

## Which Side Are You On?

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On the night of June 19, 1989, Terrence Richard and Diamond Marteen, two young black men, were murdered execution style in the Mt. Healthy area of Cincinnati. After a brief investigation, 19-year old Shawn Lamar Hawkins of Springfield Township was arrested and after procedural delays put on trial for the murders. Based upon dubious testimony and mishandled physical evidence, Hawkins was convicted of the murders as well as of armed robbery, although neither a gun nor money was ever found. He was condemned to death.

Unfortunately for Hawkins, only a few years before, the Republican-dominated Ohio legislature had re-instituted the death penalty. Hamilton County enthusiastically began to seek it in a large number of cases. At one point in time, the County had put more of its citizens on death row than all but six or seven American states.

Hawkins's case bounced up and down the appeals ladder. While Hawkins lost every round, as the years went by, more and more people expressed doubt about the fairness of his conviction. Prominent among the doubters were Republican Ohio Supreme Court Justice Paul Pfeiffer, one of the architects of the reconstituted Ohio death penalty, and Republican Chief Justice Moyer. During this period, Hawkins's defense efforts were led by a shifting cast of lawyers, including private counsel, the Ohio Public Defenders Office located in Cincinnati, and the State Ohio Public Defenders Office out of Columbus.

I knew nothing of this as I ran into prominent lawyer and fund raiser for both parties, Democratic and Republican, Stanley Chesley one morning. I asked him how

his wife, my friend and former law partner, was doing. He related that the Honorable Susan J. Dlott, appointed to the federal bench by President Bill Clinton, would love to hear from me. I called on Susan in her chambers dotted with paintings, weavings, rugs, pictures, all portraying her now deceased beloved Cavalier King Charles spaniels, Dickens and Crumpet. Before I knew it, Susan had prevailed upon me to undertake the representation of Shawn Hawkins in his recently initiated federal habeas corpus proceeding.

Over the following 14 years, we pled Shawn's case before the Federal District Court; the Sixth Circuit; and the U.S. Supreme Court. My partner Bob Smyth and I took the depositions of four judges and many prosecutors and conducted extended hearings before Republican Magistrate Judge Michael Merz in Dayton, Ohio. In a carefully crafted opinion Merz eventually ruled that Hawkins's sentence should be thrown out. On appeal Democratic Judge Dlott affirmed Merz's ruling in all essential respects. After appeal to the Sixth Circuit, a panel of three Reagan and Bush appointees, "about the most conservative panel you could draw," a colleague told me, overturned Dlott's ruling and re-imposed Hawkins's death sentence.

We applied for certiorari to the U.S. Supreme Court. On a fine November weekend in 2009, my wife and I were in our Nation's capital trying to imbue two of our grandsons with that patriotic feeling that comes from visiting our beautiful, stately national monuments. As we toured the Lincoln and Jefferson Memorials, the National Archives, the Smithsonian, the Capitol, the White House, Arlington, only a few miles away in its Saturday morning conference, an otherwise hopelessly split U.S. Supreme Court unanimously determined not to take up Shawn Hawkins's case and to let him die.

After 12 years of effort in which my office and other law offices generated three file cabinets of pleadings, Mr. Hawkins was at the end of the line. No court was open to him. Death was near.

At this point, some of you may be feeling a little bit restive. You are not used to hearing a lawyer refer so baldly to the legal affiliation of judges. While we know the ordinary proclivities of the two political parties toward the two issues framing the beginning and end of life, abortion and the death penalty, in which one party is alternatively pro-death and pro-life and the other alternatively pro-life and pro-death, we ordinarily don't speak that way of the judicial system, which we would like to think is non-partisan.

I have taken a different course tonight and am sharing with you the cold, brutal, political calculations that figured in this case. And I must confess to you how wrong I was about some of my own preconceptions in making these calculations.

I have been an enthusiastic Democrat for most of the last 50 years, although I prided myself until the last ten years or so in voting for "the man rather than the party." It has only been since the crucifixion of Bill Clinton by Newt Gingrich and his henchmen that I have found it increasingly difficult to pull the lever for any Republican. With that in mind, I looked forward through blue-colored glasses to my last campaign to save the life of Shawn Hawkins.

