FIFTH & FOURTEENTH AMENDMENTS—DUE PROCESS CLAUSE—RIGHT AGAINST SELF-INCRIMINATION—STATE'S VOLUNTARY INTERVIEW DURING CLEMENCY PROCEDURES DOES NOT VIOLATE DUE PROCESS PROTECTIONS OR THE FIFTH AMENDMENT PROTECTION AGAINST COMPELLED SELF-INCRIMINATION—*Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1998).

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In ancient times, reasons for commuting a death sentence could range from a fortuitous encounter with a vestal virgin on the way to execution, to hefty bribes paid to public officials.[1]

I. INTRODUCTION

Legally defined as the process of commuting a death sentence, clemency is a governmental pardon based upon the executive's discretionary consideration of a prisoner's specific situation.[2] Historically, the very essence of clemency was synonymous with mystery and unpredictability.[3] As contemporaneous use

* J.D., anticipated 2000. The author wishes to thank Kathleen, Donald, and Kerianne McGuire for all their love and support.

[1] Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 328-29 (1992).

[2] *See* Paul Whitlock Cobb, Jr., *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393 (1989).

[3] *See* Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1507 (1995); *see also* Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 201-02 (1993). Kobil elaborates on the mystery of clemency,

> [P]ersons vested with the power to decide whether the sentence of death should be carried out become larger than life, almost godlike in their ultimate decisionmaking power. What former California Governor Edmund G. (Pat) Brown referred to as this "awesome, ultimate power over the lives of others," is reminiscent of the king's prerogative to decide whether a condemned person lived or died. And like the monarchial power from which it derives, clemency is shrouded in mystery and often

of the death penalty has become more prevalent in America, the role of clemency has significantly risen to the forefront of criminal justice.[4]

Although the clemency process has shed some of its ancient arbitrariness,[5]

> fraught with arbitrariness at a time when other aspects of our justice system are becoming more open and fair pursuant to the dictates of the Due Process Clause. Apart from a handful of memoirs by former governors, executives typically reveal very little about the factors that result in their granting or denying clemency.

Id.

[4] *See* Michael A.G. Korengold, et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 351 (1996). Discussing the augmented need for clemency, the authors emphasize the ironically recent decline in clemency grants:

> Although the rate of executions is at an all-time high following the Supreme Court's ruling that invalidated most capital punishment statutes, the number of clemency grants has declined to an almost negligible level. In the ten years between 1960 and 1970, 261 people were executed in the United States; from 1985 to 1995, 281 people were executed. While the change in the number of executions during these two periods is negligible, the number of people granted clemency drastically declined from 204 death row inmates between 1960 and 1970, to only twenty from 1985 to 1995.

Id. at 350.

[5] Tracing the practice of clemency from the Greco-Roman era to contemporary America demonstrates the arbitrary nature of this executive power. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 583-98 (1991). Providing examples of the arbitrariness involved in clemency, Kobil states:

> [T]he procedural difficulties that attended obtaining clemency in Athens were immense. Before anyone could receive clemency, she had to comply with the process of adeia, which required that at least 6000 citizens support a petition for clemency in a secret poll. Because the approval of this many people was difficult to obtain, clemency was seldom granted to individuals, at least those who were not celebrities.

Id. at 584.

> The Roman practice of disciplining mutinous troops through decimation—the killing of every tenth soldier—rather than executing an entire army of wrongdoers, is another example of using clemency in a politically expedient fashion, maintaining discipline while preserving resources that could prove useful to the state.

Id.

there is a great deal of debate regarding the amount of executive discretion controlling the decision to commute a death sentence.[6] Most states have placed

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> [T]he Romans introduced an element of chance into the clemency process by automatically pardoning criminals sentenced to death if they encountered a Vestal Virgin on the way to the place of execution, so long as the encounter was an accidental one.

Id. at 585.

> [T]he Crown employed pardons to provide cheap labor for the American colonies; felons were typically granted a pardon conditioned on their agreeing to travel to the colonies and work on the plantations. Similarly, the Crown used the conditional pardon to "man the navy" in the eighteenth century. The clemency power was also used to exact testimony from accomplices that would incriminate codefendants, a practice that became a "mainstay" of the English criminal justice system in the eighteenth and nineteenth centuries.

Id. at 588-89.

> *Hoffa v. Saxbe* most clearly illustrates this bifurcated approach to analyzing presidential exercises of the clemency power . . . . The court refused to inquire into the President's reasons for issuing the pardon to Hoffa. The court observed even if Hoffa were correct that Nixon, in order to gain political advantage, had conspired with Teamsters officials to keep Hoffa out of the union, these improper motives could not invalidate the exercise of the clemency power.

Id. at 598.

> Indeed, President Richard Nixon's advisors had such confidence in the scope of the presidential pardoning power that they seriously explored the possibility of the President pardoning himself.

Id. at 573.

[6] *See* Kobil, *supra* note 3, at 214. Kobil criticized "[t]he notion of clemency as a boon to be magnanimously or arbitrarily bestowed on the condemned by the supreme ruler . . ." *Id.* Kobil further illustrated his disdain for the broad discretion afforded the executive in clemency matters:

> An analogy can be drawn to executive discretion in deciding whether to prosecute a particular case. Although the executive has broad, some might say "unfettered," discretion to determine whether to enforce the laws in a specific case, it cannot exercise this discretion in a selective manner that violates the Equal Protection Clause of the Fourteenth Amendment. In like fashion, the broad executive discretion that ex-

sole control of clemency with the executive.[7]

Placing such unrestricted discretion with the executive, however, runs contrary to the American legal system, which is based upon a tradition of conventional rules, such as constitutions, statutes, and judicial review. Therefore, the notion of clemency causes fear and controversy because it does not conform to the rigid structure of the judicial system.[8] For example, a death row prisoner, whose only hope for survival rests with the personal decision of a governor, would advocate some minimal guarantee that the decision was based in good faith and fairness.[9] Indeed, the potential for abuse, including discriminatory decisions founded purely on immoral, personal, or political feelings, is frightening. Arbitrariness, however, is the essence of clemency.[10] Clemency serves

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> ists at the other end of the punishment continuum to decide after conviction whether to commute a sentence does not mean that the clemency authority can be exercised in an arbitrary or discriminatory fashion.

Id. at 216.

[7] *See* Korengold, et al., *supra* note 4, at 355-56. This clemency authority can be manifested in numerous facets, including: 1) vesting power solely with the governor; 2) vesting power with a parole board appointed by the governor; 3) or a hybrid system, allowing a parole board to present the governor with a recommendation, which the governor is free to accept or reject. *See id.* at 355.

[8] *See* Brown, *supra* note 1, at 327-28. Illustrating this fear, Brown asserted, "For attorneys seeking clemency on behalf of a condemned prisoner, a procedure without specific criteria and immune to judicial review is anathema. For many, fairness without all the trappings of procedural due process is inconceivable; decision-making outside the adversarial mode engenders immediate fear and loathing." *Id.*

[9] Although it is difficult to comprehend the intense fear and urgency with which a death row inmate would pursue a grant of clemency, Kobil effectively illustrated the magnitude of this situation:

> The idea of the last-minute reprieve granted by a distant, unknowable dispenser of mercy to a man condemned to death has a powerful hold on our imaginations. Fyodor Dostoevsky's eleventh hour pardon by the czar in many ways shaped his literary career. The scene of the haunted Death Row prisoner who awaits word from the governor as a ticking clock punctuates his final hours is a stock vignette of Hollywood crime films. Anyone who has ever seized on the slimmest hope, whose fate has been committed to the hands of another—virtually all of us—can identify with the plight of the condemned prisoner.

Kobil, *supra* note 3, at 201.

[10] *See generally* Cobb, *supra* note 2.

as the prisoner's final, desperate opportunity, specifically designed to be independent of the dispassionate, conventional judicial system.[11]

This discretionary characteristic of clemency could be diminished by an application of the Fourteenth Amendment Due Process Clause to clemency procedures. The Fourteenth Amendment of the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of the law."[12] Despite the apparent need to reduce discretion, scholars have argued against the imposition of due process requirements on state clemency proceedings.[13] Specifically, the theoretical difference between the merciful act of clemency and rigid due process mandates discourages any imposition of procedural regulations.[14] Traditionally, clemency has served as the government's effort to transcend formal judicial findings with a mercifully independent solution.[15] The integrity of executive decision-making, how-

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[11] *See id.* at 391.

[12] U.S. CONST. amend. XIV. The full text of the Fourteenth Amendment is as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[13] *See* Cobb, *supra* note 2, at 390.

[14] *See generally* Brown, *supra* note 1; Cobb, *supra* note 2; Korengold, *supra* note 4. Cobb further illuminated the difference between clemency and due process:

> [M]ercy must stand outside and above justice, contemplating death sentences from a perspective external to the norms of due process, in order to satisfy the intuition that judicial norms may not always suffice in fixing a punishment as difficult as death.

Cobb, *supra* note 2, at 391.

[15] *See* Cobb, *supra* note 2, at 402. Cobb stated that

> a purely process-oriented clemency is unconstitutional in the death penalty context because courts on both the Federal and state levels have assumed that clemency-granting authorities will scrutinize capital cases on bases other than those the court use.

ever, will not be destroyed simply by the employment of procedural safeguards inherently required under the Fourteenth Amendment.

In fact, the mandatory implementation of minimal due process guarantees in clemency procedures is a contemporary necessity.[16] The death penalty, which has a uniquely dominant impact on the general society, requires exacting scrutiny.[17] Therefore, extraordinary procedural safeguards are a necessary balance against the essentially unfettered discretion of the executive branch. The high potential for mistake, as well as the "high reversal rate in death penalty cases,"[18] indicates the importance of a reliable system of clemency.[19] Recognizing this propensity for error, the Court has established legal safeguards for the implementation of the death penalty.[20] Although the Court has effectively

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Id.

[16] *See* Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395, 407-08 (1993).

[17] *See id.* at 408. Hintze contended that "the increased visibility and scrutiny of the death penalty may make a certain imperfection that is tolerable in other parts of the criminal justice system, intolerable in the realm of the death penalty." *Id.*

[18] *Id.* at 430. Describing the fallible nature of death penalty verdicts, Hintze provided the following statistics:

> One of the new problems created by the Court's diligent attempt to make the death penalty conform to the requirements of the Constitution is simply that the law surrounding the death penalty has become extremely complex . . . . This seemingly unavoidable complexity of the law contributes to a greater number of constitutional errors in Death penalty cases than in any other cases. Such a result can be seen in the extraordinary high reversal rates for death sentences. Some 46 percent of capital cases are reversed by state supreme courts. One study found constitutional violations in 41 percent of all state-court capital judgements on first-petition habeas corpus challenges in the federal courts, and in 42 percent of all final habeas challenges. Using sources in addition to the published federal decisions, the study found constitutional violations in 47 percent of such cases.

