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THE STATE, THE DEATH PENALTY, AND CARL JOHNSON†

DAVID R. DOW*

[E]verything begins in sentiment and assumption and finds its issue in political action and institutions. The converse is also true: just as sentiments become ideas, ideas eventually establish themselves as sentiments.

—Lionel Trilling[1]

Eight minutes after the State of Texas began to inject poison into his veins, Carl Johnson died. Like most every inmate executed by the State, Johnson coughed twice before he ceased all other movement. Unlike most other execution victims, Johnson's eyes never closed, but stared up lifelessly as the doctor checked his vital signs before declaring him dead at 12:24 a.m. Johnson thus became the ninety-ninth person executed by the State since Texas resumed the infliction of death in 1982. A hundred years from now, Harold Joe Lane will be the answer to a trivia question, for Lane was the State's one hundredth execution victim. Carl Johnson died a month too early; a hundred years from now Johnson will be what he already is: a historical footnote.

Johnson was my client. I began representing him in October 1988. I had previously declined several other requests to represent condemned inmates, but when I went to Texas's death row at the invitation of another lawyer to meet several inmates, Johnson was among those whom I met. My host told me that Johnson had an execution date scheduled for two weeks hence and that his lawyer had quit the day before. At the time, no petition for writ of habeas corpus had been filed. I thought it would be wrong for the State to execute a man who had no one representing him, so I agreed to handle the case. This

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* Professor of Law, University of Houston Law Center. I thank Steve Bright, Mark Dow, Irene Rosenberg and Paul Schwartz for extremely valuable advice, and I thank the University of Houston Law Foundation for financial support. I thank the Texas Resource Center, and especially Eden Harrington, for years of support.

[1] LIONEL TRILLING, THE LIBERAL IMAGINATION xi (1950).

essay describes my nearly seven-year experience of handling Johnson's appeal.

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In the last few years, the public, which has supported the death penalty by significant margins for a generation, has become increasingly hostile to legal claims raised by convicted murderers.[2] This political sensibility has, regrettably, permeated the judicial sphere as well. Not only politicians but judges have grown weary of the law. Writing in the *New York Times*, for example, Judge Kozinski of the United States Court of Appeals for the Ninth Circuit expressed the view that lawyers handling death penalty appeals get rich and that far too many appeals get filed.[3] Judge Jones of the Fifth Circuit has likewise expressed the view that appeals linger too long.[4] Even Supreme Court Justices, notably Justices Scalia and Thomas, have expressed exasperation at the appellate process.[5] They, like Judge Jones, have literally accused lawyers of abusing the system by prolonging appeals.[6]

I did not receive a penny for representing Johnson (nor have I been compensated for any of the work I have done on the two dozen other death penalty appeals with which I have assisted). I frankly do not know a single lawyer who has gotten rich representing murderers. Nevertheless, I do think it is fair to say that the universe of death penalty lawyers is like the universe of all other specialists: it includes some practitioners who are unethical. So does the universe of tax lawyers, of law professors, of prosecutors and even the universe of federal judges. Ridding any profession of its unethical practitioners is a desirable goal. The problem, however, is that death penalty lawyers have been accused of being unethical simply because they are death penalty lawyers. My experience from having served as a volunteer lawyer in this domain for seven years is that the vast majority of specialists in this very specialized universe care deeply about the law and the integrity of our legal system. To be sure, and not the least bit

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[2] *See* William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment*, 22 AM. J. CRIM. L. 77 (1994).

[3] *See* Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21.

[4] Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. B.J. 850, 851 (1990).

[5] *See, e.g.*, Collins v. Byrd, 114 S. Ct. 1288 (1994) (Scalia, J., dissenting).

[6] In one vitriolic opinion, Judge Jones chastised a lawyer for "playing chicken" with the court by waiting until the eleventh hour to file the inmate's habeas petition. Bell v. Lynaugh, 858 F.2d 978, 986 (5th Cir. 1988) (Jones, J., concurring), *cert. denied*, 492 U.S. 925 (1989). Ironically, the lawyer's client, Walter Bell, subsequently obtained relief and a new trial, though he has since been sentenced to death once again.

surprisingly, the overwhelming majority of lawyers who handle death penalty appeals for a living are opposed to capital punishment (if not when they begin their careers, then certainly by the end of them). Yet they are therefore excoriated, in literally demonic rhetoric,[7] for taking advantage of a legal mechanism—habeas corpus appeal—to pursue a political goal: namely, abolition of the death penalty. In fact, that canard is unsupported by even the thinnest shred of evidence. What death penalty lawyers actually do is what lawyers are supposed to do: they represent their clients.

Those who criticize death penalty lawyers for abusing the legal process fall into two categories: those who know better, and those who do not. My aim in this essay is to speak to the latter group. I do so by describing the process of Carl Johnson's death penalty appeals and my representation of him. In certain respects, Johnson's case is unusual, yet in most regards it is fairly ordinary. That is one reason I have chosen to write about it rather than some other more exotic case. In addition, of the various cases I have worked on, Johnson's is the only one with which I have been involved from the first state habeas petition through the carrying out of the execution. My discussion is, at times, unavoidably doctrinal, but my larger aim is simply to show, through the case of Carl Johnson, how America goes about putting convicted murderers to death.

* * * * *

I'm not the sort of lawyer who takes a lot of notes.

—Joe Cannon, who represented Carl Johnson at trial[8]

At around the same time that I met Carl Johnson, I began teaching a seminar on substantive death penalty law. This seminar grew out of my federal jurisdiction course. Over the past decade, some of the most important cases in the area of habeas corpus have tended to be death penalty appeals,[9] and so through an interest in habeas corpus, I backed into an interest in substantive death penalty law. I mention this bit of autobiography to emphasize a salient point: I am not an abolitionist, and I did not start doing death penalty appeals out of some unequivocal opposition to capital punishment. Indeed, the first time I was asked

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[7] *See* Panel Discussion, *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1114–18 (1994).