That campaign involved a clemency petition to the Governor of the State of Ohio. When Shawn ran out of options in the court system, our Governor was Democrat Ted Strickland, approaching the end of his first term. I calculated that Shawn's only hope was for a re-elected Strickland to grant him clemency. Strickland, of course, was facing

a difficult campaign in a difficult year for Democrats, challenged by former Republican Congressman and Fox News Host John Kasich. Kasich came from a working class Pennsylvania family and attended Ohio State University. He served for years in the Ohio Legislature and U.S. House, where he occasionally cooperated across the aisle with Leon Panetta and others. After flirting with running for President, he went into private life to make his fortune, first on Fox News and later with the ill-fated Lehman Brothers. Not a universally revered figure, a man who reliable sources told me had few real friends, Kasich is blunt and idiosyncratic and can be abrasive, even insulting. Kasich ran considerably behind the Republican ticket but even so defeated a tired Ted Strickland by a narrow margin.

Thus after the election, I was not optimistic about Shawn's chances. While clemency in death penalty cases is seldom granted in Ohio, it has been more often granted by Democrats than Republicans. For example, my former colleague, friend and client, Robert A. Taft, II, granted death row clemency only once during his eight years as Governor. Strickland granted such clemency on five occasions over four years, although he could be unpredictable. To add to our difficulties, the Ohio Parole Board we would face had a strong majority of Taft appointees. As best I could reckon, there were only two persons who came to the Board during Strickland's term as Governor.

The Parole Board plays an important role in Ohio clemency applications. During his final days in office, Democratic Governor Anthony Celebreeze had liberally granted clemency to a number of convicts, including eight persons on death row. This had raised the ire of the Republican legislature and other right-thinking folks and they had sponsored a successful amendment to the Ohio Constitution which limited the clemency

power of the Governor, allowing him to act only after the Parole Board had made a recommendation. Preserving the balance of powers between the Executive and Legislative branches, the Governor did not have to follow the Parole Board recommendation, but he could not act before it made one. This brought an end to the time-honored practice probably starting in the John Adams's administration of midnight appointments and grants of clemency, which we saw played out in spades during the waning hours of Bill Clinton's presidency.

As Shawn's date for execution was set early in 2011 for June 14 of that year, we faced the daunting task of winning over a Republican-dominated Parole Board and a quick-tempered Republican Governor who had stated during the campaign that he intended to hue to the recommendations of the Parole Board in granting clemency.

A clemency application starts off with filling out a two-page form that you download from the Ohio Parole Board's website, but it certainly does not end there. In the course of going back over every shred of evidence that we had accumulated, we constructed a six-inch thick binder of documents and exhibits generated after weekly meetings at the home of Shawn and his parents, enlisting the help of do-gooders far and wide, from England and the Netherlands to the four corners of the United States.

As I thought about how to reach the Parole Board and Governor Kasich, I amassed letters and petitions from common citizens and attempted to enlist the aid of anyone I thought might have some influence in Columbus. Tonight I want to particularly point out and thank three public figures who played a signal role in our eventual success. All three are Republicans. Certainly two of them have no qualms about the death penalty. The first person I sought to enlist was State Senator Bill Seitz, a former

law school classmate. As some of you probably know, Bill is a cantankerous gent who always calls them as he sees them. He is sometimes not in favor with the Republican establishment in Columbus and was not at this time as he had fallen out with Kasich and his colleagues over Senate Bill 5. At my request and after careful examination of the facts, Bill wrote a very strong letter to the Parole Board supporting Shawn's plea for clemency. During our conversations about this, there was not one word from Bill about how this would affect him politically. He did what he thought was right.

Jim Petro, former Ohio Attorney General and currently Chairman of the Board of Regents, played a quieter but equally important part. After early discussions with Petro about a letter in favor of Shawn, I heard nothing further from him. However, as the clemency process went on, reliable sources inside the State House told me that Jim Petro spoke clearly in favor of clemency for Shawn during cabinet meetings. After it was all over, I heard from Jim who expressed his pleasure at the outcome. I have no doubt that he played a positive role in saving Shawn's life, taking a position that could have been but ultimately was not opposed to that of the Governor.

