

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

Professor Stephen B. Bright
Yale Law School

Class One - Part One (Rector.pdf)

THE PROCESS OF IMPOSING DEATH

[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct. * * * [T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

- Justice Potter Stewart (joined by Powell and Stevens, JJ.), upholding the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 183, 184 (1976)

Capital punishment is at once the best and worst subject for legal rules. The state's decision to kill is so serious, and the cost of error so high, that we feel impelled to discipline the human power of the death sentence with rational legal rules. Yet a judge or jury's decision to kill is an intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision.

- Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305

When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

- *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)

Capital punishment is to the rest of the law as surrealism is to realism. It destroys the logic of the profession.

- Norman Mailer, *THE EXECUTIONER'S SONG* (1980)

Someday we will look back upon our criminal and penal process with the same horrified wonder as we now look back upon the Spanish Inquisition.

- Curtis Bok, Justice, Pennsylvania Supreme Court (1959-63), *STAR WORMWOOD* 50 (1959)

Arkansas v. Ricky Ray Rector

In 1980, Ricky Ray Rector, in the midst of a dispute over the charge for admission to a dance in Conway, Arkansas, pulled out a .38 pistol and started firing. The shots caused the death of Arthur Criswell, 33, who was hit in the forehead and throat, and wounded two other men. He ran from the scene and was at large for two days. Bob Martin, a Conway city policeman who knew the Rector family, went to the home of Rector's mother to arrest him. He was sitting in the parlor speaking to Mrs. Rector and Ricky's sister, Jose, and her son, Michael. Not long after Martin arrived at the home, Rector entered and shot and killed Martin. He then turned the gun on himself, firing into his head and causing severe damage to the front of his brain.

The District Attorney tried each incident separately. In the case involving the death of Officer Martin, the District Attorney sought the death penalty. The case presented the courts and the governor of Arkansas with a number of legal, political and moral issues due to Rector's mental condition.

The Arkansas trial court had to first determine whether Rector was competent to stand trial. The Supreme Court has held that due process prohibits the trial of a person who lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). Such a person is said to lack "competence," "capacity" or "fitness" for trial.

Arkansas has included this definition in slightly different wording in its statutes. Arkansas Code Annotated, § 5-2-302 provides:

Lack of fitness to proceed generally.

(a) No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried,

convicted, or sentenced for the commission of an offense so long as the incapacity endures.

Upon a motion by the defendant or if "there is reason to doubt the defendant's fitness to proceed," the trial court is to suspend the proceedings and order a mental health examination of the defendant by a forensic psychiatrist or forensic psychologist. The examination results in a report. If neither party contests the finding of the report, the court makes a competency determination on the basis of the report. If the report's finding is contested, the court holds a competency hearing. The court can also order further evaluation. See A.C.A. § 5-2-305 *et seq.*

If the court holds a hearing, either side may present evidence which may include the testimony of both expert and lay witnesses on whether the defendant has the ability to consult with his counsel with a reasonable degree of rational understanding and understands the proceedings against him. The Arkansas Supreme Court has held that because a defendant is ordinarily presumed to be mentally competent to stand trial, and the defendant has the burden of proof of establishing incompetence. *Bryant v. State*, 231 S.W.3d 91, 94 (Ark. 2006). Proof must be by a preponderance of the evidence.

A defendant who is found incompetent for trial will be committed to a mental institution until such time as he or she becomes competent. At that time, the defendant may be tried. However, the defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he or she will become competent. If that is not the case, the State must either institute civil commitment proceeding that would be required to commit indefinitely any citizen (*i.e.*, by showing that he is a danger to himself or others) or release the defendant. *Jackson v. Indiana*, 406 U.S. 715 (1972).

In Rector's case, the court found Rector competent after hearings in both cases.

Competency is not to be confused with sanity, which is about *responsibility* for a criminal act and the mental state of the accused *at the time of the offense*. Some states provide that offenders are not responsible for their acts if they were “insane” – as defined by the state – when they acted. Arkansas Code Ann. § 5-2-312 provides:

Mental disease as defense

(a)(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked capacity as a result of mental disease or defect to:

(A) Conform his or her conduct to the requirements of law; or

(B) Appreciate the criminality of his or her conduct.

* * *

(b) As used in the Arkansas Criminal Code, “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The defendant has the burden of proving insanity by a preponderance of the evidence. Sanity was not an issue in Rector’s cases because his mental disorder was caused by his self-inflicted wound after the murders. However, Rector’s mental condition was arguably a “mitigating factor” that could be considered by the jury in deciding whether to impose the death penalty in his case. But it could also be argued that it was not a mitigating factor because the injury to his brain occurred after the crime.

Rector’s condition was also an appropriate consideration for executive clemency. In Arkansas, the governor had the power to commute a sentence from death to life imprisonment.

Finally, a completely different issue is presented when a person with mental impairments is to be executed. The Supreme Court has held that the

Eighth Amendment prohibits the execution of one who is “insane.” *Ford v. Wainwright*, 477 U.S. 399 (1986). That has been defined as “those who are unaware of the punishment they are about to suffer and why they are to suffer it.”

**RICKY RECTOR
v.
STATE OF ARKANSAS**

Supreme Court of Arkansas
277 Ark. 17, 638 S.W.2d 672 (1982)

GEORGE ROSE SMITH, Justice.

Ricky Rector [seeks] * * * reversal in appealing from a verdict and judgment sentencing him to life imprisonment for the first-degree murder of Arthur Criswell.

* * * [T]rial counsel filed a pre-trial motion asking the court to find Rector mentally incompetent to stand trial as a result of a brain injury caused by Rector’s having shot himself some time after he killed Criswell. At the hearing on the motion the expert testimony was in conflict. * * * [The defense] witnesses testified that Rector’s brain injury caused retrograde amnesia, so that he could not remember either having shot himself or having committed the crime now on trial and other felonies at about the same time. Those witnesses considered Rector to be unable to understand the issues to be tried and to assist his counsel in his own defense. For the State the expert witnesses testified essentially to the contrary, with Dr. Hamed expressing the opinion that Rector was lying about his loss of memory, that he was competent to stand trial, and that he could cooperate with his counsel when he decided to do so. With the evidence hopelessly in conflict upon an issue of fact, it cannot be said that the trial judge’s conclusion is clearly erroneous. The trial judge apparently accepted the claim of amnesia, but he correctly pointed out that amnesia is not an adequate ground for holding a defendant incompetent to stand trial. * * *

* * *

RICKY RAY RECTOR
v.
STATE OF ARKANSAS

Supreme Court of Arkansas.
280 Ark. 385, 659 S.W.2d 168 (1983)

GEORGE ROSE SMITH, Justice.

Ricky Ray Rector was charged with capital murder in the shooting of Bob Martin, a Conway city policeman acting in the line of duty. * * * In a bifurcated trial the jury returned a verdict of guilty and imposed the death penalty. We affirm the judgment.

* * *

A[n] * * * argument for reversal is that the trial judge should have found Rector incompetent to stand trial against the death penalty. A parallel question of competency was decided adversely to Rector on his earlier appeal from his conviction for the murder of Arthur Criswell. * * * The proof in the two cases is quite similar, although in this case a witness for the State, Dr. Hamed, thought that Rector's condition was much improved as compared to the time Dr. Hamed saw Rector soon after his surgery.

The expert proof is in sharp conflict, as it was on the other appeal. It is argued, however, that it takes a higher degree of competency to defend against the death penalty; so the two appeals are distinguishable. * * * We must conclude, as we did on the earlier appeal, that the trial judge's decision is not clearly erroneous.

* * *

Counsel insist * * * that because Rector's self-inflicted brain injury had substantially the same effect as a frontal lobotomy, causing him to be mildly retarded mentally and to be somewhat unemotional, the State of Arkansas should not permit the execution of a person in that condition.

* * * In our opinion such circumstances arising after the crime affect the matter of clemency and should properly be addressed to the Governor, who has the facilities for investigating all the facts. Although we may reduce a death sentence to life without parole, and have done so in the past, that action is taken as a matter of law, not as an act of clemency.

* * *

Ricky Ray RECTOR, petitioner
v.
Winston BRYANT, Attorney General of
Arkansas, et al

Supreme Court of the United States
501 U.S. 1239 (1991).

On Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

The petition for a writ of certiorari is denied.

Justice MARSHALL, dissenting.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court recognized that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." The full Court, however, did not attempt a comprehensive definition of insanity or incompetence in this setting. This petition presents the question whether a prisoner whose mental incapacity renders him unable to recognize or communicate facts that would make his sentence unlawful or unjust is nonetheless competent to be executed. Because *Ford* leaves this question unanswered, and because this is an important and recurring issue in the administration of the death penalty, I would grant the petition.

* * *

DEATH IN ARKANSAS

By MARSHALL FRADY

THE NEW YORKER, February 22, 1993

Reprinted with permission

IN January of [1992], just when Bill Clinton's prospering campaign in the New Hampshire Democratic primary had suddenly been staggered by the tabloid allegations about [his affair with] Gennifer Flowers, Clinton was also confronted with the decision on whether to allow the execution, back in Arkansas, of a forty-year-old black convict named Rickey Ray Rector, who had been condemned for the killing of a policeman more than ten years earlier. [Clinton has signed a death warrant setting the date for Rector's execution before the primary.] The matter of Rickey Rector could hardly have seemed a more incidental concern in the political havoc surrounding Clinton at that moment. With one poll indicating that he had toppled by twelve points, and with reporters besieging him for explanations about Flowers, the Governor held feverish motel room sessions with aides and negotiated with networks for possible appearances that might dispel the scandal. Nevertheless, he flew back to Arkansas on a Thursday evening, to be in place to attend directly to whatever last appeals and legal considerations might develop the next day, when Rector was scheduled to die.

As Clinton's plane took off, the condemned man waited in a windowless holding cell in Cummins prison, in the southeast corner of the state. Rector, a ponderous two hundred and ninety-eight pound heap – far from the lithe youth he had once been – was alternatively “dancing around the cell singing & laughing” in his T-shirt, boxer shorts, and socks, according to the prison's sedulously kept death-watch log, and “howling and barking like a dog.” He kept on at this, as indeed he had for most of his ten years in prison – intermittent bursts of barking, baying, then blaring laughter and little gleeful shuffles of dancing, fingers snapping – through Friday. That afternoon, after Clinton had refused all final entreaties for clemency, Rector sat with one of his attorneys,

watching, on a TV outside his cell, news reports of his impending execution, two hours away, intermingled with accounts of Clinton's travail over the Flowers charges, and he abruptly announced, in a thick mumble, “I'm gonna vote for him, Gonna vote for Clinton.” It had always been his habit to put aside his dessert until bedtime, and after eating his last meal, of steak and fried chicken in gravy, with cherry Kool-Aid, he carefully set aside his helping of pecan pie, to finish later. One of his attorneys had earlier stated that Rector “thinks he'll be back in his cell on Saturday morning.”

Rector's case ranged beyond customary considerations of the question of capital punishment. In 1981, after killing two men, he had put a pistol to his temple and shot himself through the forehead: it had left him with what amounted, after surgery, to a frontal lobotomy and, according to subsequent testimony, with about the understanding of a young child – a dim simplicity that the surgeon who operated on him likened to that of the Jack Nicholson character after his lobotomy in “One Flew Over the Cuckoo's Nest.” At the least, it appeared incontestable that after lifting the pistol to his forehead and blasting away some three inches of the front of his brain he was not the same being who only a few moments earlier had casually murdered a policeman sitting in his mother's parlor. To proceed with his execution anyway, no matter how damaged and uncomprehending a creature he might now be, became a test in Arkansas of the lengths to which a society would pursue the old urge to expiate one killing by performing another – and a test of the state's highest temporal authority, the governor, who alone could stop it.

CONWAY grew up beside a railroad track in the years following the Civil War, and by 1980 it had become a sedate community of some twenty-three thousand souls, about ten per cent of them black. The railroad tracks still divide the town. On one side stretches a genteel expanse of neighborhoods of ample wooded yards and commodious homes. It was on the other side, among the bleaker streets of the black quarter, that

Rickey Ray Rector was born – the sixth of seven children in the spare but rigorously proper household of George Rector, a cook in a fabled Conway steak-house of the time (and, briefly, for a future governor, Winthrop Rockefeller), and Clyde Lee Rector, a soulfully religious woman who worked as a maid at a local college. Unlike Bill Clinton, born earlier in an even smaller town a hundred miles to the south, who was described by a local matron as “one of the brightest little boys that ever lived in Hope,” Rickey Rector seemed from his earliest years a curiously lost and clouded spirit. “Rickey was just different from the rest of us children,” his sister Stella Morris recalls. “He would always play by himself. The rest of us would be busy with toys and games and things like that, but Rickey, he’d always sit off by himself under a chinaberry tree, just playing with sticks.” It was as if he were locked into some private daze of withdrawal. When directly addressed, he would often only gaze back with a dreaming sweet smile. “I know now it was probably what’s called a learning disability,” Stella says. As a small boy he accompanied the rest of the family to services every Sunday at St. James CME Church, but “he really wasn’t connecting with any of it,” according to Stella. “He was having a hard life even then, and we just didn’t know what it was, that he needed special attention. But he always had trouble because of it.” Another of his sisters recalls, “He didn’t have no buddy. He didn’t bond with anybody. He had only one friend, actually, and that was Mr. Bland – an old, *old* man, who had, like, a little farm. Rickey *loved* Mr. Bland, loved those animals at Mr. Bland’s. He’d just lie there for hours in Mr. Bland’s wagon. Rickey really was just a baby, even when he grew big – loved old people and children and animals. He had this special, this strange sort of *sweetness* about him, you know?”

