

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: OHIO ADULT PAROLE AUTHORITY, ET AL.,  
Petitioners v. EUGENE WOODARD

CASE NO: 96-1769

PLACE: Washington, D.C.

DATE: Wednesday, December 10, 1997

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       OHIO ADULT PAROLE AUTHORITY,       :

4       ET AL.,                               :

5                   Petitioners               :

6               v.                               :   No. 96-1769

7       EUGENE WOODARD                       :

8       - - - - -X

9   Washington, D.C.

10    Wednesday, December 10, 1997

11               The above-entitled matter came on for oral  
12       argument before the Supreme Court of the United States at  
13       10:10 a.m.

14       APPEARANCES:

15       WILLIAM A KLATT, ESQ., First Assistant Attorney General of  
16               Ohio, Columbus, Ohio; on behalf of the Petitioners.

17       S. ADELE SHANK, ESQ., Columbus, Ohio; on behalf of the  
18               Respondent.

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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 96-1769, the Ohio Adult  
5 Parole Authority v. Woodard.

6 Mr. Klatt.

7 ORAL ARGUMENT OF WILLIAM A. KLATT

8 ON BEHALF OF THE PETITIONERS

9 MR. KLATT: Mr. Chief Justice, may it please the  
10 Court:

11 This case presents a challenge to Ohio's death  
12 penalty clemency procedures under the Due Process Clause  
13 of the Fourteenth Amendment and the Self-Incrimination  
14 Clause of the Fifth and Fourteenth Amendments. If I may,  
15 I'd like to address the due process challenge first.

16 Fundamentally, respondent's due process  
17 challenge fails for two reasons. First, he has no  
18 constitutional or inherent right to clemency based upon  
19 this Court's decision in Connecticut Board of Pardons v.  
20 Dumschat. Second, Ohio's adoption of the clemency power  
21 and the procedures associated with it do not create a  
22 constitutional entitlement because the Governor's exercise  
23 of that power remains wholly discretionary.

24 QUESTION: Well, let me ask you something, Mr.  
25 Klatt. Suppose that the Governor -- obviously an unlikely

1 scenario, but suppose the Governor of Ohio, some future  
2 Governor, decided that he would grant clemency to -- he  
3 would at least allow clemency hearings and consider  
4 clemency for white defendants but not black. No limit  
5 there on a policy like that, would you say, under the  
6 Constitution?

7 MR. KLATT: I believe there would be a limit  
8 under that --

9 QUESTION: So what we have to decide --

10 MR. KLATT: There would be an equal --

11 QUESTION: -- is, what are the limits, and how  
12 do we draw that line.

13 MR. KLATT: Yes.

14 QUESTION: So you do concede that there would be  
15 some equal protection concerns, certainly,  
16 constitutionally imposed?

17 MR. KLATT: Yes, Your Honor, we do concede that,  
18 not rational basis equal protection, but certainly a  
19 suspect category, perhaps even a substantive due process  
20 problem in an outrageous circumstance.

21 QUESTION: The court of appeals here, as I  
22 understand it, based its ruling on the Due Process Clause,  
23 not the Equal Protection Clause, is that correct?

24 MR. KLATT: That is correct. That is correct.

25 QUESTION: I don't see -- what difference would

1 that make, what clause you're proceeding under?

2 MR. KLATT: Your Honor, I don't believe it would  
3 make a difference in terms of equal protection, rational  
4 basis and due process. I think the analysis would be  
5 essentially the same, although for slightly different  
6 reasons.

7 Fundamentally, the Due Process Clause is not  
8 violated in this instance because there is no underlying  
9 life, liberty, or property interest that's at stake. That  
10 interest has been adequately safeguarded by the  
11 substantial protections that exist at the trial court  
12 level and certainly throughout the appeal process leading  
13 to the final conviction.

14 QUESTION: Mr. Klatt, are you then saying that  
15 what -- there may be some process due, but whatever  
16 process due it has been allowed, or are you taking the  
17 position that due process, as distinguished from equal  
18 protection, your answer to Justice O'Connor, due process  
19 doesn't enter into it?

20 The examples that, was it Judge Nelson gave,  
21 were due process examples. That is, arbitrary  
22 decisionmaking. She gave the example of a coin toss, or  
23 picking the straw out.

24 So are you saying, suppose the parole board  
25 said, oh, we have better things to do with our time than

1 read all this stuff, so we're going to toss a coin and  
2 every tenth or, say, every tenth applicant will get  
3 clemency?

4 MR. KLATT: Your Honor, our position is that  
5 fundamentally, because there is no underlying life,  
6 liberty, or property interest, that a Governor could make  
7 a clemency decision in an arbitrary manner. It's almost  
8 inherent in the concept of unfettered discretion.

9 I don't think that would happen. There's no  
10 reason to believe that a Governor would act any less  
11 responsibly than a court would in exercising power, and in  
12 fact clemency by constitutional design was meant to be an  
13 unfettered power of the executive branch as a check on the  
14 judicial branch, so fundamentally our position --

15 QUESTION: So it could be totally arbitrary as  
16 long as it's not a denial, so you're saying there is an  
17 equal protection check but not a due process check, is  
18 that --

19 MR. KLATT: Yes. Yes. That's exactly our  
20 position.

21 QUESTION: Then it does matter on your analysis  
22 that, although the State -- although there is no -- in  
23 your judgment, although there is no life interest to be  
24 protected, and although the State is not obligated to give  
25 any clemency consideration at all, it still does not

1 matter on your analysis that the State has chosen to do  
2 it, that that does not implicate a due process concern.

3 MR. KLATT: It does not implicate it on these  
4 facts for the simple reason that Ohio, in enacting the  
5 power, did not in any way create standards or criteria  
6 that limit the discretion of the decisionmaker.

7 QUESTION: Well, that's certainly what Dumschat  
8 held, wasn't it?

9 MR. KLATT: That's exactly what Dumschat held,  
10 Your Honor, and it's a case that we rely very heavily on.  
11 We believe it's a case that is right on point in terms of  
12 the facts that are confronted with -- that are confronted  
13 the Court in our case.

14 QUESTION: And the answer that the respondents  
15 give is that they say because this is a death penalty it  
16 is necessarily a part of the criminal process, and  
17 Dumschat was not. Is that how you understand their  
18 argument?

19 MR. KLATT: They, of course, make a number of  
20 arguments, Your Honor, but that is one of them, and I  
21 believe the argument is flawed for the simple reason that  
22 the Court in Dumschat, relying I think principally on the  
23 Greenholtz analysis, basically said that if the interest  
24 that was at issue -- and in that case I admit it was a  
25 liberty interest, not a life interest, but I don't think



1 that matters, because what the Court was saying is, if the  
2 interest that was at issue was contemplated and  
3 encompassed in the underlying conviction and sentence,  
4 that that interest has been adequately safeguarded, and --

5 QUESTION: Now, suppose -- and I suppose it's  
6 not too unimaginable a hypothetical -- that the clemency  
7 authorities said that you may not consult counsel in  
8 preparation for your clemency hearing.

