

DATE TYPED: April 28, 2014  
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**IN RE: ARTHUR TYLER, A175-637**

**STATE OF OHIO  
ADULT PAROLE AUTHORITY  
COLUMBUS, OHIO**

Date of Meeting: April 24, 2014

Minutes of the **SPECIAL MEETING** of the  
Adult Parole Authority held at 770 West Broad Street,  
Columbus, Ohio 43222 on the above date.

**IN RE: Arthur Tyler, A175-637**

SUBJECT: Death Sentence Clemency

CRIME, CONVICTION: Aggravated Murder, Aggravated Robbery to include Death Penalty and Firearm Specifications

DATE, PLACE OF CRIME: March 12, 1983 in Cleveland, Ohio

COUNTY: Cuyahoga

CASE NUMBER: CR-181132

VICTIM: Sander Leach (Age 74)

INDICTMENT: Count 1: Aggravated murder with specifications  
Count 2: Aggravated robbery with specification

TRIAL: Trials by Jury<sup>1</sup>

VERDICT: Guilty on both counts, including specifications

DATE OF SENTENCE: August 31, 1983 (First Trial)  
January 16, 1986 (Second Trial)

SENTENCE: Count 1: DEATH  
Count 2: 7– 25 with 3 years for gun specification

ADMITTED TO INSTITUTION: September 23, 1983

JAIL TIME CREDIT: 192 days

TIME SERVED: 30 years and 7 months (does not include jail time)

AGE AT ADMISSION: 23 years old

CURRENT AGE: 54 years old

DATE OF BIRTH: December 14, 1959

JUDGE: Honorable James D. Sweeney (Second Trial)

PROSECUTING ATTORNEY: Tom Terry and William Gerstenslager

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<sup>1</sup> Tyler received two trials. Tyler was convicted following his first trial. That conviction was reversed on appeal and he was again convicted after a second trial.

## **FOREWORD:**

Clemency proceedings in the case of Arthur Tyler, A175-637, were initiated by the Ohio Parole Board pursuant to Sections 2967.03 and 2967.07 of the Ohio Revised Code and Parole Board Policy #105-PBD-01.

On April 10, 2014, the Parole Board interviewed Tyler via videoconference from the Chillicothe Correctional Institution. A clemency hearing was then held on April 24, 2014 with eleven (11) members of the Ohio Parole Board participating. At that hearing, arguments in support of and in opposition to clemency were presented to the Board.

The Parole Board considered all of the written submissions, arguments, information disseminated by presenters at the clemency hearing, and the judicial decisions. The Parole Board deliberated upon the propriety of clemency in this case. With eleven (11) members participating, the Parole Board voted eleven (11) to zero (0) to provide a favorable recommendation for clemency to the Honorable John R. Kasich, Governor of the State of Ohio. Six members of the Parole Board recommend commuting Tyler's sentence to life imprisonment with immediate parole board eligibility and five members of the Board recommend commuting Tyler's sentence to 33 years to life, which would make Tyler parole eligible in two years.

## **DETAILS OF THE INSTANT OFFENSE (CR 181132):**

The following account of the instant offense was obtained from the Ohio Supreme Court's opinion, decided March 28, 1990:

Sander Leach sold produce from a van at East 66th Street and Zoeter Avenue in Cleveland, near the East 66th Meat Market. On March 12, 1983, he was shot to death in his van.

On the day Leach was killed, Leroy Head, Anthony Gillis, and appellant, Arthur Tyler, were taking drugs in Scott Hill's apartment in Cleveland. Gillis suggested that they attempt to cash Hill's \$30 welfare check and split the money. According to Head, appellant "said he knew another way that we could get some money." Appellant suggested that they rob Leach.

Gillis said that he had a gun, but no bullets. Appellant took the gun and went with Head to borrow ammunition. They went to see a man named Judge Parker, who gave appellant six brass-jacketed .38 caliber bullets. Appellant loaded the gun.

Next appellant and Head went to Ferrell's, a store on East 66th Street and Wade Park. Annie Travick, a clerk at Ferrell's, testified that appellant borrowed five cents from a customer and bought a brown paper bag. According to Head, appellant concealed the gun in this bag.

Leaving Ferrell's, appellant and Head went to Leach's van, which was parked nearby. Head knocked on the side and asked Leach if he had any

lemons. Leach came out, went to the back of the van, opened it, and climbed in. Appellant followed him into the van while Head stayed outside to act as a lookout.

Head heard two shots. He looked inside the van and saw appellant with a gun in his right hand going through Leach's pockets. Head said, "Come on, let's go." He then ran through the parking lot, through a field, and across Wade Park.

Two witnesses, Fazenda Cerafinjos and Susie Amerson, saw a thin black man run toward Wade Park. Cerafinjos testified that she heard shots just before she saw the running man. Amerson testified that, five or six minutes after seeing a tall, thin man run toward Wade Park, she saw a shorter, heavier man come around from the rear of the van and run up Zoeter Avenue.

Head went back to Hill's apartment, where Gillis was waiting. According to Gillis, appellant arrived with Head and said, "I had to burn him, the old man was silly, I had to burn him." Then appellant left. Two women named Sandra and Peg came to the apartment; a few minutes later, Tyler returned. Tyler asked Head and Gillis to join him in the bathroom. He told them that "if he heard anything else about this somebody else was going to come up dead." According to Head, it was then that Tyler confessed "that he killed the man."

An autopsy showed that Leach had been shot twice and bled to death. The deputy coroner concluded that the manner of death was homicide.

Cleveland police arrested Gillis and Head on March 14. These arrests produced the first of several statements by Gillis and Head that were inconsistent with their later trial testimony.

On March 14, Head told police that appellant suggested robbing Leach and that appellant planned to hold Leach at gunpoint while Head searched him for money. Head said that while he was searching, Leach pulled a gun. Head grabbed the gun, which went off. Leach continued to struggle; during the struggle, the gun went off again. Head claimed that he left the gun lying on Leach's chest, jumped out of the van, and ran.

On March 24, Head made a second statement, in appellant's presence, to appellant's investigator, Arthur Provenzano. This time, he said that he and appellant went out intending to cash Hill's check. He and appellant went into a store together. When the store personnel refused to cash the check, Head went out, leaving appellant in the store. Head adhered to his story that he had shot Leach in a struggle over Leach's gun; however, Head now claimed that appellant was in the store during the entire crime.

On May 27, Head made a third statement essentially conforming to his trial testimony.

One of appellant's attorneys spoke to Head at an unspecified time in the Cuyahoga County Jail. During this conversation, Head said "that Tony

Gillis did it." At trial, Head claimed that he had "just said what I figured would make [the attorney] leave me alone."

Gillis also made a statement on March 14. He said that appellant asked Head whether Head wanted to make some money. Head said yes, and they left. Twenty-five or thirty minutes later they returned, breathing hard. Appellant "kept saying the old man was silly, the old man was silly. Then I asked -- what happened and Leroy said we had to burn somebody." Gillis quoted Head further as saying: "I had to kill him, because he was reaching for his pistol." Gillis' second statement, on May 18, was consistent with his March 14 statement.

Appellant testified that he was in the East 66th Meat Market unsuccessfully trying to cash Hill's welfare check. He testified that, as he was leaving, he heard two shots and began to run toward Zoeter Avenue. However, the store owner did not recognize appellant, nor did he remember seeing appellant in his store trying to cash a check on the day in question.

The Cuyahoga County Grand Jury indicted appellant and Head on one count of aggravated murder, *R.C. 2903.01*, with a felony-murder specification, *R.C. 2929.04(A)(7)*, and a firearm specification, *R.C. 2929.71(A)(2)*, and one count of aggravated robbery, *R.C. 2911.01*. Head pled guilty to aggravated murder and aggravated robbery, and the death penalty specification was dismissed. Appellant was convicted and sentenced to death, but the court of appeals reversed his conviction. Appellant was retried, convicted of all charges and specifications, and again sentenced to death. The court of appeals affirmed.

### **PRIOR RECORD:**

**Juvenile Offenses:** According to Tyler's presentence investigation report, he has the following known juvenile arrest record. That report indicates that Tyler's juvenile court file could not be located at the time the report was prepared and that the following information was gathered through investigation and from an interview with Tyler.