Their mother, Stella says, “knew that Rickey was different, but she wouldn’t acknowledge it” – though she did once concede that he had always been “an odd child,” so solitary that he would never even venture in from the yard to ask for something to drink or to snack on. But she seemed to cherish him – already unreachably distant and

lost to her – more protectively than her other children. His father, however, taking the boy’s slowness for simple contrariness, was unremittingly harsh to him, administering repeated strappings – as a result of which, it was later conjectured, Rickey acquired a permanent, submerged rancor against all male assertions of authority. Nevertheless, Stella maintains, “Rickey never would bother anybody, just needed to keep to himself.” But she adds, “Unless they were bothering him. And then he’d react.” Once, when a brother kept taunting him, Rickey finally snatched up a pair of scissors and stabbed him in the foot.

By the time he reached junior high school, where he floundered ever more hopelessly in his classwork, still able only to print in the laboring hand of a third grader, Rickey had begun to live in a constant suspicion that contempt and hostility were everywhere focused on him. His sense of embattled displacement deepened during the first year of integration in Conway’s middle school. Stella remembers that Rickey, finding himself suddenly among a “new set” of white students, felt that “all these people didn’t want him to be there” – an impression that was not altogether imaginary. On returning home, she says, he would frequently be fuming that “he had been called ‘nigger’” and, because of his evident mental vagueness, “called other things, just as hurtful.” He began regularly getting into fights at school. He was now a tall, gangling youth, with a certain languid, smoky handsomeness, partly offset by a stare that, according to white townsmen who knew him, hinted of some faint menace. One Conway man who was in school with him recalls, “Wasn’t nobody as ease with him. You’d see him walking down the hall with that sleepy eyed look he had, all by himself with nobody around him, and there was this feeling that he was trouble. I mean, he was the sort of guy, if he came into the bathroom while you were alone in there, you’d just pinch it off real fast and get on out.”

He never made it through the tenth grade – he was expelled for his repeated fracas. When his parents made a despairing, faltering attempt to

talk to him about it, he exploded at them, too, lunging about the house and shrieking at them to leave him alone. He began vanishing from home for days at a time, wandering to unknown destinations. Thus he completed his drift into a lasting sidle from the everyday world around him at the age of sixteen. At that same age, as it happened, Bill Clinton had journeyed with a Boys' Nation delegation to Washington and, in a reception on the White House lawn, briefly clasped the hand of President John F. Kennedy.

Rickey Rector, as he grew older, took to stalking through the nighttime streets of Conway until two or three in the morning, loping along in solitude under the street lights. For a while, he worked sporadically at an assortment of jobs as a hard laborer – a roofer, a house painter's assistant, an asphalt layer. At some point, apparently in the same desultory fashion, he got married, and he seems to have fathered an indeterminate number of children by other women. And throughout this time, beginning at seventeen, he was jailed by the Conway police at regular intervals on a motley succession of charges – disorderly conduct, assault and battery, forgery, grand larceny, assault with intent to kill. The charges all ended in dismissals, sometimes with prejudice, or fines. Often when he found himself in such moments of trouble, Rickey would flee for a while to Detroit, where two of his sisters were living, and he was arrested there at least once, for selling marijuana. As the picture forms in retrospect, he had entered a kind of slowly accelerating berserkness, which took him steadily toward the farthest outskirts of society.

WHILE Rector was lurching through those years, Bill Clinton was pursuing his own large hopes as a student at Georgetown, then Oxford, then Yale, and finally circling back to his home state to begin constructing his future. In 1978, after teaching at the University of Arkansas, in Fayetteville, Clinton, still only thirty-two, managed to get elected governor, becoming the youngest governor in the country. His first term was filled with reformist efforts as he sallied forth to regulate the state's utility companies, the

lumber industry, the trucking industry. But to many of the state's political regulars, as one legislator was still grumping years later to the *Arkansas Democrat Gazette*, "he was a punk kid with long hair, he had all those longhaired people working for him, and he was a liberal." When he buoyantly ran for a second term, in 1980, the state's power complex shifted its support to the Republican candidate, and Clinton was defeated.

The astonishment of that repudiation was a trauma that, by all accounts, hugely sobered and altered Clinton. "I didn't like it," Clinton himself conceded afterward, "but I learned a lot from it." One almost metaphysical lesson it provided him was never to range, whatever his own impulses, too far beyond the standing disposition of the general populace. He prepared now for another, redemptive campaign to recover his lost office as a more muted creature, with public professions of contrition for the liberal enthusiasms of his first term. A special vow was to rectify an impression that his Republican adversary had seized upon in the 1980 race – that he might have been overly considerate of criminals. He asked to be forgiven for having commuted some seventy sentences in his first term, including the life sentences of thirty-eight first-degree murderers. An instance that gave him particular discomfort was his commutation, in 1979, of the life sentence of a seventy-three-year-old convicted murderer, who had been described to him by doctors as mortally ill and posing a possible two-hundred-thousand-dollar medical bill to the state, whereas release would make him eligible for Medicare – and who, within a year of being freed, shot to death a sixty-one-year-old man in a robbery attempt. Clinton afterward complained, "That old man was not as sick as people thought he was," and he assured everyone, as he offered himself for governor once more, that he would never risk letting anything like that happen again.

After winning a second chance in 1982, Clinton parceled out only seven more commutations throughout his ten years as governor, and none were for death sentences. Indeed, upon his reelection he began setting a profusion of

execution dates. “The defining event in Bill Clinton’s life was that defeat in 1980,” says Jeff Rosenzweig, who became one of Rector’s attorneys in the last weeks of the prisoner’s life. “Clinton set his first execution just before he left office [in 1980], so he could say later he had, but it was entirely premature and was immediately stayed. Then when he came back in, he would set new execution dates at just about every stage, every tick in the process of a case, though the parties were nowhere near exhausting their remedies, and the execution dates were almost always stayed. But it enabled Clinton to say, ‘Look, see how many executions I’ve ordered.’” By 1992, Clinton had managed to accumulate around seventy execution dates, for some twenty-some subjects on death row – four, ultimately, for Rector alone. In a visit to a high-school class in Little Rock in 1988, he declared, even after acknowledging that there was really no conclusive evidence that executions acted as deterrents to other killings, that under certain limited circumstances “the death penalty is appropriate.” He went on to say, “I don’t believe it’s the wrong thing to do,” and reaffirmed that he would continue to enforce capital punishment in Arkansas.

One of Rector’s earlier attorneys reflected recently, “Poor ole Rickey Rector’s timing just happened to be real bad.”

SOME five months after Clinton’s 1980 defeat, Rector, on a balmy early-spring Saturday evening in Conway, rode with two friends – at twenty-nine, he had still not learned to drive – to a dance, attended by about two hundred guests from the area’s black community, in a rented back hall of Tommy’s Old-Fashioned Home-Style Restaurant, a family eating place on the edge of town. There Rector, attired in a black leather coat and a leather cap, with a full goatee, fell into a dispute at the door over the three-dollar admission charge, demanding that one of his friends, who had only a dollar, be admitted anyway. It ended with Rector snatching a .38 pistol from the waist of his slacks and firing away, wounding two men. A third man, Arthur Criswell, thirty-three, was hit

in the forehead and throat, and died almost immediately. Rector then strode out to his friend and told him to drive him back to his house.

There, with his wife watching, he paced and stomped from room to room, pausing repeatedly to glance out a window. He retreated into the bedroom, suddenly smacked his fist on the bed, and cried out “*Damn!*” He told his wife that he was taking off, and rushed out of the house.

He began running. The rest of that night, and on through the next two days and nights, he plunged about the back ways of Conway in a kind of aimless, circular fleeing – on foot, slipping into a few friends’ houses, ranging then out into the countryside, trampling through tangled woods along the edges of farmland and fish ponds, huddling in ditches and the weeds below overpasses. From somewhere he phoned one of his sisters in Detroit, telling her, as she recalls his words, “I’m in trouble. I got to come and see you. I love you. I’m in real trouble. I didn’t mean to do this, but they just pushed me, you know? I didn’t know what I was doin’.” He told her that some of his acquaintances had assured him, “They gonna kill you, man. They gonna shoot you down like a dog.” He spoke to her, she remembers, like one already doomed: “They got a cake baked for me. And I’m gonna have to eat it.”

On the third night of his roamings, he made his way through several miles of hill, woods and brush and gullies to his sister Stella’s house, outside Conway, rapping on the door at about four in the morning. She implored him, in low frantic whispers, so her husband might get back to sleep, to give himself up – he looming before her, * * * bedraggled and unshaven, his eyes glaring. He had neither eaten nor slept for the past three nights, he told her, but when she offered to cook him some eggs and pancakes he said, “No, don’t fix me nothing’, I don’t want to eat.” Instead, he went into one of her bedrooms, and sat on the edge of the bed, mute, staring out the window into the night. When dawn came, he got to his feet and left.

TUESDAY, March 24, 1981, was a cool, sunny day in Conway. Around noon, Stella was visiting her mother in town, in the same house where Rickey had been raised. (George Rector had died in 1978.) As Stella was comforting her mother, the phone rang, and Stella answered it. It was Rickey. “He said he wanted to give himself up, because he knew Mama was worried and it was the right thing to do,” Stella recalls. “But he was still so scared.” And she remembers that “the very last intelligent thing Rickey ever said to me was ‘You don’t know what they do to you when they get you in that jail. Just don’t *know* what they *do* to you. And they *really* want me this time.’”

Around two-forty that afternoon, a call came into Conway’s police headquarters – from one of Rickey’s sisters, it later developed – asking specifically that Patrolman Robert W. Martin be sent to the address of Rickey’s mother. As later testimony disclosed, Rickey had finally consented to his family’s pleas that he give himself up, with the understanding that Martin, who had known the Rector family since Rickey was a child, would be the one who came for him.

Bob Martin, a seasoned regular with the Conway police, was a quiet and deliberate man of unimposing, slightly slack build, with, at thirty-eight, a sheaf of gray hair over a plain face that wore an almost unvariable bland and unassertive expression – a surpassingly mild and amiable soul, in all. He lived, with his wife and three children, in a country community outside Conway, named Wooster, where he absorbed himself in his single noticeable enthusiasm, ranching – working cattle and trading in horses. According to old acquaintances, what he’d really wanted to be was a cowboy. He was a “gentle father,” one of his daughters recalled years later, “always easy with us.” Her most cherished memory of him is of the two of them riding horses together over the fields around Wooster. Whenever he was off duty, he was always found wearing a cowboy hat.

Is was in something of a free and leisurely cowboy manner, actually, that he operated as a policeman – in a “one-on-one, lone-wolf style,”

according to Lieutenant Rodney Pearson, one of the few current members of the Conway police force who worked with Martin. He patrolled the town as what was called a rover, in “an old-style approach now being rediscovered – community policing,” Pearson says. “He would make it a point to stop and talk, to connect personally, to the whole community.” As a result, “he took great pride in the fact he could accomplish in hours what would take detectives weeks.” Martin attended with a particularly patient diligence to his complex of personal contacts within Conway’s black neighborhoods, and consequently had penetrated what Pearson calls “that cloak of anonymity in the black community.” His easy and familiar amicability with the Rector household had not been disturbed by the circumstance of his having arrested Rickey at least once before, and he had already assured Mrs. Rector, she later reported, that “he wasn’t going to try to force Rickey to come in.” Even after what happened that afternoon, Rickey’s mother declared that Martin “was the only one on the force he would trust,” and she added, “I really did like Mr. Martin. He was the nicest one on the force.” Earlier that Tuesday afternoon, Pearson recalls, he had asked Martin while the two of them were sitting in the squad room, “What should I do if I see Rector?” and Martin told him, “You don’t do nothing. You call me. Because he’ll kill you. But he won’t kill me.”

Shortly before three o’clock, after the call from Rector’s sister was relayed by the department to Martin, in his patrol car, he pulled up in front of Mrs. Rector’s house – a small, tidy bungalow with white metal awnings and pale-avocado-green aluminum siding, its half porch covered with Astro-Turf and nestled in tall, thick shrubbery just a few feet back from the street.