9 MR. KLATT: Well, I think that would -- it  
10 sounds as if you're asking a straight right to counsel  
11 question.

12 QUESTION: Yes. That would probably be under  
13 just the Sixth Amendment, wouldn't it?

14 MR. KLATT: It would be I think just under the  
15 Sixth Amendment, which of course is not at issue in this  
16 case. In answer to your question, I believe there is no  
17 right to counsel constitutionally to -- in the clemency  
18 process, so the State would not have to provide a counsel.

19 Now, of course, Ohio does provide counsel in  
20 that process.

21 QUESTION: Well, but in my hypothetical he has a  
22 counsel but he's forbidden to consult the counsel in  
23 preparing his written submission to the clemency board.

24 MR. KLATT: I don't believe that would violate  
25 due process, because there is no underlying --

1 QUESTION: Well, would it violate any provision  
2 of the Constitution?

3 MR. KLATT: It potentially could violate the  
4 Sixth Amendment. It potentially could.

5 QUESTION: Well, of course, now the Sixth  
6 Amendment is applicable to the States via the Fourteenth,  
7 and then you're right back into the question of having to  
8 have a life, liberty or property interest. I would assume  
9 it would be life here.

10 MR. KLATT: It certainly is a life interest  
11 here. In that hypothetical, denying counsel at all in the  
12 process certainly does not seem correct, but if there's no  
13 underlying life, liberty, or property interest I don't  
14 know how it would implicate a due process interest.

15 QUESTION: Does it follow from your argument  
16 that there is no due process implication to the provision  
17 of direct appeals in criminal cases, no due process  
18 implication in providing the cert process that we do?

19 MR. KLATT: I don't believe that does follow,  
20 Your Honor. Clemency and that power is very distinct from  
21 the processes that involve the judicial processes.

22 QUESTION: Oh, I will grant -- I'll grant you  
23 that, but what I was picking up on was the statement you  
24 made ago in one of your answers, I guess, to Justice  
25 Kennedy, that the interest being protected had been

1 protected in the underlying proceeding.

2 And I thought your point was that when in the  
3 underlying criminal proceeding, for example, leading to  
4 conviction, these interests had been protected, and there  
5 was simply a constitutionally unnecessary further  
6 proceeding, whether it be appeal, or cert, or clemency in  
7 this case, that there was no application of due process to  
8 those super-added stages.

9 Maybe I misunderstood your argument.

10 MR. KLATT: If I implied that, I misspoke. It's  
11 our position that *Evitts*, which, of course, is a case that  
12 is heavily relied upon by my opponent and relied upon by  
13 the Sixth Circuit below, is also correctly decided in the  
14 sense that due process certainly applies throughout the  
15 adjudicatory process, which would include the appeal  
16 process. How much --

17 QUESTION: Right, but on your theory why  
18 shouldn't the due process stop at the conviction?

19 MR. KLATT: Because the other processes are part  
20 of the system for adjudicating the guilt or innocence of  
21 the defendant. Clemency is not --

22 QUESTION: So the adjudication's not final, in  
23 other words.

24 MR. KLATT: Correct. Correct.

25 QUESTION: Then under your position, as I

1 understand it, a State could totally abolish appeal and  
2 say after the trial court proceedings are over whether or  
3 not the man will be sentenced or executed should be left  
4 entirely to the unbridled discretion of the Governor.

5 MR. KLATT: Yes.

6 QUESTION: They could do that.

7 MR. KLATT: Yes.

8 QUESTION: That's certainly consistent with the  
9 reasoning in *Evitts*, is it not, that --

10 MR. KLATT: I believe --

11 QUESTION: -- you can't block an appeal from an  
12 indigent if the State provides one, but the State under  
13 *Durston v. King* doesn't have to provide one.

14 MR. KLATT: I believe that's correct, Your  
15 Honor. The --

16 QUESTION: And if there's anything that seems  
17 harsh about that, I suppose it is the deprivation of the  
18 appeal, not the deprivation of additional procedures in  
19 the pardon.

20 MR. KLATT: I would agree, Your Honor. I might  
21 add that the fundamental flaw, I believe, in the  
22 application of *Evitts* to this case, is that the lower  
23 court's decision was based upon a faulty premise, and that  
24 premise is, that faulty premise is that clemency is part  
25 of Ohio's system for the adjudication of the guilt or

1 innocence of the defendant.

2 QUESTION: Well, we have said in cases such as  
3 the Herrera case, in talking about the finality of habeas  
4 corpus, that there is always clemency. We have made the  
5 link, to some extent, in our own writing.

6 MR. KLATT: Well, I would contend, Your Honor,  
7 that simply acknowledging the existence of a power of  
8 another branch of Government does not, in and of itself,  
9 make it part of the process, and in fact, as I mentioned  
10 earlier, as a matter of constitutional structure, clemency  
11 is one of the checks and balances that we believe exists,  
12 certainly under Ohio's constitution, that is an executive  
13 branch's check on the judicial system.

14 And of course, the check on the clemency power  
15 itself is basically the electoral process.

16 QUESTION: Well, Mr. Klatt, in Dumschat this  
17 Court's opinion said that unlike probation pardon and  
18 commutation decisions have not traditionally been the  
19 business of the courts and, as such, they're rarely  
20 subjects for judicial review.

21 If we were to take the position that it is  
22 conceivable that wholly arbitrary action in the clemency  
23 procedure could be addressed under the Due Process Clause,  
24 how would you address the allegations that are made here?  
25 Would they survive that rare situation, or how would you



1 address those challenges in this case, if there -- if we  
2 left open the possibility that there could conceivably be  
3 a due process violation?

4 MR. KLATT: Well, I certainly would hope that  
5 you wouldn't, but I believe that Ohio's death penalty  
6 clemency procedure in this case would survive such  
7 scrutiny.

8 QUESTION: Are you going to address the  
9 allegations with any particularity or specificity in  
10 giving me that answer?

11 MR. KLATT: I'd be certainly happy to. Keep in  
12 mind here that this policy was enacted to address a  
13 problem, and the problem was that the Governor was  
14 confronted with clemency applications with very little  
15 information, oftentimes because counsel for the death row  
16 inmates would not seek stays until the very last minute.

17 In fact, they had a situation where counsel for  
18 a death row inmate filed for the stay the day before the  
19 execution date with the district court judge. That judge  
20 denied the stay.

21 The stay was subsequently granted later that day  
22 in the Sixth Circuit, but the Governor was quite upset  
23 that with practically no information he was confronted  
24 with a clemency situation, so they enact these procedures.

25 The procedures are designed to be --

1 QUESTION: I didn't quite -- was the stay  
2 application, a request for a stay --

3 MR. KLATT: Of the execution --

4 QUESTION: -- of the execution by the Governor,  
5 so that the --

6 MR. KLATT: No.

7 QUESTION: -- clemency process could take place,  
8 or it was just --

9 MR. KLATT: I'm sorry --

10 QUESTION: -- a collateral -- additional  
11 collateral attack on the conviction?

12 MR. KLATT: It was a stay obtained in the Sixth  
13 Circuit, a stay of execution so that he could pursue  
14 Federal habeas. I'm sorry if I misspoke.