[8] Paul Barrett, *On the Defense*, WALL ST. J., Sept. 7, 1994, at A6.

[9] *See, e.g.*, McFarland v. Scott, 114 S. Ct. 2568 (1994); Graham v. Collins, 113 S. Ct. 892 (1993); Herrera v. Collins, 113 S. Ct. 853 (1993); Sawyer v. Whitley, 505 U.S. 333 (1992); Coleman v. Thompson, 501 U.S. 722 (1991); Butler v. McKellar, 494 U.S. 407 (1990); Murray v. Giarratano,

to handle a death penalty appeal I answered by saying that I was uninterested because I supported the death penalty. The lawyer who had approached me emphasized that I should take the case anyway because the only people who get executed are those who are poor. The solution to that problem, I said at the time, would be to execute more rich people.

The transcript of the Johnson case opened my eyes to a phenomenon to which I suspect the O.J. Simpson trial has opened millions more: America has two justice systems, one for wealthy defendants, another for the poor. Wealth matters because, in many cases, trial outcomes depend less on what really happened than on an advocate's skill. It is a chilling irony that the public's sudden attention to this obvious fact has been caused not by publicity surrounding the cases of those defendants who have been wrongfully convicted but, instead, by cases where the public perceives that a defendant has been wrongfully acquitted.[10] Of course, the former phenomenon is far more injurious to our justice system and, in truth, far more common.

Data unmistakably indicates how crucial the lawyer's role is. In the area of death penalty prosecutions, lawyer skill is the single most important factor in determining whether a defendant is sentenced to death rather than life.[11] The significance of lawyer skill is equally apparent in the criminal context generally.[12] For example, in recent years, in Texas, criminal defendants who can afford to retain private counsel are acquitted 14.4% of the time, whereas indigent defendants who rely on court-appointed lawyers are acquitted only 5.4% of the time. Similarly, only 8.3% of defendants who retain counsel receive prison time, as compared to 25.4% of defendants who require appointed lawyers.[13]

In Carl Johnson's case, the ineptitude of the lawyer who represented him jumps off the printed page. During long periods of jury voir dire, while the State was asking questions of individual jurors, the transcripts give one the impression that Johnson's lawyer was not even present in the courtroom. Upon investigation, it turned out that he

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492 U.S. 1 (1989). Perhaps the most important habeas case of the last decade, however, was a non-death penalty case, Teague v. Lane, 489 U.S. 288 (1989), the essential holding of which was quickly applied to death penalty appeals in Penry v. Lynaugh, 492 U.S. 302, 313 (1989).

[10] Both the Simpson trial and the trial of the Menendez brothers in California have contributed to the public interest. *See* Letter from David R. Dow, *Trial by Jury*, COMMENTARY, July 1994, at 6–7 (responding to Walter Berns, *Getting Away with Murder*, COMMENTARY, Apr. 1994, at 25).

[11] David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 26–27 (1991).

[12] *See* Mark Ballard, *Gideon's Broken Promise*, TEX. LAW., Aug. 28, 1995, at 1.

[13] *Id.*

was in fact present; it's just that he was asleep. That is not to say that an awake lawyer would necessarily have done a better job or obtained a different result. It is just to say that Johnson's lawyer was asleep.[14]

Johnson did have a second lawyer, a tyro less than a year out of law school who had never previously tried a capital case. He did not fall asleep. His burden was not incompetence but inexperience.

The mere fact that Johnson's chief lawyer slept during portions of Johnson's trial is not necessarily of any legal moment. An indigent capital defendant has a constitutional right to counsel. That right has been generously construed to mean a right to effective counsel, but the test used to determine effectiveness is not especially rigorous. A defendant who challenges the competency of his lawyer must prove that the lawyer's performance fell below a certain standard and that but for the lawyer's error(s), there is a reasonable probability that the outcome of the trial would have been different.[15] The standard is onerous and is rarely satisfied. Lawyers who show up at trial drunk, who have sexual affairs with the spouse of the defendant they represent, who go through entire trials without raising even a single objection, who file one-page appellate briefs from city drunk tanks have all been deemed constitutionally competent.[16]

* * * * *

And I was livin' high until the fatal day
a lawyer proved I wasn't born'd I was only hatched.
. . . .
I'll never get out of this world alive.

—Hank Williams[17]

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[14] I should add that no one disputes that the lawyer in fact dozed off on several occasions. When Johnson first told me that his lawyer had fallen asleep, I took his comment with the usual large grain of salt with which I take many reports from inmates. But all it took was a phone call to the co-counsel to confirm that the story was indeed true. In a later case, a trial court deemed this lawyer constitutionally ineffective, but the Court of Criminal Appeals rejected that court's conclusion. *See Ex parte* Burdine, 901 S.W.2d 456, 457–58 (Tex. Ct. App.) (Maloney, J., dissenting) (Judge Baird and Judge Overstreet joined in the opinion), *cert. denied*, 115 S. Ct. 2256 (1995).

[15] Strickland v. Washington, 466 U.S. 668, 688, 691–92 (1984).

[16] For a truly harrowing discussion of endemic ineptitude in representation of indigent capital defendants, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994). In the last six years I have worked on perhaps twenty different death penalty appeals. All but three of the clients have been executed. Of the three, I continue to work on only one of the cases; it is a case from West Texas involving torture to coerce a confession. That client, who is best served by remaining nameless at this point, will probably one day walk out of prison. Though I have seen the work of what are surely some of the worst lawyers in America, I have never been involved in a case where any court at any level ruled that the defendant's lawyer was constitutionally ineffective.

[17] HANK WILLIAMS, *I'll Never Get Out of this World Alive*, *on* THE ORIGINAL SINGLES COLLECTION (PolyGram Records 1990).

