

**Petition of Gregory Lott (A198-547)  
for Commutation of his Death Sentence**

**Presented to:  
The Honorable Mike DeWine  
Governor of Ohio**

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17. Joseph Murphy Commutation Recommendation dated September 15, 2011
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27. Gregory Lott Inmate Evaluation Reports, Unit File, received from ODRC
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29. Statement of Indiana Governor Joseph Kernan on the Grant of Commutation for Michael Daniels
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31. Statement of Virginia Governor Timothy Kaine on the Scheduled Execution of Percy Levar Walton, WashingtonPost.com (Jun. 9, 2008) <http://www.washingtonpost.com/wp-dyn/content/story/2008/06/09/ST2008060902009.html>
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36. Bob Taft, *Ohio Legislators Should Enact Proposed Death-Penalty Reforms: Bob Taft, former Ohio governor (opinion)*, cleveland.com (Jan. 11, 2019)
37. Jim Petro, *Death Penalty is in decline, but problems remain*, Columbus Dispatch, 2016 WLNR 27739865 (Sept. 10, 2016)
38. Terry Collins, *Ohio's former prisons chief: End the death penalty*, WCPO.com (Feb. 24, 2016) <http://www.wcpo.com/news/opinion/ohios-former-prisons-chief-the-death-penalty-isnt-worth-fixing>
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## **Petition of Gregory Lott for Commutation of his Death Sentence**

Gregory Lott respectfully requests that Governor DeWine commute his death sentence to life imprisonment. The family of the victim in this case, John McGrath, opposes an execution in their family's name and asks that Mr. Lott's death sentence be commuted to life. Mr. Lott's execution is scheduled for March 12, 2020. He has been before the Ohio Parole Board twice (once under Governor Taft, and once under Governor Kasich). In 2002 by a divided vote, the Board recommended against clemency for Mr. Lott.<sup>1</sup> In 2014, Governor Kasich granted a lengthy reprieve to Mr. Lott before the Board issued a second recommendation.

### **Introduction**

Gregory Lott, a black man and with significant cognitive deficits, was convicted of the murder in Cleveland of an 82-year-old white man named John McGrath. At the time, Mr. Lott was still living with his mother. He never achieved gainful employment. His days revolved around alcohol and drugs. In school, Gregory Lott was placed in special education classes. He received failing grades in junior high and high school and was socially promoted to the tenth grade where he remained until he aged-out of school. In July 1986, Mr. Lott broke into Mr. McGrath's home to commit a burglary. He restrained Mr. McGrath and a fire started in the home that caused Mr. McGrath to sustain serious burns. Mr. McGrath was hospitalized and there contracted pneumonia, which proved fatal nine days after the burglary. Although Mr. Lott never

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<sup>1</sup> Board member Dr. Sandra Mack voted to commute Mr. Lott's sentence due to his cognitive impairments. (Clemency Report for Gregory Lott pp.12-13, Aug. 16, 2002, Exhibit 23). The Ohio Supreme Court subsequently stayed Mr. Lott's execution date.

has been able to recall the details of that day, he deeply regrets and takes full responsibility for causing the death of Mr. McGrath.<sup>2</sup> Now, he requests clemency for four compelling reasons.

First, those with the greatest stake in seeing Mr. Lott justly punished for his crime—Mr. McGrath’s surviving daughter and grandchildren—unequivocally support this request for commutation to life without the possibility of parole. As the attached affidavits demonstrate, the McGrath family “*cannot condone his execution,*” and believe that “*a life sentence is just punishment.*” (Affidavit of Timothy J. McGrath, ¶5, Exhibit 1).

Second, as former Ohio Parole Board Member Dr. Sandra Mack recognized in 2002 recommending clemency, Mr. Lott is intellectually disabled. Prior testing consistently had revealed Mr. Lott’s severe deficits in adaptive behavior and borderline IQ. However, Ohio was slow to adopt in practice the medical community’s understanding of intellectual disability and the courts have previously determined

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<sup>2</sup> Gregory Lott has limited mental abilities and when the events in question transpired he was dangerously abusing both alcohol and drugs (angel dust, cocaine, marijuana, and a variety of other substances). His memory loss is noted in a pretrial evaluation by Dr. Karpawich: “[t]he defendant stated that he does not remember doing this crime. During July of 1986 when the offense occurred, the defendant stated he was heavily into drugs and alcohol.” (Dr. Karpawich Report, Exhibit 2). Dr. Smalldon performed a neuropsychological assessment of Mr. Lott in 2014 and describes Mr. Lott’s intellectual functioning as “borderline” and notes he has only “patchy” recollection of events that occurred during periods when he was heavily intoxicated. (Dr. Smalldon Report pp. 5-7, Exhibit 3). Consequently, as Mr. Lott has told the Ohio Parole Board, he is unable to remember precisely the events that transpired in Mr. McGrath’s home. He has, however, reviewed evidence of the crime with his current attorneys. Thus, this clemency request is predicated on Mr. Lott’s unequivocal admission that he is, as he told the Parole Board in 2014, “guilty.”

that Mr. Lott's IQ was not quite low enough for him to be considered ineligible for capital punishment. Recently, though, the Ohio Supreme Court revisited its approach to evaluating intellectual disability and expressly overruled the methodology that had been employed in Mr. Lott's case. *State v. Ford*, \_\_ N.E.3d \_\_, No. 2015-1309, 2019 WL 5792203 (Nov. 7, 2019) (overruling *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002)). Applying the modern standards identified by the Court, Dr. Bob Stinson, a Board-certified forensic psychologist, has concluded that Mr. Lott is intellectually disabled. See Dr. Stinson's Report, Exhibit 24. Mr. Lott's mental disability, while not excusing his actions, renders the death penalty unjust and unconstitutional.

