instead of John Rogers -- a cabdriver by profession -- to drive the victim from the crime scene.

Moreover, in the same catastrophic accident in which he lost his vision, Gosch also lost four of his fingers and the thumb on his left hand, as well as portions of the thumb and index finger of his right hand. For all practical purposes, these disabilities would have made it impossible for him be able to brandish a weapon with one hand while binding Mrs. Patton with electrical tape with the other. Again, it defies common sense that the two co-defendants would have chosen Gosch, and not Rogers, to go to the Patton house to attempt to abduct Mrs. Patton at gunpoint.

- (2) **Two neighbors of the Pattons', Virginia Marks and Esther Saavedra, saw John Rogers alone in the Patton neighborhood before the murder.** Unknown to the jury that sentenced Mr. Gosch to death, two neighbors of the Pattons reported to investigating law enforcement officers that they saw a man matching John Rogers' physical description *alone* in the Patton neighborhood in the days before and the day of the murder.² These unbiased witness statements contradict

² See statements of Virginia Marks and Esther Saavedra, attached hereto as Appendices 6 and 7, respectively. The appendices to Mr. Gosch's original application were numbered 1 through 5;

John Rogers' unsubstantiated claim at trial that it was Gosch, and not himself, who went to the Patton home posing as a flower deliveryman to attempt to abduct Rebecca Patton by force.

Virginia Hartman Marks gave a sworn statement that several days before the murder, at approximately 2:30 p.m., she observed a "beat up taxi with a round faced man driving."³ When Ms. Marks first noticed the taxi it was parked on the wrong side of the street; she then observed the taxi drive off "very slowly[,] as if the driver was lost," and make repeated drives through the neighborhood. Ms. Marks only observed one man in the car, whom she positively identified from news reports as John Rogers. Ms. Marks' statement contradicts John Rogers' self-serving trial testimony, in which he claimed that he and Gosch "cased" the neighborhood on numerous occasions together, and that he never did so alone.

Similarly, Esther Beatrice Saavedra, who lived across the street from the Patton's home, stated in a sworn statement to police that at approximately 2:45 p.m. on the day of the murder, she observed a white van parked across the street in front of the Patton residence. She then observed a heavy set white man -- "about 300 pounds, wearing wire rim glasses, a light colored long sleeve shirt and baggy dark colored pants" -- walking "very fast" toward the van. Ms. Saavedra had never seen the man before, but she recognized him in the newspaper as the man "the police had arrested for the murder of Ms. Patton." Ms. Saavedra's description of the suspect perfectly matches the physical appearance of John Lawrence Rogers: He weighs more than 300 pounds, wears wire rim glasses, and, by his own admission in his testimony at trial, was wearing a white long sleeve shirt and dark suit pants on the day of the crime. By contrast, Lesley Gosch was of slight build and weighed only about 135 pounds, and wore black plastic frame glasses.⁴

thus, appendices to this supplement are numbered sequentially to the original.

³ In an affidavit submitted by Detective Sergeant Giles Fortson in support of a search warrant for John Rogers' car, Detective Fortson averred that he had spoken with Ms. Marks and "believe[d] her to be a credible source because she is permanently employed, she owns a realty company in the city, and as far as I know her reputation for truthfulness is nothing other than good." At that time, Ms. Marks identified the driver of the vehicle she observed as John Rogers.

⁴ In addition, according to John Rogers' testimony at trial, Gosch was wearing blue jeans and a dark t-shirt on the day that Mrs. Patton was killed. Thus, Ms. Saavedra's description of the suspect seen in the Patton neighborhood does not match the appearance of Lesley Gosch in any respect.