When Martin got out of his patrol car, wearing the Conway police uniform of nickel-gray shirt with navy trousers, his patrolman’s cap on his head, he was met outside the house by the sister of Rector’s who had called him and was informed that Rickey was at his place, only a short stroll away – in the back yard from his mother’s house,

but would be coming over at any moment. Martin was admitted into Mrs. Rector's parlor, a room meticulously decorated with lamp shades and candles in fixtures, with a small crystal chandelier and gold shag carpeting. Martin settled himself in a Queen Anne chair and began, in his genial and unhurried way, to chat with Mrs. Rector, a solidly heavy woman, and with Rickey's sister Josie and her son, Michael, who lived, with his wife, in a trailer in the back yard.

Suddenly, almost noiselessly, Rickey materialized from the rear of the house. Wearing only a half-sleeve baseball shirt hanging loose over cotton work pants, he leaned casually against the side of the wide door to the bedroom behind the parlor. He was right beside Martin's chair, and Martin, glancing up at him, said, "Hi, Rickey, how you doin'?" Rector replied, "Hi, Mr. Bob." * * * But then, as Martin turned back to continue talking with Mrs. Rector, Rickey withdrew from the small of his back under his baseball shirt the .38 pistol * * * and he fired two shots, hitting Martin in the jaw and neck. Rickey's mother and sister screamed, and floundered to get out of the room, as Martin, blood running down his body, slowly slumped from the chair onto the floor, where, though his carotid artery and neck vertebrae were shattered, he seemed to make a last, vague effort to utter something.

Rector then turned, saying nothing, and walked slowly out of the house into the back yard, under the sheltering expanse of a silver maple tree, where Michael Gilkey's wife, rushing out of the house trailer there, saw him pass with an odd, drowsy shuffle. "He didn't appear to recognize me, because he just looked at me," she said later. "He just looked over at me and said, 'I just shot that damn cop,' and walked on away. . . . I've never seen that look on him before." He proceeded across the yard – passing under the chinaberry tree where, as a boy, he had played alone with sticks – and wandered on past a flimsy little wire fence and a neighbor's small vegetable garden, past a mound of yard trash, his shoes scuffing through drifts of leaves lying over the grass. * * * Rector halted beside a berry bush near

a pecan tree, lifted the pistol to his left temple, and pulled the trigger.

Barely a moment later, police cars, responding to a call from Michael Gilkey, came sweeping in from all over town, and then from the county, slowing to a stop around the house and soon filling the length of the street. Pearson, one of the first to arrive, saw a small group of neighbors in the yard standing around Rector's body. He was stretched out full length on his back, his thinly tapered arms lying straight along his sides, and Pearson says that after he glanced at the wound to his forehead "my opinion was, this man was dead." Someone then yelled, "The house!" and Pearson, with another officer, went in through the back door. "The house was completely still," Pearson recalls, "but, right away, we saw Bob." Back then, Pearson was not quite twenty-four and had been on the force only about two years. "You think you're almost invincible," he recalls. "But when you see a fellow-officer you've had coffee with in the squad room only an hour or so before, in a pool of blood dying, it dispels a lot of illusions. He was lying on his back with his head toward us, one leg with a bent knee. He looked to have been shot at close range with a shotgun." Lying near him on the gold shag rug was his police hat.

Martin was the first Conway policeman ever shot, much less killed, in the line of duty. Other officers piled into the house; one of them quickly came back out, sobbing, reeled over to the cluster of people around Rector's body, and began to bellow at them. "I remember that policeman that wanted to shoot Rickey," Rector's sister Josie later testified. "He was a big guy. . . . That guy said, 'Let the dirty son of a bitch die!'" Another policeman "ran and grabbed him," she said, "to make him keep his gun in his holster," and led him, still weeping, away from her brother.

Martin and Rector were taken, in separate ambulances, to Conway's hospital. In the emergency room there, Pearson encountered Faulkner County's prosecutor. William C. Brazil, who confirmed that Martin was dead. But, Brazil

told Pearson, Rector was still alive and was to be taken to a Little Rock medical center for brain surgery. Brazil then clutched Pearson's arm and demanded, "You go with him in that ambulance and stay with him until relieved."

Pearson followed Rector, in fact, all the way into the operating room at Little Rock's University Hospital, donning a gown and perching himself on a stool immediately behind the surgeon, right above Rector's head. As Pearson watched, the surgeon sliced and peeled back skin from Rector's forehead, sawed through bone ("It dispelled a lot of ideas I had about the delicacy of brain surgery," Pearson says. "Rather coarse, actually"), and finally lifted away membrane to expose Rector's brain. Pearson, peering now into Rector's open skull, recognized that "the injury was severe"; he could see, in the mangled brain tissue, sears of gunpowder burns, and "tiny arteries just shooting blood," which the surgeon cauterized with quick singes, amid wisps of smoke. The bullet itself, having passed completely through the front of Rector's skull, had lodged under the skin above the right ear, and when the surgeon extracted it he held it up in a pair of tweezers and daintily let it drop into a small cup, which was handed to Pearson. At one point, according to the surgeon's report, "soft necrotic [dead] brain in the right and left frontal lobes was removed using suction" and "frontal lobe tissue was removed approximately back to the sphenoid ridges bilaterally before normal viable brain was identified"; that is, about three inches of frontal brain tissue was taken from Rector's head, back to a diagonal line from his left temple to his right ear, before the wound was closed.

The damage extended even beyond that. A clinical neuropsychologist at the hospital later testified that "fragments of bullet and bone have been noted in the right temporal lobe portion of the brain, which means that it was more than just frontal lobe damage." Moreover, he pointed out, damage to the frontal lobe itself disrupts the rest of the brain, with an effect something like shorting out parts of an electrical circuit. A psychologist at a federal medical center for

prisoners in Missouri, who evaluated Rector's condition some time later, attested. "His brain impairment is not precisely localized to just one aspect of the brain. I think there's diffuse impairment involving both hemispheres."

The clinical effect of such a substantial destruction of frontal brain tissue is that Rector, as it was presented in testimony over ensuing months, would suffer from "gross memory loss," and particularly that when dealing with "content and meaning" he was "severely impaired," and would have a near-total inability to conceptualize beyond a response to immediate sensations or provocations; in fact, he "seemed unable to grasp either the concept of past or future." A state psychologist also noted that he had "difficulty maintaining concentration and attention to a task." In addition, although Rector did "demonstrate . . . some abilities to handle his day-to-day life in terms of actions which are repetitive," he also demonstrated what is known as a flat affect, meaning that "when it comes down to the issues of emotion . . . Rickey has absolutely no involvement in any of the dire circumstances of his life." In fact, the Little Rock clinical neuropsychologist found him to be "lacking a will or an understanding of a way to fight his present dilemma." Someone who had suffered the sort of brain damage sustained by Rector could still present, at first encounter, the appearance of normality, but within that appearance of "a mature adult," as one study of frontal-lobotomy patients was quoted in a later hearing, there still exists "a very young child." Indeed, what would prove treacherous in later attempts to appraise Rector's state was that he could seem to pass in and out of a certain minimal awareness, coming briefly into a vague focus on the life around him but then shortly receding into the shadowy void he mostly inhabited.

The day after Rector's surgery, the doctor who had performed the operation informed Stella and an attorney that it had been "a classic prefrontal lobotomy" and had left Rector "totally incompetent" to assist any attorney who took his case. "I just immediately assumed that he would

be placed in an institution, and that would be that,” Stella says.

Nevertheless, after observing the operation on Rector, Pearson returned to Conway with assurances to his fellow-officers and to local officials that Bob Martin’s slayer had survived surgery, and should recover suitably enough.

IN the first weeks after the operation, Rector declared to a number of people that he had been hospitalized for a wound in his leg. One of his attorneys later testified, “When I asked Rickey directly about the surgery or anything about the scar, he will flatly deny that he had surgery on his head at all, and will instead state that he went to the hospital so that his leg could be operated on.” Even after “people have confronted him with the fact that ‘you do have a scar on your head,’” the attorney said, “he can’t seem to explain or even acknowledge that occurred.” Eventually, he came to believe intermittently that he himself had been the victim of the violence that afternoon, informing psychological examiners and his own attorneys that, as one reported, “the police had killed the policeman and then shot him in the head.” At other times, he declared that “a scuffle ensued at which point Mr. Rector struck the police officer,” one medical evaluator said. “The patient indicated ‘I knocked him out.’ Mr. Rector said he then ran from the house and came upon another police officer who wished to arrest him, but, because he was concerned about being beaten in the local jail facility,” he then did, as everyone had been saying, shoot himself in the head.

His sisters, in their visits, now found that he had “slurred speech,” Stella later reported. “He fumbles, he has trouble picking up coins.” While once almost fanatically fastidious about what he ate, she said, “now he just shovels his food in, whatever is presented to him. He never asks about anyone or anything in the past. He seems content to just sit and stare. Nothing seems to bother him.”

THE popular and legal disposition toward Rector after the killing of Bob Martin was,

one of Rector’s early attorneys says, “They’d take his body if they couldn’t have his mind.” So formidable was the sentiment in the community about what had happened to Martin that the chore of defending Rector in court was a role that “absolutely none of the attorneys in Conway wanted” according to one lawyer finally appointed to his case. Also because of this popular mood, it became almost obligation for both the prosecutor and the judge – their offices elective, at that initial level of the justice system where Rector’s fate would first be decided – to see that he was pursued to the last possible measure of punishment. The prosecutor, Brazil, later explained to the *Conway Log Cabin Democrat* that he had refused all offers of a plea bargain for a life sentence without possibility of parole, because he was urged by the community, including Martin’s family, to settle for nothing less than Rector’s death.

Since it was never disputed that Rector had committed both the Criswell and the Martin murders, the progression of his case over the next ten years – through a protracted cycle of lawyers, most appointed by the court – depended on two intermingling principles of fundamental law about the competency of an accused to stand trial and, ultimately, to be executed. One principle * * * was that the accused must at least be capable of meaningfully assisting his counsel in his defense [and be capable of understanding the proceedings¹] – a requirement that had special import, the defense maintained, when the accused faced execution. The other measure of competence, a less stringent federal standard that came into play only in 1986, with the Supreme Court’s decision in *Ford v. Wainwright* [477 U.S. 399 (1986)], stipulated that the accused, to be subject to execution, must first comprehend that he has

1. [The standard, as stated by the Supreme Court is “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402 (1960).]

been sentenced to death and, second, comprehend why. Essential in that measure of competency, one of Rector's attorney's argued is "more than just being able to say, 'Yes. I know I am going to be executed;' it includes a genuine appreciation of those consequences."

One of Rector's early attorneys would testify, "My first impression of Mr. Rector, frankly, was that he was better off than the reports that I had would indicate. I talked to him a good while. He wanted to cooperate with me. He answered my questions directly." The attorney went on to say, "After the second and third interview, I went on to conclude that we had the same conversation over and over. . . . He would make every effort, I thought, to say what he thought I wanted him to say. He would always come back to the same points." Partly for that reason, his attorneys began to sense, in their discussions of that March afternoon, that Rector was, as one said, "giving me information that someone else had given him."

One psychologist who examined him testified for the defense, "Most of what Rickey told me . . . appeared to have been based on hearsay, what others have told him about what happened." Further, the psychologist said that while Rector apparently "understood what murder was," it seemed the recognition "a child might give . . . maybe a nine- or ten-year-old." Although he seemed to have "a below basic level" of understanding of what might happen to him, he had "marked deficits in his ability to think abstractly, to go beyond the very concrete right here and now," and had an IQ of sixty-three. If Rector was asked what should be done about someone who had killed someone else, the psychologist said, "Very passively, blandly, and very quietly, stared, 'guess they ought to send me to the chair if I did it, but I don't remember doing it.'" A year later, Rector told the same examiner that "if they're going to do it, there ain't nothin' I can do about it except get dressed and go on down and sit in the chair and they'll barbecue me" – this he uttered, the examiner said, with "absolutely no emotion." He remarked, "It's almost as if you are speaking with a person talking about someone

else's life . . . the life of another person that he's outside looking at."

In frustration, one of his early attorneys testified, he finally tried to jolt some feeling out of Rector by describing to him how, when someone is being electrocuted, "sometimes the blood boils, there's all kinds of very gruesome things that happen to a body." But, the attorney said, "he was totally oblivious to it . . . that this could relate to him." * * *

One attorney, assigned to Rector's case in 1988, did persevere all the way to the end. He was John Jewell, the scion of a relatively patrician family in Little Rock, whose father was a venerable Arkansas attorney. * * * He testified that, in his first sessions with Rector, "after maybe four or five minutes, all communication broke down and it became merely a series of questions. . . . 'What would you do if somebody spit in your face? What would you do if Tommy Robinson jumped you? . . . Is Little Rock bad?' – just a repetition of that type of question, and you couldn't focus him again."