Third, Mr. Lott's death sentence is tainted by unethical conduct by the prosecutor at his trial, and by the misconduct of his own attorneys, one of whom was publicly reprimanded by the Ohio Supreme Court and the U.S. District Court for the Northern District of Ohio. The prosecutor, Carmen Moreno, obtained Mr. Lott's death sentence after falsely informing the trial judges that the evidence showed Mr. Lott had committed premeditated murder by bringing lamp oil with him to the scene of the burglary, to use as a fire accelerant. Moreno's knowing misrepresentation to the trial judges has been described by appellate courts as egregious and intolerable. *In re Lott*, 366 F.3d 431, 434 (6th Cir. 2004). However, procedural errors by Mr. Lott's own post-conviction attorneys prevented reviewing courts from ordering that Mr. Lott be resentenced. When Mr. Lott sought habeas review of his sentence in federal court, his attorney misrepresented key facts to the court, prompting the attorney to be publicly reprimanded for misconduct by federal and state courts. (*In Matter of Attorney Disciplinary Proceedings—Randall L. Porter*, General Order No. 2002-22 at 3 (N.D.



Ohio Mar. 13, 2002)) (Exhibit 34). Against this backdrop of attorney malfeasance, only Governor DeWine, through his plenary clemency authority, can correct the malfunctioning of Ohio's justice system.

Finally, clemency is called for because Mr. Lott's death sentence is precisely the sort identified as inappropriate by the Ohio Supreme Court's Death Penalty Task Force. Mr. Lott's eligibility for capital punishment was triggered by a charge of felony murder, which the Task Force has recommended be removed from Ohio law because of its potential for use in a racially-biased manner.<sup>3</sup> According to the Task Force, the felony murder aggravator has been used disproportionately in Ohio to subject African-American defendants to the death penalty in cases of black on white crime. The death sentence is imposed 3.8 times more frequently than in cases involving black perpetrators and black victims. (Joint Task Force Final Report & Recommendations, Recommendation Number 29 pp.13-14, Exhibit 4). Mr. Lott's crime grew out of a burglary gone wrong, with no evidence of prior calculation or premeditation to commit murder; it was not the "worst of the worst" for which capital punishment must be reserved. The felony murder specification, coupled with the fact that Mr. Lott killed a white man, creates a substantial likelihood that race played a role in the imposition of his death sentence.

Given that Mr. Lott has been an exemplary prisoner during his incarceration, no one will be placed at risk if his life is spared and he is given the opportunity to

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<sup>3</sup> Relevant portions of the Joint Task Force Final Report and Recommendations are attached here to as Exhibit 4. The entirety of the Final Report and Recommendations may be found at: <http://www.supremecourt.ohio.gov/Boards/>.

continue to make amends for the tragic mistake he made more than thirty years ago. Once in the structured environment of prison, and free from the influence of drugs and alcohol, Mr. Lott became a very different person. As he explained to the Ohio Parole Board in 2014, he consistently chooses to follow the rules and to help others. Mr. Lott wants to continue to help others, especially younger inmates, change their bad behavior. He is most proud of helping others stay out of trouble and, in his words, “turning himself over to God.” Thus, as discussed below, the interests of justice and humanity will be furthered by commutation of Mr. Lott’s death sentence.

**Reasons why Governor DeWine should commute Gregory Lott’s sentence.**

**1. The family members of the victim strongly support commutation.**

At the time of Mr. Lott’s trial, Mr. McGrath’s wife and children (whom he had left in New England some time before) were not consulted by the prosecutor’s office regarding their views on whether the death sentence should be sought.<sup>4</sup> Today, the surviving McGrath family members support commutation of Mr. Lott’s death sentence. Irene McGrath Allain, Jack McGrath, Sharon McGrath Lamothe, Tim McGrath, and Charles McGrath all oppose Mr. Lott’s execution. The McGrath family

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<sup>4</sup>There is some confusion about whether the McGrath family’s wishes played a role in the prosecution’s pre-trial decisions. Current counsel for Mr. Lott discovered in the trial attorney’s files a letter written by Mr. Lott to the prosecutor referencing a 30-year plea agreement that never was finalized. In that letter, Mr. Lott thanked the prosecutor for offering a plea deal but referred to “a couple of problem[sic] with the victims[sic] family.” (Letter, Exhibit 5). Given the exclusion of the McGraths from the trial process, it is likely that the “problem” with a plea did not in fact originate with the McGrath family. It is unclear why the plea agreement was not formalized and Mr. Lott’s memory gaps make it impossible to reconstruct what actually occurred.

signed affidavits to make clear their wishes when Mr. Lott was due to be put to death in 2014. The victim's surviving daughter, Irene McGrath Allain, states:

I was excluded from my father's funeral and from the prosecution of my father's killer, Gregory Lott. I do not want to be excluded from the clemency process. Although it has been difficult for me to come to terms with how my father died, I do not agree with executing Gregory Lott. I am a devout Catholic, as is my family. I believe that life in prison is a just punishment for Gregory Lott. I believe his death sentence should be commuted to life imprisonment.

(Affidavit of Irene McGrath Allain at ¶11, Exhibit 6). Grandson Jack McGrath and granddaughter Sharon McGrath Lamothe likewise do not want an execution conducted in their family's name. They believe "*life imprisonment is a just sentence*" for Mr. Lott. (Affidavit of John R. "Jack" McGrath at ¶7, Exhibit 7; Affidavit of Sharon McGrath Lamothe at ¶8, Exhibit 8). Grandson Tim McGrath supports clemency and requests that the State of Ohio respect his "family's wishes regarding my grandfather's killer." (Affidavit of Tim McGrath at ¶5, Exhibit 1). Grandson Charles McGrath echoes the McGrath family's views: "*I cannot condone the execution of Gregory Lott ... in my family's name[;] ... his death sentence should be commuted to life imprisonment.*" (Affidavit of Charles McGrath at ¶7, Exhibit 9).