15 QUESTION: The problem that I'm having is, this  
16 case is in an interlocutory posture, and so looking at the  
17 opinion, I thought perhaps the circuit has just held that  
18 the Due Process Clause could, in some conceivable  
19 circumstance, be violated, and can we say now that we  
20 could never even imagine a circumstance, so matter how  
21 bizarre or peculiar or unfair the system was, that it  
22 couldn't possibly be a violation no matter what, and the  
23 same, really, in a sense is true of the Fifth Amendment  
24 part.

25 Is it -- do we have to say that there's never a

1 circumstance, even if the clemency board were to say, you  
2 have to confess to every crime ever, ever conceivable by  
3 any member of -- you know, think of the most bizarre  
4 circumstance you can.

5 And now, if there is such a circumstance in  
6 which either of these clauses would apply, how can we say  
7 that you win, in this posture of the case?

8 MR. KLATT: Well, it's our position, Your Honor,  
9 and we are taking an absolute position, that with respect  
10 to due process there is no due process protections that  
11 apply here for the simple reason, as I stated earlier,  
12 that there is no underlying life, liberty, or property  
13 interest to --

14 QUESTION: I suppose we could put the same kind  
15 of questions if you were arguing about the executive power  
16 to appoint or to -- in the Federal context to recognize a  
17 foreign nation. We don't like arbitrary government, but  
18 certain powers are committed to the executive.

19 MR. KLATT: Some power, some delegation of power  
20 is absolute. The veto power. State --

21 QUESTION: Mr. Klatt, I thought that that was  
22 one of the arguments that you made, but in your first  
23 exchange with Justice O'Connor you said yes, there'd be an  
24 equal protection check, so I was thinking that your  
25 argument was kind of like a, what's labeled political

1 question. This is committed to another branch of  
2 Government, totally executive, judiciary, hands off.

3 But your immediate response was no, there is  
4 judicial review for constitutionality under the heading of  
5 equal protection, so I gathered from that answer that you  
6 weren't taking the answer that you are now giving, that  
7 this is just hands-off for the judiciary, it is entirely  
8 executive branch business.

9 MR. KLATT: I may have misspoke. My point was  
10 that with respect to a due process analysis our position  
11 is absolute, because you could --

12 QUESTION: But if you're using the political  
13 question doctrine, that model, it isn't that as to one  
14 clause or as to another clause, it's even -- it's a First  
15 Amendment violation, whatever. It simply is committed to  
16 another branch of Government.

17 MR. KLATT: We're not going quite that far,  
18 because we have acknowledged that there might be some  
19 outrageous circumstance where there could be --

20 QUESTION: What is outrageous? I mean, once you  
21 say equal protection, it seems to me you give -- suppose  
22 the Governor has two applicants for pardon, they are  
23 identical in all their circumstances, and the Governor  
24 says, I grant one and I don't grant the other. Is that --  
25 you think we can intervene in that case?

1 MR. KLATT: No.

2 QUESTION: And if we can't intervene in that  
3 case, I suppose we can look to see if they are identical  
4 circumstances, so the ball game's over. You've gotten the  
5 whole matter into the court. I don't see how you can give  
6 away the Equal Protection Clause and achieve what you're  
7 seeking to achieve here.

8 QUESTION: Well -- go ahead. Answer Justice  
9 Scalia. If you consider it a question, answer it.

10 (Laughter.)

11 MR. KLATT: I'd be happy to respond --

12 QUESTION: Don't you think that if you give away  
13 the Equal Protection Clause --

14 (Laughter.)

15 MR. KLATT: It's the position of the State of  
16 Ohio that since the clemency power comes from the  
17 constitution, at least the Ohio constitution, in Ohio,  
18 that it can't violate another expressed provision of the  
19 Constitution, and the only one I can think of would be a  
20 race-based decision. That seems inherently wrong --

21 QUESTION: Why, because that is currently a very  
22 enraging thing, but why is that any more enraging than two  
23 identically qualified people, and the Governor says, I  
24 like this guy, you get it, you don't get it? Why is that  
25 any different?



1 MR. KLATT: Well, even in Dumschat the Court  
2 seemed to indicate that you could deny clemency for any  
3 reason or no reason at all for any constitutionally  
4 permissible reason. If it's not a constitutionally  
5 permissible reason it might create a problem.

6 Now, keep in mind, equal protection is not an  
7 issue that's currently before you, but if I understand,  
8 it's -- it's a diff -- hypothetical.

9 QUESTION: So, supposing the Governor has  
10 complete control over the use of the Ohio State stadium  
11 for the Ohio State-Michigan game, and he decides that only  
12 white people will be admitted for that game.

13 Now, nobody has any sort of a protected liberty  
14 interest or property interest to go to that game at all,  
15 but nonetheless the Equal Protection Clause would apply to  
16 prevent that sort of discrimination, would it not?

17 MR. KLATT: I believe it would, and that's I  
18 think our essential point, and I don't think quite frankly  
19 from a practical standpoint it's that much of a  
20 concession. What is really a problem here is applying a  
21 due process analysis which would -- at any level, which  
22 seems to totally open up the door.

23 QUESTION: It's easy enough if you limit it to  
24 race alone, but once you say you're entitled to equal  
25 treatment, why isn't he entitled to come to the court and

1 say, look, just last year somebody was pardoned who has,  
2 you know, exactly the same qual -- or no better  
3 qualifications? Why doesn't -- isn't that a denial of --  
4 is race the only basis for denial of equal protection?

5 MR. KLATT: Well, certainly, race is not the  
6 only basis, but the --

7 QUESTION: Well, I guess if it's a race-based  
8 discrimination we apply heightened scrutiny to it, and if  
9 it's not, you have a totally different standard, wouldn't  
10 you say?

11 QUESTION: -- then you agree the Governor could  
12 have a policy of pardoning all women and no men, or could  
13 he not?

14 QUESTION: That also invokes heightened scrutiny  
15 of some sort, does it not?

16 MR. KLATT: That would be intermediate scrutiny,  
17 which would be higher.

18 QUESTION: We could review his pardoning power  
19 on such a challenge, you would agree.

20 MR. KLATT: That, I think, is a very close  
21 question. I think it would be --

22 QUESTION: You want to have it both ways on  
23 almost every hypothetical.

24 (Laughter.)

25 QUESTION: No, but Mr. Klatt, isn't your

1 argument here that the Equal Protection Clause does not  
2 apply contingent upon the kind of protected interest  
3 analysis which is identical to the Due Process Clause?

4 MR. KLATT: That's exactly it, Your Honor.

5 QUESTION: And your argument as I understood it  
6 was that once there has been a final adjudication through  
7 the appellate process which has resulted in a judgment  
8 that this individual should lose his life, that there is  
9 no life interest left for the Due Proces Clause to  
10 protect. Isn't that your argument, and that's why you  
11 take the absolutist position on due process?