* * * Once, while he was in prison, Stella brought him word that one of his brothers had died. "He asked only a few questions," she says, "and then all of a sudden he asked, 'You see all that monkey smoke in here?' And began to pace like a wild animal. I said, 'Are you getting in trouble?' – because he knew when he was about to float away again and would make up things to cover it up when it began. 'Are you losing it?' I said, and he said 'Yeah.'"

At first, Jewell says, "he wouldn't know who I was when I'd come back to see him," but eventually, whenever he saw Jewell again, he yelped, "There's my man!" And before long Jewell came to feel a profound and abiding pity and sorrow for him. "It was just that he, you know, couldn't do anything whatsoever for himself, to help himself," he says. Even after leaving his law firm for a position as a corporate attorney in Little Rock, Jewell continued to labor on Rector's case "But at no point did I ever feel

with Rickey it was anything like a relationship with a friend,” he says. “Because there wasn’t anyone there to connect to.” Another of Rector’s attorneys later lamented, “We didn’t have a client to defend. Ricky was a nonexistent part of the trial.”

The question ultimately became, then, as one psychologist put it, “if Rickey is truly the same man he was before he shot himself, or do we now have a different individual?” Rector’s sister Stella testified, “The person you see here and the person that I see, it looks like Rickey. He talks like Rickey, he has some characteristics of Rickey. But the real Rickey Ray Rector was destroyed when he shot himself with the gun. This person is just not my brother.” During one of his trials, his attorney finally posed the issue as: “The person who shot Officer Martin cannot be executed. He no longer lives. if we cannot execute that person, must we, nevertheless, execute his body?”

AS the case unfolded, of course, that was more or less the determination of the officials of justice for Faulkner County and the State of Arkansas. Even so, there was first the obligation of satisfying the law’s technical punctilio by undertaking to demonstrate that there was at least a sufficient semblance of a mind in Rector to qualify him as “competent” for trial and punishment. To begin with, both the prosecution and the defense had put him through a series of psychological and neurological examinations to clinically evaluate his fitness to be legally tried and put to death. There followed two competency hearings, preliminary to his trial for first-degree murder in Arthur Criswell’s death, which was not necessarily a capital matter, and his trial in Martin’s death, which inescapably was. With Rector’s commission of the murders unquestioned by the defense, both hearings really amounted to the definitive determinations of what would become of him, and were conducted for the deliberation of the local judge, George F. Hartje, alone, without a jury, in the Faulkner County Courthouse.

The medical specialists for the defense

testified to Rector’s psychic destitution, declaring that he was manifestly incapable of assisting his attorneys in any real way. A neuropsychologist insisted that there was no possibility that Rector was shamming his pitiable performances in their examinations; one of the state’s specialists agreed, and even made the peculiarly poignant concession that Rector was “trying to do the best he could on those tests.”

Brazil, the prosecutor, also produced his own succession of specialists assigned to examine Rector – some of whom, it turned out, had never read the surgeon’s report on Rector’s operation or had read it only that morning. (One of them had no idea how much brain tissue was removed, had only briefly examined Rector’s medical chart, and passed only some twenty minutes interviewing him.) Nevertheless, the specialists variously explained Rector’s condition by reporting that he was “attempting to fake psychopathology,” that he offered irrelevant answers “primarily to avoid focusing the discussion on the issues related to the charges,” that he was “generally hostile, irritable, and suspicious,” and merely affecting a “cool daddy” pose. One psychologist discounted the ruin of Rector’s mind reported by defense experts by insisting, “He gave a performance,” and cited, as a reason for his conclusion that Rector was fully capable of assisting his attorney, “He was cooperative with my exam” and “always seemed to appreciate my questions and didn’t seem to be holding back with me.” Another cited as evidence for the same conclusion the fact that Rector was able “to express himself quite openly” in saying that “he does not remember anything. He was able to express that quite clearly.”

A psychiatrist who testified for the prosecution told the court, regarding Rector’s apparent emptiness of emotion and his serene and vacant fuzziness interspersed with a frenetic childlike scatter of attentions – his condition since his surgery – that “those are his life choices,” his “personality adaptation in life.” Rector could still “respond in an emotional way if he chooses,” and so “could choose to cooperate more” with his defense. “I believe he’s faking on some aspects of

this,” the psychiatrist said, adding that Rector had “attempted to make himself look sick.” Rector’s ploy, he explained, was “intentionally dawdling before answering.” (One of this doctor’s colleagues had testified that he found Rector to be “pretty prompt.”)

All this produced what a higher court would later characterize as testimony “hopelessly in conflict,” which left Judge Hartie free to decide either way. In this instance, the benefit of the doubt did not go to the defendant. In both competency hearings Hartie decreed that Rector was competent to be tried * * *.

Shortly after Hartie’s first ruling – about seven months after Rector shot himself – Rector’s mother died. “She had vowed that she would never testify against Rickey,” Stella says. “About two days before she went, she called me in and said – they were her last words to me – ‘Stella, I want you to promise me to take care of Rickey. And I looked into her eyes and promised her, ‘Mama, I don’t know if anybody can really help Rickey now – but I’ll do what I can.’” Even though Stella says that “Rickey and my mother had always had this sort of special bond between them,” one of his attorneys recalls that when Rector was told, in prison, that she was dead “there was absolutely no reaction,” adding, “Only said, ‘She is?’ And then, ‘When’s dinner?’” Stella was permitted to take him to the funeral home to view her body, “and he started laughing when he saw her,” Stella says. “Said, ‘Yeah, that’s her all right, she’s dead.’”

Rector’s two trials were about a year apart. In the first, for the killing of Arthur Criswell, he was sentenced to life without parole. That alone would have served, of course, to remove him from any further possible distress to Arkansas society. In the Martin trial, it took an all-white jury only fifteen minutes to find him guilty of capital murder, and the jury then moved on to decide his sentence. Rector’s attorney at the time, Dan Stripling, recalls, “You know you’re in bad trouble when the retired Methodist minister on the jury grabs for that death form to sign.”

After Rector heard his sentence sounded – death by electrocution – he stood for a few moments as spectators began leaving the courtroom and the judge and jury also departed, and then turned to Stripling and muttered, “Does this mean I’ll get a television in my cell now?”

RECTOR was sent to death row, which at the time was at Cummins prison, a former cotton plantation that is now a gigantic penal farming complex in Arkansas’s delta bottom-lands. At Cummins, Stella, keeping her promise to her mother, visited Rickey at least once every two months, sometimes with one or more of her sisters. “We’ve never abandoned Rickey for what he did,” she says. A mother of two, * * * [s]he has worked for more than twenty years in a state facility in Conway for the care of the mentally retarded. “Not because of Rickey,” she says, “but it sure helped me over the years to understand Rickey.” On her visits to Cummins, she would give him pre-addressed and stamped envelopes, along with sheets of notepaper decorated in a lower corner with a picture of Kermit the Frog talking on a telephone, in the hope that it might induce him to write letters to her, and he would occasionally do so, in cramped, childlike, punctuation-less printing:

Dear Sister How is everythang going I am doing Fine I have been doing Fine. . . . it is a lots of punks and thugs down there. . . . I am trying to stay out of trouble the best I can. . . . I read in the paper where my lawyer is dropping my case So see if you can Find another on For me right way. . . . if I kill some Body 1 don’t no nothing about it I thank I am being Frame by somebody.

Stella says of her visits to him, “His cell was just filthy. He didn’t know how to clean it. And *he* was filthy – *nasty* – his shirt all crumpled and dirty, the color of that dirt out there in that yard.” He still consumed whatever food appeared before him, with an almost unnoticing, headlong voracity. “He doesn’t seem to know when to stop eating,” Stella would testify. “On my bimonthly visits, we buy him anywhere from five to ten

dollars in junk food, and he eats all of it and he eats it very fast and he eats it very uncivilized. He thrusts it in his mouth, I mean, continuously.”

A prison chaplain named Dennis Pigman, an Assembly of God minister originally from Minnesota, recalls the first time he visited Rector. “I thought the guy was completely crazy. He was standing at the bars, hollering, dancing. He would jump up and down like some ape. Playing cowboys and Indians in his cell all by himself, dancing around and then lumping over and shooting at where he had been dancing. It was obvious he had the mentality of about a six- or seven-year-old.” Eventually, at some point, Rector began to howl, day and night, in his cell. “The more he sensed himself threatened, the more he became like a scared child,” Stella says. He became convinced that prison guards were setting loose chickens and alligators in his cell. Stella remembers, “He was afraid of everything that moved. He was afraid to go outside in the yard, because he thought somebody would hurt him, do something to him.” And for one stretch of three weeks, day after day, he just cowered in a corner of his cell, “like a child cringing in his bunk,” Chaplain Pigman says. Pigman finally arranged for him to come to chapel alone, he told me, “because he was afraid somebody would kill him”: the chaplain would conduct his service with Rector hulking there by himself, in a small concrete-block room.

Rector exasperated the other death-row inmates. During the day, one said, “no one can pass his cell without answering a long repertoire of questions that he has about dogs. . . . In the middle of the night, his light goes out, he’ll start screaming. He’s afraid of the dark And everybody is up because Rector has woke everybody up.”

Inmates began supplying him with their own medications in the hopes of calming him at least at night. But in time the condemned men around him began to feel a peculiar care and solicitude for him. William Frank Parker, a white death-row inmate, was among several witnesses who testified for Rector at some of his last hearings.

Parker assured the court that ordinarily he would feel little moved to make appeals for anyone else on death row, but he went on to say, “I seen you attacking a retarded child, I’m going to get in it. Rector is not normal.” Parker added, “He has no foothold on reality. He doesn’t know what’s going on most of the time. . . . I don’t care what all these psychiatrists and psychologists say . . . , it doesn’t take a licensed – A garbage truck guy, or anybody, could tell you that Rector is not normal.” At a clemency hearing, Parker even admitted that at one point, out of a simple rage of pity for him, “I tried to get him to commit suicide,” but “he wouldn’t do it.”

At times, Stella says, “until the day he died,” he believed those he was told he had killed “were still walking around somewhere alive.” At other times, he continued to propose, John Jewell says, “that the police had killed the policeman and then shot him in the head.” Rector announced to those presiding at one clemency hearing that his first victim was in fact still living in some little town near Conway. One of Rector’s attorneys testified that he “continually told me that the gentleman he was supposed to have killed was driving around the jail in a big white car, a Cadillac or something, and he had seen this guy and he knew he wasn’t dead.” That was also his notion about the brother of his who had died while he was in prison – “Rickey kept asking me how he was doing,” Stella says – and about his mother. “He told me that he saw Mother, she came to visit him at night,” Stella recalls. In 1989, during a two-month stay at the federal medical center for prisoners in Missouri, he consistently referred to his mother, in the present tense, informing staffers that “she has a bad heart” but never once mentioning that she had died. It was noted that he said “at times he heard the voice of his mother talking to him,” and also that of his dead brother. And another of Rector’s sisters, Celestine, recalls that, though their father had died some three years before the shootings, on several of her visits to him “he would ask me again, ‘Why Daddy won’t come to see me?’ and I’d tell him, ‘Rickey, like I told you before, he is dead.’ And he’d go over and sit on his bunk and drop his head.”

Celestine says that he continued to suppose that her children were the same age they had been that Tuesday in March of 1981— “like time had just stopped still forever for him that afternoon.” He never again, Stella declares, “consistently knew what time, what day, what month, what year it actually was.” When he returned to Arkansas’ death row after his two months in the federal center in Missouri, Stella asked him how long he had been there, and “he told me he had been there two years.”

Rector had been transported to the Missouri facility at the direction of a federal district judge in Arkansas, for further examination prior to an appeal hearing on his sentence. This time, his I.Q. was measured at seventy, but he performed as abjectly on the other tests as he had previously. The staff psychologist who evaluated him, Dr. David Reuterfors, later described his linguistic functioning as being at a “very, very primitive type of level.” The staff’s notes read, “Smiles continuously. . . . Occasionally noted to scream and yell without apparent reason. . . . Laughing without apparent reason.” The federal center reported to the judge that, while in at least the minimal, technical sense Rector could be considered to satisfy the *Ford v. Wainwright* requirement of knowing about his death sentence and the reason for it, he “would have considerable difficulty due to his organic deficits in being able to work in a collaborative, cooperative effort with an attorney” and “he would not be able to recognize or understand facts which might be related to his case which might make his punishment unjust or unlawful” — a direct contradiction of Judge Hartie’s ruling seven years earlier.

DESPITE that report, the hearing became yet another appeal denied. By now, in fact, the hearings on Rector’s death sentence, though they had progressively moved up to a judicial altitude beyond those popular considerations which prevailed at the local, elective level where his competency was originally decided, had become largely a question not of the substance of Rector’s case but of the legal correctness of the earlier pro-

ceedings. In denying [a petition for a writ of habeas corpus] in federal district court, a judge concurred with an Arkansas Supreme Court ruling that since “the expert proof is in sharp conflict,” Hartie’s ruling, by the protocols of legal procedure, could not be held “clearly erroneous,” and therefore his decision that Rector was competent to be tried and executed was “entitled to a presumption of correctness,” in accordance with [the requirements of federal habeas corpus law]. Thus the master of Rector’s actual competence for execution was progressively abstracted into merely a paper matter of the competence of the process and of which standards should be applied to his case.