Johnson was tried in 1979. He had left the army, returned to Houston with a heroin habit, and moved back into the bleak inner city neighborhood where he grew up. On a day in October of 1978, a friend of his named Carl Baltimore proposed that he and Johnson rob a small grocery store, the Wayne's Food Market, to get cash to buy drugs. Johnson agreed to the plan but said he had no weapon. Baltimore provided him with one, a .38 revolver. They entered the Wayne's Food Market together. Baltimore held a gun to the owner's head—then the details get murky. Johnson said that an elderly security guard named Ed Thompson started firing and that he fired back in self-defense. No one contradicted his version of events, but only Johnson himself knew whether it was really true. Thompson, who was nearly seventy-five years old at the time, was shot in the head and killed. Johnson and Baltimore were arrested several days later.

At the time that he was arrested and charged with capital murder, Johnson had been arrested once before. He was arrested and convicted for unlawful possession of a weapon (an offense for which half the population of Houston could be arrested at any given moment). When he was arrested for the robbery-murder at the Wayne's Food Market, Johnson made the crucial mistake of proclaiming his innocence. That gave Baltimore an opportunity to roll over first, which he did. He pleaded guilty in exchange for a forty-year sentence, of which he served eight before being paroled.

Johnson, who was indigent, had two lawyers appointed to represent him. One had been out of law school for not even a year. He had never tried a capital case. The other had tried many capital cases. Every single one of his clients had ended up on death row. Indeed, at one point in the early 1990s, around 1 in 5 members of death row whose cases had come out of Harris County had been represented by a single lawyer: the one Johnson got.[18]

The lawyer did as bad a job as one can imagine. In addition to sleeping during jury selection and portions of the testimony itself, he neglected to interview witnesses prior to putting them on the stand, which led to the entertaining spectacle of his not knowing in advance what his own witnesses planned to say. Although Johnson had given a confession, Johnson's lawyer put on a defense urging that Johnson was innocent. Johnson was quickly convicted.

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[18] The lawyer is described in Barrett, *supra* note 8. The lawyer, since representing Johnson, has seen two of his clients escape death row, though it is not clear whether this was because of his actions or the State's decision.

Capital murder trials in Texas proceed in two stages. At the first stage the jury determines whether the defendant committed the act which the State accuses him of having committed. At the second the jury assesses punishment. It does so by answering "special issues." At the time of Johnson's trial, the first special issue inquired into whether the defendant's actions had been deliberate; the second inquired into whether the defendant would probably commit violent acts in the future. (A third question was not asked of the jury because Johnson's lawyer did not request that the judge issue it; if the third question had been asked, the jury would have been called upon to determine whether Johnson's decision to fire his weapon was a reasonable response to provocation.) Affirmative answers to the two special issues result in automatic imposition of a death sentence.[19]

At the punishment phase of the trial Johnson's lawyer called three witnesses. One, Johnson's father, testified that he had abandoned Carl at an early age. A second, Johnson's former common-law wife, testified that he was basically nonviolent. Only the third witness was unrelated to Johnson; he was Reverend Shelvy Brown, the minister of a neighborhood Baptist church, who knew Johnson and his family. He had approached Johnson's lawyer about testifying in Johnson's behalf, and Johnson's lawyer had the good sense not to turn him away. The essence of what Reverend Brown had to say was that Johnson's character was essentially good, that his recent attraction to violence was aberrational rather than deeply rooted, and that he could list a variety of good deeds Johnson had done in the community and for his family.

For technical reasons which were probably ill-founded legally,[20] the State objected to Brown's testimony. Johnson's lawyer, for unknown reasons, did not fight the State's objection. The trial judge instructed the jury to disregard the Reverend's testimony.

During its deliberations, the jury sent the trial judge a note. It said: "Can we consider rehabilitation in determining the answer to the second charge [i.e., the one concerning whether Johnson would be

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[19] Following the Supreme Court's decision in Penry v. Lynaugh, 492 U.S. 302 (1989), the Texas statute was changed. The jury still determines whether the defendant acted deliberately and whether he will be dangerous, but if the jury answers affirmatively, then it must determine whether, based on all the mitigating evidence, the defendant should be sentenced to death or life in prison. *See* TEX. CRIM. PROC. CODE ANN. art. 37.071 §§ 2(b), 2(e) (West 1994). Johnson's jury did not answer this third question.

[20] The ruling probably was ill-founded legally, among other reasons, because even if state evidentiary rules supported the exclusion, which Johnson argued was not the case, the Constitution clearly requires that such testimony be admissible in a capital case. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Green v. Georgia, 442 U.S. 95, 97 (1979); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

dangerous in the future]?"[21] The trial judge should have said, "Yes, of course you can." Had the judge made clear to the jury that it could take Johnson's rehabilitative potential into account, the jury might have figured out that Johnson's prospects for rehabilitation could support a negative answer to the question concerning his future dangerousness, which would have translated into a life sentence rather than lethal injection. But instead the trial judge said, neutrally, "I can only refer you to the evidence you have heard and the charge of the court."[22] Johnson's lawyer, for unknown reasons, did not complain at the time about that answer.

The United States Supreme Court's view has long been that rehabilitation is patently relevant to the determination of who should receive the death penalty,[23] and the Court has viewed the Texas question concerning future dangerousness as allowing for consideration of rehabilitation potential.[24] The problem, of course, is that the leeway which special issue number two affords to jurors with respect to taking a defendant's rehabilitation potential into account is not always evident to the jurors themselves, as was clearly the case with Johnson's jury. Simply put, a jury that knows it can take rehabilitation potential into account does not ask a trial judge whether it may do so.

The jury answered both special issues affirmatively, so Johnson automatically received the death penalty. A new lawyer was appointed to file a direct appeal. The appellate brief was around twenty pages long, which is rather short. It raised fewer than ten issues, even though at least twice that number were available. The Texas Court of Criminal Appeals, the highest court for criminal matters in the State, voted to affirm Johnson's conviction.[25] In spite of the thinness of the appellate brief, two judges on that court nevertheless were persuaded that Johnson's conviction was problematic, and they voted to grant him a new trial.[26]

Johnson's appellate lawyer did not ask the United States Supreme Court to review the case, so Johnson's case became final on May 10, 1981.[27] The trial court set Johnson's execution for July 28, 1982.