Jack McGrath summed up the family's faith-based opposition to Mr. Lott's execution when speaking to the *Cleveland Plain Dealer*:

"I don't want to put my imprimatur on a man's execution," said Jack McGrath, a grandson. "Much of this is because of my Roman Catholic faith. When I first learned of this in 1986, I almost thought of taking matters into my own hands. But time has healed our wounds. I don't believe in the death penalty because of my faith."

“I wouldn’t want to be the person who prevents someone from changing -- from finding God, understanding the depth of what he has done and helping him prepare for the afterlife.” Jack McGrath said.<sup>5</sup>

The family’s opposition to Lott’s execution is also consistent with what we know to have been the views of the victim, John McGrath himself. Mr. McGrath attended mass daily and was a familiar figure in the parish. (Trial Tr. pp.387-90, Exhibit 11). Father Luigi C. Miola was Mr. McGrath’s priest and knew him to be a strong supporter of the Church and a devout Catholic.<sup>6</sup> Father Miola visited Mr. McGrath in the hospital while he was being treated for his injuries. Father Miola is confident that Mr. McGrath would not have wanted Greg Lott to be executed. (Affidavit of Father Luigi Miola, Exhibit 13).

The McGrath family is unequivocal in supporting the commutation of Greg Lott’s death sentence. The State of Ohio will compound the loss of the McGrath family by taking a life in their father’s name, in direct contravention of the family’s deeply-held religious beliefs. Indeed, the Catholic Church deems this matter to be of such fundamental importance that Archbishop Christophe Pierre, the Pope’s highest representative in the United States, wrote to Governor Kasich urging clemency for Mr.

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<sup>5</sup> John Caniglia, *Citing Catholic faith, family of victim seeks to keep condemned Cleveland killer from lethal injection*, cleveland.com (Jan. 30, 2014), [Citing Catholic faith, family of victim seeks to keep condemned Cleveland killer from lethal injection](#) (Exhibit 10).

<sup>6</sup> One of Mr. McGrath’s friends, Robert Small, described him as “a daily communicant at his church [who] was always doing some small repair for homeowners who in many cases were unable to pay him.” Mr. Small visited Mr. McGrath at the hospital and described Mr. McGrath as aware of his grave situation yet steadfast in his genuinely kind approach toward others. (Letter of Robert E. Small dated Aug. 6, 2002, Exhibit 12).

Lott. (Letter of Apostolic Nuncio Christophe Pierre, Exhibit 14). And the Pope has just recently affirmed that “the dignity of the person is not lost even after the commission of very serious crimes.” (Catechism of the Catholic Church No. 2267, Exhibit 15; Article detailing Pope Francis’ approved changes to the Catechism of the Catholic Church on the death penalty, Exhibit 16).<sup>7</sup> The McGrath family’s Church rejects capital punishment, calling it an “attack on the inviolability and dignity of the person.” (Catechism of the Catholic Church No. 2267, Exhibit 15).

And although the prosecution dismisses the McGrath family’s faith-based wishes as irrelevant, state law says otherwise. Ohio statute specifies that the views of the victim’s family must be considered when the Parole Board is determining whether to recommend that a death sentence be carried out. *See, e.g.*, Ohio Rev. Code § 2967.12 (B) (guaranteeing “a member of the victim’s immediate family . . . the right to give testimony at a full board hearing” regarding whether clemency is appropriate).

The views of victims are not necessarily dispositive of whether a death sentence should be imposed, but the presence of strong support from the victim’s family for clemency is unusual and highly significant. The Ohio Parole Board has repeatedly found such support to be a persuasive reason for recommending clemency to Ohio’s governors.<sup>8</sup> *See* Recommendation of Commutation by Parole Board in re: Joseph Murphy (September 23, 2011) (Exhibit 17) (citing as a reason for

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<sup>7</sup> <https://cruxnow.com/vatican/2018/08/02/pope-francis-changes-teaching-on-death-penalty-its-inadmissible/>

<sup>8</sup>When Mr. Lott’s case was first considered by the Parole Board in 2002, the McGrath family’s position in favor of clemency had not been presented to the Parole Board.

commutation that “[m]embers of the victim’s family, both at the time of trial and now, support clemency”); Recommendation of Commutation by Parole Board in re: Jeffrey Hill (Feb. 6, 2009) (Exhibit 18) (citing as grounds for commutation “the compelling and unanimous opinion of victim Emma Hill’s family who favor clemency in this case”).

Decision makers, in Ohio and in States such as Texas, Indiana, and Georgia, consider support from the victim’s family an important reason for commuting a death sentence. *E.g.*, Statement of Ohio Governor Ted Strickland commuting death sentence of Jeffrey Hill (Feb. 12, 2009) (Exhibit 18) (agreeing with the Parole Board’s findings that “the views of the victim’s family” support commutation); Proclamation of Texas Governor Greg Abbott commuting death sentence of Thomas Whitaker (Feb. 22, 2018) (Exhibit 19) (reasons for clemency include the surviving victim’s opposition to execution); Statement of Indiana Governor Mitch Daniels commuting death sentence of Arthur Baird (Aug. 29, 2005) (Exhibit 20) (citing the “unanimous sentiment expressed by family members” that life without parole is appropriate punishment); Holly Morris, *Board Spares Murderer*, 1990 WLNR 2072049, Atlanta J. – Const. A01 (Aug. 22, 1990) (Exhibit 21) (“[t]o say the least, the board was very much impressed by the fact that we did have family of the victim who . . . also asked for clemency [for William Moore],” quoting Georgia Pardon Board Chairman Snow).<sup>9</sup>