12 MR. KLATT: Yes.

13 QUESTION: So that if we disagree with you on  
14 that, if we say, for example, well, clemency really is  
15 part of the adjudicatory process, or if we were to say,  
16 well, if you grant a clemency proceeding you've got to  
17 have some minimal process for it, you would lose, but at  
18 least you would lose because we were rejecting that  
19 absolutist analysis as being sufficient, but that's still  
20 consistent, I think, with your position on equal  
21 protection.

22 MR. KLATT: I believe that's correct, Your  
23 Honor.

24 QUESTION: Well, Mr. Klatt, you never have  
25 answered my question. Would you lose if we said there

1 might be some extreme situation governed by the Due  
2 Process Clause? You've never addressed what the  
3 allegations are here. One is based on the Fifth  
4 Amendment, I believe, and one is based on the timing of  
5 the --

6 MR. KLATT: Correct, and I didn't --

7 QUESTION: -- clemency hearing. Are you going  
8 to talk about the merits of the claims at all, or are we  
9 to end this argument without ever hearing whether you  
10 would lose in the event we don't adopt the absolutist  
11 position?

12 MR. KLATT: I believe we would win even if there  
13 were some level of due process protection.

14 QUESTION: Well, why?

15 MR. KLATT: And the reason is, is because here  
16 we had notice, and opportunity for an interview. Counsel  
17 could participate in terms of helping with the preparation  
18 of written materials that the applicant could submit if  
19 they wanted to, so you certainly had notice, opportunity  
20 for participation, an informal review process -- the whole  
21 procedure was designed to be fair both to the inmate as  
22 well as to the public, as well as to the courts, and as  
23 well as to the prosecutor, so I believe the procedure is a  
24 fair one under any analysis.

25 It is not, however, an adjudicatory process, and

1 it is not an adversarial process, which is the very reason  
2 why counsel were not permitted at the interview, and  
3 counsel would not be permitted at the review itself, and  
4 we don't believe that that is in any way problematic,  
5 because there's no due process requirement under our  
6 argument that that applies, and it's --

7 QUESTION: I take it part of his argument might  
8 be, though I'm not positive on this, is that the timing of  
9 this is really -- there's no reason in the world under  
10 the -- as far as clemency is concerned that you have to  
11 have the timing deadlines the way you do, and the way you  
12 do means that he has to incriminate himself completely at  
13 a time prior to the ultimate affirmation of his  
14 convictions, and you could move that easily so he didn't  
15 have to do that, but the way it stands, he might have to  
16 have a new trial, and then he'd be convicted out of his  
17 own mouth simply because of an unnecessary and arbitrary  
18 timing circumstance in the rules. I think there's  
19 something like that going on.

20 MR. KLATT: I believe that's their argument.

21 QUESTION: Well, what's the answer to that?

22 MR. KLATT: I think the answer is that there is  
23 a legitimate -- it's not an unreasonable and arbitrary  
24 matter of timing. There's a very good reason for it, and  
25 the reason is that the Governor needs to be sure that he



1 has the information necessary so that he can responsibly  
2 exercise the discretion that he has.

3 We're talking about a very short time frame  
4 here. The rule says that if you're within 45 days of an  
5 execution date and it hasn't been stayed, that's when the  
6 interview process and the formal review process goes  
7 forward, so there is a legitimate State interest --

8 QUESTION: And in this case there was a delay in  
9 filing the habeas petition, I take it.

10 MR. KLATT: There was, and the timing problem in  
11 this case was created essentially by the respondent  
12 themselves for not getting the stay in a timely way.

13 QUESTION: But suppose, just to test the theory  
14 and to take Justice Breyer's question a little bit  
15 further, a State had a parallel track. The minute the  
16 trial court proceedings were concluded the clemency  
17 proceedings started, and the Governor said, it's very  
18 important that you admit guilt, failure to admit guilt  
19 will be an inference against you, and this was a parallel  
20 process with the direct review. Any problems with that?

21 MR. KLATT: The further --

22 QUESTION: I know that's not your case, but  
23 we're just --

24 MR. KLATT: That's obviously not our case, but I  
25 suppose that there is a line some place where timing seems

1 to give rise to compulsion, and that might be a problem.  
2 I'm not sure that it exists in the hypothetical that you  
3 proposed, but it might, but certainly, given where the  
4 process was in this case, that does not seem to be  
5 problematic.

6 QUESTION: I assume that this answer is on the  
7 assumption that the Due Process Clause applies.

8 MR. KLATT: Yes.

9 QUESTION: This is not your position in this  
10 litigation.

11 MR. KLATT: Absolutely not.

12 QUESTION: You would say in this litigation it  
13 doesn't matter.

14 MR. KLATT: Yes. Yes.

15 If I may, I'd like to reserve the remainder of  
16 my time, Your Honor.

17 QUESTION: Very well, Mr. Klatt.

18 Ms. Shank, we'll hear from you.

19 ORAL ARGUMENT OF S. ADELE SHANK

20 ON BEHALF OF THE RESPONDENT

21 MS. SHANK: Mr. Chief Justice, and may it please  
22 the Court:

23 Respondent Eugene Woodard asks only that this  
24 Court find that within the parameters of the pleadings  
25 there may be some set of facts upon which he may prevail

1 and that this case be remanded to determine whether such  
2 set of facts exists.

3 QUESTION: Well, we deal, Ms. Shank, don't we,  
4 with the facts that were alleged with respect to the Ohio  
5 parole, Ohio clemency process. I mean, it's not as if we  
6 could conjure up some hypothetical set of facts that  
7 weren't the standard Ohio clemency process.

8 MS. SHANK: We are bound by what's in the  
9 pleadings and by the process as it appears in the record,  
10 Your Honor, and if I understand your question, I think  
11 you're asking if the Court can make a decision on those  
12 facts alone.

13 QUESTION: Well, the -- I got the intimation,  
14 perhaps mistakenly, from your statement that if we could  
15 conceive of some clemency process somewhere that had some  
16 sort of provisions in it that would be so arbitrary we  
17 would say due process applies, we should bring that to  
18 bear on this case, but we're dealing with an established  
19 system of clemency in Ohio, are we not?

20 MS. SHANK: And I agree, it has to be some  
21 process that you can conceive within the procedure that is  
22 present here, but I think there are many such conceivable  
23 fact situations that may or may not be able to be proved  
24 on remand.

25 QUESTION: But I thought the remand was limited

1 to whether the district court could find that the coercion  
2 to confess guilt was an unconstitutional condition.

3 MS. SHANK: Your Honor, that --

4 QUESTION: Wasn't that what the remand was  
5 limited to, or was it remanded for the district court to  
6 come up with any other due process violation?

7 MS. SHANK: Well, it was remanded with respect  
8 to both the Sixth Circuit's analysis of *Evitts v. Lucey*  
9 and the idea that clemency is, in fact, as it is, an  
10 integral part of Ohio's criminal justice system as well as  
11 on the Fifth Amendment issue.