<b><u>DATE</u></b>	<b><u>OFFENSE</u></b>	<b><u>LOCATION</u></b>	<b><u>DISPOSITION</u></b>
07/03/1975	Breaking & Entering	Cleveland, Ohio	12/11/1975: Placed on indefinite probation
09/23/1975	Criminal Damaging	Cleveland, Ohio	Nolled
08/1976	Petty Theft	Cleveland, Ohio	Sentenced to 6 months Fairfield School for Boys; Released 04/77
10/1977	Criminal Trespassing	Cleveland, Ohio	Dismissed
11/1977	Forged Travelers Check	Cleveland, Ohio	Dismissed

**Adult Offenses:** Tyler has the following known adult arrest record:

12/13/1979	Breaking & Entering	Cleveland, Ohio	Released
01/15/1980	Aggravated Murder CR-52804B	Cleveland, Ohio	11/04/1981: Nolled
09/24/1980	Robbery	Cleveland, Ohio	10/01/1980: Dismissed
12/05/1980	Robbery CR-59005	Cleveland, Ohio	12/23/1981: 2yrs probation, costs, \$25 restitution. Probation expired 12/23/1983.
12/17/1980	Escape CR-59203A	Cleveland, Ohio	11/04/1981: Nolled
12/06/1982	Att. Grand Theft Possession of Criminal Tools (PCT)/Breaking & Entering CR-178788	Cleveland, Ohio	03/02/1983: Pled Guilty to amended indictment-Attempted PCT; remaining counts nolled; Initial sentence—6 months county jail—suspended
03/15/1983	Aggravated Murder, Aggravated Robbery with specifications CR-181132	Cleveland, Ohio	<b>INSTANT OFFENSE</b>
04/28/1983	Aggravated Robbery CR-182150	Cleveland, Ohio	Defendant arraigned 05/09/1983; nolled 08/31/1983

**INSTITUTIONAL ADJUSTMENT:**

Arthur Tyler was admitted to the Ohio Department of Rehabilitation and Correction on September 23, 1983. His work assignments while incarcerated at the Southern Ohio Correctional Facility (SOCF) included Clerk, Laundry Attendant, and Porter. He was incarcerated at the Mansfield Correctional Institution (MANCI) from January 24, 1995 to October 26, 2005. His work assignments at MANCI included Material Handler 2, Tape Transferor, Recreation Worker, Porter, Laundry Attendant, and Laundry Machine Operator. Tyler was then transferred to the Ohio State Penitentiary where his work assignment was that of Laundry Attendant.

Tyler is presently a Barber at the Chillicothe Correctional Institution. No program or community service completion was noted. Tyler's presentence investigation report indicates that Tyler graduated from high school in June 1978 and was an average student. The presentence investigation report further indicates that Tyler attended college for two terms in 1978 and 1979. Tyler attended school while incarcerated at SOCF but was removed after he was involved in an altercation with another inmate on August 30, 1991.

Since his admission, Tyler has accumulated the following disciplinary record resulting in his placement in disciplinary control:

- 04/14/84: Disobedience of a direct order. Tyler was directed to come out of the shower after being inside for ten minutes washing his underwear. He refused to come out of the shower and did not do so for an additional twenty minutes. Tyler received 5 days disciplinary control for this rule infraction.
- 04/19/84: Possession of contraband. Tyler was in possession of altered clothing, flashlight batteries, electrical cord, and plugs. Tyler received 5 days in disciplinary control for this rule infraction.
- 08/17/84: Disrespect to an officer, staff member, visitor, or inmate. Tyler told an officer, "Hey guard, I'm going to fuck your mother, bitch" while the officer was escorting a nurse on pill pass. Tyler received 10 days in disciplinary control for this rule infraction.
- 02/13/07: Threatening bodily harm to another. Tyler became upset with a commissary worker when he believed his commissary was incorrect. He threatened the officer by telling him that he "better get his shit" and that he was going to "snatch his ass" into his cuff port. Tyler received 5 days in disciplinary control for this rule infraction.
- 09/01/08: Tampering with locks, or locking devices, window bars; tampering with walls, floors, or ceilings in an effort to penetrate them. Tyler tampered with a door when he attempted to stop the cell door from closing so that he could put his personal items on the range. He then refused to remove himself from the door after being instructed to do so by the officer. A captain was contacted and the door was secured. Tyler received 4 days in disciplinary control for this rule infraction.
- 10/29/10: Misuse of authorized medication. Tyler pretended to take his medication and swallow it. Upon questioning, he palmed the pill in his hand and tried to hide the pill from the nurse. Tyler eventually disposed of the pill in the trash. Tyler received 7 days disciplinary control for this rule infraction.

Tyler has received the following conduct reports that did not result in placement in disciplinary control:

- Destruction, alteration, or misuse of property in 1985. Tyler received an altered radio from another inmate.
- Encouraging or creating a disturbance in 1986. Tyler threw his food tray (breakfast) onto the range.
- Disrespect to an officer in February 1987. Tyler demanded that a nurse give him a certain type of medication. When the nurse refused, he told her “you are a sick motherfucker.”
- Threatening bodily harm to another and encouraging or creating a disturbance in April 1987. Tyler was yelling at another inmate for not giving him something and threatened the inmate by stating he would “knock the motherfucker’s head off” if he was on the range.
- Disobedience of a direct order in June 1987. Tyler refused to comply with a direct order given to him by an officer.
- Disobedience of a direct order and encouraging or creating a disturbance in November 1987. Tyler was watching television at 11:30 p.m. and was yelling down range to other inmates until 1:20 a.m.
- Disobedience of a direct order in July 1988. Tyler was ordered to return to his cell after leaving school, refused to do so, and began arguing with the officer. He was again ordered to lock down. Tyler did so but continued to argue with the officer.
- Disrespect to an officer, staff member, visitor, or inmate and encouraging or creating a disturbance in May 1989. Tyler was yelling at another inmate on the range and continued to do so after an officer repeatedly ordered him to stop yelling.
- Destruction, alteration, or misuse of property in April 1990. Tyler took a bucket used to clean the food cart back to his cell and used it to clean his toilet.
- Encouraging or creating a disturbance, threatening bodily harm to another, and disrespect to an officer, staff member, visitor, or inmate in August 1990. Tyler was in the shower arguing with another inmate on the range. Both inmates threatened to kill one another.
- Disobedience of a direct order in May 1992. Tyler did not have his cell ready for an inspection as directed by the unit manager.
- Refusal to carry out work or other institutional assignments in June 1992. Tyler stopped passing out laundry as part of his work assignment and was caught sitting down watching television.

- Refusal to carry out work or other institutional assignments in March 1997. Tyler did not perform his job duties, playing cards instead.
- Threatening bodily harm to another and disobedience of a direct order in August 2003. While an officer conducted count, Tyler advised the officer that there were some “new rules” since the officer had been gone and all she needed to do was “sit in her chair and relax.” Tyler later asked the officer on two occasions to give him some food that she had brought from home. He stated to her that no one would ever know.
- Possession of contraband and any violation of published institutional rules, regulations, or procedures in August 2003. Tyler was in possession of 5 non-manufacturer tapes that were sexually explicit in nature.
- Disobedience of a direct order in November 2005. Tyler was given a direct order not to cross a red line but he continued to do so. When officers again ordered him to stop, Tyler responded over the intercom, “I don’t give a fuck about a ticket.”
- Disobedience of a direct order (on two occasions) in September 2007. Tyler was disrespectful to staff.
- Destruction, alteration, or misuse of property and possession of contraband in January 2008. When officers searched Tyler’s cell they found three pillows that were torn up and other items that he was not permitted to possess.
- Disobedience of a direct order in February 2008. Tyler used the intercom system for a non-medical emergency because he was upset about his toilet not operating properly. He then told staff that he wanted his “fucking toilet” fixed and stated, “I am tired of dealing with you bitches.”
- Misuse of authorized medication in March 2008. Tyler had medication that he was not permitted to have in his cell.
- Destruction, alteration, or misuse of property in November 2010. Tyler destroyed a state blanket by tearing it in half.
- Possession of contraband in April 2011. Tyler was told that he needed to take an item back or send it out of the institution. He refused to do either. A ticket was issued to determine what to do with the contraband.
- Disobedience of a direct order and disrespect to an officer, staff member, visitor, or inmate in October 2012. Tyler was being seen by nursing staff and continued to interrupt the nurse. He was advised by the nurse to stop interrupting and Tyler became loud, telling the nurse to “shut up”.

- Disobedience of a direct order (on two occasions) in January 2013. Tyler was watching television without headphones.
- Tampering with locks or locking devices, window bars; tampering with walls, floors, or ceilings in an effort to penetrate them in June 2013. Tyler used a piece of cardboard to hold open the door to his cell so it would not secure but appear as if it was locked.
- Tampering with locks or locking devices, window bars; tampering with walls, floors, or ceilings in an effort to penetrate them and disobedience of a direct order in November 2013. Tyler placed something in a lock so the door would appear to be secured.

### **APPLICANT'S STATEMENT:**

On April 10, 2014, members of the Ohio Parole Board conducted an interview with Tyler via videoconference from the Chillicothe Correctional Institution (CCI).

The following individuals observed the interview via videoconference but did not participate: Samuel Porter from the Office of Governor John Kasich; Stephen Maher from the Office of the Ohio Attorney General; Kathryn Sandford from the Office of the Ohio Public Defender; Lori Riga from the Office of the Federal Public Defender; Alan Rossman from the Office of the Federal Public Defender; Vicki Werneke from the Office of the Federal Public Defender; T. Allan Regas, Assistant Cuyahoga County Prosecutor; and Katherine Mullin, Assistant Cuyahoga County Prosecutor.

Parole Board Chair Cynthia Mausser opened the interview by introducing herself to Tyler. She noted that there were several individuals observing the interview who were not participating and identified those individuals. She then explained the purpose of the interview to Tyler and noted that his clemency hearing will be held in several weeks at which time the Board will receive arguments in support of, and in opposition to, clemency and following which the Board will make a clemency recommendation. Chair Mausser introduced Tyler to the other members of the Parole Board.

Chair Mausser asked Tyler what he would like the Board to consider in making a clemency recommendation. Tyler responded that he is on death row for a murder that he did not commit. On the day of the murder, he did a lot of things that were wrong, but he did not kill anyone, Tyler urged. According to Tyler, the person who committed the murder is Leroy Head, who has been on the street since 2008.<sup>2</sup> Head killed the victim, cut a deal with the state, and Tyler ended up on death row for thirty-one years now, Tyler

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<sup>2</sup> Head and Tyler were both indicted for aggravated murder with death penalty specifications and aggravated robbery in connection with Leach's death. Head pled guilty to aggravated murder and aggravated robbery in connection with his involvement in Leach's death, and the death penalty specification against him was dropped. Head was paroled in 2008, after serving approximately twenty-five years. He received a final release from parole supervision in July 2013.

stated. Tyler and Head never formulated any plan to kill the victim. It was something that just happened, Tyler insisted. Tyler stated that he would like to go home.

Tyler explained that on the day of the murder, he was hanging out with some friends on the street drinking alcohol. Head approached Tyler and asked him to cash a check belonging to an individual named Scott Hill. After Head told Tyler that Head needed money, the two formulated a plan to rob a local store called the "Meat Market," which was known in the neighborhood as a place where one could buy drugs and cash stolen checks.

The plan, according to Tyler, was for Tyler to go into the Meat Market on the pretense of cashing Hill's check. At the right moment, Tyler would motion for Head to enter the market and rob it. However, when it came time for Head to enter the store, he was not waiting at the store's door as he and Tyler had planned, so Tyler bought some cigarettes and exited the market. Upon exiting, Tyler heard gunshots and saw Head run past. Head ran to Hill's home and Tyler followed, running past the van where the victim was shot.

According to Tyler, he ran past the van because that was one of only two directions that he could have gone. He could either run past the van or reenter the Meat Market. Today, Tyler wishes that he had reentered the market. According to Tyler, after arriving at Hill's home, Head related that in the course of robbing Leach, he and the victim struggled for the gun, which went off killing Leach. Tyler never saw Head again until trial when Head "put the murder on him," Tyler told the Board.

Tyler spoke briefly about the two trials he received, referring to them as "horrible." Tyler stated that he hired the attorney who represented him at his first trial for \$1,000. According to Tyler, that attorney was one of the worst in Cleveland. After being convicted at his first trial, Tyler was granted a new trial on appeal. According to Tyler, the prosecutor from his first trial, William Gerstenslager, went to work for the law firm that represented him during his successful appeal. Gerstenslager, Tyler continued, then turned around and prosecuted Tyler's second trial, which resulted in the conviction on which he now faces execution. Tyler referred to the prosecutor as "rotten," and stated that the system "railroaded" him.

According to Tyler, the prosecution continued to put together stories to support its claim that he killed Leach until the prosecution arrived at a story that was believable. Tyler asserted that many of the facts of the case, as recited in the court opinions, are untrue. Among the "facts" of the case that Tyler disputes are that he had possession of the gun used in the crime, that he went in search of ammunition for that gun, and that he borrowed five cents from a customer at a nearby store to purchase a brown paper bag in which to place the gun. When asked by the Board why the witnesses who testified to those facts would have lied, Tyler responded that he has no explanation, but that he knows that none of those witnesses had emerged until after everyone decided to set him up for the crime.

Tyler stated that he understands why Head would have set him to take the fall. Head knew that he was facing the death penalty so he blamed him to save his own life, Tyler argued, and he likely would have done the same thing if it was him in Head's situation.

Tyler recounted that he was on probation for attempted possession of criminal tools on the day Leach was killed. That prior conviction, according to Tyler, involved him and some friends attempting to steal automobiles. Tyler further related that, prior to that conviction, he had been convicted of robbery. That prior robbery conviction, Tyler explained, involved him and some friends out drinking when they stopped at a Church's Chicken, where Tyler submitted an employment application. When the clerk running the register turned her back to Tyler, he reached into her register and stole some cash. Tyler referred to the robbery as "just stupid."

The Board asked Tyler to speak about a prior incident resulting in Tyler being charged with aggravated murder, charges that were eventually dropped. Tyler explained that he and a friend were gambling at an "after-hours joint" when one of the individuals he was with shot another man. According to Tyler, after he refused to testify against the shooter, the prosecutor became angry and charged Tyler with the shooting. Once the actual shooter pled to the crime, charges against Tyler were dropped, Tyler claimed.

When asked how an individual who, like himself, graduated high school and was taking college courses could become involved in the kind of criminal activity that he was describing, Tyler responded that he was an "idiot" who "messed up." However, he is not a murderer, Tyler insisted. From a young age, he used marijuana and took pills, Tyler recounted. Yet, he always functioned fairly well. So well, in fact, that while awaiting trial for killing Leach, Tyler learned that he had been hired for a job with the Cleveland Regional Transit Authority, for which he had applied prior to his arrest.

Tyler indicated that all of his brothers and sisters are deceased, with the exception of one sister with whom he has regular contact. Tyler described that sister as very supportive, noting that she calls and visits often. Tyler stated that he has a son who is incarcerated in another state with whom he exchanges letters.

Tyler indicated that he has several individuals—"married couples, for the most part"—who are his friends and who are campaigning for his freedom. According to Tyler, he has many people outside of prison who are in his corner and who would help him if released, including assistance with employment.

When asked to address his institutional misconduct, Tyler responded that he has "had some idiot moments," but stressed that he has never harmed anyone, staff or otherwise. Tyler explained that his misconduct results from frustration over being wrongly convicted and having served 31 years because no one is willing to hear his story. In other words, he continued, he is frustrated that no one can see that he is innocent. Tyler also suggested that some of his conduct reports are simply the result of him letting off steam in the course of a bad day, something that everyone, even staff, does from time to time, Tyler argued.

Tyler related that his days are idle and uneventful since being transferred to CCI because CCI makes no schooling, programs, or other activities available to him. Tyler indicated that when previously incarcerated at other institutions, he would avail himself of opportunities to engage in programming and to do community service. That community service included making cards, stuffing envelopes, making stuffed animals, and reading books onto tape for the blind.

When asked to clarify precisely what form of clemency he would like to receive, Tyler responded that he only wants the Board to review the evidence and to do what is right. He is frustrated that everyone believes Head rather than him even though Head has told 13 or 14 different stories about the crime, Tyler stated. Tyler further indicated that it would be difficult for him to cope with receiving a form of clemency that would require him to remain incarcerated, either with or without parole eligibility, because he very much wants to go home.

As a final statement, Tyler stated that he did not come to the interview to play the victim and that he hopes the Board does not perceive him as attempting to do that. Thirty-one years ago he behaved like an “idiot” and he was never an “innocent angel,” Tyler explained, but he did not kill Sander Leach.

Chair Mausser concluded the interview after thanking Tyler for his participation.

#### **ARGUMENTS IN SUPPORT OF CLEMENCY:**

A written application with exhibits outlining the arguments in support of clemency was submitted to the Parole Board. On April 24, 2014, a hearing was conducted to further consider the merits of the application. Attorneys Vicki Werneke and Alan Rossman from the Federal Public Defender’s Office as well as Assistant Ohio Public Defender Kathryn Sandford represented Tyler at the clemency hearing and presented the following arguments in support of executive clemency.

Werneke identified several bases for clemency that would comprise the overall case for clemency presented at the hearing. First, while there is no definitive proof of Tyler’s innocence, there is grave doubt as to whether Tyler bears any guilt in relation to Leach’s death due to the repeated admissions by Tyler’s co-defendant, Leroy Head, that he was the one who shot Leach. Head’s admissions include an affidavit he executed in July 1991, years after Tyler’s second conviction for killing Leach. Second, the judicial system failed Tyler in several ways, including the following: the defense counsel’s inability to fully test Head’s post-conviction confessions in court; the prosecutor’s concealment of potentially exculpatory evidence; a potential conflict of interest involving the prosecutor and Tyler’s defense attorneys at his second trial; in-fighting between those same defense attorneys; and a coercive jury instruction given at the penalty phase of Tyler’s second trial. Third, clemency is warranted due to the significant amount of support that Tyler has in the community.

Werneke noted that the Cuyahoga County Prosecuting Attorney is joining Tyler's attorneys in recommending clemency for Tyler. However, Tyler's attorneys and the Prosecuting Attorney disagree as to the appropriate form of clemency to be granted in Tyler's case. Tyler's attorneys ask that Tyler's sentence be commuted to, at a minimum, one with parole eligibility, whereas the Prosecuting Attorney recommends commutation to life without parole. Werneke stressed that to the extent her arguments and that of her co-counsel can be construed as an indictment upon the past actions of the Office of the Cuyahoga County Prosecuting Attorney, it is in no way intended as an indictment upon that office as it is *currently* constituted.

Werneke observed that the judge from Tyler's second trial, Judge James Sweeney, has likewise joined in the call for clemency in Tyler's case. According to Judge Sweeney, commutation of Tyler's sentence would be fair and proportional given the facts of the case and Head's release from incarceration.

### **Head's Repeated Confessions Create Grave Doubt as to Tyler's Guilt**

Rossman played a PowerPoint presentation for the Board that contained a narrative history of Tyler, describing how he was 23 years old when accused of killing Leach; how he had graduated high school; and how he had taken college courses but did not have the direction necessary to complete post-secondary education. The PowerPoint further described how Leach was killed in his van and how investigators recovered several items of Leach's personal property from his pockets, including a live round of ammunition, food stamps, and cash, among other things.

While investigating an unrelated homicide, police came upon Head, who was acting nervously while police questioned Anthony and Jeffrey Gillis, the brothers of the main suspect in the unrelated homicide. When asked why Head was acting so nervously, Anthony and Jeffrey Gillis responded that Head had killed Leach in the course of robbing him. The Gillis brothers later gave statements to the police in which they indicated that Head had confessed to them that he killed Leach.

When police later questioned Head about his involvement in Leach's death, Head asked to speak to his mother. After speaking with his mother, his mother exited the room in which they were in and stated, in effect, that Head had committed the crime. Head then gave a statement to the police, confessing to being the person who shot Leach, and putting Tyler at the scene of the crime. After he and Tyler were separately indicted for aggravated murder with death penalty specifications, Head gave a second statement to the police in which he again confessed to killing Leach but this time absolving Tyler of any involvement, stating that Tyler was inside the Meat Market attempting to cash a check while Head was robbing and killing Leach. Thereafter, Anthony Gillis gave a second statement to police indicating that Leach had given him the murder weapon to dispose.

On the eve of his trial, Head gave a third statement in which he for the first time identified Tyler as the person who shot Leach. In exchange for testifying against Tyler at Tyler's trial, the prosecutor removed Head's death penalty specification and accepted his guilty

plea. Based on Head's testimony, Tyler was convicted of aggravated murder and sentenced to death.

Rossman's PowerPoint described how Tyler's first conviction was reversed on appeal. A second trial against Tyler was brought in 1985, during which Head was again asked to testify against Tyler. This time, however, Head refused to implicate Tyler during his testimony. After Tyler refused to testify, a recess was held during which the trial judge, Judge James Sweeney, noted that Head clearly did not want to inculcate Tyler and directed both the prosecutor, Gerstenslager, and the defense attorneys not to have any communication with Head until he retook the stand the following day.

The following day, Head took the stand and testified that Tyler shot Leach. Head further testified that, after shooting Leach, Tyler went through Leach's pockets, emptying them. During Tyler's second trial, Gerstenslager made statements to the effect that Leach was found with no money on his person, which the prosecutor knew to be false. Gerstenslager had in his possession a police report indicating that Leach's body was found with money in the pockets of Leach's clothing. Two months later, Gerstenslager agreed to drop the mandatory gun specification that attached to Head's aggravated robbery conviction, essentially shortening Head's sentence by three years.

On July 29, 1991, Head provided Tyler's post-conviction attorneys with an affidavit describing how, during the recess in which he was ordered to have no communication with Head, Gerstenslager coerced Head into testifying against Tyler by threatening to cancel his plea agreement and to seek the death penalty against him. According to the affidavit, Gerstenslager also offered to send him to a less secure prison facility and to "short" his time. According to Head's affidavit, Gerstenslager told him not to mention their exchange when he retook the stand the following day.

Before and after Tyler's trials, Head has made numerous statements to various people claiming that he, not Tyler, shot and killed Leach. Among those confessions was a confession to a man named Sammie Rogers, with whom Head was incarcerated in the county jail in 1983. Again, in 1985, Head confessed to another county jail inmate, Alfred Morales, that Tyler did not kill Leach but that Gerstenslager had threatened Head with the death penalty if he did not testify at the second trial. Likewise, in 1985, Head confessed to prison inmate Romell Broom that he shot Leach, that he did not want to testify against Tyler at the second trial, and that his attorneys and the prosecutor worked out a deal for his testimony.

Similarly, in April 1986, Head signed a written statement stating that he alone killed Leach while Tyler was in the Meat Market cashing a check. In 1993, Head told another inmate at the Trumbull Correctional Institution that he, not Tyler, killed Leach. In January 2010, after being released from prison and having returned to Cleveland, Head told a man named Kevin Bell that he had tried to do the best he could to "right the wrong" and prove that Tyler had nothing to do with Leach's murder. Head, Rossman's PowerPoint observed, now walks around a free man while Tyler remains on death row.

Rossman's PowerPoint concluded by noting that Tyler's attorneys have sought to present Head's testimony in federal habeas proceedings but their efforts have been thwarted by the unwillingness of the Cuyahoga County Prosecuting Attorney to grant Head immunity from further prosecution in relation to his recantations. Absent that promise of immunity, Head has been asserting his Fifth Amendment right against self-incrimination.

Werneke indicated that she and her co-counsel recently met with Head at their offices. Immediately, Head made it clear that, unless they had something to offer him, he had nothing to say. According to Werneke, it was not clear what it was Head was seeking in return for any statement.

### **Head's Affidavit Recanting His Trial Testimony Has Never Been Fully Considered on the Merits**

Rossman described Head's July 1991 affidavit in which Head outlined the exchange that he had with Gerstenslager during Tyler's second trial as a "remarkable piece of evidence" for Tyler's post-conviction attorneys. Having a sworn affidavit of that kind from the only witness to a shooting and the main witness against the defendant is unheard of, Rossman argued. Armed with that evidence, an evidentiary hearing in the courts seemed likely. In the end, however, a confusing series of events and court decisions resulted in that evidence never being fully heard and considered in the courts, Rossman noted.

Sandford introduced herself to the Board as one of Tyler's post-conviction attorneys. In 1991, she filed a petition for post-conviction relief on behalf of Tyler in the Cuyahoga County Court of Common Pleas. That filing included Head's affidavit and also the affidavit from Alfred Morales. Incredibly, she continued, that petition lay dormant in the Common Pleas Court until 1996 when the Supreme Court of Ohio contacted the court regarding the case's status. Apparently, after Tyler's second trial judge, James Sweeney, assumed a judgeship on the court of appeals, confusion ensued within the Common Pleas Court as to which of the other judges on that court would be assuming responsibility for Tyler's case.

During those intervening five years, Sandford continued, the state never filed anything contesting Head's affidavit. The affidavits of Head and Morales have never been discredited, Sandford observed. Rossman added that, given the serious allegations made by Head against Gerstenslager in Head's 1991 affidavit, one would have expected the state to counter the allegations with an affidavit of its own from Gerstenslager refuting Head's charges. No court would have taken the word of Head over a prosecutor, Rossman observed. Yet, the state has never countered Head's affidavit with evidence of any kind.

Cuyahoga County Common Pleas Court Judge Janet Burnside eventually assumed responsibility for Tyler's petition, after which she contacted Sandford informing her that the record in the case was woefully incomplete. There was more information missing from Tyler's court record than there was present, Sandford noted. Sandford assisted Judge Burnside in completing Tyler's record. Judge Burnside eventually ruled against Tyler, dismissing the affidavits of Head and Morales on procedural grounds.

Following her decision, Judge Burnside returned the records she had received from the parties to the parties that had provided them without first copying them or making them part of the court record. As a result, the record was once again incomplete when Sandford appealed Judge Burnside's decision. The case finally proceeded in the court of appeals after Judge Burnside provided a complete copy of the record to the appellate court.

Much of Sandford's oral argument before the court of appeals revolved around the affidavits of Head and Morales. In its order sustaining Judge Burnside's dismissal of Tyler's post-conviction petition for relief, the court of appeals noted that it was missing a number of exhibits, including the affidavits of Head and Morales, which Sandford had attached to the petition for post-conviction relief. Even though the exhibits were attached to the petition for post-conviction relief, the court of appeals still held that because those exhibits were not part of the record, they could not be considered by the court. Sandford noted that at no point during her oral argument did the court indicate to her that it was missing the affidavits about which she was speaking.

After being denied reconsideration by the court of appeals, Sandford appealed the court of appeals's decision to the Ohio Supreme Court, which declined to exercise its discretionary jurisdiction over the appeal. In short, Sandford concluded, no state court has ever taken the opportunity to consider the Head and Morales affidavits on the merits.

Post-conviction litigation proceeded to the federal courts. According to Rossman, recognizing the seriousness of the allegations raised in Head's affidavit, the federal district court did what the state courts had previously declined to do; namely, authorize Tyler's post-conviction counsel and the Ohio Attorney General to subpoena Head for the purpose of taking his deposition. That deposition, Rossman continued, was a precursor to an evidentiary hearing. By authorizing the deposition, the federal court appeared prepared to finally get to the bottom of Head's allegations.

Rick Kerger, Tyler's attorney in the federal habeas corpus proceedings, observed that at that stage of the legal proceedings, it had become imperative that everyone involved in the case have the opportunity to speak with Head under oath. Only then would they be able to achieve some clarity as to Head's position. After being authorized by the district court to depose Head, Kerger went to take Head's deposition from prison. Head refused to answer any questions, asserting his Fifth Amendment right against self-incrimination.

Thereafter, Kerger returned to the district court and asked the court to appoint counsel to Head, which the court did. Kerger again attempted to depose Head, who again asserted the Fifth Amendment. The district court refused to order Head to provide testimony and refused to request from the Cuyahoga County Prosecutor that he grant Head immunity from a perjury charge in exchange for Head's testimony. The district court held that it had no authority to demand from the Prosecuting Attorney that he grant immunity.

Kerger then filed a state court complaint for a writ of mandamus directing the prosecutor to give Head immunity. Like the district court, the state court held that it had no power to

compel the Prosecuting Attorney to take the requested action. Once again, the legal proceedings concluded with no opportunity to fully vet Head's affidavit in court and no opportunity to have his recantation considered on the merits.

### **Prosecutor Gerstenslager Engaged in Prosecutorial Misconduct**

Werneke argued that the prosecutor had in his possession police reports that he never shared with Tyler's trial attorneys. Among those police reports was one indicating that Leach's body was found with money and other items of personal property in Leach's pockets. That fact, Werneke continued, was important because Gerstenslager repeatedly argued to the jury that Tyler had searched the victim's pockets after killing him, turning the pockets inside out. That Leach was found with money was potentially exculpatory evidence because the presence of money on Leach's person was consistent with Head's first two statements to police, during which Head indicated that he killed Leach while the two struggled over his gun. Instead, Werneke argued, Gerstenslager gave false information to the jury about Leach's pockets being turned inside out to buttress Head's trial testimony that Tyler searched Leach's pockets after killing him.

According to Werneke, we know that Gerstenslager was aware of the police report because Gerstenslager claimed that, at the time of trial, he had read pages six and seven of the report to defense counsel. Those pages, Werneke observed, were not the ones detailing the property found on Leach's person. Unfortunately, at the time of Tyler's trials, prosecutors could control the flow of information to defense attorneys in that manner, Werneke explained. Prosecutors did not always freely share information with the defense.

The fact that Gerstenslager withheld the report detailing how money was found on Leach is troubling, Werneke insisted, and could have affected the outcome of the case. Werneke stated that she recently had the opportunity to speak to one of the jurors from Tyler's second trial who found it significant that the victim's body was found with money.

In addition to withholding the police report detailing the property found on Leach, Gerstenslager also failed to turn over to the defense the statement of Jeffrey Gillis, who, not long after Leach was killed, gave a statement to police indicating that Head had confessed killing Leach to him. That statement, Werneke argued, was important because it was both consistent with, and contemporaneous to, the statements given by Anthony Gillis identifying Head as the shooter. Jeffrey Gillis's statement was also consistent with Head's own confessions.

Werneke conceded that claims of prosecutorial misconduct are nothing new to this case and that prosecutorial misconduct has been raised and rejected during Tyler's court appeals. However, those claims, Werneke continued, were rejected not on their merits, but rather on the procedural ground that Tyler's trial attorneys failed to object to them at the time of trial, resulting in the courts applying a "plain error" analysis deferential to the state.

Werneke speculated that the attorneys who represented Tyler in his second trial, Daniel Ryan and David Joyce, failed to diligently object to Gerstenslager's transgressions due to an outside relationship between Gerstenslager and those attorneys. Those attorneys, along with Tyler's appellate counsel following his first trial, Charles Laurie, all shared office space together from which they conducted private civil practices. At that time, it was not uncommon for prosecutors like Gerstenslager to maintain a private civil practice.

According to Werneke, Ryan and Gerstenslager not only shared office space, they also referred high-dollar civil cases to one another. At a minimum, their comingled economic interests created a troubling appearance of impropriety when Ryan later represented Tyler in a trial prosecuted by Gerstenslager, Werneke argued. Adding to that appearance of impropriety, Werneke continued, is the fact that another of the individuals involved in that office sharing arrangement was Donald Nugent, an attorney who went on to become a judge who later ruled on one of Tyler's appellate issues, finding against Tyler on that appellate issue.

According to Werneke, it is reasonable to conclude from the office-sharing arrangement that Tyler's attorneys were more concerned about their own interpersonal relationships as they related to their civil practices than defending Tyler. Their lack of diligence in Tyler's second trial was not the result of any ill will toward Tyler, but rather the individual pecuniary interests each had at stake, Werneke suggested.

Rossman urged that the concerns he and Werneke raise about the office sharing arrangement cannot be dismissed as mere conspiracy theory, as the Cuyahoga County Prosecuting Attorney suggests. The arrangement had a real impact on the trial behavior of Ryan and Joyce, Rossman posited. Rossman noted that an affidavit from Ryan executed in 1991 suggests that, at the time of trial, Ryan was aware of the secret meeting that was held between Gerstenslager and Head during the recess in Head's testimony. Despite having knowledge of that meeting, when Head later took the stand and denied any meeting with Gerstenslager, Ryan passed on the opportunity to confront Head on the lie. If exposed, Head's lie about the secret meeting would have crushed Head's credibility in the eyes of the jury, Rossman argued, yet Ryan never challenged Head on his lie. In the end, Ryan protected Gerstenslager at Tyler's expense, Rossman posited.

Compounding the problems with Tyler's attorneys, Werneke added, was the in-fighting that occurred between Ryan and Joyce. One of the points of contention between Tyler's two attorneys was whether Tyler should accept a plea deal that was offered to him, which would have given him the same sentence as Head. Ryan was upset that Tyler would not take the deal. Joyce, on the other hand, firmly believed in Tyler's innocence. The in-fighting, Werneke argued, corrupted the quality of the defense the attorneys provided and today creates doubt as to the fairness of Tyler's second trial.

### **The Jury in Tyler's Second Trial Was Given a Coercive Jury Instruction**

Rossman noted that following two days of deliberation in the penalty phase of Tyler's second trial, the jury presented the trial judge with the following question:

If one group of jurors is positive that the aggravating factors outweigh the mitigating factors and wishes to recommend the death penalty, but the remaining jurors are just as positive that the mitigating factors are strong enough not to recommend the death penalty and neither group is willing to change that decision, what is the proper procedure to follow at that point?

Under the capital sentencing scheme that existed at the time of Tyler's trial, Rossman explained, if the jury was deadlocked on the punishment to be imposed, a sentence of either 20 or 30 full years to life had to be imposed. However, instead of instructing the jury to return with a recommendation of either 20 or 30 years to life, Judge Sweeney provided the following instruction:

. . . [S]ince . . . the trial of this case has been expensive in time, efforts, and money, the Court urges you to make every reasonable effort to agree on a verdict. You may consider that this case must at some time be decided and that you were selected in the same manner and from the same sources from which any future jury must be selected. . . .

The following day, the jury returned with a death recommendation. From a legal standpoint, the jury's instruction was patently incorrect, Rossman argued. The deadlock did not, as the judge suggested, mean that the state would have to go through the time and expense of retrying the case. Nor would another jury need to be selected to decide upon the sentence, as the trial judge suggested. The deadlock meant only that a sentence of 20 or 30 years to life had to be imposed.

Rossman conceded that the Ohio Supreme Court reviewed the judge's instruction and concluded that, though the instruction was inaccurate, there was nothing coercive about it. However, in reality, the erroneous instruction was anything but harmless, Rossman argued. Rossman pointed to an affidavit from a juror in Tyler's second trial, Angela Acy-Hardaway, in which she averred that, though she was certain at the time that death was not warranted in Tyler's case, she interpreted the judge's instruction as requiring that she return a death recommendation.

In the federal habeas proceedings, Kerger, Tyler's habeas attorney, advanced the coercive jury instruction as a basis for relief. It was one of Tyler's most compelling claims, Rossman observed. However, in rejecting habeas relief for Tyler, the district court inexplicably made no mention of the coercive jury instruction claim. Five days after the decision was released, Tyler wrote to Kerger pointing out that the court never addressed that claim and urging him to follow-up with the district court to have the claim considered. Upon receiving no response, Tyler again wrote to Kerger, noting that the coercive instruction claim was one of his best claims and that it was never addressed by the district court.

Upon receiving no response, Tyler commenced *pro se* litigation to have the coercive instruction claim considered, without success. In August 2013, Kerger filed a motion to

withdraw as counsel for Tyler, noting that he failed to timely follow up on the overlooked claim for relief. That motion was granted. Today, Kerger takes responsibility for not following up on the matter, though he does not specifically recall receiving Tyler's correspondence.

Rossman stated that he returned to the district court, asking it to reopen the case and consider the issue of the coercive jury instruction. That request, Rossman related, was rejected by the district court on procedural grounds, with the court holding that too much time had passed since the original decision was issued. The court of appeals recently affirmed the district court's holding that too much time has now passed to reopen the case and consider the claim. Rossman indicated that he will be asking the court of appeals to reconsider its holding *en banc*. Rossman argued that procedural deficiencies not of Tyler's own making should not prevent the court from addressing his claim.

### **Tyler Has Significant Support**

Tyler's attorneys asserted that Tyler has significant support from family and friends. In support of that proposition, his attorneys offered statements from his sister, Francine Hawkins, and numerous friends of Tyler.

Hawkins noted that she and Tyler are two of five children born to their mother, Mildred. Three of the children, including Hawkins, shared the same father while Tyler and his brother, Robert, were fathered by two other men, both of whom were married to other women when they fathered the children with Tyler's mother. Hawkins and Tyler are the only children of the five who are still living.

Hawkins reported that their mother worked as a housekeeper and later earned money dealing cards at neighborhood poker games. It was at one of those poker games that she met Tyler's father. Their mother also collected welfare. Hawkins related that she was five years old when Tyler was born. She later became a surrogate mother to Tyler, caring for him when their mother was away from home. Hawkins noted that their mother was nurturing "when she was home," but never hugged the children and never conveyed her love for the children verbally.

Hawkins described Tyler as a jolly and playful child, though somewhat spoiled because he was the youngest. Tyler was a good student who graduated high school and completed some college at Cleveland State University, though he performed poorly at the university. According to Hawkins, Tyler had wanted to be an attorney while growing up.

Hawkins attributed Tyler's difficulties in college to Tyler hanging around the wrong crowd. The lure of the streets kept him from reaching his goals, she stated. Tyler was a pool hustler, Hawkins reported, and regularly shot dice on the street with older men. He was very good at hustling, she related. Today, Hawkins sees considerable change in her brother. While once a smart aleck, Tyler is, today, the most loving brother anyone could ask for. He is family oriented and always asks for updates on his family, encouraging Hawkins to regularly check in on other family members.

Hawkins noted that while she attended parts of his trials, she never testified at either of them and was never asked to do so. Had she been asked, she would have testified. Hawkins does not believe that her brother killed Leach. She noted that at the time of his trials, it was apparent that Tyler felt a lot of anger over being in jail for a crime that he did not commit.

Hawkins remains in contact with her brother. In the early years of his incarceration, it was difficult for her to visit Tyler because she had no transportation. Today, her husband makes sure that she routinely gets to the Chillicothe Correctional Institution to visit him. Hawkins writes Tyler, calls him, and sends him money. She indicated that she would remain supportive of Tyler if he is granted clemency and would welcome him into her home to live were he to be released.

Two friends of Tyler's, Ian Heisey and Christine Lee, spoke in favor of clemency. For some time, Heisey and Lee have been spearheading the efforts of an organization called "Justice for Arthur Tyler," a group of individuals committed to disseminating information about Tyler's case in general, and his innocence claim in particular. Heisey reported that he came to meet Tyler through his involvement in Pax Christi, a Catholic peace group, which encouraged its members to reach out to death row inmates with letters of support. The purpose of the letter-writing, according to Heisey, was to let those inmates know that they were not forgotten. Heisey was randomly assigned Tyler, to whom he sent a Christmas card.

That Christmas card prompted an ongoing exchange of letters between Heisey and Tyler. Lee later became involved with Tyler through Heisey. She was at first nervous about establishing a relationship between her family and Tyler, but has since become a strong supporter of his. Heisey and Lee share many details about their family's life with Tyler, including family members' birthdays and anniversaries. They send Tyler money for stamps and phone calls.

In 2008, Heisey and Lee decided to gather some people together to support Tyler and Tyler's sister. It was at first intended to be only a small group to reflect on Tyler's situation and to spread word about it, but the group steadily grew in size becoming "Justice for Arthur Tyler." Heisey attributed the group's rapid expansion to the fact that something about Tyler's situation "resonates with people."

Lee noted that she has, for some time, opposed the death penalty and that many of Tyler's supporters also oppose capital punishment. Despite her longstanding opposition to the death penalty, Lee never before felt compelled to join a group like the one supporting Tyler. She and Heisey do not write or visit anyone else on death row, Lee related.

If Tyler were to be granted parole, both Heisey and Lee would continue to support him by visiting and calling. If Tyler were to return to Cleveland, Heisey stands ready to assist Tyler with employment, housing, education, and other needs. Heisey described the overall network of support available to Tyler as extensive. Heisey envisions Tyler

mentoring young men after he is released and becoming a pillar of the reentry community. Heisey described Tyler as a thoughtful individual, who has worked on his anger through the years and who, today, writes poetry and meditates regularly.

Heisey and Lee concluded their presentations by noting that they and other of Tyler's supporters are praying for Leach's family. They stressed that they not only oppose the death penalty, but all killing.

Werneke next played a series of videotaped statements from Tyler's other supporters.

Maria Smith, another of Tyler's friends, stated that she exchanges approximately three letters with Tyler each month. Tyler has followed her son's college career very closely. Tyler, she continued, has a deep devotion to meditation. Tyler has written to her informing her that when she is meditating at 11 p.m., he is doing likewise. Smith displays correspondence from Tyler in her home. Tyler is very much a part of her family's life and she hopes that the relationship continues long into the future.

Charlie Hurst reported that he too is a friend of Tyler's. He has been visiting Tyler for several years and feels a connection to him. Hurst is concerned about Tyler and his impending execution. Hurst pastors a small congregation in Cleveland. Tyler once offered to mentor a young man in the congregation who was on the verge of succumbing to the "lure of the street." Tyler, Hurst related, has become a very spiritual person with a concern for others. Hurst is very impressed with Tyler, his words, and his attitude. Hurst looks forward to continuing his relationship with Tyler and seeing it grow deeper.

Maryann Picard stated that she has maintained a friendship with Tyler for five or six years. She is inspired by Tyler and is very concerned about his impending execution. Though she has always been opposed to the death penalty, Picard's friendship with Tyler has brought an entirely new dimension to that opposition, making it more real for her.

Bill Picard, another of Tyler's friends, stated that he came to know Tyler through Pax Christi and Justice for Arthur Tyler. Picard has always felt concern for people who are in trouble. After he and Tyler became pen pals, he quickly came to view Tyler not as a client but a friend. He and Tyler share many things, including spirituality and an interest in poetry. According to Picard, Tyler is a combination of a philosopher and a poet. When Picard explained to Tyler how Pax Christi opposes violence and war, Tyler seemed very impressed with the organization, indicating that he would one day like to join the group. At Pax Christi meetings, Picard and others leave one chair empty with Tyler's picture on it so that Tyler can be with them in spirit. Picard and his wife recently met Tyler. Picard described the meeting as wonderful.

Carolyn Horvath and her husband have known Tyler for five or six years, and Tyler is in their daily prayers. They are currently planning a first visit with him. According to Horvath, Tyler meditates at the same time of day that she does. She indicated that she would like to see Tyler released so that they can meditate together.

Tom Leonhardt has also known Tyler for five or six years. He has visited Tyler several times and was very impressed with him. They meditated together for 15 minutes during a recent visit. Leonhardt has seen much growth in Tyler through the years. According to Leonhardt, Tyler is no longer bitter, but rather shows concern for others and the world. Leonhardt looks forward to continuing his relationship with Tyler.

Paul Beaudry came to know Tyler by exchanging letters with him. Beaudry reports that Tyler is a caring person with a good soul and heart who has counseled many people. He looks forward to getting counsel from Tyler for years to come.

The last of the videotaped presentations was from Dagmar Celeste, who reported that Tyler is committed to meditation. She has visited Tyler several times in the company of Heisey and Lee. Celeste reported that she has witnessed growth in Tyler, who has moved beyond anger to acceptance. Tyler understands that his presence at the crime scene was enough to warrant his incarceration. Celeste noted that Tyler is very concerned about his son, who is also incarcerated. The inability to help his son likely drives his motivation to help other young people, Celeste opined. Celeste hopes that she and Tyler's other supporters can continue to share experiences with Tyler.

Tyler's attorneys concluded their presentation in support of clemency by again noting that, in 1985, Tyler was offered the same plea deal that Head had received years earlier. That plea offer, Sandford argued, suggests that the Cuyahoga County Prosecuting Attorney was, at one time, comfortable with Tyler and Head receiving the same punishment. It further demonstrates that the state was unsure as to whether it was Tyler or Head who shot Leach, she argued. Had Tyler not been subject to the in-fighting of his trial attorneys, Ryan and Joyce, Tyler would, like Head, be a free man today. Tyler's attorneys asked that the Board make a favorable recommendation for clemency in Tyler's case.

**THE POSITION OF THE CUYAHOGA COUNTY PROSECUTING ATTORNEY:**

T. Allan Regas and Katherine Mullin appeared on behalf of the Cuyahoga County Prosecuting Attorney. Regas explained that his office supports a favorable recommendation for clemency in Tyler's case but, unlike Tyler's attorneys, believes that Tyler's sentence should be commuted to life without the possibility of parole.

Regas explained that the Office of the Cuyahoga County Prosecuting Attorney recently adopted a policy that recognizes the seriousness of the death penalty. That policy requires that the decision to seek the death penalty in any given case be vetted through a committee of senior prosecutors to determine whether the facts of the case are so heinous and disturbing as to firmly and unanimously convince a jury or judicial panel that the aggravating circumstances in the case outweigh the mitigating factors beyond a reasonable doubt. Regas's office undertakes a similar review of older cases like Tyler's when determining whether to recommend or oppose clemency. In the clemency context, the review process now includes an assessment as to whether capital charges would be brought were the case indicted today.

After conducting a review of Tyler's case, Regas's office determined that, despite the seriousness of Tyler's crime, it would not today bring capital charges against Tyler. For that reason, the Cuyahoga County Prosecutor supports clemency in Tyler's case. The determination that the case would not, today, be prosecuted as a capital crime was based largely upon the nature of the crime itself and the potential evidentiary problems that Head's prior inconsistent statements would pose at trial.

Regas noted that the Prosecuting Attorney's new policy is intended to promote fairness and to increase public confidence in Ohio's system of capital punishment. The decision to recommend clemency for Tyler was not an easy one, Regas related.

Regas stressed that, though the Cuyahoga County Prosecutor agrees with Tyler's counsel that clemency is appropriate in his case, his office disagrees that Tyler's sentence should be commuted to anything less than life without the possibility of parole. Regas noted the advanced age, vulnerability, and good character of Leach as one of the factors that drove the charging of Tyler's case as a capital offense thirty years ago. Leach, Regas related, was not selling produce out of his van for the principal purpose of making money. Rather, he sold the produce as a service to the community, which was comprised largely of elderly individuals who had no ability to travel to the central market. The fact that over 200 people attended Leach's funeral service is testament to his character, Regas observed.

Regas urged the Board not to infer anything from the plea agreement offered Tyler during his second trial. That plea offer, Regas insisted, did not reflect any doubt that Tyler was the principal offender. The plea offer merely reflected the problem posed by Head's prior inconsistent statements and the fact that those prior statements jeopardized a guilty verdict in Tyler's case. To ascribe doubt as to guilt as the motive for that or any other plea would be a mistake, Regas urged. Every plea offer has to be understood in the context of the unique circumstances of the particular case in which it is made. In any given case, only the prosecutor who offered the plea knows the basis for the offer, Regas observed.

Regas addressed the office-sharing arrangement that Tyler's attorneys argued created an appearance of impropriety in Tyler's second trial. Until the late 1990s, Regas explained, Cuyahoga County's assistant prosecuting attorneys were considered part-time employees and the salaries, particularly in the 1980s, reflected that part-time status. As a result, it was common for assistant prosecutors to maintain private law practices. Allowing assistant prosecutors to supplement their county salaries in that fashion was a necessity if the county was to retain experienced, quality attorneys as assistant prosecutors. There was thus nothing nefarious about the practice, Regas insisted.

Mullin added that she is unaware of any disciplinary proceedings or other action challenging Gerstenslager's office-sharing arrangement as problematic. It is disingenuous for Tyler's counsel to now challenge that arrangement when no one saw it worthy of complaint at the time the arrangement was in effect, Mullin argued.

According to Regas, there is no doubt about Tyler's guilt as the principal offender. The argument advanced by Tyler's attorneys, Regas continued, is based upon the single

premise that Tyler is telling the truth while Head and every other witness who testified against him is not. To establish Head as the principal offender in this case, one has to denounce every piece of evidence that points to Tyler as the shooter, Regas observed.

Tyler has established himself as not credible, Regas continued. During his clemency interview, Tyler gave three different answers in response to the simple question of where he was standing when the shots were fired. Tyler is manipulative, Regas insisted. He has manipulated his supporters in the community while he continues to buck authority in the prison, just as he regularly bucked authority before his incarceration.

Tyler's attorneys ask the Board to accept as true an affidavit of a man, Head, who now expects to be paid in exchange for his statement, Regas observed. In any case, why, Regas asked rhetorically, must we accept the 1991 affidavit as true but Head's testimony before two separate juries as false.

Regas noted that nothing untoward should be inferred from the dropping of Head's gun specification following his testimony in the second trial. Head's plea agreement called for Head's truthful testimony corroborated by the other evidence in the case, and there is no reason to conclude that Head delivered otherwise, Regas argued. Regas noted that Head's testimony at Tyler's first and second trials was consistent. Gerstenslager remains convinced in Tyler's guilt as the principal offender, Regas and Mullin related.

Mullin added that Head's affidavit was not, as Tyler's attorneys suggest, a "remarkable piece of evidence." By the time Head executed that affidavit, he had already made two prior statements incriminating himself, and Tyler's jury was aware of those prior statements. The 1991 affidavit is thus duplicative of what the jury already knew. For that reason, the Cuyahoga County Prosecutor never felt compelled to respond to the affidavit with affidavits or other evidence of its own. Had an evidentiary hearing on the affidavit been held, his office would have responded with such evidence, Regas stated.

Legally, Mullin continued, a recantation like that in Head's affidavit is disfavored, and viewed with skepticism. Such recantations are inherently unreliable because a witness in Head's position has an incentive to recant to save his co-defendant.

Mullin took exception to the suggestion that the Cuyahoga County Prosecutor should have given Head immunity against perjury prosecution for recanting his trial testimony under oath. Immunity for Head, Mullin argued, would have been unfair and irresponsible.

Mullin briefly addressed the allegedly coercive jury instruction. She observed that, according to the Ohio Supreme Court, by suggesting to Tyler's jury that another jury could be assembled to impose sentence, the charge that was given was not only not prejudicial, it actually *reduced* the pressure placed upon the jury to return a guilty verdict.

According to Mullin, the statement of Head's mother suggesting that Head had confessed to her is easily understood in the context of Head's explanation for his two prior confessions. Tyler had threatened Head and Head's family if Head inculpated Tyler.

Given that threat, it was not unreasonable for Head to confess to his mother. Tyler's threats to Head were overheard by Head's girlfriend at the time, Cassandra Vaught, who testified at Tyler's first trial that she overheard Tyler threaten Head in the bathroom of Anthony Gillis's apartment.

More generally, Mullin added, there were a number of other witnesses who, like Vaught, provided testimony incriminating Tyler, none of whom had any incentive to falsely accuse him. Nor is there any reason to believe Tyler over Head. At the time of the crime, Head was only 18 with no prior offenses. In contrast, Tyler was 23 with a history of criminal activity, Mullin observed.

Lastly, Mullin addressed the claim that Gerstenslager engaged in prosecutorial misconduct, noting that to establish a claim for relief on the basis of improperly withheld exculpatory evidence, one has to establish that the evidence in question would have changed the outcome of the case. To say that failing to disclose the police reports detailing the contents of Leach's pockets materially prejudiced Tyler is a reach, Mullin argued. In any case, Mullin continued, there is no evidence that Gerstenslager purposely withheld the report.

As for Gerstenslager's alleged conversation with Head during a recess in Tyler's second trial, Mullin noted that it is neither unusual nor inappropriate for prosecutors to talk to their witnesses during a recess or even to advise them of the consequences of perjuring themselves. That conversation, if it did occur, was not inappropriate.

Regas and Mullin concluded by restating their position that justice would best be served by commuting Tyler's sentence to life without the possibility of parole.

#### **VICTIM'S REPRESENTATIVES:**

Chrystal Pounds-Alexander, Administrator of the Department of Rehabilitation and Correction's Office of Victim Services, read letters from the victim's grandson, Matthew Leach, and the victim's daughter, Laura Bell Leach.

In his written statement, Matthew Leach noted that, despite his best efforts, he was unable to attend the clemency hearing. He is 31 years old and though he has no memory of his grandfather, he knows that, in addition to being a devoted father and husband, he was a pillar of the community. Matthew Leach reported having no hatred toward Tyler, but he nevertheless believes firmly that "if you do the crime, you do the time." For that reason, Matthew Leach hopes that Tyler's sentence is carried out. Having taken his grandfather away, Tyler does not now deserve to see his family, be it through prison visits or as a free man, Leach stated.

Laura Bell Leach's letter noted that she and her siblings are elderly and have health problems, making it impossible for them to appear at the clemency hearing. Laura Bell Leach described how her mother passed away when she was seven, leaving her father solely responsible for her and her six siblings. Her father sent her and her siblings to live

with their aunts while he went to work in an Alabama coal mine. Every weekend her father would come to check on her and her siblings to ensure that they had everything they needed and were being treated well. Her father always provided them with clothing, money, and other necessities. His generosity with the children continued into their adulthood. Laura Bell Leach described her father as well-respected in the community in which he lived, noting that 200 people participated in his funeral procession. Her letter concluded by observing what an emotional experience it still is for her to think about, and to write about, her father.