In 1983, however, one judge of the state supreme court did put forward the proposition that circumstances “arising after the crime,” such as Rector’s mental condition, did “affect the matter of clemency and should properly” be addressed to the Governor, who has the facilities for investigating all the facts.” * * *

THROUGH those years, as Rector’s death-sentence appeals filtered on through the courts, Clinton was re-elected governor a total of three times, and compiled a respectably diligent record of sensibly proportioned reform, especially in education.

According to press accounts, Clinton, even before announcing in 1991 his entry into the Presidential competition, had already determined that the modification of his liberal enthusiasms which had regained him the governorship in 1982 was also what was essential for any Democratic Presidential candidate. Having scrupulously studied the course of every Democratic Presidential candidacy since Woodrow Wilson, he seems to have divined in the candidacies that had miscarried, like Adlai Stevenson’s and George McGovern’s and, most recently, Michael Dukakis’s, the same miscalculation that brought about his 1980 defeat — that of ranging too far beyond the apparent popular mentality. And it cannot have escaped his attention as he prepared for his campaign that polls were showing a nearly

eighty-percent popular approval of capital punishment; it had “become a virtually one-sided issue” with the public, the Democratic pollster Geoffley Gurin declared. It was “real clear,” the leader of one anti-execution coalition painted out, that “the Willie Horton incident gave Republicans and Democrats an example of the ultimate political manipulation of the crime issue.” And one commentator declared flatly, “There is no way the Democrats can nominate somebody against the death penalty and . . . be viable.”

Early in 1992, two of the other Democratic candidates, Paul Tsongas and Senator Bob Kerrey, had also avowed support for the death penalty, but only Clinton was in a position to demonstrate his support by actually applying the penalty. * * *

* * *

ON December 15, 1991, Clinton won the Florida straw poll, and he soon headed for New Hampshire, a famously conservative state, to begin mounting his campaign in earnest for the primary there. Just over a week later, two days before Christmas, Rector was handed a letter from Clinton’s office in Little Rock apprising him that he was scheduled for execution on January 24th.

There followed two clemency hearings before a panel of the state’s Parole and Community Rehabilitation Board – all of whose members had been appointed by Clinton – to decide whether to recommend to Clinton that Rector be imprisoned for life without possibility of parole or dispatched on to the death chamber. The first of these sessions, to hear from Rector himself and others arguing for clemency, was convened in the Maximum Security Unit. Rector, his by now mammoth bulk shackled in wrist cuffs and in chains wrapped around his back, was slumped in a metal folding chair at a table beside Jewel. He told the board, “I don’t want to die. I’ll take life without if I can get it” – a statement that Jewel had labored for two days to draw out from him. Otherwise, he evinced hardly more interest in the proceedings than to “play like a little kid with the guards, joking and making cracks,” Stella relates.

Aside from asking Jewel twice if he could smoke, he merely stared flatly straight ahead during the discussion around him of his mental capacity. The second session was held the next day in Little Rock, for those opposed to diminution of his sentence to anything less than death. The turnout was so large – it included the families of both of Rector’s victims, Lieutenant Rodney Pearson, and three other Conway police officers – that the meeting had to be moved to bigger quarters. One of Martin’s daughters told the board, with tears in her eyes, “People claim he’s not the same person. But at that time” – when he killed her father – “he was the same person and knew exactly what he was doing.” It took the board thirty-five minutes to receive such observations and then to vote, unanimously, against recommending that Clinton choose anything less than Rector’s death.

SOME seven years after Rector was sentenced to die for killing Martin, Dr. Reuterfors, the staff psychologist who had examined him at the federal medical center in Missouri, was asked by John Jewell, in a deposition, whether Rector might be able to understand “the Christian concept of forgiveness,” and Reuterfors responded, “He probably would be. That’s not really a particularly high concept. Little children, four, five, six years of age, are able to understand the notion of seeking forgiveness and gaining forgiveness from parents for wrongs and so forth, so in many respects that’s analogous to Mr. Rector’s situation.” Not quite a month before he was scheduled to be put to death, Chaplain Pigman was conducting for Rector one of the solitary devotional services in the prison’s small chapel. “When we finished praying, he wanted to start talking about [John] Swindler [, who had previously been executed] again,” Pigman says. Rector seemed especially curious about him now. “At first, it was the usual ‘Chaplain, who’s John gonna kill next’ and ‘who’s gonna kill me, Chaplain?’” but then, in one of his odd little momentary trespasses into a dimly sensed reality conveyed to him by others, he began asking Pigman, “Did John cry when he died? Was John ever sorry for the people he killed? Did God forgive John?” Suddenly, he said, “Chaplain, I shot

that man they say I shot. Do you think God will forgive me, too?" Pigman proceeded to tell him the story of the two condemned criminals crucified with Jesus, one taunting him but the other, after rebuking the first, imploring Lord, remember me when you come into your kingdom, and Jesus assuring him from the Cross, "This day shall you be with me in paradise." Pigman then told Rector that the same could apply to him "if he would give his life and heart to Jesus," he recounts. "And I'm happy to say he did." Pigman took Rector's huge, clumsy hands, and after another prayer – the two of them sitting alone in the glum little chapel room – they sang together "Amazing Grace," Pigman says, "and then Rickey's favorite of all, 'Jesus Loves the Little Children.'" A couple of weeks later, on Stella's last visit, Rector jubilantly informed her that he had "got saved" after Pigman told him that what Jesus had promised the criminal. He then asked her, "You think that's true, Stella? Would Jesus do that? Is Jesus really going to take me with him into paradise?"

Pigman had arranged a baptismal service for Rector, whose only misgiving, once he'd been reassured that there would be only one or two other chaplains there, was "How long you gonna hold me under, Chaplain?" A portable baptism – a large fibreglass tub set in a pine-plank frame – was brought into the prison's chapel and filled with water from a hose. In a Polaroid snapshot taken of the service, Rector sits humped slightly forward, with water up to his bare midriff, like a kind of enormous, bearded Buddha, looking a little dazed and uncertain but grinning proudly straight into the camera.

ON the final Sunday of Rector's life, Clinton, in a debate with his four Democratic competitors in New Hampshire, resonantly defended his commitment to the death penalty by declaring that Democrats "should no longer feel guilty about protecting the innocent." Back in Conway, Lieutenant Pearson, for his part, told the *Log Cabin Democrat* that he was confident that Clinton "will allow the execution because there is a pro-tough attitude against crime in this nation,"

and "he needs to project that image." Throughout the community, in fact, anticipation was quickening. One policeman told the *Log Cabin Democrat*, "I think he deserves to die and it's time." Martin's daughter said "I feel like Daddy will finally be put to rest." Her mother professed, "I'm not vengeful, but I feel it's scriptural."

ON January 21st, around six in the morning, Rector was transported through the winter darkness from Tucker prison back to Cummins, where the death chamber itself was still situated, and installed in a holding cell, just around a corner from the room where he was to be executed, by lethal injection. He would pass his last four days in a windowless concrete cubicle seven and a half feet square, painted a dull cream, dingily lit, like a perpetual late dusk, and containing, behind its barricades of bars and heavy metal mesh, only a steel commode and sink and a concrete platform with a mattress on it, where Rector sometimes used his rolled-up pants for a pillow. Pencilled on the cell's otherwise blank walls were a few whimsies from prior brief tenants: "Death Lives" and "Helter-Skelter" and a drawing of a devil's head.

From the moment of Rector's arrival, a prison guard, sitting outside Rector's cell at a tiny table just beyond a television set mounted on a shelf, began keeping what the prison termed a "death watch log," assiduously transcribing, on the ruled legal-size pages of a ledger, a record of virtually every movement and utterance of Rector's through the last days of his life. The first day began "6:40 AM – Inmate Rector received Breakfast . . . Pancakes, toast, Hot dogs, syrup, butter, and 1 cup of coffee and 1 cup of orange juice. . . . 6:46 AM – Inmate Rector . . . began howling. . . . 6:59 AM – Inmate Rector began dancing in his cell," and again, eight minutes later, "Inmate Rector began howling and dancing in his cell." Such entries recur throughout the day: "Howling and barking while sitting on his bunk . . . walking back and forth in the cell snapping his fingers on his right hand and began noises with his voice like a dog." At one point during the first morning, Rector notified the guard, "I'm going to

lay down now,” and did so, drawing a blanket over him, and beginning to snore. This nap was interrupted when a prison official arrived and, the log notes, “checked both arms of the inmate.” Shortly thereafter, “Inmate Rector layed down on his bunk and started howling.”

At 1:56 P.M., the warden, Willis Sargent, appeared, “to get Inmate Rector to sign a form saying that he wanted to die by legal injection.” Rector had earlier announced to the guard, “I’m going to let them do it Friday because I don’t want to be shot,” and over the next three days there are other such entries as “Inmate Rector stated that he was going to let them do it Friday before they hurt him.” Just seven hours before his execution, the log has him declaring, “I don’t want to die, but I’m going to go on and take it because I don’t want to get gassed and shocked,” as if, somehow, a choice of lethal injection to avoid other violence threatening him were all that his situation amounted to – a choice especially crafty because, he once assured the guard outside his cell, “if you eat lethal injection won’t kill you.”

At 2:53 P.M. on that first day, Rector received what was recorded in the log as “his evening meal” – turnips, brown beans, and chicken noodle soup, with two small cartons of milk and four slices of bread. When he finished it, he pronounced, “That was a good meal.” A little later, the log reads “inmate Rector asked for a cigarette and a light, while barking.” After a while, when he was brought a helping of black-walnut ice cream; “he said this is my good ice cream,” the log records, and notes that he sat on his bunk smacking it down with lavish appreciation, “saying how cold that ice cream felt going down.” At five, he was “standing beside his bunk watching Channel 4 News about himself,” and a few minutes later he was pacing about “in his underwear, shirt, and socks, dancing,” then “sitting on his bunk making howling noise.” He ended his day by watching the movie “Born on the Fourth of July” and “walking around cell barking, laughing, and howling.” By ten, he had asked his guard if he knew what they would be bringing him for breakfast, and he had lain down on his

concrete bunk and “grabbed his blanket and covered himself.”

ONCE during the four days, while John Jewell was trying to explain to him the legal recourses still being pursued on his behalf, Rector abruptly brought up the Jennifer Flowers allegations, and said to Jewell, “Suppose that’s true, about him and all them women? Don’t matter to me, though, I’m for him anyway.”

Just a day after the publication of a poll that showed Clinton leading all his Democratic rivals in New Hampshire, he found himself – through that week, as Rector’s last court appeals were being denied one after another – in an uproar that could end his campaign, with an ever-expanding melee of reporters rumbling after him in a storm of shouted questions. He was “fighting for his political life,” the *Wall Street Journal* said.

Meanwhile, in Cummins, Rector was awakened at 2:40 A.M. on Wednesday to receive a breakfast of eggs and biscuits and hot dogs, grits with gravy, and two cups of orange juice and two of coffee. About four that morning, standing at the bars of his cell, he began bellowing “Cold Duck! Cold Duck!” – the nickname, apparently, of some old acquaintance long lost in the wilds of his past. Rector later claimed to his guards that Cold Duck had been a “hit man,” twelve times in prison, and “that he used to run with him on the streets and that he sure would like to see him again.” Through out his last three remaining days, he kept bellowing “Cold Duck! Cold Duck!”

A little after seven that morning, the log read, “Inmate Rector watched a Ch. 7 news report concerning himself and started laughing and dancing in his cell.” Shortly before one that afternoon, “he stated, their going to kill me Friday,” but then, only five minutes later, “Inmate Rector getting excited talking about another,” meaning Cold Duck. “He is stomping his feet and barking.” After a while, he told the guard, as the guard noted it, “I’m gone to lay down so I can watch my show ‘Santa Barbara.’” At 2:53 P.M., the log records, “Chow Time for Inmate Rector he

had 2 cup milk 4, slick Bread, sour kraut, and Brown bean.” After the meal, he “asked for a cigarette and light” and “laid back down on his bunk and continued to smoke his cigarette and watched ‘People’s Court.’” Five minutes later, he was “making barking and howling noises.” On the six-o’clock local-news telecast, the log continues. “Inmate Rector saw the news story about himself and when it was over, he stated to me, ‘They are going to get me Friday at 9:00 o’clock,’ and then started clapping his hands together and laughing about it.”

But at seven that evening there is the entry, “Inmate Rector laid down on his bunk on his back and started making what sounded like crying.”

LATE Thursday afternoon, Clinton left New Hampshire for Arkansas, to be on hand to respond immediately to final appeals and arguments on Friday. Before leaving, though, he took time to profess that one ambition of his candidacy had always been to inspire children and others trapped in grimly troubled circumstances, as he, the stepson of a violent alcoholic father, once was, to make the most of their lives anyway, as he had managed to do. “I know some of the most difficult struggles in life are those that are closest to you,” he said to a group of school children.