12 But, of course, because this was a case that was  
13 ruled on based on a motion to dismiss and therefore the  
14 pleadings, this Court comes to it as if it's de novo  
15 review, and so the Court can look within the pleadings as  
16 broadly as it chooses to, so any set of facts that the  
17 Court can conceive would be -- that would allow due  
18 process to apply --

19 QUESTION: Well, I would assume we at least have  
20 to look at the facts alleged in this complaint, not some  
21 conceivable set of facts from somebody else.

22 MS. SHANK: Again, Justice O'Connor --

23 QUESTION: Don't we?

24 MS. SHANK: Yes, absolutely.

25 QUESTION: Don't we look at this complaint?

1 MS. SHANK: I do.

2 QUESTION: And this complaint says --

3 MS. SHANK: Yes.

4 QUESTION: Well, under Ohio's provisions here,  
5 which gives the convicted defendant an opportunity to ask  
6 for an interview but doesn't require it, you say that's a  
7 Fifth Amendment violation there, and it won't stand up. I  
8 assume we can address that, can't we, just head on.

9 MS. SHANK: Certainly, Justice O'Connor, the  
10 Court can do anything as if on de novo review within the  
11 parameters of the pleadings.

12 QUESTION: Well --

13 MS. SHANK: And that is what I'm trying to say.

14 QUESTION: But also we have to take it in the  
15 prism of the Sixth Circuit's analysis. I mean, if we  
16 disagree with the Sixth Circuit's analysis, the fact that  
17 the pleadings might have formed the basis for some other  
18 sort of analysis wouldn't have much to do with how we  
19 treated the opinion of the Sixth Circuit.

20 MS. SHANK: Chief Justice Rehnquist, it's true  
21 that the Sixth Circuit's opinion surely should be  
22 informative and helpful to the Court.

23 QUESTION: Yes.

24 MS. SHANK: But it is my understanding that the  
25 Court can clearly look, as if on de novo review, at the



1 pleadings and determine whether or not there are other  
2 problems or other aspects of this process that need to be  
3 considered in order to --

4 QUESTION: But what we granted review on was not  
5 the pleadings that were filed in the district court. It  
6 was the opinion of the Sixth Circuit, and if, for example,  
7 we should feel that the Sixth Circuit totally  
8 misapprehended our Dumschat opinion we would probably say  
9 so in an opinion.

10 MS. SHANK: And it could very well be that the  
11 Court would choose to remand for -- to the Sixth Circuit  
12 for assessment in light of what it took to be a  
13 misunderstanding.

14 QUESTION: And we also would, and I think must  
15 examine the Sixth Circuit's holding that the self-  
16 incrimination aspect of the case presents a serious  
17 constitutional problem in that it's an unconstitutional  
18 condition on the imposition of the -- on the Fifth  
19 Amendment.

20 MS. SHANK: Certainly the Court may choose to do  
21 that. You are obviously not required to do so. We think  
22 that it is an unconstitutional condition, and I hope I  
23 haven't said anything to make you think I'm saying you  
24 should only address one issue. I'm not.

25 QUESTION: Well, but that's the best way for us

1 to get into the case and that's, it seems to me, a quite  
2 problematic holding on the part of the court of appeals.

3 Suppose the Governor says, I'm not interested in  
4 granting clemency to people that haven't confessed, that  
5 shows remorse. That's what I'm interested in. There's no  
6 problem with that, is there?

7 MS. SHANK: Well, one of the things that I'd  
8 like to point out which --

9 QUESTION: You may disagree with it as a policy  
10 matter, but as a constitutional matter he has a complete  
11 right to say that, I should assume.

12 MS. SHANK: It's absolutely true that the  
13 Governor has complete discretion under Ohio's clemency  
14 processes. However, the Governor's executive  
15 discretionary decisionmaking authority truly is not at  
16 issue in this case. We are looking not at the end result,  
17 which is the decision made by the chief executive of the  
18 State, but rather at the procedures that are limiting the  
19 right to seek clemency. We're looking at the front end of  
20 a process.

21 As this Court noted in Dumschat, there the Court  
22 found there was no due process interest in that end  
23 result, at least none that required an explanation of the  
24 reasons for a clemency decision.

25 QUESTION: It said none at all. Didn't the

1 Dumschat opinion say that?

2 MR. KLATT: The Court found that there were no  
3 due process liberty interests at that point.

4 QUESTION: Yes.

5 MR. KLATT: But the important point for us with  
6 regard to Dumschat is the fact that the Court noted in the  
7 final line of the opinion that Connecticut had a State  
8 right to clemency and there had been no breach of that  
9 right.

10 Now, the Court went no further, but the fact  
11 that the Court recognized a difference between the end  
12 result of the executive discretionary decisionmaking  
13 process and a possible difference between that and the  
14 right to get your papers on the Governor's desk is what we  
15 are focusing on here.

16 The other thing is that I think --

17 QUESTION: Well, let me read you a couple of  
18 sentences from Dumschat which strike me as being a little  
19 different than the way you interpret -- the Court said we  
20 rejected the claim that a constitutional entitlement to  
21 release from a valid prison sentence exists independently  
22 of a right explicitly conferred by the State, and then it  
23 goes on to quote from Greenholtz. There is no  
24 constitutional or inherent right of a convicted person to  
25 be conditionally released before the expiration of a valid

1 sentence.

2 Well, it seems to me that says that unless the  
3 State has created some sort of a liberty interest there  
4 isn't any. Justice Stevens in dissent, of course, felt  
5 differently.

6 MS. SHANK: Chief Justice Rehnquist, I agree  
7 with what you just read from Dumschat, and I think that  
8 what is important about it is that it does focus on the  
9 decision, and that's what this Court said there isn't an  
10 interest in.

11 At the end of this process, as Justice Ginsburg  
12 noted, we are moving into the executive discretionary  
13 decisionmaking process, and there, the Court is right, but  
14 we are not looking at that end of it, and we're not  
15 looking at what the decision is. We are looking at the  
16 right to apply for clemency and get to the point where we  
17 get a decision, and I think Ohio --

18 QUESTION: This is -- I don't understand this.  
19 This is sort of a right to the process with nothing at the  
20 end of it?

21 MS. SHANK: It's a right --

22 QUESTION: Just a right to the process -- I can  
23 understand, and I think Dumschat permits your claiming a  
24 right to the procedure which the State has accorded, so  
25 that if they violate their own procedures for clemency,

1 yes, you would have some right to complain.

2 But where their procedures give you no more than  
3 what you've received, you're asserting that you've been  
4 deprived of what? You say, I'm not being deprived of my  
5 liberty, but I'm just being deprived of something in the  
6 abstract that -- I don't -- I really don't understand --

7 MS. SHANK: Well, okay, Justice Scalia, we're  
8 actually presenting four different grounds, one of them  
9 being the fact that the State has created a liberty  
10 interest and a life interest in clemency in Ohio, and that  
11 is in the right to seek it, and the Ohio supreme court  
12 noted in Weaver v. State that clemency is the remedy that  
13 is available to individuals who are unable to achieve  
14 redress in the courts.

15 They said in In re Kline that Ohio defendants  
16 who can't have a conviction overturned because it's beyond  
17 judicial process have a right to apply for clemency. On  
18 top of that --

19 QUESTION: Right, but -- let me just clarify.  
20 You're not contending that Ohio violated any of its own  
21 laws pertaining to the clemency application. You're  
22 saying that something which they have in there shouldn't  
23 be there, or that something which they don't have should.