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<sup>9</sup> Surviving family members, regardless whether they advocate for clemency, are often taken into account by decision makers. For example, Arkansas Governor Asa Hutchinson granted clemency to Jason McGehee on February 22, 2018, but not without first meeting the victim’s family. *See* Max Brantley, *Hutchinson favors clemency for Jason McGehee*, [arktimes.com](http://arktimes.com) (Aug. 25, 2017),

Strong institutional reasons support the special weight that governors and parole boards give to victims who advocate mercy: the sentencer is usually unable to consider this important information. In contrast, in most capital cases, victim impact evidence favoring imposition of a death sentence may be introduced by the prosecution. *E.g., Payne v. Tennessee*, 501 U.S. 808 (1991) (permitting the State to introduce evidence about the victim and about the impact of the murder on the victim’s family in order to determine whether death is appropriate). And as Governor DeWine is no doubt aware, prosecutors often seek the death penalty in the name of providing justice to the victim’s family. *E.g., State v. McNight*, 837 N.E.2d 315, 332 (Ohio 2005) (prosecutor argued to have capital specifications reinstated to give “fair justice” to the families of two murder victims).

However, courts have consistently excluded from consideration evidence that execution will adversely affect a victim’s family. *E.g., Ware v. State*, 759 A.2d 764, 783-86 (Md. 2000) (excluding testimony from victim’s family that death sentence would lead to “anxiety and uncertainty”); *Robison v. Maynard*, 829 F.2d 1501, 1503-05 (10th Cir. 1987) (excluding testimony from victim’s family in opposition to death); *Barbour v. State*, 673 So. 2d 461, 468-69 (Ala. Crim. App. 1994) (excluding a request from the victim’s brother for the defendant to be sentenced to life rather than death); *Greene v. State*, 37 S.W.3d 579, 583-84 (Ark. 2001) (excluding a letter from the victim’s wife expressing desire for a life sentence).

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<https://www.arktimes.com/ArkansasBlog/archives/2017/08/25/hutchinson-favors-clemency-for-jason-mcgehee> (Exhibit 22).

Before trial in this case, the prosecution did not even place a return phone call to the McGrath family, let alone consider their wishes. The McGrath family was ignored in 1987 when Mr. Lott was prosecuted and sentenced to death. Clemency is now the only mechanism that can take into account the family's faith-based views favoring mercy for Mr. Lott. The family has made its position known, through their sworn statements and the press. Governor DeWine can and should honor their requests by commuting Mr. Lott's death sentence to life imprisonment.

**2. Mr. Lott is intellectually disabled, rendering the death penalty an unjust punishment.**

Mr. Lott's significantly diminished mental capacity reduces his culpability and directly bears on the appropriateness of the death sentence. Greg Lott was placed in special education classes and was unable to succeed in school. Experts have found he is intellectually disabled and also suffers from brain damage. In 2002, Parole Board member and psychologist Dr. Sandra Mack found Mr. Lott is deserving of clemency in light of "scientific uncertainty" and the "inexact" nature of IQ testing. (Clemency Report for Gregory Lott dated Aug. 16, 2002, Exhibit 23). Subsequently, the Ohio Supreme Court stayed Mr. Lott's execution to determine the standard to be applied to claims raising a capital defendant's intellectual disability. *State v. Lott*, 779 N.E.2d at 1013, *overruled by State v. Ford*, 2019 WL 5792203. The court held, among other things, that there is a rebuttable presumption that a defendant is not mentally retarded if his IQ is above 70. *State v. Lott*, 779 N.E.2d at 1014, *overruled by State v. Ford*, 2019 WL 5792203, at \*12-13. While no court has ever found Mr. Lott's impairment sufficient for him to be considered "intellectually disabled" in a legal sense, intelligence testing over the years consistently places Mr. Lott's intellectual



functioning “well below average range,” often just above where earlier courts had placed the cut off for “intellectually disabled.” His raw scores fall into the “borderline” range.

Experts could not previously offer the opinion that Mr. Lott was in fact, intellectually disabled under Ohio law as it stood prior to *State v. Ford*, 2019 WL 5792203, which was decided this past November. With scores that generally put him in the 2nd to 8th percentile of intellectual functioning, Dr. Smalldon had found that Mr. Lott was very close to that designation. (Dr. Smalldon Report p.9, Exhibit 3).

However, now that the Ohio Supreme Court has overruled its earlier standards for finding intellectual disability—standards set forth in Mr. Lott’s own case—Mr. Lott is able to present expert testimony to this Board that he is, indeed, intellectually disabled under the law.<sup>10</sup> As Dr. Robert Stinson states in his attached report: “Considering the three elements under *Ford*, and based on my careful review and analysis of the records provided, it is my opinion, offered to a reasonable degree of psychological certainty, that Gregory Lott meets the criteria for intellectual disability.” (Dr. Stinson Report p.9, Exhibit 24). In reaching this conclusion, Dr. Stinson noted the following key facts:

[T]wo of his [Lott’s] [IQ] scores fall below 70 and all but one are within 2 to 3 points of 70. This is the case even before adjusting for the Flynn Effect. In this case, I recommend also adjusting for the Flynn Effect. Otherwise, Mr. Lott’s IQ is likely to be overestimated by the simple fact that time elapsed between when the test was normed and when Mr. Lott was tested. After accounting for the Flynn Effect 5 or 6 (depending

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<sup>10</sup> In *State v. Ford*, the court applied updated medical diagnostic standards in overruling *State v. Lott*, *supra*. *State v. Ford*, 2019 WL 5792203, at \*12-13 (explaining why *State v. Lott* contains an improper standard for assessing intellectual disability).

on whether one uses a 95% confidence interval or a 99% confidence interval) of the scores are roughly 70 or lower.

\* \* \*

The results [of testing] were that he had adaptive functioning deficits in multiple domains[.]