The final person whose help I enlisted is a member of this Club, Ohio Secretary of State, Ohio Treasurer, candidate for Governor, conservative commentator, J. Kenneth Blackwell. Ken is more closely aligned with the far right than Bill Seitz or Jim Petro, but when I approached him, I found him thoughtful and receptive. Before he wrote a letter on Shawn's behalf, Ken did his own investigation not only of Shawn's case but of his behavior as an inmate in the Ohio penal system over the last 22 years. Ken related, not without a smile, that sources in the Department of Corrections told him that Shawn was a model citizen. While I attempted to keep Ken's advocacy of Shawn's

case below the radar for Ken's benefit, his name and that of Bill Seitz did appear in the media. Despite any potential fallout to Ken, he, like Bill, was a standup guy and did not murmur one word of regret for supporting Shawn's cause.

Eventually, in May, 2011, my colleague Robert Smyth and I drove to Columbus along with 12 members of Shawn's family dressed in their Sunday best for our hearing before the Parole Board. The hearing lasted 10 hours. I will remember every minute of it until my last day. The following week, at precisely the appointed hour, we received a telephone call from Cynthia Mausser, Chairman of the Parole Board and a Strickland appointee. She and her colleagues had voted unanimously in favor of recommending clemency for Shawn.

Even with that, there was no guarantee that John Kasich would grant Shawn clemency in this, his first death penalty case. While the Parole Board had made its recommendation, the unpredictable Kasich did not have to follow it. Shawn, his family and I spent four nerve-wracking weeks waiting for the Governor to hand down his decision.

During the course of the next four weeks, I was treated with the utmost courtesy and candor by the Governor's legal staff, as I had been throughout. They gave me all the information they could without violating confidentiality and, frustratingly, without giving me any indication of the Governor's final decision.

Less than a week before the scheduled execution, while on a plane to San Francisco to attend the wedding of the daughter of Literarian Jim Fitzgerald, I learned that Governor Kasich had granted Shawn clemency. This was a great day, my best day as a lawyer these past 33 years.

In Kasich's reported remarks on the clemency decision, he mentioned that his own life had been touched by tragedy, the death, I later learned, of his parents in a 1987 automobile accident. This surprising fact, curious to me at the time I heard it, had, I believe, a bearing on Kasich's decision. I was wrong about John Kasich's sensitivity and essential humanity.

As I ruminate on the outcome of Shawn's case, I tax myself with my own misconceptions. Democrat that I am and Democrats that Shawn and his family certainly are, Shawn owes his life to Republican Governor John Kasich. Shawn was supported in his efforts to save his life by good Republicans J. Kenneth Blackwell, William Seitz, James Petro, Paul Pfeiffer, the late Thomas Moyer and others. The sentencing judge, the late good Republican Norman Murdock, shook Shawn's hand at one of the hearings in Dayton and wished him luck.

The title of this paper: "Which Side Are You On?" It's a union organizing song, written not so long ago and not so far away. Penned at her kitchen table by Florence Reese, wife of union organizer Sam Reece, one night after she and her children had been terrorized by "Bloody Harlan" Sheriff J. H. Blair during the mine wars of 1931, the song goes through my mind, no, my soul, whenever I am involved in a case like Shawn's. I guess I am afraid sometimes that I might stray from the true path, and go over to the dark side. Florence's song sets me right.

As this proceeding went forward, my dark thoughts were that a Republican Governor and Republican appointees would never grant clemency to a black man convicted of murder. How wrong I was. How wrong we all are in this sad period of American and Ohio politics that we do not see the essential humanity in those on the

other side. This is not “bloody Harlan”; these are not the mining wars of the Great Depression. Unless we want them to be, unless we make them so. Isn’t it time that we take such a thing as the maverick tendencies John Kasich displayed here as an indicator of the need to see both sides of political questions, to apply lessons learned in our own lives to the decisions we make about the lives of others who disagree with or differ from us.

Of course, if that had occurred in 1989, this story would never have had to be written. Shawn Hawkins would be a free man.

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