24 MS. SHANK: We are saying that this process  
25 violates that State-created right to seek clemency in that



1 particular analysis.

2 QUESTION: The court of appeals disagreed with  
3 you on that point though, didn't it?

4 MS. SHANK: The court of appeal --

5 QUESTION: Did it, or did it not?

6 MS. SHANK: They did not accept that position,  
7 but again, I would like to put forward, Your Honor, that  
8 we were on motions and pleadings, and the facts hadn't  
9 been fully explicated, so the court didn't have before it  
10 the full history and background --

11 QUESTION: Well, but presumably the court of  
12 appeals well knew that you -- dealing with a complaint  
13 dismissed on motion you give it a generous construction.  
14 You say that's what we should do, and certainly I'm sure  
15 the court of appeals knew that.

16 MS. SHANK: Your Honor, I can tell you from  
17 reviewing the pleadings that the cases that I've just  
18 cited to you, In re Kline and Weaver v. State were not  
19 before the court, and very, very --

20 QUESTION: You didn't argue that point to the  
21 court of appeals? Did --

22 MS. SHANK: Your Honor, the question of whether  
23 or not there was --

24 QUESTION: I asked you a question, Ms. Shank.

25 MS. SHANK: I'm sorry, Your Honor.

1 QUESTION: I asked you, did you argue those  
2 cases that you just cited to the court of appeals?

3 MS. SHANK: No, they were not included in the  
4 briefing at that point, Your Honor, but the issue was  
5 included, the question of whether there was a State right.

6 But I think that the entire process has been  
7 truncated by the fact that it was -- that the Court --  
8 it's here before the Court without sufficient fact  
9 development. That's why a remand is in order. Were the  
10 Court to send it back --

11 QUESTION: Ms. Shank, one of the problems is,  
12 it's always going to be facial because you took this case  
13 out of the Ohio system -- true, it's an executive process,  
14 and you're taking it into the Federal court and you're  
15 saying now, what if, what if. We don't know what it would  
16 be.

17 Are you taking the position that it is  
18 inevitable that this procedure that Ohio has would yield a  
19 violation of due process? Couldn't one say, well, it may  
20 work so that he is treated fairly. How can one say just  
21 on what we have here that applying these rules to his case  
22 would inevitably deny due process?

23 MS. SHANK: Justice Ginsburg, we agree with  
24 that. We think that it is possible that it could go back  
25 on remand. There could be full hearings, and there could

1 be factual development that determined that in fact  
2 sufficient due process protections have been recognized,  
3 but --

4 QUESTION: But it had been -- nothing has  
5 happened. You took -- you got a stay and took it all into  
6 the Federal court, so we don't know how this State process  
7 would work because it didn't get off the ground.

8 MS. SHANK: That's correct. It --

9 QUESTION: The analogy that I'm -- sorry. Were  
10 you -- answer Justice Ginsburg.

11 MS. SHANK: I was just going to say, it's  
12 correct we would -- for this Court right now the  
13 determination has to be whether within the parameters of  
14 what's before it, that we might possibly prevail on a set  
15 of facts that could be established on remand, and so what  
16 we suggested earlier, that we could go back and find that  
17 what has been provided is sufficient, is a very real  
18 possibility.

19 It's certainly not what we believe, but it is  
20 possible, and it could happen. So there's nothing in this  
21 case to say that we couldn't go back and find ourselves  
22 being told that due process parameters have already been  
23 satisfied.

24 QUESTION: Or will be.

25 MS. SHANK: Or will be under the --

1           QUESTION: May I go back to Dumschat for a  
2 second, because I didn't think you distinguished it in the  
3 same way that the court of appeals did. It seems to me  
4 one can reasonably say that the right to due process  
5 before liberty is taken away is exhausted once you're in  
6 jail, because your liberty's gone.

7           But you're relying on the right to due process  
8 before life is taken away, and this man is still alive, so  
9 you have an argument for a protected interest in  
10 procedures until his life is taken away that just wasn't  
11 available in Dumschat because he was in jail.

12           MS. SHANK: That's correct. We do also present  
13 to the Court the fact that there is a Federal life  
14 interest protected by the Fourteenth Amendment that is  
15 independent of the other issues that we've presented, the  
16 other types of interests, and that that was not present in  
17 Dumschat, and that it independently is basis alone to  
18 allow this Court to make the decision that special -- that  
19 this special proceeding for death penalty cases impacts  
20 that life interest and therefore distinguishes it from  
21 Dumschat.

22           QUESTION: I think the State might argue it this  
23 way in response to your argument about the life interest.  
24 I think the State might say, we agree that there is a life  
25 interest up to the time which may lawfully be set for

1 execution under Ohio law, but that's not what's in  
2 question here.

3 What's in question here is an opportunity to  
4 have life after the date which the law has already said at  
5 which it may be taken away, and because you have no life  
6 interest after that point -- you litigated that on direct  
7 appeal and you lost -- because you have no life interest  
8 after that point, and because that is the only life  
9 interest that could be served by clemency, there is no  
10 interest for Fourteenth -- for due process analysis, to  
11 which process could apply and help you.

12 What's your answer to that argument?

13 MS. SHANK: Well, first that the life interest  
14 remains fully intact as long as a person is alive. I  
15 mean, the Fourteenth Amendment right to life that is  
16 protected is nothing more and as simple as the right to be  
17 alive and to continue to live, and a date does not  
18 determine when that right that is protected ends. The  
19 only thing that ends that right and its protection under  
20 the Constitution is actual death.

21 So the life interest, unlike liberty, isn't  
22 diminished in increments. It's not diminished by having  
23 been placed into the prison, as is the liberty interest,  
24 and it can't be diminished in bits and pieces. It exists  
25 with all of its -- in its full-blown state until the



1 moment of death.

2 And I think recently this Court recognized that  
3 in its -- addressing the question of whether or not there  
4 was a right to assisted suicide. There the Court even  
5 cited the Ohio supreme court, saying that even condemned  
6 prisoners have the right to protection of law up until the  
7 last moment of life.

8 QUESTION: Well, all we held in the assisted  
9 suicide case was that there was no constitutional right to  
10 have the assistance of a physician if you wanted to commit  
11 suicide, wasn't it?

12 MS. SHANK: That's correct.

13 QUESTION: Can you think of any other analogies?  
14 I take it your basic argument is that the procedural part  
15 of this is something that the Ohio legislature itself has  
16 said is not within the Governor's exclusive power. They  
17 say the general assembly's authority to regulate the  
18 application process extends from the time just before the  
19 Governor reaches the decision, and you're talking about  
20 that time before, is that right?

21 MS. SHANK: That's correct.

22 QUESTION: And what I'm looking for, the only  
23 one with a very far analogy is like international airline  
24 applications, where the Courts won't review what the  
25 President's final decision is, but I've always thought

1 they would review what used to be the Civil Aeronautics  
2 Board's preparation of the recommendation to the  
3 President.