- (3) **According to the undisputed testimony of the prosecution's own witnesses at trial, John Rogers was in possession of the murder weapon and other instrumentalities of the crime both immediately before and after Mrs. Patton's murder; Gosch, in contrast, was not.** It is undisputed that John Rogers was seen in possession of the murder weapon, a .22 Ruger, both before and after the crime occurred, and that the phony "flower box" that was used as part of the ruse to gain entry to the Patton home was observed in Rogers' apartment. In fact, prosecution witnesses Stephen Hurst and John Howells both testified that they saw Rogers fire the .22 Ruger into a pile of magazines at his apartment. After the murder, Rogers had extensive contacts with Hurst and Howells in an effort to get rid of the murder weapon. Neither Hurst nor Howells ever saw Gosch in possession of the weapon or anything else connected to the homicide; thus, Rogers' claim that he gave the weapon and the phony flower box to Lesley Gosch to use during the planned abduction is wholly unsubstantiated by any other witness.
- (4) **Evidence related to the murder was seized from John Rogers' apartment and car, which logically links Rogers but not Gosch to the murder.** Finally, all items of evidence that the prosecution alleged were linked to the offense were found in either Rogers' apartment or his car. For example, law enforcement officers seized numerous items from inside Rogers' apartment, including several more guns, ammunition, and a gun cleaning kit. In addition, investigating officers also seized a pair of gloves from Rogers' car that at trial the prosecution attempted to suggest Mr. Gosch wore when he entered the Patton's house in an effort not to leave any fingerprints. However, there was absolutely no evidence to link the gloves -- one of which was found in Rogers' coat pocket -- to Mr. Gosch. In fact, Mr. Gosch is an unlikely candidate for such gloves, for the obvious reason that he is missing fingers on both hands. In contrast, Rogers tried the gloves on while on the witness stand, and they fit him perfectly.
- (5) **During two prior robberies committed twelve years earlier by Rogers and Gosch as juveniles, Rogers was principally responsible for planning and carrying out both crimes.** In November 1972, while Lesley Gosch was 17 years old and still in high school, John Rogers, taller and almost double Lesley Gosch's size, induced Gosch to take part in the armed robbery of two area pharmacies on the same day. In both cases, it is clear that Rogers instigated the crimes and played the primary role in their commission. In the first robbery, Rogers entered the Jefferson Pharmacy alone, pointed a sawed-off shotgun at the clerk, and demanded money from the cash register; Gosch never even entered the store, but remained behind with the car. During the second robbery committed later that

evening, Gosch entered the Lakeview Pharmacy and asked for some band-aids to "divert attention," while Rogers again entered the store, brandished the sawed-off shotgun and demanded money. For their respective involvement in these offenses, John Rogers received a ten-year prison sentence in the Texas Department of Criminal Justice, while Gosch was placed on probation; Gosch's probationary sentence was due in part by the testimony of a pharmacist who stated that Gosch prevented Rogers from shooting him during the robbery. Although the facts of these prior offenses do not prove what happened during the Patton murder, they demonstrate that John Rogers tended to assume the principal role in carrying out offenses in which both he and Gosch were involved.

In short, the vast weight of the evidence supports the conclusion that John Rogers -- and not Lesley Gosch, as Rogers claimed at trial -- "cased" the Patton residence prior to the murders, went to the Patton residence and gained entry to the home, and then shot Mrs. Patton to death. On the basis of this evidence, Lesley Gosch -- not John Rogers -- is deserving of a sentence less than death. Yet it is Gosch who counts down the days to his execution on April 24th, while Rogers looks forward to his release from prison less than two months later.

As the Supreme Court explained more than 70 years ago:

*Executive clemency exists to afford relief from undue harshness or evident mistake in the operation of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.*⁵

Throughout our nation's history, executive clemency has frequently been granted in capital cases "in which an equally or more culpable codefendant was not sentenced to death."⁶

⁵ *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

⁶ Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICHMOND L. REV. 289, 301-302 (1993).

As one commentator noted, a disproportionate disparity in the severity of sentences “offends the public’s need to view the criminal justice system as fair,” and was “often” cited as a basis for clemency in capital cases in this century.⁷ Among cases in which clemency was granted to redress a disproportionate disparity in sentencing are the following examples:

- * In 1977, Georgia death row inmate Charles Hill’s sentence was commuted to life imprisonment, because his co-defendant -- the actual “triggerman” -- had been sentenced to life.⁸
- * In 1980, Florida death row inmate Richard Gibson’s death sentence was commuted to life imprisonment because of sentencing disparities between co-defendants: one of Gibson’s accomplices had been sentenced to life and two others were never prosecuted.⁹
- * In 1988, Georgia death row inmate Freddie Davis’ sentence was commuted because a co-defendant, although equally culpable, was sentenced to life. The commutation was granted because the Georgia Board of Pardons and Paroles felt that similar degrees of culpability warranted similar punishments; said one member of the Board, “The scales of justice were just out of balance on this one.”¹⁰
- * In 1991, Ohio death row inmate Beatrice Lampkin’s sentence was commuted to life imprisonment, in part because her co-defendant (a man whom she had hired to

⁷ Michael A.G. Korengold, Todd A. Noteboom, Sara Gurwitch, *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 358 (1996).

⁸ David Morrison, *Hill Death Sentence Commuted to 99 Years*, ATLANTA CONST., Sept. 30, 1977, at 18A.

⁹ *Graham Commutes Gibson Sentence*, FLA. TIMES-UNION (Jacksonville), May 7, 1980, at B4.