Id. at 410-11.

[19] *See id.* at 430. Consequently, Hintze feared that "a withdrawal by the Court from the essential role of judicial review would result in a rash of unconstitutional executions." *Id.*

[20] In *Furman v. Georgia*, the Supreme Court held that the death penalty, invoked solely by the jury's discretion, was unconstitutional and required certain standards. *See id.* at 397-98 (citing Furman v. Georgia, 408 U.S. 238 (1972)).

expressed concern for the arbitrary nature of employing the death penalty, the Court refuses to bridle the discretionary process of clemency.

The Supreme Court's opinion in *Ohio Adult Parole Authority v. Woodard*[21] attempts to remove clemency from potential judicial scrutiny,[22] thereby delegating all authority to grant death penalty commutation to the discretion of the executive.[23] The Court's concern with governmental bifurcation of clemency power, however, must be balanced against the public need for controlled, meaningful clemency procedures.[24] The *Woodard* Court's holding imports an absolute rejection of Fourteenth Amendment due process protection for post-conviction relief.[25] The inherent danger of the *Woodard* decision is the Supreme Court's refusal to find a life interest in clemency procedures, as an important governmental check on the irrevocable nature of capital punishment.[26]

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[21] 118 S. Ct. 1244 (1998).

[22] This judicial impotence has been traced back to the early Nineteenth Century:

> [F]ear of overreaching into an area traditionally shielded from review has disabled courts from following the trend in other areas of law favoring judicial review of administrative procedures. In 1833, Chief Justice Marshall described the clemency power as "a constituent part of the judicial system." In the century and a half that followed, the Supreme Court paid lip service to the importance of clemency in the nation's criminal justice system, but remained ambivalent about imposing mandatory procedures to control the administration of clemency.

Klasmeier, *supra* note 3, at 1515.

[23] *See Woodard*, 118 S. Ct. at 1250-51.

[24] *See* Daniel Lim, Comment, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47, 74 (1994). Lim advocated the imposition of procedural safeguards to prevent the granting of clemency based upon random, irrelevant factors, such as a lottery or a rotational pattern of every tenth prisoner. *See id.*

[25] In *Woodard*, the Court denied the respondent's claim to have a life interest in procedurally safeguarded clemency procedures. *See Woodard*, 118 S. Ct. at 1250-51. Without any finding of a life or liberty interest in the clemency proceedings, the Supreme Court was unable to trigger the Fourteenth Amendment Due Process Clause. *See id.*

[26] The importance of due process protection in death penalty cases is demonstrated by Professor Tribe:

> As Professor Tribe has argued, due process is valuable instrumentally, as a means of ensuring informational accuracy in decisionmaking, and intrinsically, as a necessary

Additionally, the *Woodard* Court diminished the ability to appeal a death sentence by dismissing the Fifth Amendment implications inherent in an interview conducted during clemency investigations.[27] The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself."[28] This privilege against self-incrimination has evolved into a protection from improper governmental interrogation.[29]

Fifth Amendment precedent has additionally generated a mandatory respect for the criminal defendant's decision to remain silent during the trial phase of prosecution.[30] The *Woodard* Court's decision, however, disposes of this right to remain silent during clemency procedures.[31] Consequently, the pressure

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> opportunity for those affected by governmental processes to express their human dignity. Both of these considerations are significant in the context of capital clemency decisions. Given the harshness and irrevocability of the sanction that will be imposed if clemency is denied, as well as the ultimately dehumanizing nature of capital punishment, enhancement of informational accuracy and of personal dignity are surely desirable as matters of policy.

Kobil, *supra* note 3, at 203 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 666-67 (2d ed. 1988)).

[27] *See Woodard*, 118 S. Ct. at 1253.

[28] U.S. CONST. amend. V. The full text of the Fifth Amendment is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

[29] *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626-27 (1996).

[30] *See id.* at 2627. Alschuler discusses the United States Supreme Court decision in *Griffin v. California*, which held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 2627-28 (quoting Griffin v. California, 380 U.S. 609, 615 (1965)).

[31] *See Woodard*, 118 S. Ct. at 1252. The Court permitted the Ohio Parole Board's consideration of Woodard's silence as a factor in determining his eligibility for clemency. *See id.*

placed upon all death row inmates, to express remorse during the voluntary interview process, amounts to an unconstitutional condition placed upon the Fifth Amendment right to silence.[32] The Supreme Court, however, unanimously refused to uphold the Sixth Circuit's application of the "unconstitutional condition doctrine."[33] This absolute rejection of a post-conviction protection against self-incrimination implicates serious consequences for the traditional notion of Fifth Amendment guarantees.

The United States Supreme Court, in *Ohio Adult Parole Authority v. Woodard*, held that death-row inmates are not entitled to procedural due process protections during clemency procedures.[34] In so holding, the Court's rigid application of Fourteenth Amendment precedent effectively eliminated any possibility of the death-row prisoner's minimal interest in life. The *Woodard* decision further stripped the federal government of any power to regulate abusive clemency proceedings. Furthermore, the Court's dismissal of Woodard's right to Fifth Amendment protection neglects the evolving governmental abuse of the criminal's right to silence.

II. STATEMENT OF THE CASE

In *Ohio Adult Parole Authority v. Woodard*, the United States Supreme Court examined the constitutionality of Ohio's clemency procedures for death-

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[32] *See* Alschuler, *supra* note 29, at 2627. Alschuler describes the unconstitutional condition created by the denial of Fifth Amendment protection,

> In ordinary usage, compulsion does not encompass all forms of persuasion. A person can influence another's choice without compelling it; to do so she need only keep her persuasion within appropriate bounds of civility, fairness, and honestly. Compulsion is an open-ended concept encompassing only improper persuasive techniques. On this view of the self-incrimination privilege, the concept of waiver of the privilege becomes paradoxical. Although a defendant or suspect might sensibly waive a right to remain silent, few sane adults would waive a right to be free of compulsion.

Id. at 2627-28.

[33] *See Woodard*, 118 S.Ct. at 1252-53. According to scholar Kathleen Sullivan's definition, "[t]he doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

[34] *See Woodard*, 118 S. Ct. at 1247.

row inmates.[35] By rejecting the alleged need for federally-mandated due process requirements within the area of clemency, the Court upheld the traditional notion that clemency is a discretionary matter left to the individual state's executive.[36]

The Ohio State Constitution grants the Governor sole discretionary power to extend clemency based upon certain factors that he or she, as opposed to the state legislature, considers important.[37] The Ohio General Assembly did, however, have the power to regulate the procedural aspects of clemency, including application and investigation.[38] This regulatory power was delegated from the Ohio General Assembly to the Ohio Adult Parole Authority (hereinafter the "Authority").[39] The Ohio clemency procedures for death-row inmates have evolved into a three step process. First, there is a mandatory scheduling of a clemency hearing forty-five days prior to inmate's date of execution. Second, there must be notice to the inmate of an optional interview with the Authority. Third, final clemency recommendation is given to the Governor by the Authority.[40]

In *Woodard*, Eugene Woodard was convicted and sentenced to death for committing an aggravated murder during the course of a robbery.[41] The

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[35] *See id.* at 1247-48. The Ohio clemency procedures for death row inmates included a "voluntary interview process" which provided the prisoner with an opportunity to meet with one or more members of the Ohio Adult Parole Authority prior to the formal clemency hearing. *See id.* at 1248. Counsel is not permitted to attend the informal interview. *See id.*

[36] *See id.* at 1252.

[37] *See id.* at 1247 (citing OHIO CONST. art. III, § 2).

[38] *See id.* (citing State v. Sheward, 644 N.E.2d 369, 378 (Ohio 1994)).

[39] Pursuant to legislation enacted by the Ohio General Assembly:

> All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor . . . .

OHIO REV. CODE ANN. § 2967.07 (West 1998).

[40] *See Woodard*, 118 S. Ct. at 1248.

[41] *See* State v. Woodard, 623 N.E.2d 75, 82 (Ohio 1993). Respondent Woodard's conviction and death sentence were affirmed on appeal, and the United States Supreme Court subsequently denied *certiorari*. *See* Woodard v. Ohio, 512 U.S. 1246 (1994).

Authority commenced clemency proceedings after Woodard was unable to obtain a stay of execution forty-five days prior to his scheduled date of execution, October 7, 1994.[42] Thereafter, the Authority gave Woodard's attorney notice that an optional interview would be held on September 9, 1994, and that the clemency hearing was scheduled for September 16, 1994.[43] Woodard rejected the optional interview because he alleged insufficient notice and maintained that the Authority had failed to answer his request to have counsel present at the interview.[44]

On September 14, 1994, Woodard filed suit in the United States District Court for the Southern District of Ohio, claiming that the Ohio clemency process violated his Fourteenth and Fifth Amendment rights.[45] Although Woodard successfully postponed his clemency hearing before the Authority, a United States Magistrate Judge ultimately determined that Woodard failed to factually support his allegations.[46] The magistrate judge further recommended that the district court grant the state's motion for judgment on the pleadings to dismiss the claims.[47] Reasoning that the Governor's extensive discretion was an essential aspect of the Ohio clemency process, the magistrate judge denied the existence of any possible liberty interest in the actual clemency procedures.[48] The district court fully accepted the magistrate judge's findings and entered judgment against Woodard.[49]

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[42] Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1181 (6th Cir. 1997).

[43] *See id.*

[44] *See id.* at 1182. Woodard objected to the initiation of clemency proceedings on August 24, 1994 because his counsel had just recently been appointed for the purposes of pursuing state post-conviction relief that was unrelated to the clemency proceedings. *See id.*

[45] *See id.* Judge Joseph P. Kinneary, U.S.M.J., never published an opinion regarding the dismissal of Respondent Woodard's suit and, therefore, the district court's findings are outlined in the record of the opinion of the United States Court of Appeals for the Sixth Circuit. *See id.*

[46] *See id.*

[47] *See id.* Respondent further claimed that the Ohio clemency proceedings violated his rights under the Fourteenth Amendment Equal Protection Clause, the Ninth Amendment, and the Eighth Amendment right against cruel and unusual punishment. *See id.* Judge Kinnerary, however, summarily dismissed these allegations along with the respondent's primary Fifth Amendment and Fourteenth Amendment due process claims. *See id.*

[48] *See id.*

[49] *See id.*

The United States Court of Appeals for the Sixth Circuit objected to the district court's complete rejection of Woodard's claims and further delineated the pertinent issues involved under a due process analysis.[50] In addressing Woodard's claims, the court of appeals separated the analysis into two different "strands" of due process.[51] The court rejected Woodard's "first strand" due process allegation because neither federal precedent, nor Ohio's discretionary tradition of clemency created a life or liberty interest in the clemency process itself.[52] The court of appeals effectively created a "second strand" of the due process analysis, however, by recognizing that Woodard actually possessed a

[50] *See* Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244, 1248-49 (1998).