\* \* \*

The reports of numerous individuals across time converged to illustrate that Mr. Lott has experienced adaptive functioning deficits in the conceptual, social, and practical domains—starting in his childhood and persisting through his adult years. Thus, Gregory Lott has significant adaptive deficits in all three adaptive-skill sets.

\* \* \*

[T]here is ample evidence that Mr. Lott’s cognitive deficits, as documented through individualized tests of intelligence during his adult years, existed when he was a minor. . . . [T]he adaptive functioning deficits clearly had their onset when Mr. Lott was a minor.

(Dr. Stinson Report pp. 8-9, Exhibit 24).

Under the *Ford* test, Mr. Lott qualifies as intellectually disabled. Therefore, his death sentence should be commuted to life imprisonment.

But even if Mr. Lott’s low IQ scores were not dispositive, neurological tests also reveal frontal lobe brain impairment. (Dr. Smalldon Report p.10, Exhibit 3). The impairment is categorized as “mild” but that label does not diminish the disability. On the contrary, according to Dr. Smalldon, “Any brain impairment . . . can have a significant negative impact on the impaired person’s ability to manage the activities of day-to-day living.” (Dr. Smalldon Report p.10, Exhibit 3) (emphasis added). Mr. Lott has significant deficits in executive functioning which impair his ability to solve problems, plan ahead, or constrain his impulsivity. (Dr. Smalldon Report p.11, Exhibit 3).

These intellectual deficits explain many of the difficulties with school and maintaining employment that Mr. Lott experienced as a young adult, particularly when he was abusing drugs and alcohol. Damage to the frontal region of the brain, as found by Dr. Smalldon, results in impulsive acts because it impairs the ability to plan and anticipate the long-term implications of actions. (Dr. Smalldon Report p.11, Exhibit 3). This is evident in Mr. Lott's criminal history at the time of this offense—he committed robberies very close to home, even entering the same residence more than once despite very little to be gained each time (during one burglary, he apparently stole a quarter that the police placed under a glass to obtain his fingerprint). (Trial Tr. p.416, Exhibit 25).

Mr. Lott's intellectual limitations were detrimental before his incarceration, but they have not hindered his ability to conform his behavior on death row. Mr. Lott has shown that he adapts very well to the highly regimented environment of prison. At the time of trial, Dr. Eisenberg noted Mr. Lott greatly benefited from the structure of incarceration. (Trial Tr. pp.918-19, Exhibit 26). Dr. Smalldon notes, “[i]ndividuals who have impairment of this kind often perform well in structured settings where they're required to make fewer decisions, and where the environmental ‘presses’ tend to be steady and relatively predictable.” (Dr. Smalldon Report p.11, Exhibit 3). This is evident in Mr. Lott's exemplary institutional record since arriving on death row over 30 years ago. He has never had a major disciplinary problem. He is a good worker who receives consistent praise. (Inmate Evaluation Reports, Exhibit 27). One corrections officer describes Lott as a “keeper” due to his work. (Inmate Evaluation Reports, Unit File p.95, Exhibit 27). Another officer has observed that “Lott's never a

problem.” (Dr. Smalldon Report p.5, Exhibit 3). This anecdotal information bears out Mr. Lott’s remarkable adjustment to prison. The Governor can be assured that if he grants clemency, Mr. Lott will not cause problems in prison.

The executive clemency power is uniquely positioned to prevent violation of the Eighth Amendment’s prohibition against executing those who the medical community recognize as intellectually disabled. Chief executives, including Ohio’s governors, have long considered the existence of a substantial mental handicap to be a compelling reason to commute a death sentence. When Governor John Kasich commuted the death sentence of John Eley in 2012, he noted that one of the key reasons for granting clemency was Mr. Eley’s “limited mental capacity.”<sup>11</sup> Indiana Governor Joe Kernan commuted the death sentence of Michael Daniels<sup>12</sup> for similar reasons in 2005. He explained that Mr. Daniels’ limited mental capacity—which is comparable to the low IQ possessed by Mr. Lott<sup>13</sup>—made execution an inappropriate sentence:

Daniels’ mental state casts further doubt on the appropriateness of his execution. Daniels’ IQ has been measured at 77, just above the retarded range. If Daniels’ IQ were a few points lower, the Constitution would bar his execution. While his low intelligence does not preclude his execution under constitutional principles, it made it more difficult for him to assist his attorneys in providing him a defense.

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<sup>11</sup> *Kaisich Commutes Sentence of John Jeffrey Eley*, Jul. 10, 2012 (Exhibit 28).

<sup>12</sup> *Grant of Commutation for Michael Daniels*, Statement of Governor Joe Kernan (Exhibit 29).

<sup>13</sup> Like Mr. Daniels, Mr. Lott’s IQ has been measured, without adjustments, at 77. *See* Dr. Stinson report p.5. (Exhibit 24).

Likewise, President Barack Obama commuted the death sentence of Arboleda Ortiz because he was intellectually disabled.<sup>14</sup> For similar reasons, Virginia Governor Tim Kaine commuted the death sentence of Percy Walton to life imprisonment.<sup>15</sup>

Gregory Lott is intellectually disabled, has significant deficits in adaptive behavior, and has suffered brain damage. His death sentence should be commuted by Governor DeWine.

**3. Mr. Lott was wrongly sentenced to death because the prosecutor falsely represented evidence of premeditation to the three-judge panel that sentenced Mr. Lott to death.**

Mr. Lott's death sentence is unreliable because it is the product of a process that was marred by disturbing prosecutorial and defense attorney misconduct. Prosecutorial misconduct distorted the sentencer's view of Lott's culpability. Defense attorney misconduct prevented later courts from considering the fact that Mr. Lott did not enter the victim's home with an intent to kill. Mr. Lott did not premeditate the killing and he is not among the worst of the worst for whom the death penalty is reserved.

During Mr. Lott's trial and sentencing, the prosecutor (Carmen Marino) conducted himself in a manner that at least two Ohio courts have described as

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<sup>14</sup> Debra C. Weiss, *Obama's overlooked last-minute commutation lifts death sentence for disabled inmate*, ABA Journal (Jan. 18, 2017), <http://www.abajournal.com/news/article> (Exhibit 30).

<sup>15</sup> Statement of Governor Tim Kaine, WashingtonPost.com (Jun. 9, 2008) <http://www.washingtonpost.com/wp-dyn/content/story/2008/06/09/ST2008060902009.html> (Exhibit 31).

improper.<sup>16</sup> Mr. Lott was convicted of felony murder. Through extraordinary efforts, the prosecutor misled the three-judge panel into thinking that Mr. Lott had planned in advance the killing of Mr. McGrath, which calls the validity of the death sentence into doubt. In his closing argument, the prosecutor succeeded in exaggerating Mr. Lott's culpability for the death of Mr. McGrath by representing to the court—falsely—that Mr. Lott had premeditated the murder by bringing lamp oil and a cord with him to the McGrath home:

The physical examination of his house unquestionably shows aggravated burglary and aggravated robbery as stated in the indictment and the laws of the State of Ohio. But to *consider the specific intent that the killer had to kill Mr. McGrath.*

I'm not going to even seriously consider those suggestions made by defense counsel concerning the bottle of lamp oil. *Nothing in that man's house that uses kerosene or lamp oil. So, with that in mind, consider the intent of the individual who would break into an old man's house, knowing the frailty that age has inflicted on him, bringing with him a cord to tie him up and the lamp oil to burn him.*

You may argue that a person that has a gun and kills somebody does it by accident, a knee jerk reaction or a spasm, or for some reason reacted to some fear instilled by the victim.

*You cannot but look upon this act as deliberate, vile and specifically intending to cause the death of Mr. McGrath; that he was tied up and that the killer poured this flammable substance on him and ignited him.*

(Trial Tr. pp.778-79, Exhibit 32) (emphasis added).

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<sup>16</sup> *State v. Lott*, 51 Ohio St. 3d 160, 166-67 (Ohio 1990) (“[T]he prosecutor exceeded reasonable limits of propriety” by repeatedly referring to evidence not accepted by the court and by expressing his strong personal opinion about Lott’s guilt); *Lott v. Bagley*, No. 1:04-cv-822, 2007 WL 2891272, at \*18 (N.D. Ohio Sept. 28, 2007) (the prosecutor’s assertions regarding the lamp oil may be the subject of a prosecutorial misconduct claim). Those courts concluded, however, that this misconduct did not satisfy the high legal standard for overturning the death sentence.

While the prosecutor told the court that Mr. Lott acted in a “deliberate, vile” premeditated fashion by bringing murder implements with him to the burglary, the prosecutor was unquestionably aware that those statements were inaccurate. More than a month before trial, police detectives wrote in a report: “[r]eceived information from Prosecutor Marino relative to finding out if in the house of the victim there was located any lamps which would use lamp oil in same.” (East Cleveland Police Dept. Detective Report, Exhibit 33). They reported to Marino that a man who had cleaned out the McGrath house indeed found “one oil burning type lamp in peices [sic], which was later thrown away.” (*Id.*). Thus, the prosecutor knew that Mr. McGrath had an oil lamp in his home, yet he told the sentencing judges that “nothing in that man’s house” used lamp oil, creating a false impression that Lott had to have brought this accelerant with him to the burglary. Moreover, Lott’s trial attorneys allowed this misimpression to stand despite the fact that they were aware that it was false. *Lott v. Bagley*, No. 1:04-cv-822, 2007 WL 2891272, at \*18 (N.D. Ohio Sept. 28, 2007) (“defense counsel Kersey admitted that he and co-counsel were aware that there was no evidence to support the prosecutor’s statement that Lott brought the lamp oil with him”).

The prosecutor’s unchallenged misrepresentation to the judges who sentenced Mr. Lott to death was crucial. As was made clear by their pointed questioning of the prosecutor, the sentencing judges were troubled by the lack of evidence that Mr. Lott had acted with intent to murder Mr. McGrath. (Trial Tr. pp.786-800, Exhibit 32). One judge asked the prosecutor whether the evidence was actually consistent with a theory that “Mr. McGrath fell, by whatever reason, on top of the pile of burning materials,” which resulted in the burns that sent him to the hospital? (Trial

Tr. p.790, Exhibit 32). The prosecutor responded to this question by doubling down on the canard that Mr. Lott had brought a flammable substance with him to the burglary in order to injure Mr. McGrath: “How did that fire start then? *Who brought that flammable substance in to pour it?*” (Trial Tr. p.790, Exhibit 32) (emphasis added). The Ohio Supreme Court found that “the prosecutor exceeded reasonable limits of propriety” by repeatedly referring to evidence not accepted by the court and by expressing his strong personal opinion about Lott’s guilt. *State v. Lott*, 51 Ohio St. 3d 160, 166-67 (Ohio 1990).

Finally, years after the trial when Mr. Lott was seeking habeas corpus review of his sentence from District Judge O’Malley, his state-appointed public defender Randall Porter undermined the force of Mr. Lott’s claims when he was caught deceiving the court about when the defense had obtained the police report that showed Mr. Lott did not premeditate the killing—evidence that was vital to Mr. Lott’s habeas claims. In an effort to persuade the court that the prosecutor had wrongfully withheld an exculpatory police report, Mr. Porter concealed the fact that Mr. Lott’s postconviction attorney had earlier been given a copy of the report. Ultimately, Judge O’Malley denied Mr. Lott’s petition for habeas corpus. She also referred Mr. Porter for disciplinary sanctions that resulted in Mr. Porter being publicly reprimanded for engaging in a “continuous course of conduct which . . . constitutes misrepresentation.” *In Matter of Attorney Disciplinary Proceedings—Randall L. Porter*, General Order No. 2002-22 at 3 (N.D. Ohio Mar. 13, 2002) (Exhibit 34).