4 That's a pretty far-out analogy, and I wonder if  
5 there are other instances you could think of where the  
6 congressionally regulated preparation of the application  
7 is certainly reviewable, but the final decision is not.

8 You've looked into this, so I assume your answer  
9 is no, you can't.

10 MS. SHANK: I have looked into it, and I think  
11 that there are some arguments about veto. I mean, that's  
12 a possibility, although there are different remedies,  
13 rather than going back to the --

14 QUESTION: All right. Have you -- the other  
15 question that I has is, is the particular problem here,  
16 which I couldn't quite figure out from the dates -- I  
17 can't keep them quite in mind, but the particular problem  
18 is that the State says, prepare this 45 days before the  
19 execution is scheduled, but in the case of your client, he  
20 had to go to his hearing 6 months before, or 4 months  
21 before, because there was a stay that said the execution  
22 couldn't take place until January 18, '95, but they wanted  
23 to have the hearing on September 9, 1994, and you're  
24 objecting to the fact that they made him come to that  
25 hearing without a lawyer, and having to incriminate

1     himself so soon. Could you explain that a little bit, how  
2     those work?

3             MS. SHANK: Sure. There are a number of factors  
4     involved in it. The time frame is that if you have not  
5     managed to get a stay when -- within 45 days before the  
6     first scheduled execution date after the Ohio supreme  
7     court finishes direct appellate review, a hearing will be  
8     scheduled, and even if you get a subsequent stay -- in  
9     this case the stay was actually granted on the 45th day,  
10    so it's one of those counting things. They decided that  
11    day did count for their purposes, and we would, of  
12    course --

13            QUESTION: So your objection, then, precisely is  
14    you say, look, he can't have a lawyer, he has to  
15    incriminate himself, and all they have to do to avoid the  
16    problem and keep their time is, you say, do it 45 days  
17    before, but if there's been an extension of a stay, well,  
18    then it's 45 days before the real execution date, not the  
19    one that was just hypothetical. Is that the problem?

20            MS. SHANK: Well, the problem is more  
21    complicated than that because, of course, the petition --  
22    I mean, the respondent in this case, or the inmate in any  
23    case has an extremely limited control on that timing.

24            You can file for a stay, but there are many  
25    exigencies that come up in the court system that sometimes

1 it takes 2 months to get a stay, sometimes you're very  
2 lucky and you can get a stay within a week or 2 or 3 days,  
3 so you don't have control over the timing in this case no  
4 matter how it is handled.

5 But part of the reason that this is so critical  
6 is that whenever this particular process kicks in it then  
7 negates the opportunity -- well, I should say, negates the  
8 right to have a clemency application filed by the inmate  
9 and have it considered.

10 QUESTION: Ms. Shank, is there any rule in Ohio  
11 that you know of that would prevent your client in his  
12 interview with the clemency people from declining to  
13 answer a question because it might incriminate him?

14 MS. SHANK: There's nothing in the procedure  
15 that says that that could not be done, although the  
16 procedure itself is, with regard to the interview is  
17 inherently coercive, counsel is specifically prohibited  
18 from being there, in this case we had 3 days' notice and  
19 counsel would not have had an opportunity --

20 QUESTION: But so far as you know there are no  
21 further sanctions -- in fact, it's difficult to see what  
22 further sanction could be attached to someone who is  
23 condemned to death -- would be attached if the -- if your  
24 client simply said, I'm not going to answer that question?

25 MS. SHANK: Well, they may draw an adverse

1 inference from his silence, may view him as being  
2 uncooperative, and go --

3 QUESTION: But that wouldn't incriminate him.

4 MS. SHANK: Well, but it's part of what the  
5 problem is with the choice that he is facing.  
6 Incriminating him if he chose to speak and then those  
7 matters were used against him --

8 QUESTION: But that happens in civil proceedings  
9 all the time.

10 MS. SHANK: And it's possible, too, that it  
11 could be used to impeach him, and the silence itself could  
12 at least be attempted to be used for impeachment in  
13 subsequent criminal proceedings, so --

14 QUESTION: Well, by the time you get to clemency  
15 beggars can't be choosers.

16 MS. SHANK: Well, Your Honor, and I think that  
17 if clemency were to be handled at the end of the process  
18 instead of at this premature point where you have ongoing  
19 litigation and future litigation as a right still in front  
20 of you, that it might be possible that a procedure that  
21 set some time limits toward the end of the process would  
22 meet due process.

23 QUESTION: Ms. Shank, it's not only capital  
24 defendants who apply for clemency, and it's quite possible  
25 to talk about the end of the process when you're dealing



1 with a capital defendant who's lost, but what about other  
2 defendants? What's the end of the process?

3 As long as they're in prison they can continue  
4 to find new reasons why the case should be reopened, and  
5 so forth and so on. What is the end of the process for  
6 someone who hasn't -- you know, who hasn't been condemned  
7 to death?

8 MS. SHANK: Well, for Ohio's purposes it's not  
9 relevant because they don't put these restrictions on  
10 noncapital defendants. These restrictions and these time  
11 frames, this mandatory, this forced clemency review at  
12 this early date is only applied in capital cases.

13 QUESTION: Well, but in any of the other cases,  
14 whenever the hearing is held, wouldn't the prisoner have  
15 the same objection? You know, I'm going to be spending  
16 years in prison trying to figure out what went wrong in my  
17 trial, and I'm going to file collateral review  
18 applications, and by making me come in and confess, you're  
19 making it impossible for me to do that. Wouldn't every  
20 prisoner have that claim?

21 MS. SHANK: Well, Justice Scalia, I think it's  
22 part of the problem with that process, is that if a  
23 prisoner initiates the clemency process, if he exercises  
24 that State right we've talked to you about seeking  
25 clemency, then he's made some choices about where he wants

1 to go and the statements he's making.

2 But when he is subjected to a forced process at  
3 a time when he is still in litigation, those  
4 considerations aren't available to him.

5 QUESTION: I understand, but my -- the point I'm  
6 making is, we can't solve the problem, as Justice Breyer  
7 suggests, by simply making sure that the proceeding here  
8 is held after the last habeas before the execution. The  
9 problem's going to exist in noncapital cases perpetually.

10 MS. SHANK: Justice Scalia, I must say that if  
11 it was a forced process at some time I think that perhaps  
12 the hypothetical you're proposing would have application  
13 to noncapital cases, but that's not the situation in Ohio.  
14 Noncapital cases aren't subjected to that standard. They  
15 aren't forced into clemency review and, of course, we are  
16 dealing with the capital case here.

17 QUESTION: Suppose Ohio said, well, for capital  
18 cases we're going to have a simple proceeding. It's just  
19 the Governor and whatever trusted advisor, so we cut out  
20 all this process that you're complaining is inadequate.  
21 Would it be constitutional for Ohio to have such a system,  
22 just the Governor, who will consult with a trusted  
23 advisor?

24 MS. SHANK: I think that at least under the  
25 parameters that we're dealing with in this case the answer

1 would be yes, because the right to seek would not have  
2 been impaired. As long as the State doesn't erect a  
3 barrier to getting to the decisionmaker, I think that the  
4 clemency right to seek has been observed.