[51] *See id.* at 1248. Developed by the Sixth Circuit Court of Appeals, the dual "strand" analysis of the respondent's due process issue distinguished the traditional "first strand," from the "second strand." *See Woodard*, 107 F.3d at 1182.

In examining the "first strand" of due process, the court of appeals distinguished the possibility of a state-created interest in clemency proceedings, from the federally created interest in clemency. *See id.* at 1183. The Sixth Circuit held that the injection of discretion to a state procedure negates the existence of a state-created liberty interest. *See id.* at 1184. Explaining the significance of discretion, the court stated,

> [I]f state procedures essentially allowed "unfettered discretion" in making the ultimate decision, no constitutionally protected liberty interest would be created, even if some of the procedures leading up to the final decision might be couched in mandatory terms.

Id.

Regarding a federally created interest in clemency proceedings, the court of appeals followed the Supreme Court precedent which rejected any liberty interest in a prisoner's incarceration because conviction effectively terminates the constitutionally-protected interest in freedom. *See id.* at 1183. Furthermore, the Sixth Circuit refused to find a federally-created life interest in clemency process, explaining that

> [i]n order to argue that Ohio's clemency procedure by itself impinges upon a protected life interest, however, he must point to a separate, life-affecting change in his situation. In this case, . . . [i]t is just a change in expectation as to the possibility of having his sentence commuted.

Id. at 1184.

[52] *See id.* (citing Connecticut Board of Pardons v. Dumschat, 452 U.S 458, 464-65 (1981) (rejecting a federally-created liberty interest in the process of clemency)).

life and liberty interest in clemency, simply by virtue of his participation in the entire adjudication process.[53] Despite holding that Woodard was entitled to some due process protection, the Sixth Circuit emphasized the minimal amount of safeguards potentially obtainable by Woodard.[54] The court of appeals advocated the limitation of due process dispensation in this case because the post-conviction clemency process was so far removed from the actual trial for which Fourteenth Amendment due process protections are intended.[55]

The Sixth Circuit also addressed Woodard's alleged Fifth Amendment violation.[56] The Sixth Circuit held that the Ohio clemency procedures, including the voluntary interview, placed an unconstitutional condition upon the inmate.[57] In fact, the court of appeals employed the "unconstitutional condition" doctrine[58] and held that, under Ohio law, Woodard's was impermissibly com-

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[53] *See Woodard*, 107 F.3d at 1186 (citing Evitts v. Lucey, 469 U.S. 387 (1985) (holding that a state which extends the criminal adjudication process to an appellate level, must then provide the defendant with a due process right to effective counsel)).

[54] *See* Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244, 1248 (1998).

[55] *See id.*

[56] *See id.* at 1249.

[57] *See id.* Although Woodard was not required to participate in the interview, his cooperation could have potentially augmented his chance of clemency. *See Woodard*, 107 F.3d at 1192. This cooperation, however, could force Woodard to incriminate himself. *See id.*

[58] The unconstitutional condition doctrine "reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." *Woodard*, 107 F.3d at 1189 (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989)). The Sixth Circuit Court of Appeals held that

> [i]n Woodard's case, the "benefit" is the uncounseled clemency interview, and the "unconstitutional condition" is the requirement that he waive his Fifth Amendment right against self-incrimination. The clemency interview undoubtedly presents a serious matter for Woodard, whose life may literally depend upon it, yet in deciding between this interview and the risk of self-incrimination, Woodard has been offered a choice by the state that can hardly be deemed a constitutionally unencumbered one.

Id.

The "unconstitutional condition" doctrine has been upheld by the United States Supreme Court in numerous contexts, including the First Amendment and the Fifth Amendment Eminent Domain Clause. *See, e.g.*, Board of County Comm'rs v. Umbehr, 518 U.S. 668

pelled to make a detrimental decision.[59] Categorizing this decision as a "Hobson's choice,"[60] the court of appeals held that it was unconstitutional to force a death-row inmate in a position similar to the respondent's, to choose between redeeming oneself by participating in the clemency process or avoiding self-incrimination through testimony at the optional clemency interview.[61] The court of appeals found both a liberty interest in the clemency process and the implication of an unconstitutional condition, and consequently, the court remanded the case to the district court to determine whether the Authority's clemency procedures met the due process requirements.[62]

The United States Supreme Court granted *certiorari* and reversed the decision of the Sixth Circuit Court of Appeals.[63] The Court reiterated the lower court's rejection of any continuing life interest under the "first strand" of due process, thereby denying the possibility of a protected interest in the clemency process.[64] The Court did, however, reverse the Court of Appeals' finding that the clemency investigative procedures deserved protection under the "second strand" of due process.[65] Distinguishing case law relied upon by the lower

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(1996) (invalidating the respondent's termination of petitioner's employment because it compromised free speech under the First Amendment); Dolan v. City of Tigard, 512 U.S. 374 (1994) (rejecting local property requirements which unconstitutionally conditioned the petitioner's protection under the takings clause); Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating a state statute which abridged appellant's First Amendment right to free exercise of religion).

[59] *See Woodard*, 118 S. Ct. at 1249.

[60] The Sixth Circuit provided the origin of the expression: "The phrase [Hobson's Choice] comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door . . . . A Hobson's choice is thus an apparently free choice when there is no real alternative . . . ." *Woodard*, 107 F.3d at 1189 n.3 (quoting Wang v. Reno, 81 F.3d 808, 813 n.5 (9th Cir. 1996)).

[61] *See Woodard*, 118 S. Ct. at 1249. Although the doctrine of unconstitutional condition has been predominantly used with regard to monetary subsidies and tax exemptions, the Sixth Circuit Court of Appeals noted that Woodard's Fifth Amendment claim was "a 'purer,' and therefore, easier case of unconstitutional condition" and furthermore, the court emphasized that "a degree of uncertainty in the doctrine is not a sufficient basis for resisting its application." *Woodard*, 107 F.3d at 1191.

[62] *See Woodard*, 107 F.3d at 1193-94.

[63] *See Woodard*, 118 S. Ct. at 1249.

[64] *See id.* at 1248; *see also supra* text accompanying note 51.

[65] *See Woodard*, 118 S. Ct. at 1251-52.

courts, the majority demonstrated that the "function and significance" of the clemency process is not an integral part of adjudication.[66] This fact, combined with the traditional discretionary nature of executive clemency power, compelled the Court to deny any judicial review of due process afforded to the Ohio clemency procedures.[67]

Further, the Court held that the voluntary interview did not violate Woodard's Fifth Amendment rights.[68] Rejecting the Sixth Circuit's application of the unconstitutional condition doctrine, the majority reasoned that mere "pressure" to speak did not amount to compulsion or implicate the Fifth Amendment protection against self-incrimination.[69] Consequently, the Court reversed the Sixth Circuit's order of remand and reinstated the order of the district court.[70]

The Supreme Court's dismissal of Woodard's Fifth and Fourteenth Amendment claims demonstrates a strict adherence to precedent. Nonetheless, the majority's reasoning relies upon a compilation of prior Fourteenth Amendment case law which, once synthesized, does not coincide with the result in *Woodard*. Conversely, the Court's application of the Fifth Amendment, although improperly dismissive, does flow logically from precedent.

III. PRIOR CASE HISTORY

A. THE SUPREME COURT'S TREATMENT OF DUE PROCESS RIGHTS IN DISCRETIONARY DECISIONS FOR POST-CONVICTION RELIEF

The case of *Morrissey v. Brewer*[71] first addressed Fourteenth Amendment due process rights in the context of post-conviction relief. In *Morrissey*, the Court held that the state must satisfy a minimal level of due process to prisoners before an individual's parole can be revoked.[72] The petitioners in *Morris-*

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[66] *See id.*

[67] *See id.* at 1252.

[68] *See id.*

[69] *See id.* at 1253.

[70] *See id.*

[71] 408 U.S. 471 (1972).

[72] *See id.* at 490.

sey, arrested for violating the terms of their parole, challenged the constitutionality of Iowa's parole revocation process, which did not permit the parolee to appear before the judge and, therefore, denied the petitioners an opportunity to be heard.[73] In analyzing whether an individual should be entitled to a hearing under due process, the Court divided the parole revocation process into two distinctly separate phases.[74] The first phase was an entirely factual determination as to whether the parolee violated a condition of parole, and the second step involved more "predictive and discretionary" considerations.[75] Depending upon the factual establishment of a parole violation, the second step required the parole authority to balance certain societal factors before considering an order of parole revocation.[76] The *Morrissey* Court recognized that parole revocation was not a part of the original criminal prosecution process under Iowa law.[77] The Court further emphasized the significance of accurate fact-finding as a crucial factor in the parole authority's discretionary decision for parole revocation.[78] Accordingly, the *Morrissey* Court, having noted the adjudicatory nature of the parole authority's decision, found that an individual's minimal

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[73] *See id.* at 472. Petitioner Morrissey's original conviction was based upon a guilty plea for forging checks. *See id.* Although paroled, Morrissey was arrested seven months later based upon information that he bought a car and obtained credit under an assumed name, as well as lied to his parole officer regarding his place of residence. *See id.* at 472-73.

The second petitioner, Booher, was paroled from a ten year sentence for the conviction of forgery. *See id.* at 473. After violating his territorial restrictions, obtaining a driver's license under an assumed name, operating a car without permission, and failing to remain gainfully employed, Booher was re-incarcerated and his parole was revoked. *See id.* at 473-74.

[74] *See id.* at 479-80.

[75] *See id.*

[76] *See id.* at 481. The societal factors addressed by the Court include predicting the ability of the parolee to refrain from committing anti-social acts once released, the severity of the parole violations and their effects on society, and the societal gain or returning the parolee to living a normal and useful life. *See id.* at 481-84.

[77] *See id.* at 480.