During the week of the Jennifer Flowers furor, one of the questions being heard about Clinton’s political validity was, as *Time* posed it, “Suppose Clinton does sew up the nomination by mid-March and the Republicans discover a Willie Horton . . . in his background?” And the director of the University of Arkansas’s governmental studies institute commented to the *New York Times*, “The death penalty is about as good a way to get Willie-Hortoned as there is.” * * * Stella’s pastor, the Reverend Kelan Morton, recalls, “Almost up to the very end, in back of everybody’s mind was, They really won’t do it – given Rickey’s condition, *surely* they aren’t *finally* going to do this. But, because it was an election year, what we forgot was that he *would* go ahead and do it to prove a point, saying, ‘We

fight crime.’” In fact, Clinton’s two previous executions were both held in an election year.

Clinton was not statutorily obliged to be in the state at all on the day of an execution; when an Arkansas governor is absent from the state, his authority, including that for commutation or approval of an execution, devolves upon the Lieutenant Governor, and in this case Lieutenant Governor Jim Guy Tucker had announced that he would not intervene in Rector’s execution. For that matter, a spokesman in Little Rock for both Clinton and Tucker had already declared that Rector would not be granted a commutation. Obviously, then, the execution would have taken place even if Clinton had remained in New Hampshire, but, according to Rosenzweig, who had now joined Jewell in pressing Rector’s last appeals, Clinton returned anyway, because “he wanted to make the point that *he* did it.” The *Houston Chronicle* later remarked, “Never – or at least not in the recent history of presidential campaigns” – has a contender for the nation’s highest elective office stepped off the campaign trail to ensure the killing of a prisoner.”

Soon after Clinton arrived in Little Rock, he received a call from Jesse Jackson, who urged him – saying, “Now, Bill, just on a moral, humanitarian basis” – to stay Rector’s execution. Clinton’s response, Jackson relates, was that “he’d been researching various ways to get around it, but it just couldn’t be done, there were doctors who’d said he was competent. Said he’d be praying about it, though.”

THE January 24th issue of the Conway *Log Cabin Democrat* informed the community – under the banner headline “CLOCK TICKING ON RECTOR EXECUTION” – that at three-thirty that afternoon a local radio station would begin carrying hourly reports on Rector’s progress toward the death chamber, ending with a live broadcast from the prison when the execution was scheduled to take place, at nine o’clock.

Down at Cummins, Rector had been awakened at three that morning with the delivery of a tray

holding his last breakfast – eggs, a hot dog, biscuits and gravy. He ate only the hot dog, and went back to sleep, waking up shortly before dawn. He then watched a local telecast about his imminent death and “stated that they were going to get him today,” the log says. “Inmate Rector then started dancing and clapping his hands,” and, a moment later, “hollering Cold Duck.” But then he told the guard “that he probably would not see me anymore after I went home,” the log noted. “He then stated ‘that it was good meeting you.’” With that, he lay back down on his bunk and napped, was awakened again and asked if he wanted anything, and replied that he’d like a shower. He was allowed to take one, then returned to his cell and, having been supplied with fresh underwear and bed linen, quickly lapsed into a deep deep, snoring. But he awoke after only a few minutes, to notify his guard, “They are going to get me, I’m going to die tonight but I’ll be asleep when I die.” A little later, again he asked the guard about the last meal he had selected “What time will I get that steak & chicken, around 3:00 o’clock?” At 10:44 A.M., he was brought his next-to-last meal – two pork chops with sweet potatoes and greens, two cups of jello, and milk. At 11:26 A.M., the log records, “he said I’m going to take a nap,” but only some eight minutes later, “Inmate got up off his bunk and stretched and said to me ‘I will get that steak and chicken about 3 pm o’clock, I can’t wait. I love that steak and chicken.’” A few minutes after that, he was pacing about his cell, “snipping his fingers on both hands, stomping his feet howling, and barking like a dog,” and then, still swinging and dodging about his cell, he began to wail out, according to the log, “No mom. No Mom.”

IN Little Rock, both Jewell and Rosenzweig had now begun trying to reach Clinton by phone. “After all,” Rosenzweig says, “he’d said he was coming back only for this case.” Jewel, meeting only with politely firm deflections from members of the Governor’s staff, began “calling people I knew who might know how to get through to him,” in a last, desperate effort to simply have it conveyed to Clinton somehow that “Rector was a totally different person” from the one who had

shot Martin, that the case would “be easy enough to distinguish from other capital cases,” and that “if ever there was a valid cause for clemency and the opportunity to demonstrate that he could show mercy, this was it.” But finally, in a conference call, Clinton’s counsel and his acting chief of staff collectively informed Jewell that, he says, “the Governor wasn’t available to me, but they would pass my message on.” He remarks, “It was pretty clear that was as far as I was getting.”

Rosenzweig himself had begun at eight that morning to place a call every half hour, struggling to get through to Clinton, beseeching his secretary and chief counsel, “Look, the Governor *has* said he was coming back to deal with the execution issue with Rector. I mean, who’s he gonna *talk* to, if not the defense attorneys?” But, he relates, “I was told again and again, We’ve given him your message. Nonetheless, Rosenzweig pleaded throughout the morning to anyone he could get on the line, “Please, please have him call me. Because there’re some things he needs to know.”

Rosenzweig, as it happened, had grown up with Clinton, in Hot Springs, and his father had been Clinton’s pediatrician. After graduating from Princeton and studying law at Southern Methodist University, in Dallas, Rosenzweig had returned to Arkansas to develop his practice. * * * [H]e continued trying to reach Clinton by phone, his final, thin hope being that in considering Rector’s situation Clinton “had been dealing totally off paper, just the legal record of it.” He explains, “I doubted deeply if he had actually talked with anyone who really *knew* Rector and the actual condition he was in. He needed to hear an affirmation from somebody who actually knew Rector and whom he knew, hear it himself ear to ear, plainly, that this guy was indeed truly zombied out, seriously, *seriously* mentally deficient, just no doubt about it.” Also, Rosenzweig says, he calculated that “the politics of it he should be aware of as well – that Rector had been convicted by an all-white jury, and this was something that just might come to waylay him down the road.”

But Clinton had now withdrawn into a resolute seclusion in the Governor's Mansion. What principally occupied him through that last day of Rector's life were continuing emergency sessions with aides and supporters about the Flowers crisis. He finally decided on an appearance with Mrs. Clinton on "60 Minutes," in a special broadcast that Sunday after the Super Bowl, which held the promise of an audience of twenty-four million households. * * * James Carville, the campaign strategist, later reflected, "I think everybody understood . . . it was high noon."

In the meantime, in Cummins, Chaplain Pigman paid his last call on Rector, in the prison's visitation center. As the two sat at a small round table there, Rector in leg irons and manacles and chains, "I had church with him again," Pigman says. When Pigman was stirring to leave, Rickey said, "Aren't we gonna sing, Chaplain?" Recalling this ten months later, Pigman – a small, crisply neat, graying man in glasses – suddenly flushes, and his eyes blur with tears. "And we sang together for the last time 'Amazing Grace,'" he says, and then the little Sunday-school tune that was Rickey's favorite, their voices echoing over the tin shed: "Jesus loves the little children, all the children of the world. Red and yellow, black and white, they are precious in his sight. Jesus loves the little children of the world."

As the day wore on into the afternoon, even the warden at Cummins, Willis Sargent, who was a burly former Army noncommissioned officer, "seemed coming apart the closer it got," according to Stella's pastor, the Reverend Kelan Morton. Sargent confided to Morton, "Rickey's a harmless guy. This is not something I want to do." Ten months later, Sargent remarked, shifting uneasily behind his desk, that most of the public "just doesn't know how sensitive we are," and he went on to explain, "I dread to see these days approach. It's a hard business. You have to work hard to prepare yourself." He conceded that "executions are a part of the job that I accepted" but said, "I have mixed emotions." His voice sank to a murmur as he went on, "Legally, it's correct, but morally – morally – I don't know."

Around four that afternoon, Rosenzweig, in a frenzy over his failure to break through to Clinton, finally complained about his isolation to a local television reporter who had come by to interview him about the execution. Shortly thereafter, he left for Cummins, driving south out of Little Rock through darkening forest land, in about half an hour entering the northern outskirts of Pine Bluff on the Martha Mitchell Highway, passing through a shabby fringe of weedy auto scrap yards and high tension power lines. Then, at one large intersection, he pulled into a Road Runner filling station, across from a Burger King and a Western Sizzlin' Steakhouse, and, from an outside pay phone, called his office. He was told that shortly after the local newscast aired his protests about Clinton's unreachability Clinton's office had called with a request that Rosenzweig phone Clinton at the Governor's Mansion.

For a stretch of minutes then, Rosenzweig tried to get through to the mansion from the pay phone outside the Road Runner station * * * but he kept getting a busy signal. Finally, he began frantically trying to call from both pay phones on the wall of the station, in rapid alternation, but he met only with recurrent beeps on both. He plunged back in the car and drove on through Pine Bluff as far as an E-Z Mart beside a Conoco gas station. From the pay phone at one end of the store's brick front, he at last managed to get through to the Governor's Mansion by first calling his office, telling his staff there to put him through, and when someone at the mansion informed him that Clinton was in a meeting, insisting that Clinton at least be told he was returning his call. After a few moments, Clinton's voice came on the line: "Jeff, how are you?"

"Not real good," Rosenzweig remembers saying. "How're you?"

With just the smallest hang of a pause, Clinton said, "All right," with a sigh – his voice "real glum," Rosenzweig recalls.

Rosenzweig quickly undertook to describe Rector's condition. "The thing you got to bear in

mind is, he really is greatly mentally defective. He's a zombie, he doesn't understand death is permanent, he's a *child*. If you're gonna execute people, this is just not the appropriate one.

"Well, why did Henry approve of it if it's as bad as you say it is?" Clinton asked, referring to Henry Woods, the federal district court judge in Arkansas who had denied Rector's appeals.

"His hands were tied because of the way the case was presented to him," Rosenzweig declared, and then posed to Clinton what in fact amounted to a fundamental issue about the whole system of law itself – that considerations of substance about Rector's true situation had sifted out of the process by the time it reached the higher courts, so that the judges had been obliged to defer to Hartje's local ruling of competency. Rosenzweig then pleaded, "The guy is truly a human blank, just pathetic. If there's anything you can do, *please* do it –"

"Where are you?" Clinton suddenly asked.

"Where am I? I'm at a pay phone at a convenience store in Pine Bluff – I'm headed on down to the prison."

But Clinton ended their exchange with only a noncommittal geniality.

Rosenzweig now admits that he had made the effort to reach him with only minimal expectations, in view of the formidable political barometrics surrounding Clinton then. "But I thought he just might not want to be seen as merciless. And that we might be able to get a reprieve that could shift it into, you know, a less political time."

He drove on out of Pine Bluff. It was dark by the time he reached Cummins, and a hard cold had come into the January night.

Earlier that afternoon, at Cummins, Rector had asked the guard "what time the tie down team would come to get him," the log says, and shortly

afterward fell asleep, snoring. Around one o'clock, a party of three men arrived, including an inmate, to prepare for Rector's short passage that night to the death chamber. The log records, "All locks were lubricated and visually examined. Inmate Rector layed down on the bunk quietly and didn't say anything." As soon as this operation was finished and the men left, though, "Rector walked to the center of the cell and began dancing and howling." Presently, a pint of black-walnut ice cream was brought to him, and he spooned it down while sitting on the edge of his bunk in his shirt, shorts, and socks. But upon finishing it he began bawling out, "Cold Duck! Cold Duck!" At 2:52 P.M., he was lying on his right side, his back to the guard, with his legs stretched out straight and stiff, his feet clamped together, and he was howling.

AT 2:57 P.M., his final meal arrived, with Rector watching its approach and snapping his fingers in impatient glee: one steak, well done, fried chicken in heavy gravy, and brown beans, with three rolls, cherry Kool-Aid, and a plump helping of pecan pie. He set to it, sitting on his bunk and facing, as he rapidly chewed, a blank wall. He got up once to proclaim. "Chicken is good." When he had finished, he wiped his hands on a towel and ambled about a bit with his paper cup of Kool-Aid. The death-watch log notes that at this point, after his tray was taken away, "Kept the pecan pie."

Morton, Stella's pastor, now reflects, "The way Rickey would always eat, he would always save part of his dessert to eat just before he went to sleep," and Pigman says, "He was clearly planning to come back when the whole thing was over with. Rickey otherwise would have never left anything like a slice of pecan pie uneaten, *never*." Jewell had earlier declared, during one plea for a stay of execution in Little Rock circuit court, "When you sit down and, face to face, explain to somebody that they're going to die, and then the next thing they say is when I get out on the street, or, you know, Well, what's going to happen next?" . . . it leads me to the conclusion . . . that he doesn't grasp that he's going to die."