5 Part of the problem we have here is that we have  
6 a process that keeps us --

7 QUESTION: So once you have a process, once you  
8 try to install something like this, it better be  
9 meticulously observed. Doesn't that give the signal that  
10 it's not very wise for a State to have these processes,  
11 that they ought to stick with just a simple, you ask the  
12 Governor, the Governor says no, that's it?

13 MS. SHANK: I don't think it has that meaning  
14 here, because the meticulous observation of rules comes  
15 from that line of cases, Meacham and the prison cases,  
16 Greenholtz, some of the cases that have been mentioned.

17 But in those cases, the procedure did not erect  
18 a barrier either to getting to the final decisionmaker  
19 even in Dumschat, even in the prison cases, and it did not  
20 prevent the ultimate decisionmaker from making his  
21 decision.

22 This process has to be complied with -- I mean,  
23 the application process has to be complied with for the  
24 Governor to make a valid decision, and it's a forced  
25 process that once it's been engaged in, its initial timing

1 denies a meaningful opportunity to be heard at a  
2 meaningful time and then precludes the right to seek when  
3 it is meaningful, because it becomes discretionary with  
4 the APA whether a subsequent application from the inmate  
5 will be considered for clemency.

6 That is under paragraph G of the policy, which  
7 makes it forever, and then in the administrative code,  
8 5120 1-1-15 puts a 2-year limit on it. At the moment I  
9 cannot tell you which of those the courts of Ohio will  
10 determine may or may not be the final time limit on how  
11 long they can withhold the clemency application from  
12 consideration.

13 So I think that the process distinction here,  
14 and the reason we don't have to worry about the details,  
15 is that this is a process that keeps us from getting  
16 there. Those cases that address that kind of detailed  
17 parsing of the language are ones where you always were  
18 able to get there.

19 I also think that in this case we have a  
20 situation where the process itself has created the kinds  
21 of parameters that this Court has recognized as creating a  
22 due process interest, a State-created liberty interest  
23 that deserves due process protection.

24 QUESTION: Do we have -- it seems to me that the  
25 most forceful of your arguments is the unconstitutional

1 condition argument on the self-incrimination privilege  
2 that he has in the criminal proceedings, and there we  
3 focus on the criminal side and say, he's losing something  
4 on the criminal side because you're coercing or compelling  
5 the abandonment of the privilege.

6 What's your best case on that? Baxter doesn't  
7 work for you, really.

8 MS. SHANK: Well --

9 QUESTION: And as sort of a follow-up to that,  
10 do we ultimately come back to the question whether or not  
11 there is a right to the clemency proceeding, so that we're  
12 back to the initial point.

13 MS. SHANK: You don't have to come back -- I'll  
14 answer the last part first. You don't have to come back  
15 to there being a right to the clemency proceeding in order  
16 to reach the question whether or not this imposes an  
17 unconstitutional condition.

18 QUESTION: And what's the best case for that?

19 MS. SHANK: I think that the best case for us is  
20 one that analyzes the rough proportionality or rational  
21 nexus that must exist between the condition that's being  
22 imposed and the policy it's supposed to implement, and  
23 that is *Dolan v. City of Tigard*, where this Court found  
24 that that was essential.

25 The purpose, the stated purpose, the declared



1 purpose by the Ohio supreme court and the Ohio  
2 constitutional debates for these legislative regulations  
3 on the application process, and they are legislative, not  
4 executive, is to ensure the quality of information that  
5 reaches the Government.

6 When you put the person in the position of  
7 either being unable to participate because they have to  
8 exert their Fifth Amendment rights, or being in a coercive  
9 situation, then you have undermined the State's stated  
10 purpose for having these regulations.

11 QUESTION: Thank you, Ms. Shank.

12 Mr. Klatt, you have 3 minutes remaining.

13 REBUTTAL ARGUMENT OF WILLIAM A. KLATT

14 ON BEHALF OF THE PETITIONER

15 MR. KLATT: Thank you. One thing I'd like to  
16 make very clear is that there is nothing in Ohio's death  
17 penalty clemency procedures that compel the respondent to  
18 incriminate himself. The interview places no condition  
19 requiring the waiver of any constitutional right, and has  
20 no element of compulsion.

21 QUESTION: Suppose it was very clear that  
22 silence would be not only an adverse inference but would  
23 likely result in denial of clemency.

24 MR. KLATT: You might have compulsion under  
25 those circumstances. That's not the situation here.

1 QUESTION: What if the -- I don't know if she  
2 wants this argument, but the strongest point, I thought,  
3 going back to the complaint, would be a Mathews v.  
4 Eldridge point, that all she wants is you to postpone this  
5 hearing until it's 45 days before the real execution, and  
6 you won't do it.

7 And the State's interest in not doing it -- you  
8 know, not postponing it till the 45 days is real, is zero,  
9 her interest is -- well, she loses her right, the client  
10 loses right to a lawyer and self-incrimination in a real  
11 practical way, very strong. The administrative ease is  
12 tremendous. All you have to do is say we're going to  
13 follow what the court does, and therefore this is a  
14 tremendously strong argument for -- since it isn't even  
15 the Governor, it's the special board run by the  
16 legislature, for denial of due process.

17 Now, I'm being quick about that, but I -- so  
18 what's your -- what -- I got that out of the complaint --  
19 what's --

20 MR. KLATT: Well, I would respectfully disagree,  
21 that there is a very important, legitimate State interest  
22 in the timing of obtaining the information. Even if a  
23 stay would be obtained, the order --

24 QUESTION: Sure there is, but everybody else,  
25 everybody without a stay it's 45 days before, it's before

1 the real execution, so what's your interest in getting  
2 that information 6 months before the execution, where all  
3 that's happened is that there's been a court order  
4 delaying it for 6 months.

5 MR. KLATT: Well, if I understand your question,  
6 I don't know that the State would have an interest at that  
7 point --

8 QUESTION: Here they ask -- they pointed out,  
9 they enclose, attached to the complaint, the court order  
10 of Ohio making the execution date not 45 days after  
11 September 9, but sometime after the following January 18,  
12 and still the board, they say, wouldn't postpone the  
13 hearing. They wanted to have it on the 9th.

14 MR. KLATT: That's correct. The simple fact  
15 that there is a time limit -- in this instance it was 45  
16 days, which seems to be a reasonable period of time -- who  
17 knows when the stay might ultimately be obtained. It  
18 might never be obtained.

19 QUESTION: I suppose for Mathews v. Eldridge to  
20 apply there has to be some protected interest under the  
21 Due Process Clause in the first place.

22 MR. KLATT: Absolutely, and fundamentally --

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klatt.  
24 I think you've answered the question.

25 The case is submitted.

1                   (Whereupon, at 11:10 a.m., the case in the  
2 above-entitled matter was submitted.)  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

OHIO ADULT PAROLE AUTHORITY, ET AL., Petitioners v. EUGENE WOODARD  
CASE NO: 96-1769

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)