[78] *See id.* at 484. The Court stated that "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* Therefore, the Court emphasized the importance of fact-finding during the second step of the parole revocation decision. *See id.*

due process rights mandate the commencement of an informal hearing prior to parole revocation.[79]

Five years later, in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,[80] the Supreme Court revisited the issue of due process in parole decisions. In *Greenholtz*, prison inmates brought a class action suit against the State of Nebraska alleging that their parole denials resulted from unconstitutional procedures employed by the Nebraska Parole Board.[81] Writing for the majority, Chief Justice Burger held that there was "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[82] Chief Justice Burger reasoned that a legitimate conviction, "with all its procedural safeguards," extinguished the inmate's liberty interest in remaining free from incarceration.[83] Accordingly, the Court in *Greenholtz* held that administrative grants for parole release did not automatically require due process protection because the discretionary nature of the decision should remain outside the adversarial process of judicial prosecution.[84] The *Greenholtz* Court emphasized the general rule that parole decisions, which are predominantly unstructured and arbitrary, are not part of the adversarial judicial process, thereby negating the need for rigid safeguards.[85] With respect to the specific Nebraska parole statute, however, the Court found that proce-

[79] *See id.* at 490.

[80] 442 U.S. 1 (1979).

[81] *See id.* at 3-4. The actual procedures used by the Parole Board included: 1) mandatory, initial parole review hearing held every year; 2) examination of the inmate's entire confinement record; 3) an informal hearing including an interview with the inmate; and 4) if parole is determined a possibility, the Board schedules a final hearing, during which the inmate may prevent evidence on his own behalf. *See id.* at 4-5. Notwithstanding these procedures, the Court emphasized the non-adversarial nature of the final hearing. *See id.* at 5.

[82] *Id.* at 7.

[83] *See id.* Chief Justice Burger opined that a parole inquiry, including the hearings, is "an 'equity' type judgment" that cannot be compared to the traditional judicial synthesis of fact-finding and law because a decision to grant parole hinges on personal observations and societal considerations. *See id.* at 8; *see also supra* text accompanying note 76.

[84] *See Greenholtz*, 442 U.S. at 13. Providing a rationale for the non-adversarial nature of parole decisions, the Court examined the "ultimate purpose of parole" which is the rehabilitation of inmates for reintroduction to society. *Id.* An adversarial parole proceeding, however, would "invite or encourage a continuing state of adversary relations between society and the inmate," thereby hindering the ultimate goal of societal integration. *Id.* at 14.

[85] *See id.* at 15-16.

dural due process was required because the statute specifically required annual, mandatory hearings outside the realm of the Nebraska Parole Board's discretionary decision.[86] Nonetheless, the *Greenholtz* Court intentionally narrowed its analysis to the unique, statutorily mandated procedures under Nebraska law.[87]

The Supreme Court expanded its position on post-conviction due process to matters of clemency in *Connecticut Board of Pardons v. Dumschat.*[88] Dumschat alleged a violation of his Fourteenth Amendment due process rights when the Connecticut Pardons Board refused to supply a list of reasons for its decision to deny commutation of his life imprisonment sentence.[89] The Court flatly rejected Dumschat's alleged liberty interest.[90] The Court refused to create such an interest based merely upon statistics of the Parole Board's frequent practice of granting commutation for life imprisonment.[91] The Court reasoned that a prisoner's interest in clemency is no more than a "unilateral hope."[92] In addition to the lack of a liberty interest in clemency, the Court discussed the "unfettered discretion" conferred upon the Board.[93] The Connecticut commutation statute did not contain mandatory provisions and, therefore, left all discretionary authority to the Connecticut Board of Pardons.[94] Consequently, the Court

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[86] *See id.* at 13-14. The Court noted that the initial, mandatory hearing could be distinguished from a discretionary process because certain objective factors are considered. *See id.* These include the inmate's entire record through sentencing, the gravity of the original offense, and the inmate's behavior during confinement. *See id.* at 15.

[87] *See id.* at 12. The Court reserved judgment on the constitutionality of other state parole statutes that would necessitate a case-by-case analysis. *See id.*

[88] 452 U.S. 458 (1981).

[89] *See id.* at 460-61.

[90] *See id.* at 465.

[91] *See id.* Writing for the majority, Chief Justice Burger emphasized that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections . . . ." *Id.*

[92] *See id.*

[93] *See id.* at 466. The Court distinguished the Connecticut commutation statute in *Dumschat* from the Nebraska statute in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). *See id.* Unlike the Connecticut statute, the statutory language in *Greenholtz* mandated a parole hearing and certain criteria, thereby requiring constitutional due process rights. *See id.*

[94] *See id.* The *Dumschat* Court explains the discretionary nature of the Connecticut

held that a prisoner was not entitled to Fourteenth Amendment due process protection in clemency proceedings.[95]

While dismissing a prisoner's liberty interest in the specific process of clemency, the Court left the issue of a criminal defendant's interest in the general adjudication process unresolved.

B. THE SUPREME COURT'S TREATMENT OF POST-CONVICTION PROCEEDINGS AS PART OF THE ADJUDICATION CONTINUUM

The Supreme Court first established the concept of due process rights along the continuum of post-conviction adjudication in *Evitts v. Lucey*.[96] In *Evitts*, Lucey was pursuing his right to a first appeal when his appointed counsel failed to comply with the mandatory Kentucky procedures.[97] Asserting his Sixth Amendment right to effective counsel, Lucey asked the Court to decide whether procedural due process protection exists at the appellate level.[98] After synthesizing the Supreme Court's firmly established precedent,[99] Justice Brennan, writing for the majority, reasoned that the first appeal was considered the

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Pardon Board's authority:

> [T]here are no explicit standards by way of statute, regulation, or otherwise. This contrasts dramatically with the Nebraska statutory procedures in *Greenholtz*, which expressly mandated that the Nebraska Board of Parole "shall" order the inmate's release "unless" it decided that one of four specified reasons for denial was applicable. The Connecticut commutation statute, having no definitions, no criteria, and no mandated "shalls," created no analogous duty or constitutional entitlement.

Id. (citing *Greenholtz*, 442 U.S. at 11).

[95] *See id.* at 466-67.

[96] 469 U.S. 387 (1984).

[97] *See id.* at 389. The Kentucky Rules of Appellate Procedure require that appellants serve a "statement of appeal," including names of the parties, the trial court information, and the pertinent filing dates. *See id.* (citing Petitioner's Brief at 9-10, Evitts v. Lucey, 469 U.S. 387 (No. 83-1378) (outlining the Kentucky Rules of Appellate Procedure)).

[98] *See id.* at 388-89.

[99] *See id.* at 404-05. *See generally* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (guaranteeing a criminal defendant the Sixth Amendment right to effective counsel at the trial level); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (holding that the Fourteenth Amendment protects a criminal appellant's right to pursue a first appeal from conviction).

final step in the adjudication of a criminal defendant's innocence or guilt.[100] Consequently, Justice Brennan held that the procedural guarantees of the Fourteenth Amendment did extend to a criminal appellant's Sixth Amendment right to effective counsel for the process of first appeal.[101] The *Evitts* Court created an exception, however, which dictates that due process protection extends only to an appeal as of right, as distinguishable from a purely discretionary appeal.[102] The Court, therefore, minimized the amount of Fourteenth Amendment procedural safeguards placed upon discretionary aspects of post-conviction proceedings.[103]

This distinction between a discretionary appeal and an appeal as of right was further addressed by the Supreme Court in *Pennsylvania v. Finley*.[104] Convicted for murder, sentenced to life imprisonment, and unsuccessful on her first appeal, Finley attempted to gain relief through a post-conviction hearing.[105] The Pennsylvania Supreme Court appointed counsel for Finley, who later claimed she deserved Fourteenth Amendment procedural protections when her attorney sought to withdraw.[106] The United States Supreme Court granted *certiorari*, reversed the finding that Finley was entitled to the right of counsel on a discretionary appeal and, accordingly, rejected any claim of procedural due process rights.[107] Chief Justice Rehnquist, writing for the majority in *Finley*, held that procedural protections could not be afforded to post-conviction proceedings in the absence of a legitimate, underlying constitutional right.[108]

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[100] *See Evitts*, 469 U.S. at 404 (citing *Griffin*, 351 U.S. at 18).

[101] *See id.* at 402.

[102] *See id.* at 401-02. The Supreme Court made this distinction by outlining the essential differences between *Evitts* and *Ross v. Moffit*, 417 U.S. 600 (1974). *See id.* In *Ross*, the Court held that a criminal appellant does not have the right to counsel on discretionary appeals, which involve "significant public or jurisprudential issues" because it follows the criminal appellant's unsuccessful pursuance of a first appeal as of right. *See id.* (citing Ross v. Moffit, 417 U.S. 600, 615 (1974)). Conversely, the *Evitts* Court pointed out that the purpose of a first appeal in the Kentucky court system is "precisely to determine whether the individual defendant has been lawfully convicted." *Id.* at 402.

[103] *See id.*

[104] 481 U.S. 551 (1987).

[105] *See id.* at 553.

[106] *See id.* at 553-54.

[107] *See id.* at 554-55.

The Court reasoned that post-conviction relief is sufficiently removed from the initial trial.[109] Consequently, this process could not fall under the continuum of adjudication because "[i]t is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."[110] The *Finley* court further expanded this holding and found that any state-offered form of discretionary, post-conviction relief did not require strict compliance with procedural guidelines established through the United States Constitution.[111]

Two years later, the Supreme Court, in *Murray v. Giarranto*,[112] established the precedent for minimal due process application to capital cases.[113] In *Murray*, the Court explicitly refused to extend extraordinary protections to death-row inmates and, in fact, declined to read "the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases."[114] The Supreme Court extended the rule enunciated in *Pennsylvania v. Finley*, which rejected post-conviction procedural protections, to capital cases in the *Murray* decision.[115] Consequently, the Supreme Court reiterated the limited purpose of state post-conviction proceedings in relation to the overall continuum of criminal adjudication.[116]

The Supreme Court finally extended its post-conviction jurisprudence to capital murder cases in *Herrera v. Collins*.[117] Ten years after Herrera was convicted and sentenced for capital murder and was unsuccessful on appeal, new evidence was discovered suggesting that Herrera was innocent of the

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[108] *See id.* at 557.

[109] *See id.* at 556-57.

[110] *Id.*

[111] *See id.* at 559. The Supreme Court encouraged State experimentation with the development of post-conviction review programs. *See id.* Consequently, the amount of procedural protections afforded the prisoner is not federally mandated. *See id.*

[112] 492 U.S. 1 (1989).

[113] *See id.* at 9.

[114] *Id.* at 10.