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[21] *See* Johnson's Petition for Writ of Habeas Corpus, Exhibit 17, December 23, 1993, filed in the United States District Court for the Southern District of Texas.

[22] *Id.*

[23] Jurek v. Texas, 428 U.S. 262, 275–76 (1976).

[24] *Id.* at 273; *see also* Franklin v. Lynaugh, 487 U.S. 164, 178 (1988).

[25] Johnson v. State, 629 S.W.2d 731, 737–40 (Tex. Crim. App. 1981) (Clinton, J., dissenting). Johnson's motion for a rehearing was denied on February 10, 1982. *Id.* at 731.

[26] *Id.*

[27] Rehearing was denied in Johnson's direct appeal on February 10, 1982. The conviction became final 90 days later.

Once a criminal conviction is final, the legal device available to attack it, or the sentence, is the petition for writ of habeas corpus.[28] Under federal law, a habeas petitioner cannot proceed directly to federal court but must first give state courts an opportunity to correct any legal errors. This aspect of habeas corpus procedure is called the exhaustion requirement, referring to the need to exhaust state avenues for relief before pursuing a federal remedy.[29] It is not an arcane element of habeas corpus law. Quite the contrary is true; it is a principle that is deeply rooted and firmly established in modern law.

Nevertheless, the same lawyer who filed Johnson's direct appeal filed a petition for writ of habeas corpus in federal district court in July 1982, even though he had not first proceeded through the state courts. The federal court granted a stay of execution and then, nearly a year later, in May 1983, realized that Johnson had not exhausted his state court remedies. At that point the federal court dismissed the habeas petition without prejudice (meaning that the dismissal was not a comment on the merits of the petition's substantive arguments). For reasons not known, however, neither Johnson nor the lawyer who filed the federal habeas petition was notified of the dismissal until 1987. During the intervening four years, the State took no action. It took no steps to notify Johnson that his execution would be set unless he pursued his appeal. Finally, the State set Johnson's execution for October 10, 1988. In late September his lawyer resigned. I went to the prison on October 1, met Johnson, and was asked that afternoon whether I would represent him. On October 7, I asked the state court for an emergency stay so I could study the file and file a habeas petition in state courts. The stay motion was granted.

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The following summer, the summer of 1989, was a volatile period in Texas death penalty law. In July, the Supreme Court of the United States decided *Penry v. Lynaugh*, which involved a challenge to the Texas statute by a retarded death row inmate who asserted that the

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[28] *See generally* 28 U.S.C. § 2254 (1984).

[29] The exhaustion requirement is now codified as part of the procedural rules pertaining to habeas corpus procedures in the federal courts. *See id.* § 2254(b). The requirement first appeared in case law as early as 1886. *See* Ex Parte Royall, 117 U.S. 241, 252 (1886). The doctrine is now firmly established. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 257 (1986); Rose v. Lundy, 455 U.S. 509, 515 (1982). The scholarship pertaining to exhaustion is legion. *See generally* 1 JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 37–56 (1988); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

Texas death penalty law did not give the sentencing jury the opportunity to give mitigating effect to evidence of child abuse and mental retardation, as the Constitution requires.[30] The Supreme Court agreed with Penry, but what was not immediately clear was how far reaching the impact of the *Penry* decision would be. The language of the opinion itself appeared broad indeed, and lawyers representing death row inmates in Texas almost uniformly concluded that their cases were helped by *Penry*. Moreover, the Texas Court of Criminal Appeals subsequently determined that an inmate could raise a claim under *Penry* even if it had not been preserved procedurally under state law.[31]

Johnson's case remained in the state courts for nearly six years, as the law pertaining to so-called *Penry* claims percolated. During those six years, several decisions amplifying the *Penry* holding were handed down, by both the United States Supreme Court as well as the Fifth Circuit Court of Appeals. As the rule of *Penry* was increasingly refined (some would say eviscerated), Johnson filed briefs in the state court emphasizing the significance of these developments to his own case.

While Johnson's case was simmering in state court, the federal landscape was changing dramatically. In addition to the ineluctable narrowing of the *Penry* holding, the Fifth Circuit, the federal circuit with jurisdiction over Johnson's case, was becoming exasperated with death penalty appeals. Throughout the 1980s, a death row inmate pursuing federal habeas corpus appeals could count on having an opportunity at some point to introduce evidence that his trial lawyer had been ineffective. However, in the 1989 case of *McCoy v. Lynaugh*,[32] a capital defendant who had never received an evidentiary hearing as part of his first federal habeas petition was speedily executed during his first trip through the courts. That procedure had not previously occurred. The *McCoy* case signalled that death row inmates would no longer be assured an opportunity at which they could present live evidence establishing that their representation had been ineffective or that any other constitutional errors vitiated their conviction or sentence.

Similarly, throughout the 1980s, the Fifth Circuit granted a death row petitioner the opportunity to have oral argument before that court whenever it determined that the petitioner was raising an argument

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[30] 492 U.S. 302 (1989). The notion that the Constitution requires the sentencer in assessing the sentence to take into account all mitigating evidence proffered by the capital defendant was delineated in Lockett v. Ohio, 438 U.S. 586 (1978).

[31] Selvage v. Collins, 816 S.W.2d 390, 392 (Tex. Crim. App. 1991).

[32] 874 F.2d 954, 956 (5th Cir. 1989).

upon which reasonable legal minds could disagree. In the case of death row inmate Johnny James, however, the Fifth Circuit, for the first time in its history, issued a certificate of probable cause to appeal—meaning that James' case presented arguable issues—but nonetheless then disposed of the case on the summary calendar without providing James an opportunity for oral argument.[33] In short, the Fifth Circuit had grown tired of death penalty cases.

Finally, in June of 1993, the state trial court denied Johnson relief and set his execution for January 4, 1994. Six months later, on December 15, 1993, the Court of Criminal Appeals adopted the trial court's determination in an unpublished order. The case was finally ripe for federal court review. The order of subsequent events was as follows:

1. Johnson filed a federal habeas petition (his first, excluding the petition from 1982 which should never have been filed in federal court in the first place) on December 23, 1993, barely one week after the Court of Criminal Appeals denied him relief and a week and a half before his scheduled execution.

2. On January 3, a day before the execution, the federal district court granted a stay.

3. Over nine months later, in September 1994, the district court ruled against Johnson. Johnson appealed to the Fifth Circuit.

4. In March, the Fifth Circuit set a briefing schedule and ordered that Johnson's brief be filed in May 1995.

5. Following the issuance of the Fifth Circuit's briefing schedule, the State ordered that Johnson be executed on September 19, 1995.

6. In May, Johnson filed his brief in the Fifth Circuit, as ordered. In July, after receiving an extension, the State filed its answer.

7. On September 11, the Fifth Circuit had still not decided the case, so Johnson filed a stay motion. (The execution was scheduled for September 19.)

8. The next day, on September 12, less than one week before his scheduled execution, the Fifth Circuit ruled against Johnson.

9. Also on September 12, the clerk of the United States Supreme Court called to ask whether I would be filing any appeals with that Court. I said I would file a petition seeking a writ of certiorari along with a stay application on Sunday the 17th.

10. At 6:00 p.m. on Sunday the 17th, a three issue petition for writ of certiorari was sent by facsimile to the Court. Johnson's execution was scheduled to occur in eighteen hours.

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[33] James v. Collins, 987 F.2d 1116 (5th Cir.), *cert. denied*, 509 U.S. 947 (1993). I should add that I was James' co-counsel.

There had been some confusion as to when exactly Johnson's execution would transpire because the Texas legislature had recently amended the law pertaining to the time of carrying out executions.[34] Under the old statute, executions occurred between midnight and dawn. In one famous case, the appeal to the Supreme Court literally took all night, and by the time the Court ruled against the habeas petitioner the sun was rising in central Texas, and so the inmate, who had been strapped to the gurney since midnight, was taken back to his cell, to be executed six months later.[35] In Johnson's case, prison officials originally said that he would be executed under the new law, which provides that executions occur after 6 PM on the date of the execution (therefore meaning that they occur between 6 and midnight). That would have meant that Johnson would be injected after 6 PM on Tuesday the 19th. But on Wednesday, September 13, when the clerk of the Supreme Court called me to ask me when and if I planned to file a stay application in the Supreme Court, she informed me that prison officials had determined that Johnson would be executed under the old statute, meaning eighteen hours earlier. In the meantime, guards on death row had told Johnson that he was going to be executed at 6 PM on Monday the 18th. Nobody was exactly sure when Johnson would die.

The stay application and certiorari petition which were filed with the Court on Sunday the 17th lacked an in forma pauperis ("IFP") affidavit. Federal courts waive the filing fees for indigent litigants, but receiving a waiver requires one to file an IFP affidavit attesting to one's indigence.[36] To file the affidavit, I needed to get Carl's notarized signature.

The day of the scheduled execution was a beautiful Texas summer day. Huntsville, where the death row prison is located, lies about seventy miles north-northwest of Houston. The city is nestled next to the East Fork of the Trinity River, in a fertile area just to the east of the mouth of the San Jacinto River. Sam Houston camped nearby on his way south to fight in Texas's war of independence, and the drive up from Houston takes one by the Sam Houston National Forest.

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[34] *See* TEX. CODE. CRIM. PROC. art. 43.14 (West 1995).

[35] As it became clear that the Supreme Court would not rule before sunrise, a Judge on the Texas Court of Criminal Appeals, Sam Houston Clinton, issued a stay. Herrera was eventually executed after the Supreme Court reached the merits of his case in Herrera v. Collins, 113 S. Ct. 853 (1993); but he had come within moments of death a year earlier, when the Court had denied him temporary relief. *See* Herrera v. Texas, 502 U.S. 1085 (1992).

[36] Sup. Ct. R. 39.

Every time I drive to the prison I am awed by the land's sheer physical beauty.

I drove into Huntsville at around 1 PM, stopped by the motel at which I was registered to see if any messages had arrived, then drove out to the prison. I parked my truck in a parking lot full of other pickups. My shotgun resting in the gun rack visible through the truck's rear window announced that my vehicle belonged there. I approached the guard tower and told the guard my name and who I was there to see. Then I waited. I looked at my watch, and then at the guard, and then again at my watch. After I had stood outside the razor-wire topped fence for eight minutes and forty-five seconds under the scorching Texas sun, the prison guard took a break from her crossword puzzle to unlock the gate and let me into the prison.

There are no contact visits for death row inmates in Texas. A wall, with thick, wire-laced bullet proof glass, separates the inmates from their visitors. When I arrived at the visiting area, Carl's wife Barbara was with him. I was accompanied by another lawyer who was also working with me on Carl's case. The four of us made small talk and discussed details, such as Carl's wishes concerning the disposal of his remains. In short, I forgot about the IFP affidavit.

Finally at three o'clock, while I was talking to Carl and his wife, a guard came up to me and passed along a message that had been left by the clerk at the Supreme Court asking where the IFP affidavit was. I asked prison officials to send a notary to witness Carl's signature. Forty-six minutes later, a notary arrived. Regulations require death row inmates to have their hands shackled behind them when removed from the cages they sit in during visits, but Carl needed to sign an affidavit. The prison guard, exercising her discretion, ignored the regulation and agreed to permit Carl's hands to be cuffed in front. He signed the affidavit and a guard slid it to me through a slot in the wall. I drove back into town to fax it to the Supreme Court. But coming over the fax machine when I arrived at my hotel was the State of Texas's response to the papers I had filed in the Supreme Court the previous day. The hotel could not send my fax until it had finished receiving the other one from the State, and when I arrived at the hotel page two of a thirty page document was being received. I called the clerk at the Court and explained my dilemma and promised that the IFP affidavit would arrive momentarily. Finally, I called the person who was sending me the State's response and asked that the transmission be halted. We were thus able to fax the IFP affidavit to the Supreme Court at five o'clock. I called the clerk to make sure it had arrived, and she told me

that it had and that the Court had denied Carl's appeal by a vote of 7–2, with Justices Stevens and Ginsburg voting to grant the stay. Four votes are required to grant certiorari, but five are needed for a stay. We had not come close.

* * * * *

Johnson's petition before the Supreme Court raised three issues. One dealt with whether the jury should have been answered forthrightly when it inquired about the possibility of rehabilitation.[37] A second dealt with whether it was a reversible mistake for the trial court to have excluded the testimony of Reverend Brown.[38] The third dealt with a timing issue, which I will explain a bit more momentarily.

In responsive papers filed by the State of Texas in the Supreme Court responding to Johnson's claim that the jury should have been told that it could consider Johnson's prospects for rehabilitation, the State argued that Johnson's lawyer did not object to the trial judge's answer to the jury's note at time of trial. (It is not clear from the transcript whether Johnson's lawyer was napping when the jury's note was received; however, the transcript does not record that his lawyer said anything at all at this critical moment.) Likewise, in response to Johnson's claim that the trial court's exclusion of Reverend Brown's testimony was reversible error, the State again argued that Johnson's lawyer did not object to the exclusion at trial.

The timing issue raised by Johnson in the Supreme Court (i.e., the third issue in the certiorari petition) concerned the decision by the State to set an execution date even while the case was pending in the Fifth Circuit. Although the Fifth Circuit has been notoriously inhospitable to claims raised by death row inmates over the past half decade,[39] and might well have decided against Johnson even if that court had given his claims thoughtful attention, Johnson argued in the Supreme Court that the Fifth Circuit gave hurried consideration to his federal claims as a result of the State's decision to set an execution date while the court was in the midst of analyzing the legal issues.[40]

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[37] I argued that this issue raised concerns like those present in Simmons v. South Carolina, 114 S. Ct. 2187 (1994), in which the Court held that a capital defendant's due process rights were abridged when a jury was confused about his eligibility for parole under a life sentence.

[38] Technically, I argued that the Court should determine whether a so-called *Hitchcock* error can ever be deemed harmless or whether it requires per se reversal. In *Hitchcock v. Dugger*, the Court invalidated a Florida death sentence because the sentencer felt precluded by Florida law from giving mitigating effect to any factors other than those identified in the statute. 481 U.S. 393, 398 (1987).

[39] *See supra* note 4 and accompanying text.

[40] My argument was that the State had interfered with Johnson's right of access to the federal

Recall that while Johnson's appeal was pending in the Fifth Circuit, the State had set his execution date. Indeed, Judges Reavley and Jones of the Fifth Circuit have both criticized the State of Texas for using execution dates to drive cases hurriedly through the federal courts.[41] Texas, as have other states, has long used the setting of dates as an impetus to motivate lawyers to file their habeas appeals,[42] but the use of an execution date to impel court action is obviously a different matter, one that raises a distinct set of concerns, which is precisely why Judges Reavley and Jones have complained about it.

It is impossible to tell whether Johnson would have fared any better in the Fifth Circuit had it considered his case with greater care, or even whether the setting of the execution date hurried the court's analysis. But one thing is clear: the Fifth Circuit's opinion includes at least one quite inexplicable error—well, perhaps not truly inexplicable, for it readily partakes of an error caused by haste.

In his appeal from the federal district court's ruling, Johnson had raised the question of the Fifth Circuit's jurisdiction. In the portion of his brief detailing the case's procedural history, Johnson pointed out that his notice of appeal was not filed until February 21, 1995, even though the district court had denied him relief on September 22, 1994. In the following footnote, I questioned the court's jurisdiction:

> Petitioner's Notice of Appeal was timely filed notwithstanding the passage of nearly five months between Judge Harmon's order and the posting of the notice of appeal. In fact, in view of the various filings which followed Judge Harmon's September 1994 Order, Petitioner has some question as to whether this Court presently has jurisdiction.
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> Judge Harmon's September 1994 order granted Respondent's Motion for Summary Judgment and declined to issue a certificate of probable cause, yet her order also preserved the stay of execution then in effect contingent on Johnson's perfecting an appeal to this Court. The State desired to dis-

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courts for the purpose of obtaining habeas review. The right of access has its roots in *Ex parte* Hull, 312 U.S. 546 (1941), and has been explicated in Wolff v. McDonnell, 418 U.S. 539 (1974), and Bounds v. Smith, 430 U.S. 817, 821–22 (1977). I argued that the right is abridged when a state interferes with meaningful access by holding a federal court's feet to the fire to expedite its review.

[41] *See* Mark Ballard, *Death Penalty System Ridiculed: Fifth Circuit Judge Blames Process, Not Resource Center, for Delays*, TEX. LAW., May 11, 1992, at 4 (quoting Judge Reavley's description of the Texas death penalty system as "vaudeville"); Jones, *supra* note 4.

[42] Under the new Texas post-conviction statute, this use of an execution date as a spur will not be necessary, as the statute provides time limitations for filing collateral appeals. *See* TEX.

> solve the stay and therefore filed a Rule 59(e) motion in early October 1994. The filing of that motion had the effect of making the summary judgment order not final (and hence not appealable to this Court). . . . Petitioner filed a response to the Rule 59(e) motion on October 6, 1994.
>
> On January 13, 1995, with the Rule 59(e) motion still pending, the State filed an additional motion, requesting that Judge Harmon expedite her ruling on the Rule 59(e) motion. Two weeks later, on January 27, 1995, Judge Harmon granted the State's motion to expedite and vacated the stay of execution *but did not rule on the Rule 59(e) motion itself.* Nevertheless, not wanting to risk defaulting his appeal, Petitioner filed a Notice of Appeal despite his concern that the district court has yet to enter a final judgment in this matter.
>
> Accordingly, this Court may well lack subject matter jurisdiction at this time.[43]

The first sentence says that, despite appearances to the contrary, Johnson's notice of appeal was filed on time; the last sentence questions whether the court of appeals had jurisdiction over the case.

One might say that this argument was just picayune quibbling. Perhaps. But whatever else one might say about it, the argument itself does not seem terribly subtle or arcane. Still the Fifth Circuit apparently misunderstood it, for this is what the court said in its opinion denying Johnson relief: "Petitioner questions whether the notice of appeal, filed February 22, 1995, is timely in view of the various filings following the district court's order of September 22, 1994 granting the state's motion for summary judgment. . . . [T]he notice of appeal is timely."[44] Obviously, it would have been most extraordinary for Johnson to call into question the timeliness of his own notice of appeal, and it is difficult to figure out how the Fifth Circuit read the footnote in Johnson's brief to be raising such a question. Yet it did.

In addition, it is fair to say that the Fifth Circuit's opinion essentially parroted the conclusions of the district court without responding at all in any direct fashion to the arguments Johnson directed against the lower court's analysis. Most strikingly of all, of course, is the timing:

CRIM. PROC. CODE ANN. art. 11.071 §§ 4(a)–(b) (West 1996). The statutory procedure, however, has not yet been subjected to judicial scrutiny.

[43] *See* Application for Certificate of Probable Cause to Appeal and Brief in Support; and Petition for Writ of Habeas Corpus at 4–5 n.2 (citation omitted).

[44] Johnson v. Scott, No. 95–20117, unpublished Fifth Circuit opinion, filed 12 September 1995. The author maintains a copy of the opinion.

after having had both sides' briefs for over two months, and after having had Johnson's brief for nearly four months, the Fifth Circuit issued a mistake-riddled, unresponsive opinion less than a week before a scheduled execution. Under these circumstances, it is difficult to resist the conclusion that the Fifth Circuit was cranking it out at the last minute in response to the impending date.

In response to Johnson's argument in the petition for certiorari that the State had used an execution date to hold a federal court's feet to the fire, the State responded that Johnson had not made that point in the court below and was therefore barred from raising it in a certiorari petition. The State also argued that the Fifth Circuit was not obligated to pay serious attention to most of Johnson's claims because they had been deemed procedurally barred. The United States Supreme Court, of course, does not provide reasons when it denies a stay or a petition for certiorari, but its disposition of Johnson's case is consistent with the view that his claims were defaulted.

* * * * *

> *When a life is at stake, the fact that one or a few claims may "fall through the cracks" and reach the merits is a small price to pay for utter and scrupulous fairness to an accused under sentence of death.*
>
> —Judge Jerre Williams, concurring in *McCoy v. Lynaugh*[45]

Carl Johnson committed a horrible act; there is no question about it. But after he did so, the State's ignominy began. First it provided Johnson with a somnambulant lawyer, and then both the state and federal courts decided that the merits of Johnson's constitutional claims could not be reached because his sleeping lawyer had not raised them earlier.[46] So if a death penalty advocate were to argue that

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[45] 874 F.2d 954, 968 (5th Cir. 1989) (Williams, J., concurring).

[46] In *Lockhart v. Fretwell*, the Court determined that a lawyer's failure to raise certain objections did not constitute prejudice under *Strickland*. 113 S. Ct. 838, 841 (1993). Johnson argued that the appropriate standard for determining prejudice in his case was the test the Court identified in Sawyer v. Whitley, 505 U.S. 333 (1992), though it must be added that the proper application of that standard to the Texas statute is unclear. Under *Sawyer*, a death row inmate establishes prejudice if he can show that but for the error he would probably not have been sentenced to death. Because the Texas statute provides that the defendant will be sentenced to life if the jury cannot agree on an answer to either of the first two special issues, Tex. Crim. Proc. Code Ann. art. 37.071 § 2(g) (West 1994), it seems reasonable to conclude that a petitioner satisfies the *Sawyer* standard if he can show that a single juror would have refused to answer either special issue affirmatively. David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151, 182 n.50 (1994).

Johnson was treated much better than was his victim, Ed Thompson, that person might be right,[47] but that hardly means that Johnson was treated all that well.

There is little left to say about the morality of capital punishment. The deterrence data remain indecisive,[48] the arguments flowing from retribution have not changed in millennia, and there is no question but that a capital punishment regime will on occasion execute an innocent man. Different people reach different conclusions from these facts. Still, three points do, I think, bear emphasis, for they have been largely obscured in the passion of recent death penalty debate.

The first is that the observation that the State treats the murderer better than the murderer treated his victim is an observation which, even if true, is of no ethical moment. Who among us would accept the moral notion—or even the constitutional notion—that the State's action is morally and legally acceptable as long as the degree of pain it inflicts on the criminal is somewhat below the degree that the criminal inflicted on his victim? The simple fact is that whether the State ought to kill is a logically distinct moral question. It is a question that has nothing to do with the pain inflicted by a particular murderer.

Second, the federal courts in the domain of death penalty appeals have become an abomination because they have ceased caring about the law. The courts of appeals hide their shameful opinions by not publishing them,[49] and the Supreme Court has never announced why it declines to review cases. Once upon a time Supreme Court Justices endeavored to separate their political inclinations from their analysis of Eighth Amendment doctrinal claims. Justice Powell, for example, often voted for the state in death penalty cases even though he averred that he would vote against a death penalty were he a member of a state legislature. Likewise, before he reached the conclusion that the infliction of the death penalty was unavoidably arbitrary, and therefore

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[47] They also might not be. For instance, polls routinely suggest that most Americans would not want to know in advance the date and time they will die.