Morton remembers that when he visited Rector about thirty minutes after his last meal “he started asking me again about some friends from his childhood, twenty years ago, some of whom had died, even though I’d told him over and over they were dead. Even some of the people he said he wanted to be pallbearers at his funeral, when I asked him about that, they were already dead, though I’d told him about that, too.” After praying with him, Morton left, and Rector lay back on his bunk and watched “Geraldo.

Soon, though, he began repeatedly rubbing his forehead, under the half-moon scar, first with his left hand, then with both hands, then with his right. A little after six o’clock, after asking the guard exactly what time he was supposed to go to the death chamber, he watched a news story about his execution, now only a few hours away, which reported that all petitions for a stay and commutation had been denied, and he began mumbling, “I’m in trouble. I’m in trouble.”

Rosenzweig arrived at Cummins around six o’clock and was taken in a prison car to the building – it was vanilla white – that housed the death chamber and the holding cell containing Rector. He found that Rector’s beard had been shaved off, leaving his massive round face now slickly bare – “He did it because he knew I didn’t like it,” Stella says of the beard – and Rector told Rosenzweig, “Yeah, I wanna look good.” While they were talking, a newscast appeared on the television set above them about Clinton’s continuing political woes over the Jennifer Flowers affair, and it was then that Rector said with a grunt to Rosenzweig, “Don’t none of that matter, I’m gonna vote for him for President.”

Left alone again for a while, Rector lay back on his bunk. his hand lying across his forehead, his legs drawn up, and presently he inquired of the guard, though he was to be cremated, whether the guard had any idea when he was to be embalmed. Four minutes later, he was standing at the bars of his cell, chatting with the guard, according to the log, “about opossim and racoons and their teeth.” Later, Rector spoke to Rosenzweig and Jewell

about how he would be strapped down when the hour came, but then he began chatting to them about picking pecans.

At eight minutes after eight that evening, Rector was given a short-sleeved white shirt, white pants, and calf-length white athletic socks to change into. The last death-watch log entries report, “8:21 PM Inmate Rector appears to be nervous, pacing and asking questions . . . continues to pace in cell and is asking questions about dieting. . . . 8:27 PM Tie-down team in death chamber lobby.” At 8:36 P.M., Rector was taken out of the cell and led, surrounded by seven large prison guards in black helmets and carrying riot shields, to a tan metal door bearing the sign “Exit”; it opened onto a turn into a short corridor that led into the execution chamber itself.

AROUND nine o’clock a somewhat disparate delegation of thirteen witnesses was assembled by prison officials to watch the execution from what the prison called, with a certain mortuarial delicacy, “the viewing room.” They included Morton, Jewel, and Rosenzweig, and also four Faulkner County law officers, among them Lieutenant Rodney Pearson. One of the officers explained his presence there this way “I wanted to see justice served. You don’t get that many chances.” Pearson now says, “I was the only one left in the department who was originally associated with the case, and I went as a private citizen on behalf of those others. I wanted to close the books on it.”

When Pearson arrived at Cummins, with others driven there in a van from Pine Bluff, and they all got out into the cold darkness of its hushed grounds, he noticed “about a hundred yards away from the death house, parked back in shadows with its parking lights on, this very large black stretch hearse, like a bird of prey.” He said later, “It was an ominous sign to me that hearse standing by to pick up the body of a human being that was still alive at that moment.” The group was conducted into the viewing room – a concrete-block chamber painted cream, under low white ceiling tiles and with a streaky tan vinyl

linoleum floor. Orange plastic chairs were ranged in three precise rows before a wall of four large glass panes, like department-store windows, across which a black velvet curtain had been drawn from the other side. Affixed to opposite walls near the ceiling were two little boxes – one an automatic air-freshener and the other an insecticide spray mechanism. “Mosquitoes really get in here in the summer,” a prison guard politely explained when I visited the prison about ten months later. Also on the chairs that night were car-sickness bags, and a nurse was standing by to attend to anyone who might get ill from what the group had gathered to observe.

Pearson and two other Conway policemen took seats in the front row, beside the Reverend Mr. Morton, who had brought along a small Bible. The lighting in the room was discreetly dim. Pearson now admits that “although I volunteered, I wondered if this was a good idea, when you’re sitting there in a darkened room, and you know you are about to witness the death of a human being, a planned execution.”

As the minutes passed, with a subdued rustle of voices, and an occasional stirring of the curtain from the passing brush of someone behind it. The group began to sense that something was amiss. Eventually, the director of the Department of Corrections, Art Lockhart, opened the door from the hall to tell the assembled spectators that medical technicians were having some difficulty locating a serviceable vein in one of Rector’s arms. With that, he stepped back, and the door was locked after him.

As it turned out, the witnesses had to sit waiting for a full hour, hearing from behind the curtain periodic hand slaps on skin and sudden great grunting groans. * * * One witness, a sheriff from a neighboring county, observed to everyone after another groan from behind the curtain, “Seems like they’re really having trouble.” In fact, the medical crew was soon increased from two to five in an urgent scramble – if the execution didn’t take place before midnight, it would have to be postponed until another date decreed by

Clinton – to find a vein that would not wilt at the needle’s insertion, a difficulty later attributed to Rector’s bulk and his regular doses of the antipsychotic drug Mellaril. * * * At one point, after applying a local anesthetic, a scalpel slashed into the crook of his arm, in what the attending supervisor, John Byos, a former military medic, afterward described as a “cut down” method of finding a usable vein. “He gave us quite a go,” Byos admitted to the *Log Cabin Democrat*, remarking that he himself was not “an advocate of injection,” and preferred the old sure simplicity of electrocution. During that hour, eight outcries from Rector were heard. In the stillness in between, the automatic air-freshener on the wall would occasionally discharge, startling the people in the chairs below.

All this time, back in Conway, Stella, two of her sisters, and their families were collected in her small den watching television for further reports from Cummins. “We were all sitting holding hands,” Stella recalls. Just us, now, all alone.” And, with the periodic announcements of the continuing delay, one of the sisters finally cried, “Lord, please lead him on! *Lead him on.*”

At last, the black curtains over the windows of the viewing room were pulled back, to reveal an antiseptically stark room, where fluorescent lights cast a shadowless glare on white-painted concrete-block walls. And on a hospital gurney that was bolted fast on its trolley wheels to the vinyl-tile floor, over the metal-plate fixtures for the electric chair, lay the vast bulk of Rickey Rector, bound with blue and orange straps, and draped in a sheet up to his chin, his head held fast by a tan leather strap to a kind of V-shape clamp of boards. His right arm was strapped to a narrow tray extending from the gurney’s side. Blood was spattered on the sheet from the futile attempt with the scalpel, but now a catheter and a tube were at last in place, taped to the top of his right hand. His thick fingers were curled around a lump of gauze.

The tubing ran under the sheet covering Rector and then up to two bottles suspended above his head. They held some fluids that, when used in

combination, are known as the Texas Mix: sodium pentothal, which slackens the muscles and depresses the central nervous system while beginning to induce unconsciousness; Pavulon, which blocks the exchanges between nerves and muscles, suppressing the respiratory system and beginning to arrest the heart; and potassium chloride, which stuns the heart to a stop altogether with an electrolyte imbalance – each one of these chemicals in a dosage heavy enough to be fatal in itself. This load of fluids was attached then to other connections that disappeared into an enclosed compartment just behind Rector's immobilized head, a cubicle three feet wide and five long, where two executioners were stationed, unseen, unknown.

On the wall above Rector were a circular, metal-rimmed Seth Thomas clock and a beige wall phone, and near the foot of the gurney was a wooden lectern, where the prison's last few bookkeeping notations on the prisoner were entered onto a standard form. The formal proclamation of his sentence were read. A heart-monitoring machine stood on the floor just below Rector, it faced outward, toward the viewing room, so that Rector couldn't see it. The windows separating the witnesses from this brightly lit tableau were one-way, and, from within the execution room itself, merely mirrored back its own confines.

Rector was breathing, the sheet rising and falling on his chest, and he was gazing dully into the middle of the room but glancing now and then toward [Commissioner of Corrections] Lockhart and [Warden] Sargent. Then his mouth moved, in response so a query from Lockhart, and he delivered his last words * * * "Yeh, I got baptized and saved," but from the shadowy room on the other side of the glass, Rosenzweig recalls, "it was like sitting there watching a silent play." Then someone noticed that fluid had begun to drip from one of the bottles into the tubing. "It was so strange," Jewell says. "All so clinical-looking that automatically you feel that this is a hospital setting and somebody as being helped. But they are killing him." There was another unheard

remark from Rector on the other side of the glass: "I'm gettin' dizzy." * * * After a few moments, Rector's eyes slowly closed – his last glimpse of life the flat glow of two fluorescent panels in the ceiling above him.

Some of the viewers now leaned forward, and others rose from their chairs and moved to the window for a closer look. Everyone was watching a luminous green dot still leaping on the heart-monitor screen. Then Rector's mouth sagged open. "You could see he was gasping for air," Motton says. * * * Someone said, "It looks like it's flat-lining." Then "Oh, there was a jump. There's another flutter." But after that last lurch the green dot began tracing a steady, level line. At 10:09 P.M., nineteen minutes after the fluids had begun dropping into the tube, Ricky Ray Rector died.

LIEUTENANT PEARSON drove back to Conway that night with two of his fellow-officers, and reached the Conway Police Department around midnight. There, to two officers who had been at the house of Rector's mother that March afternoon almost eleven years before, Pearson described the execution of Bob Martin's slayer. One of the officers, as he listened, began to weep.

Stella says of the night after her brother's execution, "I slept well for the very first time in years. It was over. It was lifted. I could rest."

Some eleven years, then, after Bob Martin was buried near his country place at Wooster, the body of his killer was brought back to Conway and, having been cremated, also buried in Faulkner County earth, under an oak tree, on a warm and overcast January afternoon. During the brief grave side service, Stella noticed a stranger standing nearby, a white man in a tan raincoat, who was weeping. He was "sobbing so hard," Motton, who also noticed him, recalls, that when, after the service, he walked over to the man. It turned out that he was the son of one of the jurors at Rector's trial, who voted so condemn him to death. Before his own death, a few years later, the juror had

passed on so his son his remorse and guilt over that judgment.

Chaplain Dennis Pigman was also at the burial service, and he saw another stranger, standing off apart from the family – “this young black girl, about eighteen or nineteen,” he says. “She was all by herself, but she had this oddly familiar look to me. I went over and asked her who she was. She said, ‘I’m his daughter,’ and she began crying.”

Shortly after Rector’s execution, Pigman left the Arkansas prison system, and he has since undergone periodic sessions of psychotherapy. “I hate murder,” he says today. “I hate murderers. But to execute children? What was done to Rickey Ray Rector was in itself, absolutely a crime. A horrible crime. We’re not supposed to *execute children*.”

THE day after Rector’s death, Clinton flew out of Little Rock for campaign appearances in Washington and Boston, and a rally that had been scheduled for that evening in Manchester, New Hampshire. In Washington, he presented himself in a candidates’ forum before a convocation of Jesse Jackson’s National Rainbow Coalition. “I know most of you in this room do not support the death penalty and disagree with the decision I made yesterday,” he said. But, he went on, in all three of his executions now, he had “prayed in private, not in public for the souls of the condemned as well as those they killed,” and, he said, “last night I thought of Mr. Rector” but “also of Robert Martin, the police officer who was killed in cold blood . . . and I prayed that I had not made the wrong decision.” Mostly, though, he had to answer questions about Jennifer Flowers. On the Sunday after Rector’s execution, he and his wife taped the “60 Minutes” interview, and then flew back to Little Rock to watch the program in the Governor’s Mansion.

Over the following months, there were only occasional comments on Clinton’s decision to permit Rector’s execution, and they mostly came down to what the black political analyst Eddie Williams said at a press conference in October:

Clinton had “looked like he was strong on crime.” Others observed that the Rector execution had at least served as a conclusive preemptive strike against any possible assaults, like those about his attitude toward law and order which had beset him in 1980. Indeed, once Clinton’s campaign against Bush began, it came to be generally appreciated that his decision on Rector, as a California Democratic activist told the Houston *Chronicle*, “completely undermines” the Bush campaign strategists’ “attempt to define Bill Clinton and Al Gore as out of touch with mainstream public and even mainstream Democrats.” New York’s seasoned political impresario David Garth put it more simply “He had someone put to death who had only part of a brain. You can’t find them any tougher than that.”

In May, Clinton again interrupted his campaign to fly back to Little Rock, this time to sanction his fourth execution – of a white man convicted of murdering a state police investigator. In October, the day after a campaign spot began advertising his sternness about crime and his endorsement of the death penalty, he set the date for still another execution.