[115] *See id.*

[116] *See id.*

[117] 506 U.S. 390 (1993).

charges.[118] Herrera claimed that, in light of the discovery of the exculpatory evidence, the Due Process Clause of the Fourteenth Amendment guaranteed his protection from the unlawful execution of an allegedly innocent man.[119] The Court, however, disagreed and held that the Fourteenth Amendment due process protection does not extend beyond the actual adjudication of an accused's case at the trial level.[120] In response to Herrera's claim of innocence, the Court explained that any evidence found after an accused is convicted during a trial proceeding could not be considered by an appellate level court toward his guilt or innocence.[121] The *Herrera* Court further dismissed petitioner's argument that capital cases require greater due process protection.[122]

C. THE SUPREME COURT'S TREATMENT OF THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AS APPLIED DURING CRIMINAL PROCEEDINGS

As far back as 1896, the Supreme Court permitted a criminal defendant to voluntarily testify on his or her own behalf at trial.[123] By voluntarily electing to testify, the criminal defendant automatically waives any Fifth Amendment self-incrimination protection with regard to the prosecution's cross-

[118] *See id.* at 393. Petitioner Herrera offered the affidavits of Hector Villarreal, the attorney representing petitioner's brother Raul Herrera Sr., and Juan Franco Palacious, his brother Raul's former cellmate. *See id.* at 396. Both individuals claimed that Raul Herrera Sr., who was deceased at the time, had admitted to the capital murder for which petitioner Herrera was convicted. *See id.*

[119] *See id.* at 393. Petitioner Herrera also claimed that the Eighth Amendment protection against cruel and unusual punishment prohibited his execution. *See id.*

[120] *See id.* at 399.

[121] *See id.* at 399-40. In response to petitioner Herrera's claim of innocence, the Court opined:

> Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears . . . . Thus, in the eyes of the law, petitioner does not come before the Court as one who is "innocent," but on the contrary, as one who has been convicted by due process of law of two brutal murders.

Id.

[122] *See id.* at 405

[123] *See* Brown v. Walker, 161 U.S. 591, 597-98 (1896).

examination.[124] In effect, once a defendant testifies on his or her own behalf, the defendant can no longer refuse to answer any questions during cross-examination.[125] Although this holding has been preserved throughout decades of American criminal jurisprudence,[126] the Court has recently expanded this area of defendant autonomy to include civil matters.

In *Brown v. United States*,[127] the Supreme Court extended the concept of voluntary waiver of Fifth Amendment protection to include waivers within the context of an administrative proceeding.[128] The petitioner in *Brown*, who was charged with fraudulently procuring citizenship in a denaturalization suit,[129] claimed a violation of her Fifth Amendment right against self-incrimination after being held in contempt of court for refusing to answer questions on cross-examination.[130] Although denaturalization is not technically within the realm of criminal prosecutions, the Court drew an analogy between the present witness

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[124] *See id.*

[125] *See id.*

[126] *See, e.g.*, Baxter v. Palmigiano, 425 U.S. 308, 324 (1976) (holding that adverse inferences drawn from a prisoner's silence during a disciplinary hearing did not violate the prisoner's constitutional rights); McGautha v. California, 402 U.S. 183, 221-22 (1971) (affirming a jury's imposition of the death penalty and finding no violation of Fourteenth Amendment rights based on absence of specific procedural, governing standards); Spencer v. Texas, 385 U.S. 554, 568-69 (1967) (holding a state statute, which permitted the introduction of evidence regarding prior indictments with a limiting jury instruction, constitutional under the Fourteenth Amendment Due Process Clause).

[127] 356 U.S. 148 (1958).

[128] *See id.* at 155.

[129] The Court provided the following description of the denaturalization suit:

> The complaint in the denaturalization suit charged that petitioner had fraudulently procured citizenship in 1946 by falsely swearing that she was attached to the principles of the Constitution, and that she was not and had not been for ten years proceeding opposed to organized government or a member of or affiliated with the Communist Party . . . whereas in fact petitioner had been, from 1933 to 1937, a member of the Communist Party and the Young Communist League.

Id. at 149.

[130] *See id.* at 149-51.

who was testifying in a civil proceeding and a criminal defendant.[131] Just as a criminal defendant who testifies on his own behalf risks possible impeachment during cross-examination, the Court found that "a witness in any proceeding who voluntarily takes the stand" also puts their own credibility at risk.[132] Accordingly, the petitioner's claim that her Fifth Amendment rights were violated was summarily dismissed by the Court.[133]

In *Williams v. Florida*,[134] the Supreme Court revisited the issue of Fifth Amendment protection as applied to compulsory disclosure rules.[135] Under the Florida Rules of Criminal Procedure, a defendant is required to give prior notice to the prosecutor regarding the intended use of an alibi at trial.[136] The defendant must further provide the prosecutor with factual information surrounding the defense, as well as anticipated supporting witnesses.[137] Although defendant Williams properly asserted his intent to claim an alibi, he objected to the mandatory disclosure of additional information as a violation of his Fifth Amendment rights.[138] The Supreme Court swiftly rejected such a claim and reasoned that the statutory choice between presenting a defense and remaining silent does not violate the Fifth Amendment protection against compulsory self-incrimination.[139] Emphasizing the voluntary nature of the "unfettered choice" left to a defendant—the defendant may use an alibi and disclose the information to prosecutors or remain silent regarding defendant's whereabouts and make no

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[131] *See id.* at 154-55.

[132] *Id.* at 155.

[133] *See id.* at 157. The Court sought to prevent witnesses from taking advantage of the opportunity to provide their version of the facts while simultaneously demanding immunity from any evidence arising from the disclosed testimony. *See id.* at 156. This manipulation would convert the Fifth Amendment into "a positive invitation to mutilate the truth." *Id.*

[134] 399 U.S. 78 (1970).

[135] *See id.* at 81-82.

[136] *See id.* at 79 (citing FLA. R. CRIM. P. § 3.200 (1970)).

[137] *See id.*

[138] *See id.* Williams claimed that the statutory "notice of alibi" rule required him to provide the state prosecutor with the name and address of his witness Mrs. Scotty, thereby allowing the state to obtain a pre-trial deposition of a witness for the defense. *See id.* at 82-83. Furthermore, Williams contended that the state gained valuable information revealing the strategic elements of the defense. *See id.* at 83.

[139] *See id.* at 84.

disclosure—the Court refused to recognize evidentiary responses to government-created "dilemmas" or "pressures" as compelled self-incrimination.[140]

The precedent established in *Dumschat* and *Evitts* illustrates the continually evolving nature of Fourteenth Amendment Due Process Clause protection for post-conviction jurisprudence. Furthermore, the lineage that resulted from *Brown* and *Williams* provides a history of the Supreme Court's intolerance for allegations of Fifth Amendment violations based upon voluntary choices offered to a criminal defendant during the trial phase. *Ohio Adult Parole Board v. Woodard* is an example of the Supreme Court's steadfast adherence to precedent.

IV. *OHIO ADULT PAROLE AUTHORITY V. WOODARD*: OHIO'S CLEMENCY PROCEDURES DO NOT VIOLATE THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE OR THE FIFTH AMENDMENT

A. THE FOURTEENTH AMENDMENT DOES NOT CREATE A LIFE OR LIBERTY INTEREST IN THE PROCESS OF CLEMENCY

Writing for the majority, Chief Justice Rehnquist[141] scrutinized the constitutionality of the Ohio Adult Parole Authority's procedures for clemency review.[142] The Chief Justice first examined the Sixth Circuit's decision by ana-

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[140] *See id.* at 84-86.

[141] Chief Justice Rehnquist delivered the opinion of the Court with respect to Part I, in which Justices O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsberg, and Breyer joined; an opinion with respect to Part II, in which Justices Scalia, Kennedy, and Thomas joined; and the opinion for a unanimous Court with respect to Part III. *See* Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244, 1247 (1998). Justice O'Connor, joined by Justices Souter, Ginsburg, and Breyer, filed an opinion concurring in part and concurring in judgment. *See id.* at 1253 (O'Connor, J., concurring). Finally, Justice Stevens concurred in part and dissented in part. *See id.* at 1254 (Stevens, J., concurring in part, dissenting in part).

[142] *See id.* at 1247. Under Ohio law, a request for clemency must be made in the following manner:

> All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes re-

lyzing the respondent's claim to a post-conviction, continuing life interest under the Fourteenth Amendment.[143] Relying on precedent, the majority held that Woodard's assertion of his existing life interest in clemency was barred by the Court's holding in *Conneticut Board of Pardons v. Dumschat*.[144] The Court disagreed with the respondent's distinction between the present situation, where the petitioner argued a life interest in clemency, and *Dumschat*, which focused solely on Dumschat's liberty interest in commutation proceedings.[145] Reiterating the *Dumschat* holding, Chief Justice Rehnquist explained that any interest in clemency held by respondent was solely based on the convicted prisoner's hopes for commutation, thereby negating the existence of any legally binding constitutional right.[146]

The majority also dismissed the respondent's alleged right to extraordinary procedural protections in a capital murder case.[147] Chief Justice Rehnquist distinguished the respondent's legitimate "residual life interest," which exists to

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lating to the case.

OHIO REV. CODE ANN. § 2967.07 (West 1998).

[143] *See Woodard*, 118 S. Ct. at 1248.

[144] *See id.* at 1249-50.

[145] *See id.*

[146] *See id.* at 1250. While quoting the reasoning in *Dumschat* which characterized a petition for commutation as "simply a unilateral hope," the Court found no distinction between the prisoner's "hope" for commutation and the respondent's present appeal for clemency. *See id.* (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

[147] *See id.* at 1249-50. Respondent Woodard's case was capital in nature due to Woodard's impending death sentence. *See id.* Numerous legal scholars have commented on the severity of the death penalty and the resulting opportunity for mercy:

> A defendant convicted of a serious crime faces the death penalty in the majority of American jurisdictions. Apart from direct appeals, . . . commutation or pardon offers many death row inmates the best opportunity for relief. In the twenty years since the Supreme Court reinstated the death sentence, a number of political and legal developments have converged to undermine the role of clemency in death cases. The result is that the inmate confronting the severest penalty often has the least chance of securing meaningful review of his petition for commutation or pardon.

Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1507-08 (1995).

prevent prison guards from arbitrarily killing prisoners, from the respondent's alleged life interest in avoiding an ultimate sentence of execution.[148] Relying on the Court's prior holding in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, the majority explained that a person's interest in simply remaining alive does not invoke protection from a lawfully imposed conviction and death sentence.[149] Furthermore, the Court summarily rejected the respondent's use of *Ford v. Wainwright*[150] in support of an argument seeking due process protection for death-row inmates.[151]

Chief Justice Rehnquist specifically refused to confine the holding in *Dumschat*[152] to non-capital cases.[153] In restricting the distinction between capital and non-capital cases to trial-level analysis, the Court cited prior case law requiring the use of equivalent standards for capital and non-capital cases at both the appellate and post-conviction levels.[154] Accordingly, the majority applied the same minimal due process standard to the respondent's clemency proceedings as was applied to the respondent's in *Dumschat*.[155]

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[148] *See Woodard*, 118 S. Ct. at 1250.