[48] That is, there is no reliable evidence that capital punishment generally deters others from committing capital crimes. For further discussion of this issue, see MICHAEL L. RADELET & MARGARET VANDIVER, CAPITAL PUNISHMENT IN AMERICA (1988).

[49] Footnote one of the Fifth Circuit's opinion in Johnson's case included this familiar boilerplate:

> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Johnson v. Scott, No. 95–20117, unpublished Fifth Circuit opinion, filed 12 September 1995. The author maintains a copy of the opinion.

unconstitutional,[50] Justice Blackmun often voted in favor of the state notwithstanding his personal opposition to the death penalty.[51]

Regrettably, the discipline that it takes to reach sound doctrinal conclusions without having one's analysis distorted by political passion has evaporated. Judges and Justices routinely express impatience, anger and frustration with lawyers representing condemned inmates.[52] During the oral argument of a recent Texas death penalty case, for instance, Justice Scalia chastised the petitioner's lawyer for waiting until five days before the execution before seeking a stay. The lawyer answered that she had sought the stay the day after the state proceedings concluded—in other words, as soon as she was legally entitled to. Justice Scalia snapped: "Don't waste any more of your time . . . I just want you to know that I'm not happy with the performance of the Texas Resource Center [the since-defunded organization in Texas which had responsibility for locating representation for indigent death row inmates]."[53]

When judges themselves, appearing bloodthirsty, start to opine (much less believe) that the law—that is, the Constitution of the United States—is defective if it thwarts the intense desires of the states to execute convicted criminals, then the rule of law has become subordinate to crass, often base, political impulses. Judges ought not need be reminded what a Constitution is.

Finally, it bears mention that while the State is many things, one of those things is a teacher. Though it may be moral for the State at times to execute, it can never be moral for the State to execute when its own hands are deeply soiled. Biblical literalists may insist on exacting a life for a life, but surely biblical literalism cannot be deployed to defend a system which hands out inept lawyers to poor defendants and then executes those same defendants for their lawyers' failures.[54]

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[50] Callins v. Collins, 114 S. Ct. 1127, 1137 (1994) (Blackmun, J., dissenting).

[51] Indeed, in the 1976 cases which reinstated the death penalty in America, Justice Blackmun voted with then Justice Rehnquist in favor of sustaining each of the five challenged statutes. Justices Stewart, Powell and Stevens were the centrists responsible for the result that the mandatory death penalty statutes of North Carolina and Louisiana were stricken down whereas the statutes of Georgia, Texas and Florida survived. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[52] *See supra* note 4–6 and accompanying text.

[53] Panel Discussion, *supra* note 7, at 1111. The case was McFarland v. Scott, 114 S. Ct. 2568, 2574 (1994), which held, with Justice Scalia in dissent, that a capital defendant need not file a habeas petition in order to invoke his right to qualified representation and to establish a federal court's jurisdiction to grant a stay of execution.

[54] Moreover, biblical literalism does not in fact support the modern state's use of the death penalty. *See* Panel Discussion, *supra* note 7, at 1117–18.

Most generally of all, citizens learn from the State. If violence on television and in Hollywood movies desensitizes viewers to the effects of violence, it is difficult to see how the State's act of executing does not convey the message to the citizens—the *moral* message—that killing is an acceptable ethical solution to one's problems. If we as a society want to send that message, that is one thing; but it is important that we acknowledge that that is the message we are sending—and we should not be surprised when other citizens learn it.

* * * * *

There may be always a time of innocence.
There is never a place. Or if there is no time,
If it is not a thing of time, nor of place,

Existing in the idea of it, alone,
In the sense against calamity, it is not
Less real. For the oldest and coldest philosopher,

There is or may be a time of innocence
As pure principle. Its nature is its end,
That it should be, and yet not be, a thing

That pinches the pity of a pitiful man,
Like a book at evening beautiful but untrue,
Like a book on rising beautiful and true.

It is like a thing of ether that exists
Almost as predicate. But it exists,
It exists, it is visible, it is, it is.

—Wallace Stevens, *The Auroras of Autumn*[55]

When the clerk of the Court told me that Johnson's stay application had been denied, I called Carl to tell him that we had lost. He asked how it happened so fast. I explained that the Court did not actually need the IFP affidavit to decide the case, they just needed it before they would tell us what they had decided. He asked what the vote had been and I told him. "So we got two votes," he said. "That's pretty good. It's a lot better than being shut out." Then he thanked me.

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[55] WALLACE STEVENS, *The Auroras of Autumn*, *in* THE COLLECTED POEMS OF WALLACE STEVENS 418 (1985).

Ordinarily on the inmate's last day alive he gets to visit with friends and family until five o'clock.[56] Then guards take him from the Ellis I unit, where death row is, to the institution known locally as the Walls Unit, where the execution occurs. At four o'clock, prison officials told Carl's wife that Carl would be taken to the Walls at 4:15 instead of five. They did not tell her why. She decided not to watch the execution.

Carl wanted to be cremated. His wife Barbara took care of carrying out his wishes. But first Barbara arranged for a funeral home to recover the body so that there could be a viewing for his family the day following the execution. I asked Barbara why she insisted on having a viewing in a city where she and Carl had no friends or family. She did not meet or marry Carl until he had been convicted and sentenced to death. So—because death row inmates have no contact visits—she had never touched her husband, never kissed him or held his hand. The reason for the viewing, she told me, was that she wanted the opportunity to feel his skin. "I know I never got to touch him while he was still alive," she told me, "but I just wanted to touch him once, just this one time, even though he's dead."

[56] This schedule applied to the old statute, which set executions for after midnight. Inmates are now executed between 6 p.m. and midnight. *See supra* note 34 and accompanying text.