The prosecutor lied to the court about premeditation in order to obtain a conviction and death sentence. Then, deficient performance by Mr. Lott’s attorneys



created insurmountable obstacles that prevented appellate and federal courts from reviewing the constitutional claim that might have won Mr. Lott a new sentencing hearing.<sup>17</sup> Mr. Lott has been beset by attorney misconduct at every stage of his case, both by the prosecution and the defense. Fortunately, clemency exists as an extra-judicial mechanism designed to mitigate sentences like this one, that may be technically “correct” (meaning there are no errors that the courts can address), yet palpably unjust.<sup>18</sup> Commutation by Governor DeWine is the only fail-safe that can prevent the implementation of a death sentence that was improperly obtained.

**4. Mr. Lott was sentenced to death based solely on the felony murder specification that Ohio’s Death Penalty Task Force has recommended be removed from Ohio law because it is used in a racially disparate manner against blacks who kill whites, as in this case.**

Mr. Lott’s crime, while extremely serious, does not place him among the “worst of the worst” offenders, for whom the death penalty is properly reserved. The State did not formally allege that Mr. Lott injured Mr. McGrath “with prior calculation and design.” *State v. Lott*, Nos. 79790, 79791, 79792, 2002 WL 1265579, at \*4 (8th Ohio App. Dist. May 30, 2002). Moreover, despite misleading statements by the prosecuting attorney (discussed above in subsection 3), there is absolutely no

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<sup>17</sup> *Lott v. Bagley*, 569 F.3d 547, 549 (6th Cir. 2008) (considering the *Brady* claim only through the lens of the actual innocence exception to the procedural bar imposed due to post-conviction counsel’s deliberate by-pass of the prosecutorial misconduct issue).

<sup>18</sup> See Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. Times (Jan. 19, 2008) <https://www.nytimes.com/2008/01/19/> (revelation of prosecutorial misconduct leads to commutation of death sentence), (Exhibit 35).

evidence that Mr. Lott entered Mr. McGrath's house with a weapon or with an intent to kill. As Mr. Lott told the Parole Board during his 2014 interview, he did not enter that particular house out of a desire to harm Mr. McGrath, nor did he know the house would be occupied. The only factor that allowed Mr. Lott to be sentenced to death was the felony murder aggravating circumstance, namely, a killing in the course of a burglary.

The problem with such use of the felony murder specification is that it fails to ensure that only those who commit the most heinous murders receive the death penalty: all "robber-murderers" are automatically subject to the death sentence regardless of the circumstances of the crime. This raises the specter of arbitrary or racially-biased imposition of the death penalty and—when viewed in conjunction with its actual, disparate application—the author of Ohio's death penalty statute as well as those who study the death penalty recommend that the felony murder specification be eliminated.<sup>19</sup> Former Governor Bob Taft agrees that felony murder cases are a major cause of racial disparities in the use of Ohio's death penalty. He has explained that the felony murder specification "cast[s] doubt about whether our criminal justice system is providing 'equal protection under the laws.'"<sup>20</sup>

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<sup>19</sup> Former Justice Paul Pfeifer has repeatedly criticized the use of the felony-murder aggravator. *See, e.g. Sate v. Murphy*, 91 Ohio St.3d 516, 581 (2001).

<sup>20</sup> Bob Taft, *Ohio legislators should enact proposed death-penalty reforms: Bob Taft, former Ohio Governor (opinion)*, cleveland.com (Nov. 6, 2016) <https://www.cleveland.com/metro/2016/11/ohio-legislators-should-enact.html> (Exhibit 36). In addition, former Ohio Attorney General Jim Petro believes that adoption of the Task Recommendation to eliminate the felony murder rule "would address much of Ohio's disparity in death sentencing." Jim Petro, *Death penalty is in decline, but problems remain (opinion)*, 2016 WLNR 27739865, The Columbus

“Academic commentators, with divergent views about the death penalty have joined in rejecting felony-murder as a basis for death eligibility.” Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fla. L. Rev. 719, 764 (2007). Professor Robert Blecker, a death penalty advocate, has explained why the felony murder aggravator, used to sentence Mr. Lott to death, is a flawed basis for imposing the death penalty:

The fact is that the felony murder aggravator does not belong in any proper death penalty statute. Any time you need to get to the death penalty because the person deserves it--such as rape, which should independently qualify as torture-with a well-drawn statute, you can get there. But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as the “worst of the worst.” The felony murder aggravator should be dropped entirely.

Robert Blecker, Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?* 24 Pace L. Rev. 107, 176 (2003).

The Ohio Supreme Court’s Joint Task Force on the Death Penalty likewise concluded that the felony murder specification is flawed. It recommended eliminating the death penalty specification in Ohio for offenses such as Aggravated Burglary, the sole basis for sentencing Mr. Lott to the death penalty. (Joint Task Force Final Report & Recommendations, Task Force Recommendation 33 p.14, Exhibit 4). The Joint Task Force reasoned that this specification results in capital charges being brought in cases

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Dispatch (Sept. 10, 2016) (Exhibit 37). Former Director of the Ohio Department of Rehabilitation and Correction, Terry J. Collins, has said: “The offenders in our prisons I encountered who committed unimaginable crimes were usually not on Death Row.” Terry Collins, *Ohio’s former prisons chief: End the death penalty*, WCPO.com (Feb. 24, 2016) <http://www.wcpo.com/news/opinion/ohios-former-prisons-chief-the-death-penalty-isnt-worth-fixing> (Exhibit 38).

that are not “the worst of the worst,” and cited data showing that prosecutors and juries overwhelmingly do not find felony murder to be the worst of the worst murders. Despite this unified belief, prosecutors continue to seek the death penalty based on the felony murder specification and sentencers are bound to apply it to a case if the facts are present.