[149] *See id.* The Court, in analogizing *Greenholtz* to the respondent's case, reiterated that a prisoner's interest in relief from a prison or death sentence is "extinguished by the conviction and sentence," thereby denying the respondent's use of this interest to "challenging the clemency determination by requiring procedural protections." *Id.* at 1249-50 (citing Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979)).

[150] 477 U.S. 399.

[151] *See id.* In *Ford v. Wainwright*, the Court held that certain procedural protections were required to prevent the execution of a death-row inmate who had become insane subsequent to his trial, conviction, and sentencing. *See id.* at 1250 n.3 (citing Ford v. Wainwright, 477 U.S. 399, 425 (1986)). Therefore, the life interest involved in *Ford* had arisen after the case was adjudicated, remaining completely separate from any initial life interest. *See id.* (citing *Ford*, 477 U.S. at 425). Conversely, respondent Woodard was attempting to legitimize his initial life interest as unique due simply to his impending death sentence. *See id.* at 1250.

[152] *See supra* text accompanying note 146.

[153] *See Woodard*, 118 S. Ct. at 1250.

[154] *See id.*; *see also* Murray v. Giarratano, 492 U.S. 1 (1989); Satterwhite v. Texas, 486 U.S. 249 (1988); Ford v. Wainwright, 477 U.S. 399 (1986); Smith v. Murray, 477 U.S. 527 (1986).

[155] *See Woodard*, 118 S. Ct. at 1250.

The majority further addressed the role of the Governor, as the leader of the state executive branch, in the clemency process.[156] Focusing on the actual purpose of clemency, Chief Justice Rehnquist reiterated that an executive grant of clemency should be considered a "matter of grace," dependant upon the state executive's consideration of numerous intangible factors.[157] While preserving the discretionary nature of the executive's decision, the majority emphasized the value of considering extraneous factors, independent of the issues introduced at trial.[158] Accordingly, Chief Justice Rehnquist noted that mandatory procedural requirements placed upon an entirely discretionary decision could produce inconsistent results.[159] Advocating the Ohio Governor's role as the

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[156] *See id.* at 1250-51.

[157] *See id.* Under Ohio law, the governor may grant clemency based upon the recommendation of the Ohio Adult Parole Authority, which formulates a report based upon the following:

> The authority may investigate and examine, or cause the investigation or examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.
>
> The authority may recommend to the governor the pardon, commutation of sentence or reprieve of any convict or prisoner or grant a parole to any prisoner for whom parole is authorized, if in its judgment there is reasonable ground to believe that granting a pardon, commutation, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society.

OHIO REV. CODE ANN. § 2967.03 (West 1998).

[158] *See Woodard*, 118 S. Ct. at 1250-51. The Court properly focused on the extraordinary role of clemency in the judiciary system. *See id.* The Governor, in granting a death-row inmate clemency, typically concentrates on more compassionate and humane factors, including, family relations and remorse. *See* Cobb, *supra* note 2, at 392. Therefore, the actual facts of a prisoners trial, the prisoner's culpability, and the issue of guilt are less relevant. *See id.*

[159] *See Woodard*, 118 S. Ct. at 1251. Chief Justice Rehnquist went on to cite the Court's earlier findings in *Sandin v. Conner*, 515 U.S. 472 (1995). *See id.* In *Sandin*, the Court rejected the respondent's claim of a due process liberty interest in being able to call witnesses during a disciplinary hearing. *See* Sandin v. Conner, 515 U.S. 472, 474-75 (1995). The Court held that the circumstances creating liberty interests under the Due Process Clause:

"ultimate decision-maker," the Chief Justice rejected respondent's argument that the existence of the Ohio Authority's mandatory procedures, within the application and investigative process, required the state executive to comply with any procedural due process requirements.[160]

B. Clemency Proceedings Do Not Fall Within The Realm Of Criminal Adjudication And Do Not Require Due Process Constraints

After affirming the Sixth Circuit Court of Appeals' dismissal of respondent's claim to a life interest in clemency, the Court next addressed the lower court's reliance on a "second strand" of due process rights.[161] Chief Justice Rehnquist rejected the respondent's argument, under the Court's earlier opinion in *Evitts v. Lucey*, that clemency is considered part of a criminal defendant's adjudication of guilt or innocence.[162] The Court further dismissed the respondent's improper use of the *Evitts* decision to establish a "due process continuum across all phases of the judicial process."[163]

> will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 484.

Just as the Court did not find any significant hardship in the denial of Sandin's witnesses, the Court also rejected Woodard's demand for procedural protections because there was no extraordinary hardship imposed by the denial of clemency and subsequent enforcement of a lawful sentence. *See Woodard*, 118 S. Ct. at 1250.

[160] *See Woodard*, 118 S. Ct. at 1250-51. The Court was clearly advocating the Governor's retention of ultimate discretion and power in the realm of clemency decision-making. *See id.* Chief Justice Rehnquist stated that "the ultimate decision-maker, the Governor, retains broad discretion." *Id.* at 1250. Therefore, "under any analysis, the Governor's executive discretion need not be fettered by the types of procedural protections sought by the respondent." *Id.* at 1250-51 (citing Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 12-16 (1979)).

[161] *See id.* at 1251.

[162] *See id.* Chief Justice Rehnquist paraphrased the respondent's argument that the clemency process "has historically been available as a significant remedy, its availability impacts earlier stages of the criminal justice system, and it enhances the reliability of convictions and sentences." *Id.*

[163] *Id.*

The majority next evaluated the respondent's arguments in support of a "second strand" of due process rights. The Chief Justice distinguished *Woodard*, involving a discretionary appeal for clemency, from *Evitts v. Lucey*, which discussed the "first appeal as of right."[164] Chief Justice Rehnquist traced the *Evitts* Court's synthesis of two separate constitutional protections to create a respondent's right to effective counsel for appellate proceedings.[165] The Chief Justice explained that these two firmly-rooted guarantees, including a criminal defendant's right to counsel for a first appeal[166] and a criminal defendant's Sixth Amendment protection from ineffective counsel at the trial phase,[167] were the sole justification for the *Evitts* progeny.[168] Consequently, Chief Justice Rehnquist rejected Woodard's argument for an alleged "continuum of adjudication."[169] Moreover, the majority, in fact, stated that "there is no continuum requiring varying levels of process at every conceivable phase of the criminal

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[164] *Id.* The "first appeal as of right" refers to a criminal defendant's right to an appellate review of the trial court's initial decision convicting the criminal defendant. *See* Evitts v. Lucey, 469 U.S. 387, 393 (1985). In fact, the *Evitts* Court described the evolution, and resulting responsibilities of state appellate courts:

> Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. McKane v. Durston, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894). Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," Griffin v. Illinois, 351 U.S., at 18, 76 S. Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

Id.

[165] *See Woodard*, 118 S. Ct. at 1251.

[166] *See id.* (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956); Douglas v. California, 372 U.S. 353, 405 (1956)).

[167] *See id.* (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that an indigent criminal defendant has a Sixth Amendment right to counsel during state criminal proceedings); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (holding that the Sixth Amendment protects the criminal defendant from the dangers of inadequate counsel during state criminal procedures)).

[168] *See id.*

[169] *See id.*

system."[170]

Applying the "function and significance" test[171] as the standard for introducing due process requirements, the majority then examined the importance of Ohio's clemency proceedings.[172] Although Chief Justice Rehnquist noted that clemency proceedings play a significant role in the display of government mercy, the Court held that clemency is "not part of the trial-or even the adjudicatory process."[173] The majority reasoned that clemency proceedings are not intended to affect the determination of guilt or the level of trial reliability and, therefore, are not within the realm of criminal adjudication.[174] Due to the majority's characterization of clemency as a desperate, last opportunity to appeal to the mercy of the state, the Chief Justice described the clemency process as "independent of direct appeal and collateral relief proceedings."[175] The extremely attenuated relationship between clemency and the judicial function of the state, combined with the unstructured and discretionary nature of clemency matters, led the majority to hold that post-conviction clemency was not "an integral part" of the criminal adjudication process.[176]

One interesting aspect of the *Woodard* decision was the Court's extended discussion of the differentiation between federal government branch responsibilities for purposes of clemency.[177] The Chief Justice advocated the preserva-

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[170] *Id.* The Court supported the "no continuim" theory with prior case law denying due process guarantees for criminal defendants at post-conviction or discretionary proceedings. *See id.* (citing Murray v. Giarratano, 492 U.S. 1, 9-10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 555-57 (1987); Ross v. Moffitt, 417 U.S. 600, 610-11 (1974)).

[171] The Court extracted the "function and significance" test from *Evitts v. Lucey*, 469 U.S. 387 (1984). In *Evitts*, the Court held that the function and significance of the first appeal of right was important to the adjudication of the defendant's guilt or innocence because "a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a lay person would be hopelessly forbidding." Evitts v. Lucey, 469 U.S. 387, 396 (1984).

[172] *See Woodard*, 118 S. Ct. at 1251.

[173] *Id.*

[174] *See id.*

[175] *Id.*

[176] *See id.* at 1252 (quoting *Evitts*, 469 U.S. at 393).

[177] *See id.* at 1251-52. The separation of powers between different governmental branches originated with the framers of the constitution. Indeed, James Madison, one of the United States Founding Fathers, provided the following description of the separation of government powers,

tion of the authority vested in the executive branch. The Court feared that clemency would "cease to be a matter of grace" if the judicial branch usurped some of the executive's power.[178] Applying the Court's holding in *Dumschat*, Chief Justice Rehnquist stated that the executive branch's discretionary decision to grant clemency has "not traditionally been 'the business of the courts.'"[179] The majority further emphasized the need for a predominant executive role, as well as an absence of judicial review, in clemency proceedings to maintain the separation of powers element inherent in the clemency procedure.[180] In effect, the executive branch, in granting clemency, acts as a check or balance on the judicial branch's decision to convict the criminal defendant.[181] Thus, the majority reasoned that, as a means of providing a criminal defendant with relief from a severe or subjectively unfair court decision, executive clemency should remain outside the grasp of the judiciary.[182] Therefore, the Supreme Court was reluctant to disturb the traditional division of authority between the separate, government branches.

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

[178] *Woodard*, 118 S. Ct. at 1252.

[179] *Id.* 1251 (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

[180] *See id.* at 1252 (citing Herrera v. Collins, 506 U.S. 390, 411-15 (1993)).

[181] *See id.* The clemency procedure has been described by legal scholars as a "discretionary exercise of mercy as an external check on judicial sentencing." Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1507-08 (1995). This application of the separation of powers theory has, however, been criticized for being extremely discretionary: "Clemency procedures—for which kings and, more recently, governors and presidents have been unaccountable—have escaped much of the criticism and reform targeted at other administrative proceedings." *Id.* at 1508.

[182] *See Woodard*, 118 S. Ct. at 1252 (citing *Ex Parte* Grossman, 267 U.S. 87, 120-21 (1925) (holding that executive clemency provides an independent source of relief from the potential mistakes and severity of judicial decisions)).

C. VOLUNTARY INTERVIEWS DURING CLEMENCY INVESTIGATIONS DO NOT UNCONSTITUTIONALLY CONDITION OR IMPLICATE A PRISONER'S FIFTH AMENDMENT RIGHTS

The Court next addressed whether the clemency procedures under Ohio law, where a criminal defendant is provided with the option to attend a voluntary interview in the absence of counsel, violated the respondent's Fifth Amendment protection against self-incrimination.[183] The respondent claimed that the interview process compelled him to choose between his constitutional right to remain silent and the possibility of clemency.[184] Chief Justice Rehnquist declined, however, to categorize this choice as an unconstitutional condition, stating that "the procedures of the Authority do not under any view violate the Fifth Amendment privilege."[185] Presuming that the Authority would be permitted to infer adverse conclusions from the respondent's silence, the majority nonetheless found that the clemency interview was a voluntary procedure, which effectively negated any inference that the state could have compelled the respondent in any manner.[186] Chief Justice Rehnquist criticized the contradictory nature of the respondent's argument because an optional interview, where the choice is left solely to the prisoner, cannot be legally categorized as a situation of unconstitutional compulsion.[187] Thus, the Chief Justice

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[183] *See id.*

[184] *See id.*

[185] *Id.* The respondent argued that his appeal for clemency was unconstitutionally conditioned upon self-incrimination based upon the following factors: 1) There was only one opportunity for clemency review; 2) respondent's silence may be interpreted against him; 3) respondent's answers could incriminate him as evidence in on-going, post-conviction proceedings or in the prosecution for other crimes. *See id.*

[186] *See id.* The Court could not cite any concrete evidence of the Ohio Authority's ability to make adverse inferences from the respondent's refusal to answer questions during the clemency interview. *See id.* Chief Justice Rehnquist did, however, cite to the Reply Brief for Petitioners, which concedes that "nothing in the procedure grants clemency applicants immunity for what they might say or makes the interview in any way confidential." *Id.* (quoting Petitioners' Reply Brief at 6, Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244 (1998) (No. 96-1769), *available in* 1997 WL 703003.)

Although the Court did cite to a prior opinion, which permits the drawing of adverse inferences from silence in civil proceedings, the Chief Justice did not address any case law regarding the adverse inference from a criminal defendant's silence. *See id.* (citing Baxter v. Palmigiano, 425 U.S. 308, 316-18 (1976)).

[187] *See id.* at 1252-53.

completely rejected respondent's implication that the optional interview violated the Fifth Amendment. Refusing to alter Fifth Amendment precedent, the Court reasoned that Woodard "[m]erely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment."[188]

The Chief Justice distinguished certain governmental pressures that are inherent to the adversarial judicial system from acts of state compulsion, stating that "[t]here are undoubted pressures—generated by the strength of the Government's case against him—pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute 'compulsion' for Fifth Amendment purposes."[189] The majority further addressed the difference between governmental pressure and compulsion by examining *Williams v. Florida*. In *Williams*, the defendant was precluded from presenting an alibi during the trial phase because he failed to comply with the state-mandated requirement of prior witness disclosure.[190] The *Williams* Court rejected the defendant's argument that the notice-of-alibi rule violated the defendant's Fifth Amendment right to protection from self-incrimination because "[n]othing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice."[191] Just as the *Williams* Court denied the defendant his Fifth Amendment privileges, so too did the majority refuse to sympathize with Woodward's "choice."[192] While acknowledging the fact that respondent's choice to participate in the Ohio interview might have harmed his chance of post-conviction relief, Chief Justice Rehnquist held that "this pressure to speak in the hope of improving his chance

[188] *Id.* at 1252. The Court referred to case law dating back to 1896 which denied a criminal defendant the Fifth Amendment privilege against self-incrimination on cross-examination because the defendants chose to place themselves at risk by taking the stand. *See id.* at 1253 (citing Brown v. United States, 356 U.S. 148, 154-55 (1958); Brown v. Walker, 161 U.S. 591, 597-98 (1896)); *see also* McGautha v. California, 402 U.S. 183, 215 (1971) (holding that a defendant's choice, between carrying out a risky defense and resting on a motion, does not violate the Fifth Amendment); Spencer v. Texas, 385 U.S. 554, 568-69 (1967) (holding that a criminal defendant who opts to testify cannot claim Fifth Amendment protection from impeachment of prior convictions).

[189] *Woodard*, 118 S. Ct. at 1253.

[190] *See* Williams v. Florida, 399 U.S. 78, 80-81 (1970).

[191] *Woodard*, 118 S. Ct. at 1253 (quoting *Williams*, 399 U.S. at 84-85).

[192] *See id.*

of being granted clemency does not make the interview compelled."[193]

Accordingly, the Court summarily dismissed respondent's Fifth Amendment claim and refused to find any type of unconstitutional condition within the Ohio Authority clemency procedures.[194] In fact, the majority completely refrained from analyzing Woodard's allegation of an unconstitutional condition, explaining that "[w]hile the Court of Appeals accepted respondent's rubric of 'unconstitutional conditions,' we find it unnecessary to address it in deciding this case."[195] Consequently, the Court relied upon the autonomous nature of a criminal defendant's choices to justify the complete rejection of any Fifth Amendment violation under the Ohio clemency procedures.

D. JUSTICE O'CONNOR ADVOCATED MINIMAL PROCEDURAL SAFEGUARDS FOR THE CLEMENCY PROCESS TO PROTECT THE PRISONER'S REMAINING LIFE INTEREST

Justice O'Connor, with whom Justices Souter, Ginsburg, and Breyer joined, concurred in part and concurred in the judgment.[196] Justice O'Connor began by asserting that a death-row inmate's interest in life stems from the prisoner's status as a living, human being until the time of execution.[197] Justice O'Connor agreed with the majority that the due process afforded a convicted criminal is reduced substantially by the prisoner's prior access to the trial process.[198] The Justice, therefore, defined a criminal conviction as an extinguished opportunity to utilize the criminal justice system as a means of proving innocence and avoiding punishment.[199] The Justice did, however, support minimal procedural safeguards for prisoners who are seeking clemency from the death penalty.[200]

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[193] *Id.*

[194] *See id.*

[195] *Id.* at 1252.

[196] *See id.* at 1253 (O'Connor, J., concurring).

[197] *See id.*

[198] *See id.*

[199] *See id.* Justice O'Connor further stated that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." *Id.* (quoting Ford v. Wainwright, 477 U.S. 399, 429 (1986)).

[200] *See id.*

By elaborating on the majority's examination of *Conneticut Board of Pardons v. Dumschat* and *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, Justice O'Connor attempted to distinguish the liberty interest in clemency from the life interest for purposes of post-conviction relief.[201] Although the Justice agreed with the Court's termination of the liberty interest immediately after a defendant's criminal conviction, Justice O'Connor believed the majority was overzealous in holding that "a prisoner has been deprived of all interest in his life before his execution."[202] Accordingly, Justice O'Connor advocated the institution of slight judicial intervention procedures to insure a minimal amount of procedural safeguards, which would effectively protect the prisoners from a state's unencumbered power to arbitrarily deny clemency.[203]

Justice O'Connor further agreed with the majority's reversal of the decision by the Sixth Circuit Court of Appeals to remand the case for findings regarding the amount of procedural due process the respondent was entitled to.[204] Illustrating the constitutionally sound treatment that the respondent received from the Ohio Authority,[205] Justice O'Connor found no violation of the minimal due process requirements.[206] Finally, Justice O'Connor concurred with the majority's finding that the voluntary interview did not violate the respondent's Fifth or Fourteenth Amendment right against self-incrimination.[207]

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[201] *See id.* at 1253-54 (O'Connor, J., concurring).

[202] *Id.* at 1254 (O'Connor, J., concurring).

[203] *See id.* Justice O'Connor specifically provided examples of the type of potential abuse of power the Court should seek to prevent:

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.

Id.

[204] *See id.*

[205] Justice O'Connor outlined the Ohio clemency process wherein the respondent was given decent notice of both his hearing and interview. *See id.* Furthermore, the Justice refused to acknowledge the respondent's claims as having violated his right to procedural due process. *See id.*

[206] *See id.*

[207] *See id.*

E. Justice Stevens' Dissent Upheld The Court Of Appeals' Holding That A Life Interest In Clemency, Combined With The Severity Of The Death Penalty, Requires Some Procedural Limitations Imposed Upon The State

In a separate opinion, Justice Stevens, concurring in part and dissenting in part, attacked the majority's dismissal of due process requirements for clemency proceedings.[208] Agreeing with the Sixth Circuit Court of Appeals, the Justice claimed that the language of the Fourteenth Amendment mandated minimal procedural regulations in clemency proceedings.[209] Absent proper protection from arbitrary state actions, Justice Stevens explained that "even procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable."[210]

Addressing the due process issue, Justice Stevens applied an "adverse effect" standard, which had been used in previous case law to establish either liberty or property interests.[211] This standard examines "whether the state action adversely affected any constitutionally protected interest."[212] Applying this standard to *Woodard*, the Justice reasoned that the respondent, whose interest in his own life was "obviously" present as a living person, was adversely affected by the Authority's denial of certain procedural protections during the clemency process.[213] Justice Stevens attempted to distinguish case law cited by the majority, including *Dumschat* and *Greenholtz*, from *Woodard*.[214] According to the Justice, *Dumschat* and *Greenholtz* both involved state deprivation of an individual's desired conditional liberty, whereas the Authority conversely decided to "deprive [Woodard] of the life that he still has."[215]

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[208] *See id.* at 1254 (Stevens, J., concurring in part, dissenting in part).

[209] *See id.*

[210] *Id.*

[211] *See id.* at 1254-55 (Stevens, J., concurring in part, dissenting in part) (citing Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976)).

[212] *Id.* at 1255 (Stevens, J., concurring in part, dissenting in part).