* * *

The * * * Sunday morning [following Clinton’s election as President] I attended the eleven-o’clock worship service at Clinton’s church, Immanuel Baptist, which is a citadel-like edifice of yellow-ochre brick with faintly Alhambran nuances. As the organist and the choir began booming over the sanctuary’s grand expanses the anthem “In the Name of Jesus,” Clinton came striding down the aisle, a Bible in his hand, and joined other worshipers in a pew at the front. Eventually, Dr. Rex Horne, an immaculately groomed man with a collegiate freshness about him, took the pulpit. His sermon that morning happened to be about God’s commandment to Abraham to sacrifice Isaac. In Abraham, Horne said, God recognized “that there is a person to be tested,” and he tests all believers on whether they will “do the right, noble thing, even if it is painful.”

My last morning in Conway, * * * I called on Stella, at the care center for the mentally retarded where she has been working for so long. * * *

* * *

On Stella's desk was a large calendar pad with Bible verses written by her into the square spaces of its days ("Though you have made me see troubles, many and bitter, you will restore my life again; from the depths of the earth you will again bring me up"), and other verses, written on leaves from a small yellow notepad, were stuck up around her. "These were all that kept me going," she said. Before I left her, she peeled one of them off and gave it to me. I did not finally read it until I was on the flight out of Arkansas. It was I Corinthians 4:5. "Therefore judge no thing before its time; wait till the Lord comes. He will bring to light what is hidden in darkness."

For discussion:

1. Assuming you were the District Attorney in Faulkner County and accepting for purposes of this discussion the legitimacy of Arkansas law providing for the death penalty for certain crimes, including for the murder of a law enforcement officer, what factors would you consider in deciding whether to seek the death penalty for Ricky Rector?

2. Assuming as District Attorney that you decided to seek the death penalty, what factors would you consider with regard to whether to engage in plea negotiations and what plea offer, if any, to make to Rector?

3. Identify each of the legal issues presented by Rector's mental capabilities at each stage of the case. From your reading of the statutes, the article, and the excerpts of the appellate decisions, what were the precise legal issues presented, what standard was used to deciding each issue, what evidence was relevant to each, how was the issue decided by the trial court in the first instance and what was the scope of appellate review with

regard to each?

Clinton's Record on Crime Issues as President

Clinton was more generous with the commutation and pardon power on his last day in office as President of the United States. On that day, January 20, 2001, in what some called the last scandal of his administration, Clinton granted 140 pardons as well as several commutations. (Pardons free the person of any responsibility for their conviction; they can register to vote among other things. Clemency reduces a sentence, such as from death to life imprisonment, or a term of years to a shorter term.)

Among the most controversial was a pardon of financier March Rich, who had fled to Switzerland after being indicted for evading more than \$48 million in taxes, 51 counts of tax fraud and running illegal oil deals. Critics thought their might be a relationship between the pardon and large donations made by Rich's ex-wife to the Clintons and the Democratic Party.

Clinton granted 150 pardons and commuted 39 sentences while President – almost all in the final days of his Presidency. Many others were controversial, including the pardon of Susan McDougal, who served the maximum of 18 months, including eight months in solitary confinement, for contempt for refusing to testify about Clinton's role in a real estate development project known as "Whitewater." Clinton pardoned two other people after lobbying on their behalf by Tony Rodman, the brother of Hillary Rodman Clinton.

Clinton also commuted the death sentence of David Ronald Chandler, the first person sentenced to a federal death sentence following passage of the Anti-Drug Abuse Act of 1988. There were serious questions about the guilt of Chandler, who was convicted of ordering a murder in the course of his marijuana operation in Piedmont, Alabama, and the competency of his counsel. *See Chandler*

v. United States, 218 F.3d 1305 (11th Cir. 2000) (en banc).

In other regards, Clinton maintained a tough approach to crime consistent with his denial of clemency for Rector. He signed into law legislation greatly expanding the federal death penalty, severely restricting review by federal courts of convictions and sentences in habeas corpus proceedings, and making it much more difficult for the men, women and children in prisons and jails to obtain relief for civil rights violations in those facilities by barring some suits outright and severely restricting the remedies that federal courts can order for unconstitutional conditions and practices in prisons and jails. Clinton also funded and facilitated the most intensive incarceration boom in the history of the country. By the time he left office in 2001, there were 645,135 more people behind bars than on his inauguration day. About 60 percent of these new inmates were black and Latino.

On September 14, 1994, Clinton signed into law the greatest expansion of the federal death penalty in the history of the nation.² Until then, the federal death penalty had been limited to “drug kingpins.”³

Clinton’s Attorney General, Janet Reno, approved the prosecution of 27 cases as capital cases in the first two years of his administration, equaling the amount sought by Attorneys General Thornburgh and Barr during the entire George H. W. Bush administration. The first ten capital prosecutions approved by Reno were all against

African American defendants.⁴

In 1995, Reno instituted a protocol regarding the consideration of cases for the death penalty and established a committee of senior Justice Department attorneys to review the cases and make recommendations to her. She retained the final decision on whether to approve a capital prosecution. From January 27, 1995 to July 20, 2000, Reno considered 588 cases and authorized seeking the death penalty in 159 of them.⁵

Although the protocol provided that characteristics such as race and ethnicity were to play no role in the decision to recommend the death penalty, a Department of Justice study released on September 12, 2000 revealed that from 1995 to mid-2000, 72% of the cases approved by Reno for death penalty prosecution involved minority defendants.⁶ The report also found that cases involving minority defendants were less likely to be resolved with plea bargains in which the government agreed not to seek the death penalty.

The survey also reported large disparities in the geographical distribution of federal death penalty recommendations. From 1995 to mid-2000, 42% (287 out of 682) of the federal cases submitted to the Attorney General for review came from just five of the 94 federal districts.

2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 105 Stat. 1796.

3. Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848. There was no federal death penalty between 1972, when the Supreme Court declared the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), and 1988.

4. *Racial Disparities in Federal Death Penalty Prosecutions 1988-1994* (Staff Report by the Subcommittee on Civil and Constitutional Rights Committee on the Judiciary, 103d Cong., 2d Sess., One Hundred Third Congress, Second Session (March 1994)), available at www.deathpenaltyinfo.org/racial-disparities-federal-death-penalty-prosecutions-1988-1994.

5. U.S. Department of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* (2000), at T-207, available at www.justice.gov/dag/pubdoc/dp_survey_final.pdf.

6. *Id.*

In July 2000, the federal death row was made up of 13 African Americans, 4 whites, 1 Hispanic, and 1 “other”). (At the end of 2011, the federal death row was made up of 30 blacks, 24 whites, 6 Latinos and 1 Native American. Two are women.)

“I can’t help but be both personally and professionally disturbed by the numbers that we discuss today,” then-Deputy Attorney General Eric Holder said when the report was released. “[N]o one reading this report can help but be disturbed, troubled, by this disparity.”

On April 24, 1996, while a candidate for reelection, Clinton signed into law the Antiterrorism and Effective Death Penalty Act,⁷ which severely restricts habeas corpus review of convictions and sentences by federal courts by, *inter alia*, establishing for the first time in history a statute of limitations for filing of habeas corpus petitions,⁸ requiring deference to the *legal conclusions* of state courts⁹ (previously federal courts deferred only to fact findings by state courts), prohibiting evidentiary hearings by federal courts except in a few instances,¹⁰ prohibiting second or “successive” petitions except in cases where the constitutional violation resulted in the conviction

7. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (amending 28 U.S.C.A. §§ 2241-2255 and adding 28 U.S.C.A. §§ 2261-2266) (since amended by the Patriot Acts).

8. 28 U.S.C. § 2244(d); 2255 (the limitations period is one year except in certain capital cases in which it may be six months, *see* 28 U.S.C. §§ 2261-2266).

9. A federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254 (d)(1). The Supreme Court has since held that the law must be clearly established at the time of the state court decision. *Greene v. Fisher*, 132 S.Ct. 38 (2011).

10. 28 U.S.C. § 2254 (e)(2). *See Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) (holding that federal habeas review of state-court proceeding was limited to record before the state court).

of an innocent person,¹¹ and providing for expedited consideration of habeas corpus cases under strict deadlines if states met certain conditions.¹²

The next day, Clinton signed into law the Prison Litigation Reform Act,¹³ which established procedural barriers to cases involving unconstitutional conditions or practices in prisons and jails in cases brought under 42 U.S.C. § 1983, prohibited some prisoner suits altogether, and restricted the power of the federal courts to remedy unconstitutional conditions and practices.

The Act bars actions by prisoners who, usually lacking the assistance of lawyers, fail to exhaust administrative remedies such as grievance systems which may have deadlines as short as a few days.¹⁴ In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court held that a prisoner was barred from filing a federal lawsuit because he missed a 15-day deadline which was part of California’s grievance procedure. The California grievance procedure required prisoners to seek relief through an informal process and, if unsuccessful there, a three-step formal process, which included the 15-day deadline. While acknowledging the harsh consequences of the law, the Court observed that “prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements.” *Id.* at 103.

11. 28 U.S.C. § 2244 (b)(3); 2255.

12. 28 U.S.C. §§ 2261-2266 (since amended to give the Justice Department, instead of the federal courts, authority to determine compliance by a state).

13. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (amending various sections of 18 and 42 U.S.C.).

14. 42 U.S.C. § 1997e(a) (“No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted”).

The Act also prohibits any action “for mental or emotional injury suffered while in custody without a prior showing of physical injury.”¹⁵ This provision bars, for example, lawsuits in the courts of the United States for treatment of prisoners in state and federal prisons and jails such as that suffered by some detainees at Abu Graib and Guantanamo, such as stripping a prisoner naked; placing prisoners in humiliating poses; forcing them to remain in painful positions; and subjecting prisoners to sleep deprivation, extreme temperatures, deafening music and threats of attacks by dogs.

The Act also restricts federal courts to granting only relief that is “narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation.”¹⁶ It prohibits a single judge from ordering the release of prisoners as a remedy for constitutional violations resulting from overcrowding and provides that only a three-judge court may order release;¹⁷ limits the duration of any prospective relief to two years,¹⁸ and reduces the attorney fees that can be recovered in cases where relief is obtained, thus discouraging lawyers in private practice from representing prisoners.¹⁹

15. 42 U.S.C. § 1997e(e). *See, e.g., Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc). There is a similar provision in the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(2).

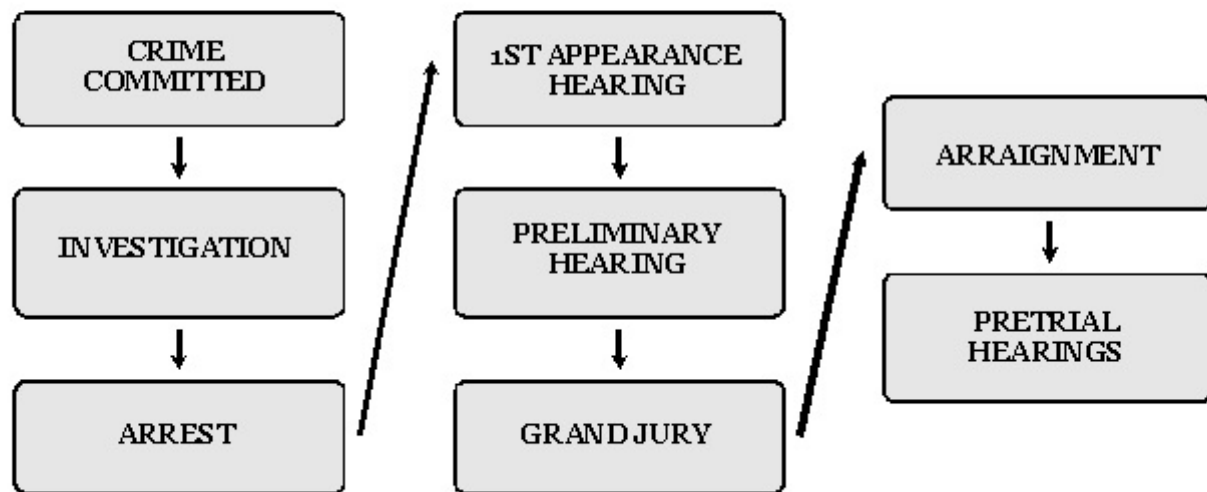
16. 18 U.S.C. § 3626(a)(1).

17. 18 U.S.C. § 3626(a)(3). The only time a three judge court ordered such reduction in prison population was with regard to the California prisons in *Coleman v. Schwarzenegger*, 2010 WL 99000 (E.D. Ca. 2010). The Supreme Court upheld the order by a 5-4 vote in *Brown v. Plata*, 131 S.Ct. 1910 (2011).

18. 18 U.S.C. § 3626(b).

19. 42 U.S.C. § 1997e(d)(3); 18 U.S.C. § 3006A (restricting fees awarded pursuant to 42 U.S.C. § 1988 in prisoner cases to 150% of the Criminal Justice Act rates).

Pretrial Proceedings



Stages of Review in a Criminal Case:

