

**APPLICATION FOR EXECUTIVE CLEMENCY
FOR
JOHN W. BYRD, JR.**

RESPECTFULLY SUBMITTED ON JOHN BYRD'S BEHALF

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I. Overview: Why Clemency Must Stop the Execution of the Wrong Man for the Death of Monte Tewksbury

John Byrd did not kill Monte Tewksbury. Co-defendant Brewer did. John Byrd was sentenced to death; Brewer was sentenced to life. Brewer has confessed to murder; John Byrd remains on Death Row for a murder he did not commit.

At his trial, the sole witness who claimed John Byrd stabbed Monte Tewksbury was a jailhouse snitch who lied about facing hard time and who was rewarded with freedom after he testified. The snitch's story that John confessed to him was the lynchpin for the prosecutors' case as it was the only evidence that differentiated John Byrd from John Brewer. To this day it remains the only basis for the disproportionate sentences given to Brewer and John Byrd.

John Byrd's trial lawyers made mistakes from day one that cost him a fair trial. His post-trial lawyers made mistakes that caused courts to ignore compelling facts and issues in his favor. The trial prosecutors broke basic rules of fair play at trial. Procedural doctrines have almost without exception blocked the courts from analyzing the most compelling factual and legal errors in John's case. Many of these procedural blockades were erected by the mistakes and bad judgment calls made by John's lawyers.

The key facts which justify commuting John's death sentence to a sentence of life imprisonment are these:

- ◆ Co-defendant Brewer stabbed Monte Tewksbury. John Byrd was in the King Kwik with Brewer, but John did not wield the knife.
- ◆ At trial, the prosecutors put up the testimony of a jailhouse snitch to put the knife in John Byrd's hand. There is no other direct evidence purporting to prove that John Byrd, not Brewer, stabbed Mr. Tewksbury.
- ◆ The all-critical snitch was a repeat violent offender who lied about facing hard time for a parole violation when he testified against John Byrd.
- ◆ The jurors never learned of the snitch's lengthy record or the fact that he had a long prison sentence hanging over his head when he testified; nor did they know that the prosecutors had denounced this same man as a violent, untrustworthy career criminal just two years earlier when hotly contesting his release on parole.
- ◆ The trial prosecutors broke fair-trial rules by vouching for the credibility of their snitch. They declared their personal beliefs in a witness's testimony. No lawyer is allowed to do this in trial.
- ◆ Evidence discovered after trial from other jail inmates proves that the snitch cooked up his false testimony to escape years in prison for a parole revocation.

- ◆ Within weeks of giving the prosecutors the testimony they needed to put John on Death Row, the prosecutors did an about-face and rewarded the snitch with a favorable letter to the Parole Board. It worked. The snitch went free. John went to death row.
- ◆ John Byrd's lawyers made mistakes, the biggest being their decision not to file Brewer's affidavit back in 1989. While many raise valid questions asking why John's lawyers did not reveal Brewer's affidavit years ago, it is invalid to use these questions as decoys designed to shift the debate away from John's innocence of a capital offense. Lawyer error cost John the chance to have Brewer's confession fully and fairly reviewed in court. But the lawyers' mistakes do not give Ohio's citizens the moral authority to execute the wrong man for a crime he did not commit.

Execution should be used only in those cases where we have the utmost certainty in the guilt of the condemned and complete confidence in the legal process which imposed and upheld the death sentence. This is not such a case.

Although John should be punished, he should not be executed for a murder he did not commit. The anguish of senseless murder cannot be quieted by killing the wrong man. No matter how deep our sorrow for Monte Tewksbury and his family, executing the wrong man is neither just nor moral.

An execution should not be a game won on a defense lawyer's fumble or the shady play of a prosecutor using a snitch cloaked in false credibility. The Governor's power of clemency must stop this execution because John Byrd did not kill Monte Tewksbury, and because no man should be executed on the word of a single snitch who won his freedom by falsely claiming he took a man's confession in jail.

II. John Brewer Murdered Monte Tewksbury – His Confession Squares with the Physical Evidence

A. But for Their Snitch's Testimony, the Prosecutors' Own Evidence Points to Brewer as the One Who Stabbed Mr. Tewksbury

At 11:00 p.m. on April 17, 1983, William Woodall parked a van outside a King Kwik store in Cincinnati. John Byrd and John Brewer exited the van and entered the store. Apparently, they initially intended only to rob, not kill: they wore masks; they disabled the phone inside the store – dead men don't make phone calls; dead men don't identify robbers. Monte Tewksbury was alone in the store. Brewer leapt onto and over the counter to get the cash from the register, leaving his shoeprint on the counter. He stabbed Mr. Tewksbury once in the side. Mr. Tewksbury lived long enough to say two masked men entered the store and that the one that stabbed him wore a plaid or checkered shirt. (Exhibit M, Tr. 1282, 1298, 1312-1313)

About two hours later, the police stopped the van and arrested John Byrd, Brewer, and Woodall. John Byrd gave the police his name and identification. Brewer gave them a fictitious

name and conflicting statements. According to police reports, John Byrd was too drunk to be interrogated that night – they had to let him sleep it off. When questioned the next morning, John told police he thought he had been locked up for public intoxication. To this day, John Byrd has no memory of the events leading up to his arrest due to an alcohol and drug-induced blackout.

The physical evidence from the scene, the van, and the three men points to Brewer as the actual killer. Circumstances indicate that Mr. Tewksbury was standing behind the counter when he was stabbed. Police found a shoeprint on the top of the counter that their own expert determined matched Brewer's shoes, but not Byrd's shoes. (Exhibit M, Tr. 1399, 1514-1516) When arrested, John wore a sweater that did not fit Mr. Tewksbury's description of his killer's shirt. Brewer wore only a thin sleeveless tee-shirt on a night so cold he complained to the police about it. Police found Mr. Tewksbury's personal effects in the immediate area of the van where Brewer was sitting and did not find any similar evidence in the area of the van where Byrd was seated. Brewer had \$89.00 in small bills in his pockets (one \$20, two \$10, four \$5, and twenty-nine \$1 dollar bills); Woodall had \$32.00, also mostly small bills; John Byrd had less than \$5.00 on him. (Exhibit M, Tr. 1329, 1354-55, 1371, 1374)

Prior to the robbery Brewer told a prosecution witness, Bobby Pottinger, "I'm going to have to kill somebody." (Exhibit M, Tr. 1223) Brewer made repeated predictions that he would be doing something for which he would receive a lot of prison time. (Exhibit M, Tr. 1209, 1216, 1221-1222, 1645) And, according to Pottinger, John Byrd fought with his fists but Brewer "likes to pick something up to use to fight with instead of his fist." (Exhibit M, Tr. 1222) Since being imprisoned for this Aggravated Murder conviction, Brewer has been caught twice for stabbing other inmates. (Exhibit I)

B. Co-defendant Brewer Confessed to Killing Mr. Tewksbury

The prosecutors sent the wrong man to death row. Brewer, not John Byrd, stabbed Mr. Tewksbury. Brewer twice confessed under oath by affidavit, the first time in 1989 and again in 2001. (Exhibit A) Both Brewer and John Byrd went into the King Kwik, both were convicted of Aggravated Murder, but only one could lawfully and fairly be sent to Death Row. Only the "principal offender," the one that actually stabbed Mr. Tewksbury, was eligible for the death penalty. As it stands, John Byrd is being punished for Brewer's conduct. The power of clemency must correct the disproportional, incorrect, and unjust death sentence imposed on John Byrd.

Co-defendant Brewer did not just suddenly come forward at the eleventh hour in an attempt to save Byrd's life. Evidence now available shows that he has been telling fellow inmates at the Southern Ohio Correctional Facility as far back as the mid-80's that the wrong man was on Death Row and that, he not Byrd, killed Mr. Tewksbury. A number of these inmates have now come forward and sworn out affidavits saying that Brewer has confessed to them. (Exhibit C) Brewer acknowledged under oath that he was the actual killer in 1989. (Exhibit A)

Much controversy swirls around this issue of Brewer's veracity. In court filings, prosecutors have raised two key criticisms: (1) Brewer's affidavits contradict his sworn

testimony and his comments to prison officials during the classification process; (2) John's lawyers failed to file Brewer's initial affidavit back in 1989. At the end of the day, these criticisms neither erase the fact that Brewer confessed nor lift the pall his confession casts over John Byrd's death sentence.

To the concern that Brewer's confession contradicts his earlier statements, two things must be said. First, by going on record to say he in fact killed Monte Tewksbury, it seems certain that Brewer has damned any hope he had for ever being released on parole. He entered prison convicted of being there when another (theoretically, Byrd) actually committed the murder. By confessing now that he murdered Mr. Tewksbury, Brewer has reduced to zero his chances of ever being released on parole. Those who say Brewer has nothing to lose by confessing are wrong. He has almost certainly lost all hope for parole by confessing to being the one who actually murdered Mr. Tewksbury.

The second thing to be said about Brewer's contradictory statements is that his conduct is not inconsistent with the vexing patterns those of us in the criminal justice system have seen before: guilty defendants lie up front to avoid trouble; time goes by and they finally tell the truth. If nothing else, those experienced in the criminal justice system must admit that we often do not know for sure who is telling the truth or which of two contradictory versions from any one person contains the moral (not "legal") truth about what happened. By acknowledging this inexorable dilemma, Byrd's clemency counsel does not mean to yield ground; but rather to recognize that no one can ever honestly claim to know the total truth about an event we did not witness. What we all must recognize at some point is that competing versions of the same event must cause us to question whether we have enough moral certainty to proceed with John Byrd's execution.

Regarding the fact that John's lawyers failed to file Brewer's affidavit in 1989, there is no doubt that, in hindsight, John's lawyers made a bad decision. But their failure to file it does not make John Byrd guilty; nor does it mean that they did not think Brewer believable enough to present his affidavit.

The fact is that John's lawyers believed Brewer, but they decided not to file his affidavit because they were overly optimistic that they would win a new trial based solely on evidence that the prosecution's key witness had lied under oath (see the following section for a detailed description of the facts proving that the snitch lied to gain his own freedom). Believing that they would win a new jury trial, John's lawyers withheld Brewer's affidavit because Brewer truthfully says that John Byrd was the second robber who entered the King Kwik. Without Brewer's affidavit, the prosecution had only the word of a repudiated snitch to "prove" that John Byrd even entered the store. They had no direct evidence that John stabbed Mr. Tewksbury (that is, no evidence other than that fabricated by the snitch as detailed in the next section). Thus, back in 1989, John's lawyers thought that they would get a new trial and wrongly concluded that John would be better off in the new trial if they did not bring forth evidence from Brewer that put John in the store.

In hindsight, the decision not to file Brewer's affidavit was wrong. However, the fact remains that we ought not execute the wrong man based in large part on bad decisions by lawyers.

III. *The Prosecutors' Snitch Lied to Avoid Prison – No Man Should Be Executed on the Word of One Jailhouse Snitch*

John Brewer's confession was not available to John Byrd's jury. Instead, jurors had to try to determine who actually killed Mr. Tewksbury based solely on the word of a jailhouse snitch who was not there, but who claimed that John Byrd chose him to be the one he confessed to in jail.

Through all these years since his trial, appellate judges have punished John Byrd's lawyers for their mistakes and rewarded the prosecutors' reliance on a snitch whose word couldn't sell a used car to any decent Ohio citizen who knew of his background. John's jurors did not know of the snitch's background when they heard his melodramatic testimony at trial, asked that it be replayed during their deliberations, and unwittingly relied upon it to send John to Death Row.

Despite physical evidence that fingered Brewer even before he confessed, it was Byrd and not Brewer who was convicted for capital murder. Prosecutors built this distinction on the back of Ronald Armstead, a jailhouse snitch they had just two years earlier vilified as a violent criminal who should not be released on parole. Prosecutors then blocked Byrd's jurors from learning of Armstead's incredulous character, violent background, and the fact he hoped to avoid hard time when he went back to prison as a parole violator (probable cause had been found by the time he testified). Evidence developed after John's trial leaves no doubt that Armstead lied.

A. *Armstead's Claim that John Byrd Confessed to Him Is Palpably False*

Armstead and John Byrd were in the Cincinnati Workhouse at the same time in 1983. That is where the truth begins and ends for Armstead's trial testimony. He made up the rest to gain freedom from a parole violation.

Armstead was a veteran of the local criminal justice system back in 1983. He had been incarcerated in the Cincinnati Workhouse in 1964, 1968, 1972, 1977 and 1980, and in the state penitentiary system in 1981. He escaped twice from the workhouse. During one of his escapes, he hit a guard with a metal crank. In 1980, he assaulted a woman in a bar by hitting her in the face with a bottle, knocking her to the floor, and stomping her. (Exhibit D) By 1983, Armstead's record reached back nearly twenty years and included sodomy, assault, escape and drug offenses. (Exhibit D) No miracle reformed Armstead when he told John's jurors that he was testifying out of a sense of moral outrage and civic duty – palpable falsehoods the prosecutors trumpeted in closing argument.

Armstead, a black man, claimed that Byrd, a white man, sought his counsel and confessed to him in a jail which was then racially segregated by the inmates themselves. Black

and white inmates did not mix in the Hamilton County jail. (Exhibit C) Armstead's claim that John confided in him is simply ludicrous.

Beyond the racial divide in the jail, neither John Byrd nor any other inmate would have confided in Armstead. Inmates shunned Armstead due to his reputation as a snitch. They heard Armstead and his crony Virgil Jordan conniving to get information on Mr. Tewksbury's murder and other cases. Some heard Armstead say he wanted information on John Byrd to "get some play" on his own case. John knew Armstead's reputation and refused to talk to him. (Exhibits B, C)

Armstead's story that John confessed to him that he stabbed Monte Tewksbury was crucial to the prosecution as it was the only evidence presented that differentiated John Byrd from John Brewer. It was the only "evidence" they had that John Byrd, not Brewer, stabbed Mr. Tewksbury. To this day it remains the only basis for the disproportionate sentences given to Brewer and John Byrd.

Knowing that they had to sell Armstead to the jurors to win a death sentence against John, the prosecutors fought heated and repeated battles to prevent John's lawyers from even scraping the surface of Armstead's shoddy character and violent criminal history. Among the more basic and, normally, non-controversial rules of evidence is that either side can tell jurors about a witness's criminal record. That rule was broken in John's trial. When John's lawyers tried to employ this fundamental tool of cross-examination the prosecutors objected and the trial judge inexplicably sustained the objections. Ohio's appellate courts brushed off this error; federal courts deferred to those ill-founded judgments.¹ Any trial lawyer worth his or her salt must admit that Armstead's story went untested by an effective cross-examination, which resulted in a lopsided trial, an inaccurate guilty verdict, and an unjust death sentence against John Byrd.

B. Armstead Lied to John's Jurors When He Said He Had No Motive to Lie

Armstead falsely bolstered his credibility by telling the jurors that "I don't have no more cases pending, and I come to testify against him because he was wrong." (Exhibit M, Tr. 1570) He swore that he would soon be getting out of jail and that he had no time hanging over his head: "I got my time in March the 15th [1983] and I don't have no time pending or nothing else pending." (Exhibit M, Tr. 1569) In truth, Armstead was facing a parole revocation for the remainder of a 3-15 year sentence for felonious assault and drug trafficking. He had been convicted of these offenses in 1980 and had been paroled. While on parole, he was arrested on Robbery charges in December, 1982. At the time of Byrd's trial, probable cause had been found and Armstead had been declared a parole violator. (Exhibit E) He was slated to return to prison

¹ Those Attorneys General who are experienced federal habeas corpus litigators (most county prosecutors are not) will have to concede that the hallmark of modern federal habeas jurisprudence is the procedural rule that federal judges must in most cases defer to state court decisions. Thus, the mere fact John Byrd's case was in federal court hardly means the federal judges reviewed the substance of the errors in John's trial.

when his local jail time ended.² Based on his age and his lengthy record, there can be no doubt that he was heading for a hard flop.

Hamilton County prosecutors convicted Armstead of the crime for which he was on parole. They knew at the time of John's trial that Armstead was going back to prison as a parole violator; the jurors did not. The prosecutors knew Armstead stood to gain by his testimony (if they chose, as they did, to write him a favorable letter for his testimony); the jurors did not. The trial prosecutors never brought these facts before the jurors. For years, they fought successfully against John's request for a post-trial hearing to examine the impact on the jury of Armstead's false claim "I don't have no time pending or nothing else pending." Why?

At the time he testified against John Byrd there is nothing in his parole records to indicate that Armstead should have or could have honestly believed that he was not going back to prison. Thus, he clearly lied – unless he had some off-record deal with law enforcement authorities which the prosecutors have always adamantly denied.

Both sides to John Byrd's court battles have bitterly debated the question of whether Armstead had an "off record" deal. Now is the time to put aside battles over whether Armstead had a secret deal for his testimony and to accept two irrefutable facts:

- ◆ Prosecutors cannot have it both ways: if Armstead did not have a side deal then he clearly lied under oath when he said "I don't have no more time pending or nothing else pending."
- ◆ Street-wise criminals need nothing in writing to know that good things come to those who give prosecutors favorable testimony – and the more serious the crime, the greater the reduction in time. This "time honored" but dishonorable practice reaps no greater reward than in a death penalty trial.

Armstead got away with leading the jurors to believe that his testimony against Byrd was a selfless act done out of a sense of moral and civic duty. (Exhibit M, Tr. 1570) That was pure bunk from a street-wise con. The trial prosecutors never corrected this false impression; instead, they exploited it to bolster Armstead's credibility so the jurors would not suspect his testimony was selfishly motivated and untrue, which it was.

C. Prosecutors Did An About-face When They Rewarded Armstead with A Favorable Letter To the Parole Board

² On August 30, 1983, John Kinkela, Case Analyst in the Parole Supervision Section of the APA, sent a letter to William C. Clarke authorizing the return of Ronald Armstead to the Columbus Correctional Facility. The letter indicates that Armstead was declared a parole violator in custody on 12/20/82 and became available to the APA on 8/29/83. (Exhibit E)

The Hamilton County Prosecutors did a complete about-face in their opinion of Ronald Armstead after he gave this testimony against Byrd. Not long before Armstead came to their aid in John's trial, the Hamilton County Prosecutor's Office twice opposed his release on parole:

"For purposes of the record, and in light of the prior arrest record and history of this defendant for assaultive type behavior, it is our belief that this defendant represents a substantial, potential risk of committing acts of violence as against innocent victims if released at the present time or at any time within the immediate future." Letter from Leonard Kirschner, Chief Assistant Prosecuting Attorney, Appellate Division, to the Ohio Parole Authority, dated April 29, 1981. (Exhibit F)

"We direct your attention to our letter of April 29, 1981 and we respectfully submit that it is clearly inappropriate that the defendant Ronald Armstrong, etc. [the caption of this letter refers to him as "a.k.a. Ronald Armstead a.k.a. Ronald Scott, Your No. 160648"], be released at the present time or at any time within the immediate future. We stand by our prior recommendation that this defendant should not be released at any time prior to December 1, 1983 at the earliest." Letter from Leonard Kirschner, Chief Assistant Prosecuting Attorney, Appellate Division, to the Ohio Parole Authority, dated 4-12-82. (Exhibit F)

After Armstead gave them testimony that put John Byrd on Death Row, the Hamilton County Prosecutor's Office did an about-face and told the Parole Board that they were no longer opposed to Armstead's probation. Citing claimed concerns that Armstead would be attacked as a "stoolie" in prison, assistant trial-prosecutor Breyer wrote a letter suggesting Armstead's freedom on August 30, 1983:

. . . I am firmly convinced that, without Mr. Armstead's cooperation and assistance, the prosecution of John Byrd, Jr., would have concluded with a much less favorable result. This cooperation by Ronald Armstead, in the form of information and testimony, was attained without any promise or inducement by the State of Ohio.

. . . I can state after discussing this matter with Arthur M. Ney [the elected county prosecutor at the time], that the Hamilton County Prosecutor's Office would not be opposed to your department's continuing Ronald Armstead on parole so that he may remain out of any state penal institution. (Emphasis in original.)

The sudden conversion in the prosecutors' take on Armstead means one of two things: either they alone had the insight to see that Armstead suddenly changed into a respectable

citizen; or their understandable desire (and duty) to punish someone for murdering a very decent man blinded them to the Armstead's true character.³

Armstead's testimony had its intended effect – he won his freedom. On October 20, 1983 Armstead was granted parole by the APA. (Exhibit H) The APA based its decision on Armstead's testimony against Petitioner Byrd, which the APA viewed as a mitigating circumstance in favor of parole. The APA considered the letter from Assistant Hamilton County Prosecutor Daniel Breyer written on behalf of Armstead to the APA which Armstead submitted as an exhibit to his request for parole; the telephone call made on Armstead's behalf by Assistant Hamilton County Prosecutor Karl Vollman; and a newspaper article submitted by Armstead that detailed the testimony offered by Armstead as an exhibit in support of his request for parole. (Exhibit H)

There is no doubt that Armstead lied when he said his time would be up in two weeks; there is no doubt that Armstead lied when he said John confessed to him. We in Ohio must not execute a man whose conviction rests almost completely on the word of a snitch like Armstead. With all of the evidence of Armstead's scurrilous character developed after trial, it is abundantly clear that John's jurors were led astray by Armstead's false testimony (Armstead's testimony was the only testimony the jurors asked to have read back to them during deliberation, making clear its importance to their verdicts).

D. Evidence Discovered after John's Trial Proves that Armstead Fabricated His Claim that John Confessed to Him

After trial, John's post-conviction lawyers located others who were jailed in the Cincinnati Workhouse at the time and who refute Armstead's claim that he won John's trust, heard his confession, and testified with pure motive. If the prosecutors can rely on a jailbird to make their case against John Byrd, then they must afford the sworn affidavits of these men the same respect they gave Armstead. And if they say that these affidavits can not be cross-examined, then they should retract their opposition to an evidentiary hearing to bring all this evidence out into the open.

According to Marvin Randolph, inmate Virgil Jordan orchestrated a scheme to provide false testimony against John Byrd. Randolph knew both Jordan and Armstead when he was incarcerated in the Cincinnati Workhouse in 1983. Jordan devised a plan that could help all three with their pending criminal cases. Jordan explained to Armstead and Randolph that his plan was to put together a story against the defendants in the King Kwik murder case, John Byrd, John Brewer and William Woodall. Jordan's plan involved informing the Hamilton County

³ Any attempt to claim that the prosecutors' letter supporting Armstead was written solely because they feared for his safety cannot be taken seriously. While it is true that known snitches are not well received in prison, members of the Parole Board know full well that Ohio safely incarcerates many inmates with a "snitch" reputation. It is also well-known that Ohio's prison officials have ways of moving snitches to other facilities and out of state if necessary to protect them while they serve their time. What set Armstead apart appears to have been the prosecutors' desire to reward him for his testimony.

Prosecutor's Office that he had evidence that would help convict the defendants in the King Kwik murder case. Jordan explained to Armstead and Randolph that he had made up his story by reading newspaper stories and listening to radio broadcasts of news regarding the King Kwik murder case. (Exhibit B)

As it turned out, Jordan testified for the prosecution at Brewer's trial. Jordan claimed that Brewer made inculpatory statements to Jordan at the Cincinnati Workhouse on May 26, 1983 while a story about Mr. Tewksbury's daughter was being aired on PM Magazine. In truth, Jordan lied. He had been removed from the Workhouse and placed in the county jail six days earlier. (Exhibit J)

Jordan told Ronald Armstead and Randolph that they should tell the Hamilton County Prosecutor's Office that they had heard the defendants admit involvement in Tewksbury's killing. Jordan specifically told Armstead and Randolph to say that Byrd admitted stabbing Tewksbury. Jordan told Armstead and Randolph that they should tell the prosecutors that Byrd and Brewer had asked questions about bloodstains on the knife that was used to kill Tewksbury. (Exhibit B)

This was simply a fabrication. In his affidavit, Randolph stated that John Byrd, Jr. never admitted to Randolph that he had stabbed Monte Tewksbury. Furthermore, Randolph's affidavit directly undermines Armstead's testimony that Randolph was one of the inmates at the jail in A Block to whom Byrd "bragged" about killing Mr. Tewksbury. (Exhibit B)

Robert Jones was also incarcerated in Hamilton County in 1983 with Ronald Armstead and Virgil Jordan. In his affidavit, he stated that Armstead and Jordan were outside Jones' cell discussing how they would put a story together against the defendants in the King Kwik murder case. (Exhibit B) Like Randolph, Jones said he heard Armstead and Jordan agree that they could use newspaper accounts of the King Kwik murder case to put together a story. He also heard Armstead and Jordan discuss their intention to go to the Hamilton County Prosecutor's Office with their made-up story. He recalled hearing Armstead and Jordan talk about having their sentences reduced in return for testifying against the co-defendants in the King Kwik murder case. He remembered that Armstead, Jordan and Jones were shipped out of the jail to the penitentiary on the same day.

Another inmate who was incarcerated with Armstead and Jordan in Hamilton County in 1983 was Elwood Jones, Jr. While Jones was incarcerated in the Cincinnati Workhouse, he observed Virgil Jordan and Ronald Armstead talking. (Exhibit B) He overheard them discuss their intention to create a story regarding the King Kwik murder case and their belief that if they could put together a story regarding this case that the Hamilton County Prosecutor's Office would give them favorable consideration and treatment with their criminal cases. Later, Jones observed Armstead and Jordan meeting with law enforcement officers from the Hamilton County Sheriff's Department and he overheard Jordan and Armstead discussing the fact that they had been informed that crucial evidence was missing from the prosecution's case in the King Kwik murder. The "crucial evidence" involved a knife and a stocking cap used in the King Kwik murder. Armstead and Jordan discussed the fact that the prosecution needed their help regarding the "crucial evidence."

Elwood Jones was also incarcerated in the Hamilton County Jail with Ronald Armstead after Byrd's conviction and on September 21, 1983, he and Armstead had a conversation. Armstead told Jones that he needed Jones' help. (Exhibit B) Armstead told Elwood Jones that he was afraid to remain in prison because he lied when he testified against John Byrd, Jr. Armstead told Jones that the Hamilton County Prosecutor's Office, through Assistant Prosecutor Vollman, had made a deal with Armstead and that the deal was that Armstead would remain out of jail if he would testify against John Byrd, Jr. and his co-defendants. Armstead gave Jones a copy of a letter sent from the prosecutor's office to the Ohio Adult Parole Authority, Cincinnati, Ohio office as well as a copy of a letter he had written to the Hamilton County Prosecutor's Office. Armstead also informed Jones that he had been returned from prison to the Hamilton County Jail because of these letters. Armstead admitted to Jones that he had lied while testifying against John Byrd, Jr. as to Byrd's involvement in the King Kwik murder case particularly as to the knife used in the murder, and Byrd's statement regarding the murder while Byrd was in jail before trial.

Those opposing clemency for John have been heard to argue that Elwood Jones is discredited by the fact that he too is now on death row. However, the fact that Elwood Jones was in possession of a letter written by the Hamilton County Prosecutor's Office concerning Ronald Armstead authenticates his acquaintance with Armstead and corroborates his account of Armstead's statements.

Marvin Randolph, Robert Jones and Elwood Jones, Jr. provided these detailed recollections of events that led to Ronald Armstead's false testimony against John Byrd five years after Byrd was convicted and sentenced to death. These affidavits contained in Exhibit B were executed in separate locations at different times, thus eliminating the possibility of any collusion. The fact that these accounts are so very much alike speaks to their veracity. The prosecutors cannot have it both ways: they cannot sweepingly discredit these men because they are convicted criminals unless they also ask you to discredit Ronald Armstead for the same reason.

E. Armstead is the Lynchpin that Put John Byrd on Death Row

Prosecutors cannot plausibly deny the importance of Armstead's testimony. Their arguments at trial and their arguments over the years on appeal convinced the federal courts that Armstead was single-handedly responsible for John's capital conviction and death sentence:

- "All agree that Armstead's testimony was vitally important to the jury's determination that Petitioner was the principal offender in the aggravated murder of Monte Tewksbury." Byrd v. Collins, 209 F.3d 486, 499 (6th Cir. 2000).
- "Everyone involved with the case presumably knew that, if Armstead's testimony was believed, then Petitioner was the principal offender and guilty of the cold-blooded murder of Monte Tewksbury." Byrd v. Collins, 209 F.3d 486, 537-538 (6th Cir. 2000).

- “The principle evidence presented at trial to suggest that Byrd was the person who stabbed Monte Tewksbury came from Ronald Armstead, who, at the time of trial, was serving a sentence at the Cincinnati workhouse.” Byrd v. Collins, No. C-1-94-167, Slip op. at 6 (S.D. Ohio July 28, 1995) (Opinion of Federal Judge James Graham).

Armstead was the lynchpin for the prosecutors’ death-penalty case against John Byrd. They blatantly and illegally vouched for his credibility in closing arguments to the jury saying, “I believe him, and I submit that you should believe him.” (Exhibit M, Tr. 1662)⁴ One Sixth Circuit Judge harshly criticized this vouching by saying, “Armstead was a jailhouse informant and convicted felon whose credibility was questionable at best. The State’s representations that it believed Armstead are certainly likely to mislead a citizen jury as to Armstead’s actual credibility.” Byrd v. Collins, 209 F.3d 486 (6th Cir. 2000) (Jones, J., dissenting). (Exhibit K) Unless the jury believed Armstead’s testimony, the prosecutors could not convict Byrd of a capital offense. Now, with all of the evidence assembled to prove Armstead lied, the death-penalty capital case against John falls apart. Once Armstead is removed from the equation, none of the remaining evidence is adequate to sustain confidence that the right man was sentenced to death.⁵

Armstead is a proven liar. If nothing else, even the most ardent proponents of the death penalty must feel queasy when it comes to using the state’s power to take life in a case so dependent upon a snitch like Ronald Armstead. John Byrd must not be executed on the basis of such fraudulent testimony.

IV. John Byrd Has Matured and is Now Adjusted to Prison Life

In coming before the Governor and the Parole Board, John recognizes that his prison records will be carefully scrutinized. This examination will uncover a history of very poor conduct (to put it mildly) in the early years of his incarceration. When John Byrd arrived on Death Row in 1983, he was only nineteen years old. He was a very angry, hostile young man who was clearly bitter at having been sentenced to death for a murder he did not commit. His early records show this immaturity and this anger. However, following his early years of incarceration, his record has improved and he has adjusted to life in prison. If John receives clemency, he will continue to work toward becoming a model inmate.

⁴ For further examples of prosecutorial vouching, see Exhibit M, Tr. 1658-1659.

⁵ In addition to Armstead, the prosecutors put forth circumstantial evidence from another robbery to try to put the knife in John Byrd’s hand during the King Kwik robbery. This other robbery occurred at a U-Totem convenience store not long after the King Kwik robbery. There, two masked men entered, one wielded a knife, the other did not. One witness (Nitz) unequivocally said that the masked man who had the knife wore tan pants. When arrested a short time later, John Byrd wore blue pants. Tan and blue are too far apart on the color spectrum to create any kind of circumstantial bridge strong enough to prove John Byrd stabbed Monte Tewksbury. This “other bad acts” circumstantial evidence cannot by definition be adequate to create the moral certainty Ohioans should demand before a man is executed.

When he was sentenced to death, John was an immature nineteen-year-old boy who had had little in his background to prepare him for becoming a responsible adult. John's mother began dating his father when she was thirteen years old. At age fifteen and five months pregnant with John, she married his father. The marriage lasted less than a year due to John Byrd Sr.'s violent attacks on his wife and child.

During John's childhood and adolescence, his mother lived with two men and was married three additional times. In each instance, the males were physically and emotionally abusive to John. He began running away from home at age five to avoid abuse that ranged from violent beatings—being thrown into walls and through a screen door as well as being pistol-whipped—to shaming and degrading comments. To escape such abuse, John fled to the streets.

The pattern of escaping to the streets placed John in contact with street companions with whom he could forge an alliance. At an early age, he became a user and abuser of drugs and alcohol. Due to John's dyslexia and the lack of any support at home—his step-fathers repeatedly referred to him as "stupid" and a "dummy"—John made little progress in school, where he might have found appropriate nurturing and stability. Instead, his education became a product of the street environment. It was there that he learned from teachers who were skilled in committing petty crimes. As a result he became subject to the juvenile court system for a series of minor offenses. Finally, at age seventeen he was arrested for driving a stolen truck across state lines into Kentucky. He was convicted and sentenced to prison, where he served time in the maximum security prison at Eddyville. It is purported that he was the youngest inmate in that infamous prison.

Following his release from prison in Kentucky in 1983, he returned home to Cincinnati. With no education or job skills, John had few prospects for employment. Once again, he was not welcome in the family home. The old pattern of returning to the streets led him to fall in with John "Red" Brewer, a tough street punk, and William "Dannie" Woodall, an alcoholic Vietnam War veteran known as "Pop." On April 17, 1983, after a day of drinking and drug taking, the three became involved in the crime that put John on death row.

John has spent virtually his entire adult life on Death Row. He has matured. He has achieved Class-A status and has adjusted to prison life. If John is granted clemency, he will continue to maintain this status and will work at being an exemplary prisoner.

V. The Governor's Clemency Power Must Bring Fairness and Proportionality Where the Courts Have Not

Clemency is the age-old remedy for bringing the final hand of fairness and proportionality to our criminal justice system. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera v. Collins, 506 U.S. 390, 411-12 (1993). In Herrera, the United States Supreme Court recognized that the judicial system does not cure all mistakes, especially if proof of the mistake is discovered after trial or if an error cannot be considered due to a lawyer's "procedural default." "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples

of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.” *Id.* at 415. Here, John Byrd stands wrongfully sentenced to death because he did not actually stab Monte Tewksbury.

Some will say that clemency should be denied because the courts denied John relief. But that is wrong for at least three key reasons. First, due to technical barriers and some bad decisions by John’s lawyers, the courts never really analyzed the most compelling evidence that proves that John is innocent of death-penalty murder; nor did the courts ever correct the fact that John’s jurors were misled with false impressions of the credibility of the jailhouse snitch. Second, due to the rules of post-trial litigation, no one court has ever seen in one clear picture all of the reasons why John should not be under a death sentence. Third, in our system of government, the fact that the courts have not corrected John’s mistaken death sentence simply places his case in the Governor’s hands; it does not tie the Governor’s hands. If it did, the Executive’s clemency power would be reduced to the rote rubber-stamping of conclusions reached by the judicial branch of government.

Of the three persons convicted for the Aggravated Murder of Mr. Tewksbury, John alone received a death sentence.⁶ When the prosecutors first got the King Kwik case, all they knew was that Byrd, Brewer, and Woodall had been involved in the King Kwik robbery. Early on they had no idea who stayed in the van or which two entered the store, much less who stabbed Mr. Tewksbury. In fact, unless you embrace without even modest skepticism the claims of the jailhouse snitch, no one ever knew for sure that John Byrd entered the King Kwik with Brewer until Brewer’s affidavit was filed and Byrd’s lawyers admitted to that fact in legal pleadings.⁷ Under Ohio law, then as now, evidence placing John in the King Kwik admits his guilt in the Aggravated Robbery and complicity in Brewer’s murderous act. That admission *does not* make him guilty of death-penalty Aggravated Murder.

⁶ Executive Clemency in Ohio has often been used to rectify disparities in sentences. Governor C. William O’Neill commuted the death sentence of Cleo Eugene Peters whose co-defendant, Michael G. Dumoulin, had received a life sentence. Governor O’Neill gave as his reason that “under the law they are equally guilty.” Here, Brewer’s culpability is greater because he stabbed Mr. Tewksbury. Governor Thomas Herbert commuted the sentence of Charles Ames because triggerman Julius Emerick received a life sentence from a different jury. Governor Herbert said, “[I]n America we pride ourselves on doing comparative justice . . . the first jury recommended mercy . . . thereby compelling a sentence of life imprisonment . . . I am impelled to commute the sentence of Ames to the same penalty . . . not for any sympathy for Ames, but in order that it may not be said that Ohio failed in comparative justice.” Here, Brewer essentially received a life sentence from the prosecutor who made the decision not to indict him for a death-eligible Aggravated Murder.

⁷ Contrary to the incorrect claims some have lodged against John Byrd and his lawyers, he never put on evidence claiming he was not in the King Kwik. Rather, through counsel, John Byrd exercised his constitutional right to stand on his presumption of innocence and challenge the prosecution’s evidence. This is a far cry from “changing his story” as some would have it. Those who advance this argument are in fact attacking the very fabric of our criminal justice system by trying to fault a man for exercising his constitutional rights to remain silent and to rest on his presumption of innocence at trial.

VI. *The Majority of Ohio's Citizens Favor Clemency in A Case Like John Byrd's*

Clemency is appropriate where the judicial system offers no remedy, but the resulting execution would go against contemporary standards of what is right and wrong. Data collected in a University of Cincinnati survey shows that Ohioans would favor clemency in a case like Byrd's. Recent polling data shows that a majority of Ohioans surveyed would be against the execution of a man who has provided evidence that someone else killed the victim and that evidence was never heard by the jury or judge. (Exhibit L) Furthermore, the people responding to the survey believe that when two people are equally involved in a crime and one person is sentenced to death and the other is sentenced to life in prison, it would be appropriate to grant clemency to change the single death sentence to a sentence of life in prison. Id. Here, Byrd has provided the affidavit of his co-defendant who has admitted to being the actual killer. Further affidavits and other evidence strongly support the veracity of this admission. Thus, this data would indicate that most people in this state would be in favor of a grant of clemency in this case.

VII. *In Conclusion, John Byrd Respectfully Requests that His Death Sentence Be Commuted to Life In Prison Without the Possibility of Parole*

The wrong man was sentenced to death for the murder of Monte Tewksbury. If nothing else, the evidence outlined in this clemency petition creates doubts so grave as to justify the mercy of clemency to ensure that Ohioans do not execute the wrong man.

John Byrd respectfully requests that he be granted clemency and that his death sentence be commuted to life in prison without the possibility of parole.

RESPECTFULLY SUBMITTED ON JOHN BYRD'S BEHALF BY
THE OFFICE OF THE OHIO PUBLIC DEFENDER, AUGUST 13, 2001

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