[213] *See id.* Justice Stevens further noted that "[t]here is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life." *Id.*

[214] *See id.*

[215] *Id.*

While acknowledging the minimal amount of due process afforded by the clemency program, Justice Stevens concluded that the state program could not be completely removed from the judicial review of the federal courts.[216] In fact, despite recognizing the executive role in clemency, the Justice refused to permit an absolute discretionary process fearing, for example, that a governor could potentially "ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency."[217] Justice Stevens further addressed the state's responsibility to provide procedural due process for the established clemency program.[218] Once the state created clemency as an "integral" part of the criminal system, the Justice asserted that the state must follow the appropriate mandates of the United States Constitution.[219]

Finally, Justice Stevens analyzed the need for heightened protection in situations involving the death penalty.[220] Comparing the mere liberty interest involved in the Court's precedent,[221] the Justice illustrated that the death penalty has dramatic and extraordinary effects on both the prisoner and society.[222] Justice Stevens noted that the execution of a criminal defendant necessarily entails a foreboding sense of severity and finality to a defendant's life, and similarly, the state's action in taking the life of a citizen necessarily has a harsh impact on society.[223] Consequently, the Justice argued that the American

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[216] *See id.*

[217] *Id.*

[218] *See id.*

[219] *See id.* Justice Stevens cited various cases in an attempt to demonstrate the notion that a state's decision to establish a program for post-conviction relief requires that the State, in denying this post-conviction relief, must use procedures which comply with the Due Process Clause of the Fourteenth Amendment. *See id.* (citing Evitts v. Lucey, 469 U.S. 387, 396 (1985); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973); Morrissey v. Brewer, 408 U.S. 471, 480-90 (1972)).

[220] *See id.* at 1256 (Stevens, J., concurring in part, dissenting in part).

[221] The majority concluded that the respondent's liberty, manifested in an interest to remain free from incarceration and impending death sentence, was extinguished after the respondent was convicted. *See id.* at 1249 (citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979)).

[222] *See id.* at 1256 (Stevens, J., concurring in part, dissenting in part).

[223] *See id.*

community as a whole deserves assurances that the death penalty will be imposed under steadfast, constitutional principles, and not arbitrary emotions.[224]

In conclusion, Justice Stevens concurred with the majority's dismissal of the respondent's Fifth Amendment claim. The Justice believed, however, that the case should have been remanded to the district court for a determination of the proper due process requirements, based on an independent evaluation of the Authority's clemency procedures.[225]

V. CONCLUSION

In *Ohio Adult Parole Authority v. Woodard*, the Court properly reversed the court of appeals decision to remand the case. The specific facts in *Woodard* did not merit a determination of the necessary procedural requirements in the Ohio clemency proceedings.[226] Justices O'Connor and Stevens, however, illustrated the significant impact of the Court's termination of the death-row inmate's life interest.[227] The majority's very subtle distinction between a life interest in being unfairly killed by a prison guard and a life interest in avoiding the state's sentence of execution is highly attenuated.[228] While recognizing that a death-row inmate deserves obvious protection from arbitrary cruelty, the *Woodard* Court ignored the potential abuses inherent to the arbitrariness of clemency decisions. For example, if a prison guard unilaterally decided to beat every prisoner, based on minority ethnicity, the Court would not hesitate to find constitutional violations. Conversely, if a governor chose to deny a death-row inmate's application for clemency solely due to race, the prisoner would not have an avenue for constitutional relief. The *Woodard* Court, therefore, effectively nullified the power of the Fourteenth Amendment Due Process Clause for clemency applicants.

According to the *Woodard* Court, incarceration necessarily implies the loss of interest in all property, liberty freedoms, and even life. It is indisputable that the interest in preserving life is fundamental.[229] The Court, therefore, went too far in creating an absolute denial of protected interests for death-row

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[224] *See id.*

[225] *See id.* at 1256-57 (Stevens, J., concurring in part, dissenting in part).

[226] *See id.* at 1254.

[227] *See id.* at 1255 (Stevens, J., concurring in part, dissenting in part).

[228] *See id.* at 1250.

[229] *See* Lim, *supra* note 24, at 63.

inmates. The *Woodard* Court relied upon the precedent established in *Dumschat*, which held that a prisoner's life and liberty interests were necessarily extinguished upon conviction.[230] Consequently, the Court differentiates between criminals and innocent individuals.[231] However, the Court's emphasis on the issue of guilt should not be the exclusive method of determining those worthy of a fundamental life interest.

Although the Supreme Court properly asserted the convicted criminal's loss of freedom, a prisoner should not be completely severed from the protections of the constitution. Indeed, the fundamental interest in life, albeit diminished by a guilty verdict, mandates minimal rights to a meaningful post-conviction process. By establishing an interest in meaningful clemency proceedings, the Supreme Court would refrain from disturbing the *Dumschat* precedent and still provide death-row inmates with Fourteenth Amendment protections.[232]

By denying clemency applicants the Fourteenth Amendment procedural safeguards, the *Woodard* Court intended to preserve state autonomy by granting freedom to state institutions to experiment with criminal programs. Although the Court's purpose was noble, the realistic effect of *Woodard* may have a disturbing impact on the relationship between the federal and state criminal justice systems. The Court has absolutely prevented the federal government from interfering with a state's method of post-conviction commuta-

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[230] *See Woodard*, 118 S. Ct. at 1249 (citing Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981); Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7 (1979)).

[231] *See* Lim, *supra* note 24, at 63. Analyzing the paradoxical nature of a death row inmate's life interest, Lim stated,

> The life interest at stake in these matters is clearly a substantive, fundamental right worthy of federal or state due process protection. However, focusing on an innocent person's life interest is not practical because innocence must be established before that right can be protected. Likewise, focusing on a life interest if one *might* be innocent is not helpful because a large number of convicted inmates would claim innocence based on remote possibilities. Therefore, the right at issue must be characterized in another manner in order for it to receive procedural due process protections.

Id. (emphasis in original).

[232] *See id.* at 63-64; *see also* Kobil, *supra* note 3, at 218. Kobil advocated the establishment of a right to a meaningful clemency process and provided the following distinction: "The argument for procedural due process advanced in this article is not based on any expectation of the applicant of actually receiving clemency. The relevant expectation which triggers the Due Process Clause is that his capital clemency request *will be given meaningful consideration* by the ultimate decisionmaker." *Id.* (emphasis in original).

tion.[233] Indeed, the *Woodard* Court granted an inordinate amount of power to a state executive body, which abuses the unfettered control over capital cases. For example, if a state government was controlled by an extremely fundamentalist political party, the process of clemency appeals could become an instrument for corrupt, political bargaining. Moreover, a state executive could routinely reject clemency requests in order to preserve the integrity of the local law enforcement unit. The possibility of judicial relief from this potential abuse of executive power was effectively curtailed by the *Woodard* decision.

Finally, the *Woodard* Court's unanimous rejection of the respondent's Fifth Amendment claim implies an unequivocal erosion of the traditional right against self-incrimination. Summarily dismissing the lower court's findings, the *Woodard* Court provided a minimal amount of explanation.

Indeed, the Court did not even discuss the Sixth Circuit's use of the "unconstitutional condition" doctrine. The court of appeals provided a thorough analysis of the tension between the Fifth Amendment right to silence and the Ohio Adult Parole Board's consideration of Woodard's silence as a factor in a clemency determination.[234] The Sixth Circuit further held that the clemency interview, under Ohio law, compelled the prisoner to face self-incrimination as a condition of clemency consideration.[235] The Court, however, simply dismissed the theoretical underpinnings of the "unconstitutional condition" doctrine, which is more subtle than the standard theory of governmental compulsion.[236] Chief Justice Rehnquist, writing for a unanimous Court, refused to

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[233] Any federal interference with state clemency procedures would be minimal because the sole intent of due process regulations would be to curb potential abuse of arbitrary power. Kobil reiterated:

> The effect of imposing due process protections on capital clemency proceedings would not be as striking as might seem to be the case at first glance. Because most states typically provide meaningful clemency procedures in capital cases, there would not be a profound impact in those jurisdictions. However, where capital clemency review is perfunctory or arbitrary, the upheaval that would occur is essential in order to assure that clemency functions as a final, deliberative opportunity to consider whether the sentence of death should be imposed, considering all the circumstances.

Kobil, *supra* note 3, at 225.

[234] *See* Woodard v. Ohio Adult Parole Auth., 107 F.3d 1178, 1188-93 (6th Cir. 1997).

[235] *See* Ohio Adult Parole Auth. v. Woodard, 118 S. Ct. 1244, 1253 (1998).

[236] *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 12 (1988). Epstein discounted the requirement of pure compulsion to fulfill the definition of an unconstitutional condition:

even address this theory.[237] The complete neglect of this issue illustrates a decline in judicial tolerance for claims of protection against self-incrimination.

In fact, scholars have noted the diminished amount of Fifth Amendment guarantees provided by the courts.[238] Recently, the judicial trend is to permit adverse inferences from a defendant's silence. This trend is evidenced by the 1975 Supreme Court case, *Baxter v. Palmigiano*.[239] In *Baxter*, the Court allowed the use of a prisoner's silence as evidence in disciplinary proceedings.[240] The consideration of a prisoner's silence as a relevant factor for evidentiary purposes represents a significant dilution of the traditional right to silence.[241]

> The balancing tests commonly suggested by commentators show that the doctrine of unconstitutional conditions cannot be explained by analogy to common law coercion. This balancing is not evidentiary, as courts are not asked to weigh different sorts of evidence that might indicate whether a certain gesture is an implied threat of the use of force. Rather, its close involvement with the substantive terms and conditions of the statute . . . distances us from the process-oriented issues that dominate ordinary duress cases.

Id.

[237] *See Woodard*, 118 S. Ct. at 1252-53.

[238] *See* Alschuler, *supra* note 29, at 2637. Elaborating on the erosion of Fifth Amendment protection, Alschuler stated,

> Prosecutors and other officials exert extraordinary pressure on defendants, not merely to obtain an answer, but to secure an unqualified admission of guilt. The Federal Sentencing Guidelines currently promise a substantially discounted sentence to a defendant who supplies "complete information to the government concerning his own involvement in the offense." Few other nations are as dependent as ours on proving guilt from a defendant's own mouth.

Id.

[239] 425 U.S. 308, 318 (1975) (holding constitutional the "adverse inferences against parties to civil actions where they refuse to testify").

[240] *See id.*

[241] *See* Alschuler, *supra* note 29, at 2628. Alschuler discusses the right against self-incrimination,

> [L]ike affording a right to silence, forbidding improper means of interrogation protects against torture, other abusive interrogation techniques, and imprisoning someone for the refusing to incriminate herself . . . *Griffin v. California*, in which the Su-

Furthermore, there is no doubt that the *Woodard* Court upheld the Authority's ability to consider silence as a factor for clemency review.[242] Unfortunately, this erosion of the traditional Fifth Amendment Self-Incrimination Clause may evolve to wreak havoc within the American system of criminal jurisprudence.

preme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

See id. (citing Griffin v. California, 380 U.S. 609 (1965).

[242] *See Woodard*, 118 S. Ct. at 1251.