¹⁰ Tracy Thompson, *Panel Commutes Davis Execution to Life Sentence*, ATLANTA CONST., Dec. 17, 1988, at 1.

kill her husband) had received a life sentence.¹¹

- * In 1991, Georgia death row inmate Harold Williams' sentence was commuted after his accomplice (a half-brother) was convicted only of voluntary manslaughter. In commuting Williams' death sentence to life imprisonment, the Georgia Board of Pardons and Paroles cited the disproportionate sentence received by the accomplice; the chair of the Board of Pardons was quoted as saying, "There was ample evidence the co-defendant, Dennis Williams, was the ringleader in the murder." Among those requesting clemency was former President Jimmy Carter.¹²

To the degree that one goal of the death penalty is to secure "justice," clemency can help insure that the punishment among codefendants is equitably distributed according to their relative culpability. Chief Justice William Rehnquist has stated, "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."¹³ Although the grossly disproportionate sentencing disparity between Lesley Gosch and John Rogers implicates core constitutional concerns, it is beyond the reach of the state or federal judiciary to adjust Mr. Gosch's sentence accordingly. Only by granting executive clemency and commuting Lesley Gosch's death sentence to life imprisonment can the Board and Governor redress this manifest injustice.

II

¹¹ *Stark Killer's Sentence Commuted by Celeste*, BEACON J. (Akron, Ohio), Jan. 11, 1991, at 1.

¹² Jingle Davis, *Ex-Marine's Death Sentence for Murder is Commuted*, ATLANTA CONST., Mar. 23, 1991, at B5.

¹³ *Herrera v. Collins*, 113 S. Ct. 853, 866 (1993).

There is one other important development since Mr. Gosch filed his clemency application in January that must be brought to the attention of the Board: On March 25, 1998, a majority of the Justices of the United States Supreme Court announced in *Ohio Adult Parole Authority v. Woodard*, that clemency proceedings in capital cases must observe basic requirements of due process. The Justices' opinions in *Woodard* oblige this Board to give Mr. Gosch's clemency application meaningful review and strongly counsels in favor of granting him a hearing at which he can present evidence and argument in support of his plea.

When Mr. Gosch originally filed his clemency application earlier this year, he strongly urged the Board to grant a hearing in order to give full and fair consideration to the basis for his request. Mr. Gosch observed that of the 37 inmates executed last year, the Board had not granted a hearing in a single case. Indeed, although Texas has executed more inmates since 1976 than almost all other death penalty jurisdictions combined, only one Texas inmate has even been granted a hearing before the Board and not a single Texas death-row inmate has been granted clemency for reasons other than judicial expediency.¹⁴ In contrast, other active death penalty states, such as Florida, Georgia, Virginia, and Ohio – each of which has carried out many fewer executions than Texas – have granted clemency in capital cases where appropriate circumstances

¹⁴ Clemency has been granted in a number of Texas death penalty cases for reasons of so-called "judicial expediency" – that is, "because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding." Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 292 (1993). Commutations were granted in Texas cases because the Supreme Court's decisions in *Adams v. Texas* and *Estelle v. Smith* would have required retrials in many cases; for purposes of judicial expediency, the State granted these inmates commutations.

indicated that a lesser punishment was appropriate.¹⁵

In recent years, constitutional and legal scholars have criticized the absence of meaningful clemency review in capital cases and have suggested that clemency procedures are not immune from state and federal due process requirements.¹⁶ As Professor Daniel Kobil has observed:

Because clemency is an integral part of our federal constitutional scheme and all state systems of justice, it ought to function in a meaningful way. If a criminal punishment system which includes the death penalty, but not executive clemency, is indeed "totally alien" to American notions of justice, then it would seem that the dispensing of clemency must be more than a sham or perfunctory exercise. This is particularly true in death penalty cases where there is a heightened need to be sensitive to the values underlying the Due Process Clause and where clemency is historically the vehicle for preventing miscarriages of justice.¹⁷

Specifically, the denial of a public hearing in capital clemency proceedings has generally

¹⁵ According to a 1993 survey of clemency grants in capital cases nationwide, Florida had granted clemency in six cases for humanitarian reasons; Georgia had granted clemency in four; Ohio in eight; and Virginia in two. See Michael L. Radelet and Barbara A. Zsembik, *supra*, note 14, at 300.

¹⁶ See, e.g., Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507 (1995); Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994); Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993); Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91); Deborah Leavy, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889 (1981).

¹⁷ Daniel T. Kobil, *supra*, note 16, at 217.

been considered to be particularly violative of fundamental due process norms:

In many instances, the secrecy surrounding acts of clemency extends even to the process by which clemency decisions are made. It is often difficult or impossible to ascertain whether, in a particular case, the governor or president has carefully considered all of the available information bearing on clemency, has made a purely self-serving decision to deny or grant clemency, or has flipped a coin. This procedural "blackout" takes on greater significance in view of the increasing willingness of society and the courts to impose the death penalty and the apparent decline of clemency in capital cases. If executives do not employ reasonably fair procedures in making clemency decisions, how can we be assured that clemency is fulfilling its function of providing "a final deliberative opportunity to reassess the moral and legal propriety of the awful penalty which [the State] intends to inflict?"¹⁸

In recent years, the Texas clemency process, in particular, has been the subject of considerable criticism.¹⁹ In addition to not providing Texas clemency applicants with the "minimum" protections of a hearing that comports with due process, the Texas clemency procedures have been faulted for other perceived failings as well:

[C]lemency boards should consider applications in a formal setting. Board members should debate merits of an application

¹⁸ *Id.* at 201.