**PAROLE BOARD'S POSITION AND CONCLUSION:**

The Parole Board reviewed submissions both in favor of and in opposition to executive clemency. The Parole Board reached a unanimous decision to make a favorable recommendation for clemency. Six (6) members of the Parole Board recommend commuting Tyler's sentence to life imprisonment with immediate parole eligibility and five (5) members of the Parole Board recommend commuting Tyler's sentence to 33 years to life, which would make Tyler parole eligible in two years.

The six members of the Board who recommend commuting Tyler's sentence to life imprisonment with immediate parole eligibility make that recommendation for the following reasons:

- Given that Tyler denies killing Leach; that Tyler's co-offender, Head, has repeatedly given statements identifying himself as the person who shot Leach; and that, prior to Tyler's first trial, other witnesses, including Anthony Gillis, had given statements implicating Head, doubt exists as to whether Tyler is the principal offender in this case.
- The Cuyahoga County Prosecuting Attorney now recommends mercy in Tyler's case.
- The Office of the Cuyahoga County Prosecuting Attorney indicated during its presentation that it would not today seek the death penalty with the evidence presented in this case yet the Prosecuting Attorney simultaneously relies on that same evidence to support a recommendation of commutation to life without the possibility of parole. Given the doubt that surrounds the evidence, commutation to life without the possibility of parole would not serve the interests of justice in this case.
- Granting Tyler immediate parole eligibility would allow the Board to immediately evaluate his institutional conduct and to consider other release suitability factors. Immediate parole eligibility would also make Tyler's sentence more proportionate to the sentence imposed upon Head.

The five members of the Board who recommend commuting Tyler's sentence to 33 years to life make that recommendation for the following reasons:

- The Cuyahoga County Prosecuting Attorney is no longer supporting Tyler's execution.
- While there appears to be little doubt that Tyler participated in Leach's death, it is less clear that Tyler, and not Head, was the person who actually shot Leach.
- Several irregularities occurred during Tyler's various court proceedings, including a petition for post-conviction relief that lay dormant in the Cuyahoga County Court of Common Pleas for several years.
- Given Tyler's poor institutional adjustment to this point, Tyler needs to, at a minimum, demonstrate an adequate adjustment to general population before he should be considered for release onto parole supervision.

**RECOMMENDATION:**

The Ohio Parole Board with eleven (11) members participating, by a vote of eleven (11) to zero (0) recommends to the Honorable John R. Kasich, Governor of the State of Ohio, that executive clemency be granted in the case of Arthur Tyler A175-637. Six (6) members of the Parole Board recommend commuting Tyler's sentence to life imprisonment with immediate parole eligibility and five (5) members of the Board recommend commuting Tyler's sentence to 33 years to life, which would make Tyler parole eligible in two years.

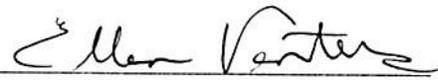
Arthur Tyler, A175-637  
Death Penalty Clemency Report

Adult Parole Authority

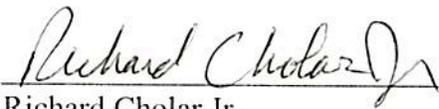
Ohio Parole Board Members  
Voting Favorable

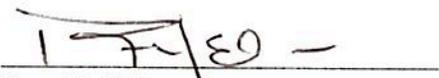
Life Sentence w/immediate parole eligibility

  
\_\_\_\_\_  
Andre Imbrogno, Vice Chair

  
\_\_\_\_\_  
Ellen Venters

  
\_\_\_\_\_  
R.F. Rauschenberg

  
\_\_\_\_\_  
Richard Cholar Jr.

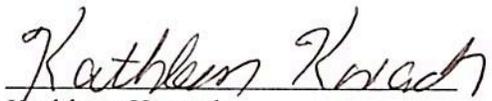
  
\_\_\_\_\_  
Ron E. Nelson Jr.

  
\_\_\_\_\_  
Michael H. Jackson

Ohio Parole Board Members  
Voting Favorable

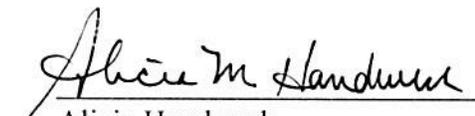
Life Sentence with parole eligibility after 33years (actual)

  
\_\_\_\_\_  
Cynthia Mausser, Chair

  
\_\_\_\_\_  
Kathleen Kovach

  
\_\_\_\_\_  
Trayce Thalheimer

  
\_\_\_\_\_  
Marc Houk

  
\_\_\_\_\_  
Alicia Handwerk

March 14, 2013

Dear Mr. Kasick, Sr.

My Name is Laura Bell Leach Bell  
I am the Daughter of Mr. John Saunders  
Leach,

I am writing to let you know My  
Father Mr. Leach was a Outstanding  
Father to all 7 of his Children,

I was Born in Birmingham Alabama  
My Mother Passed away, when I was  
about 7 yr. old Left 7 Children for My  
Father to take care of. He went to  
Thornville Alabama to see if his Sister  
& My Mother's <sup>sister</sup> would take us in & raise us  
while he worked in Coal Mine in  
Birmingham he did not want us apart  
so we were divided among her Sister  
& his Sister, My Father Mr. Leach <sup>came</sup> from  
Birmingham every week end to check on  
us to make sure we all was all right  
he would bring to new clothing, give  
money to the head of the house to spend  
on us. we never went hungry & shoddy  
in 1955 on May 18, or May 19, My uncle  
sent me to Cleveland where my Sister &  
Brother

And Brother was, here, when the other  
Sibling <sup>came</sup> to Cleve. with my Father, I  
asked him could I go back to Thomsville  
Alabama to finish school, he sent me  
Clothing every month from Stores like  
Debee + May Company; he use to buy  
all 7 of us ~~to~~ out for Sunday <sup>School</sup> + Church  
he did not get married until we were  
all teenagers. he married Rosa after  
I graduate I was 18 yr. old, he worked  
at America Steel + wire comp until  
he retired then he mop floor a Metro  
Hospital, then he started selling on his truck  
My Brother Floyd Leach + Shelly Leach  
had ~~his~~ Nick name was Bubby they payed  
my Father house note, The two of them  
Floyd + Bubby spent 20 yrs in Army.  
he open a Credit in a grocery Store  
for us to get what we wanted while  
he was ~~at~~ work, we Ran the food Bill  
up to \$700.00 a Month he did not fuss,  
Holly + say anything to us, he did not  
want us hungry, I had just got  
married + he had married Rosa a few  
months before me, we needed 200.00 for  
something + we did not have it, I asked

(3)

My Father Saunders Lead for it  
he did not love it, but he went  
& borrowed it from a friend & gave  
it to me. how many Father would  
do that when you have a Husband  
I had a good Father he would  
love not been killed by some  
one who he gave a job to. it  
hurt me & my Sister very bad  
and still do, he killed him in  
1983, My leg was broken & I could  
not go to Trial.

My Father come to Thomasville Alabama  
after my Mother pass every week end to  
check on all 7 of his children to make sure  
we were treated right. I remember my Uncle  
Will, his sister Husband spank me for not  
speaking to him when I got up to go outside  
to get wood to start a fire in house and he  
told me I bet not tell my Father of course  
I did not, when he asked me ~~was~~ I all right  
but <sup>I said yes</sup> someone else told him, then he asked me  
I was afraid to tell, he then went to Uncle Will  
and said, do not spank my kid I will punish  
her when she wrong. He was a very good outstaring  
Talker up until he was killed, I Miss him

3

Very Much, He would give me + my  
Sister ~~Food~~ food from his truck altho  
we were married I cannot not  
explain all the good thing he did for  
his 7 kids,

I Cant Not Write everything Cause  
I get ~~of~~ Choke, but he hope every body  
giving the food from his truck

every body talk good about my father

his funeral prasion was about 200 Come

going to grave. ~~It~~ it is so sad to me

while trying to write the Letter

no one had nothing bad to say about

John Saunders Leach My father,

My father got me a job before I

got to Clev. at age 18, when I graduate

at albit B.G. I gave him something for Rent

but not much Cause he was so coming for

us watching over us when My Mother pass away,

I could write a book, but I get upset

I hope you all understand what I

am saying. God Bless. Thank for

Reading My Name are God saying this cause

I cannot explain everything.

From Laura Bell Leach Bell

3/14/2014

Many Thanks

## Matthew Leach Statement

Grandson of Mr. John Sanders Leach.

I tried every avenue I could and its impossible for me to make it today. I'm 31 years old and I don't have any memories of my grandfather because he was murdered and robbed by a man he employed and helped. I don't have any hatred in my heart towards Mr. Tyler, but I believe that if you do the crime, you do the time.

Cuyahoga County felt that the death sentence was a just punishment for his actions. I agree and hope to see the punishment carried out.

He took the life of a father, husband, grandfather, and pillar in the community. My grandfather, Sanders Leach has not seen his friends and family since 1983.

Tyler doesn't deserve to see his friends or family either - whether its incarcerated or free.

Arthur Tyler A175-637