The felony murder specification contributes to the disparate imposition of Ohio’s death penalty against black defendants. (*Id.*). A black perpetrator such as Mr. Lott who kills a white victim in the course of a robbery is “3.8 times more likely to receive a death sentence than those who kill blacks.” (Joint Task Force Final Report & Recommendations, Task Force Recommendation 29 p.13, Exhibit 4). Such a stark racial disparity may not yet constitute a violation of the U.S. Constitution, *see, McCleskey v. Kemp*, 481 U.S. 279 (1987), but it is a disturbing fact that requires Governor DeWine to look especially closely at whether Mr. Lott was sentenced to death because his crime was truly the worst of the worst, or because he is a black man who killed a white.

The manner in which racial factors affect Ohio’s death penalty system can be seen by comparing the Cuyahoga County Prosecuting Attorney’s disparate approaches to Mr. Lott’s request for clemency and that of Arthur Tyler, whose death sentence was appropriately commuted by Governor John Kasich in 2014. As the Parole Board noted in its clemency recommendation for Mr. Tyler, the Cuyahoga County Prosecuting Attorney supported a favorable recommendation for Mr. Tyler. The same office does not take the same position about Mr. Lott’s case, although it is hardly clear that Mr. Tyler’s clemency request was qualitatively different from the

request of Mr. Lott. Mr. Tyler was convicted of murdering an elderly, vulnerable individual of “good character” during the course of a robbery. (Recommendation of Ohio Adult Parole Authority *In re: Arthur Tyler* p.25 (April 29, 2014) (Exhibit 39). While Mr. Tyler continued to assert his innocence, the Cuyahoga County Prosecutor’s Office maintained that Mr. Tyler had committed all of the acts for which he was sentenced to death. Tyler did not express remorse and the victim’s family strongly opposed clemency. The Prosecutor’s Office, however, did not oppose commutation by Governor Kasich.<sup>21</sup> Notably, Mr. Tyler’s victim, Sander Leach, was black. And the Prosecuting Attorney told the Parole Board that life without parole was the appropriate sentence for Mr. Tyler.

Mr. Lott, like Mr. Tyler, caused the death of a vulnerable, elderly man—but a white man. In contrast to Mr. Tyler’s offense, Mr. Lott’s killing occurred without premeditation or planning. Unlike Mr. Tyler, Mr. Lott did not bring a weapon with him to burglarize Mr. McGrath’s home. Mr. Lott didn’t even know the home would be occupied. Mr. Lott takes complete responsibility for his actions. And importantly, the victim’s extended family and priest strongly support Mr. Lott’s request for clemency. Finally, unlike Mr. Tyler, Mr. Lott has a stellar record of institutional adjustment and

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<sup>21</sup> According to the prosecutor, Mr. Tyler murdered his victim using a gun and bullets acquired from two separate sources when planning the robbery. (*In re: Arthur Tyler* p.3, Exhibit 39). He shot the victim twice and had a long history of robbery and violence. (*In re: Arthur Tyler* pp.4-6, Exhibit 39). In addition, Mr. Tyler had what can only be described as a terrible history of institutional adjustment, and he denied responsibility for his offense. (*In re: Arthur Tyler* pp.7-10, Exhibit 39).

of working to help others avoid his own mistakes. Nevertheless, the Cuyahoga County Prosecutor who lobbied for Mr. Tyler’s clemency, now opposes clemency for Mr. Lott.

Race, as the Supreme Court Task Force recognizes, is an invidious factor in determining who among those convicted of first-degree murder in Ohio will be executed. Well-meaning people are often unaware of the effect that race has on many every-day decisions.<sup>22</sup> Even years after the trial, in its opposition to Mr. Lott’s request for clemency in 2002, the State highlighted the white race of other persons whom Mr. Lott burglarized before committing the crime against Mr. McGrath.<sup>23</sup> That is why the Ohio and Cleveland branches of the NAACP have placed their support behind Mr. Lott’s clemency request. (NAACP Support Letter, Exhibit 41). Viewed through a dispassionate lens of equity and fairness, it is difficult to say that Mr. Lott deserves the punishment of death for a crime that plainly is not “the worst of the worst.” Governor DeWine can, and should, prevent the improper use of the overly-broad and disparately-used felony murder specification in this case where it is the only basis for the death sentence.

### **Conclusion**

By commuting Gregory Lott’s death sentence, Governor DeWine would be strengthening Ohio’s criminal justice system in fundamental ways. Granting clemency

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<sup>22</sup> “Extensive research has documented the disturbing effects of implicit racial biases in a variety of realms ranging from classrooms to courtrooms to hospitals.” Understanding Implicit Bias, Kirwan Institute, The Ohio State University, available at: <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>

<sup>23</sup> State of Ohio’s Information for Gregory Lott’s Clemency Hearing p.12 (Aug. 12, 2002) (Exhibit 40) (reiterating that the victims were all white).

would demonstrate that the State of Ohio considers and respects the sincere, faith-based wishes of the victim's family to spare Mr. Lott; that Ohio's system of justice is refined enough to treat those with severe mental handicaps in a humane, fair manner; that Ohio does not tolerate prosecutorial misconduct in the pursuit of a death sentence or condone defense attorney misconduct by allowing unjust procedural barriers to legal relief; and that the State will not be complicit in carrying out an execution tainted by the possibility of racial bias. For all of these reasons, Gregory Lott respectfully requests that Governor DeWine commute his sentence to life imprisonment.

Sincerely,



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