¹⁹ See, e.g., Stephen E. Silverman, *There Is Nothing Certain Like Death In Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375 (Spring 1995); *Texas Clemency 'Sorely Inadequate'*, TEXAS LAWYER, May 17, 1993, at 18; *New Clemency System Urged: Lawyers Say Process Inadequate in Death Penalty Cases*, DALLAS MORNING NEWS, May 67, 1993, at 20A. See also *Graham v. Texas Bd. of Pardons and Paroles*, 913 S.W.2d 745-749-50 (Tex.App.-- Austin 1996) (noting that tradition of clemency as a "fail-safe" for death-row inmates "is subject to serious criticism" and that although "abuses" of clemency power have been reduced "the clemency process is still greatly affected by public opinion and political pressures").

“face to face.” The Texas Board of Pardons and Paroles action of voting by facsimile machine to deny Gary Graham a hearing on his claim of innocence appears particularly susceptible to procedural abuses.²⁰

Indeed, a member of the highest court of this state deems Texas’ clemency process to be “a legal fiction at best.” *Ex Parte Tucker*, 1998 WL 28104 at *6 (Tex. Crim. App.) (Overstreet, J., concurring).

The Supreme Court’s recent decision in *Woodard* marks a substantial step in the Court’s constitutional jurisprudence toward recognition that the executive clemency process must comport with basic norms of federal due process. In a landmark decision, five Justices of the Supreme Court found that executive clemency procedures are subject to the federal due process clause. As Justice Stevens wrote:

The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [other due process cases decided by the Supreme Court]. For “death is a different kind of punishment from any other which may be imposed in this country. . . . 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.” Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life.²¹

Although the Court found that the Ohio Death Penalty Clemency Procedure at issue in

²⁰ Silverman, *supra* note 18, at 395.

²¹ *Woodard*, __ U.S. __, __ S. Ct. __, No. 96-1769 (Stevens, J., dissenting in the judgment) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)).

Woodard satisfied the minimum constitutional due process requirements, it must also be observed that the Ohio clemency procedures provided for a hearing in death penalty cases before the parole board at least 21 days in advance of a scheduled execution, as well as reasonable notice of the scheduled hearing -- procedures that are lacking in Texas.²²

Thus, *Woodard* raises serious questions about the constitutional adequacy of Texas' clemency practices and procedures in death penalty cases. In order to ensure that Mr. Gosch's clemency application receives the constitutionally meaningful review to which he is entitled, Mr. Gosch strongly reurges his request that the Board grant a hearing in this case.

III.

Mr. Gosch is seeking commutation of his sentence of death to life imprisonment. The facts set forth in his original application, and the materials submitted in support, evince that he is a perfect candidate for this relief. Mr. Gosch is the perfect candidate for commutation: he has a pristine prison record, has developed extraordinary talents and skills while living on death row, and provides solace, guidance and humour to those he comes into contact with, whether incarcerated at the Ellis Unit or living in the free world. In short, he does not present a danger to society, and exhibits qualities that warrant this Board's compassion. Mr. Gosch's desire is only to live, and he recognizes that if he is allowed to do so he must remain in prison. To assure this

²² *Id.*, (O'Connor, J., concurring) (Ohio clemency procedures that mandate that the parole board schedule a clemency hearing for a date at least 21 days in advance of execution, entitle prisoner to a pre-hearing interview with one or more parole board members, and provide 10 days notice of the hearing satisfied applicable requirements of due process).

Board of his acceptance of this fact, Mr. Gosch has executed an affidavit stating that he waives any and all right he may have in the future to seek parole or release on mandatory supervision, attached hereto as Appendix 8.

CONCLUSION

For the reasons stated above and in Mr. Gosch's previously filed application, Applicant respectfully requests that this board recommend to the the Hon. Governor Bush that his sentence be commuted to a sentence of life imprisonment. In the alternative, he submits that he is entitled to a hearing on the issues presented, and that a thirty day reprieve is necessary to afford both sides adequate preparation time. The relief request is warranted by the merits of the issues presented, and by the seminal Supreme Court decision affirming that Mr. Gosch's consitutional life interest demands that he be afforded due process in these proceedings.

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