

*Misapplication of Power and the Death Penalty in Georgia*

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**Abstract**

In Georgia, as well as many parts of the United States, the misuse of power is often centered on who goes to prison and who goes free. Worse is the misapplication of power in connection with the death penalty, which is still legal in 30 of the American states, over who gets life with or without parole and who is executed. The arbitrary nature of the application of the death penalty is fatally ironic. Under consideration are two cases, that of Emma Ruth Cunningham and the process of parole and that of Kelly Gissendaner who is still on death row after two postponements of her sentence of execution.

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## **Introduction**

Although still very divided, Americans are moving toward the abolition of the death penalty. Yet in this evolution toward a more humane viewpoint, Justice is neither blind nor balanced. The legal process available to someone given the death penalty in Georgia, follows the judicial procedures used all over the US. After the appeals route, there is one significant difference which makes the progression to execution or commutation in Georgia even more Draconian. In August 1953, Georgia voters ratified a landmark amendment to the State Constitution. In that document, the sole authority to grant paroles, pardons, reprieves, to commute sentences, including death sentences, to remit sentences, and to remove disabilities imposed by law was given to the State Board of Pardons and Paroles. This Board, which also deals with clemency, is a five-member group appointed by the serving Governor “for staggered, renewable seven-year terms subject to confirmation by the State Senate”. Each year the board elects one of its members to serve as chairman.” Once appointed, this group does not answer to the Governor or any other elected state official. This gives them unrestricted power over paroles and more significantly over who on death row lives or dies at their discretion. <sup>1</sup>

Statements from lawyers on behalf of the defendant and those concerned with the victims are held privately. There is no opportunity for additional information to be presented after the fact from either side. Not Even additional legal briefs can be added. Each of the five board members decides even which cases to review and when selected each member reads an inmate’s case file and comes to an independent decision about whether to grant or deny parole. The board’s majority opinion of three determines whether the inmate will be released or granted clemency. <sup>2</sup> It is almost impossible to obtain any information about how decisions are made. The Board really does hide state secrets. Only personal connections and hard won interviews allow even a glimpse of the truth.

# States and the death penalty

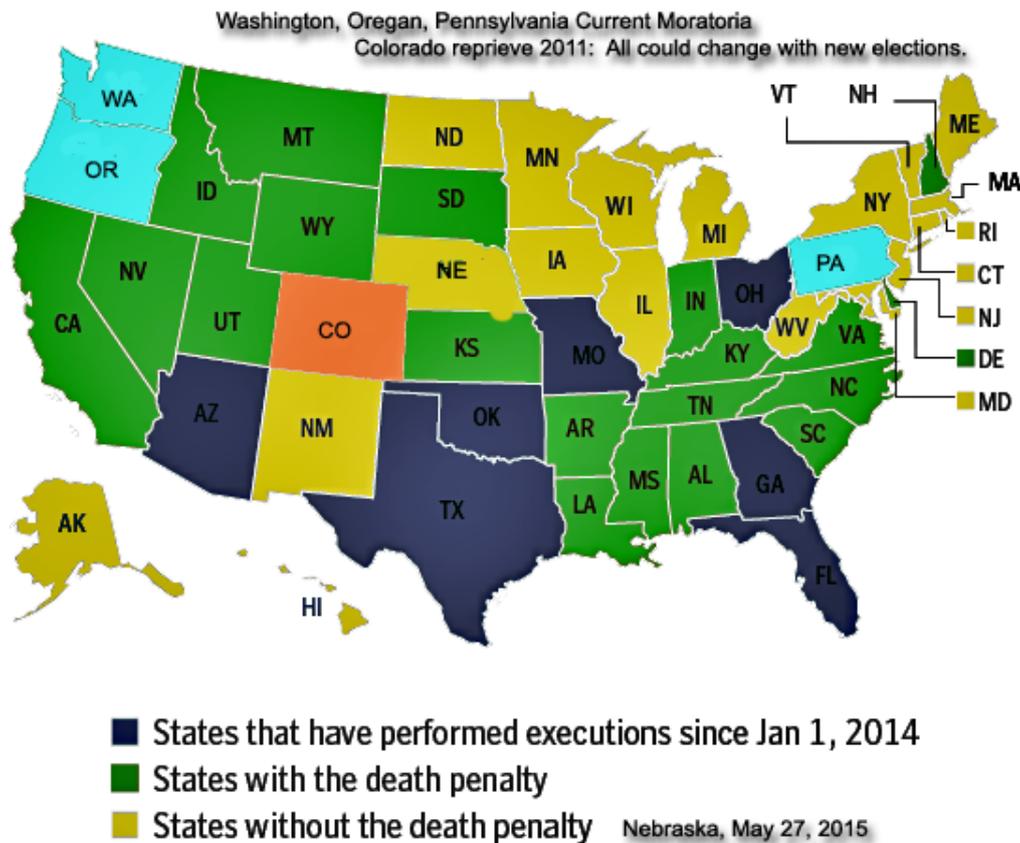


Figure 1: States with the death penalty 2015

## The Road to Parole: Emma Ruth Cunningham

In a previous presentation at the European Social Sciences conference in 2014, I discussed a case study about Emma Ruth Cunningham, a young African American woman, who was convicted in 1979 of the murder in Lincolnton, GA of a prominent white businessman, William Beal Crawford. Emma spent 3 ½ years on death row and after a retrial in 1983, granted because of erroneously introduced evidence, was given a plea bargained sentence of life with the possibility of parole. There was never any evidence but circumstantial against her and considerable proof that she was not guilty. Emma Cunningham’s former husband James Cunningham confessed to killing Crawford and was also placed on death row. James was without doubt guilty of the crime. Yet under a federal appeal based on mental incompetence his sentence was also commuted to life with parole.<sup>3</sup>

Emma was assisted in her defense at her second trial by the addition of the famous *Dead Man Walking* ACLU attorney Millard Farmer to her coterie of lawyers. In addition to the lack of physical evidence against Emma, the US Supreme Court case *Enmund v. Florida* explicated the idea of proportionality of sentencing in the commission of a felony murder. This case examined the issue of death as valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life. The Court’s response was that death

was a “disproportionate” punishment. This case had direct bearing on Emma's retrial but it was not used as an argument. Instead a compromise decision of the plea of life with the possibility of parole was determined, based on the strong possibility that if Emma’s case went to actually went to a jury, in the racially prejudiced South the outcome might end with a second death sentence, with little or no chance of another reversal. An examination of the circumstances of Emma Ruth Cunningham’s case offers a rare look at the usually secret workings of the parole process.<sup>4</sup>

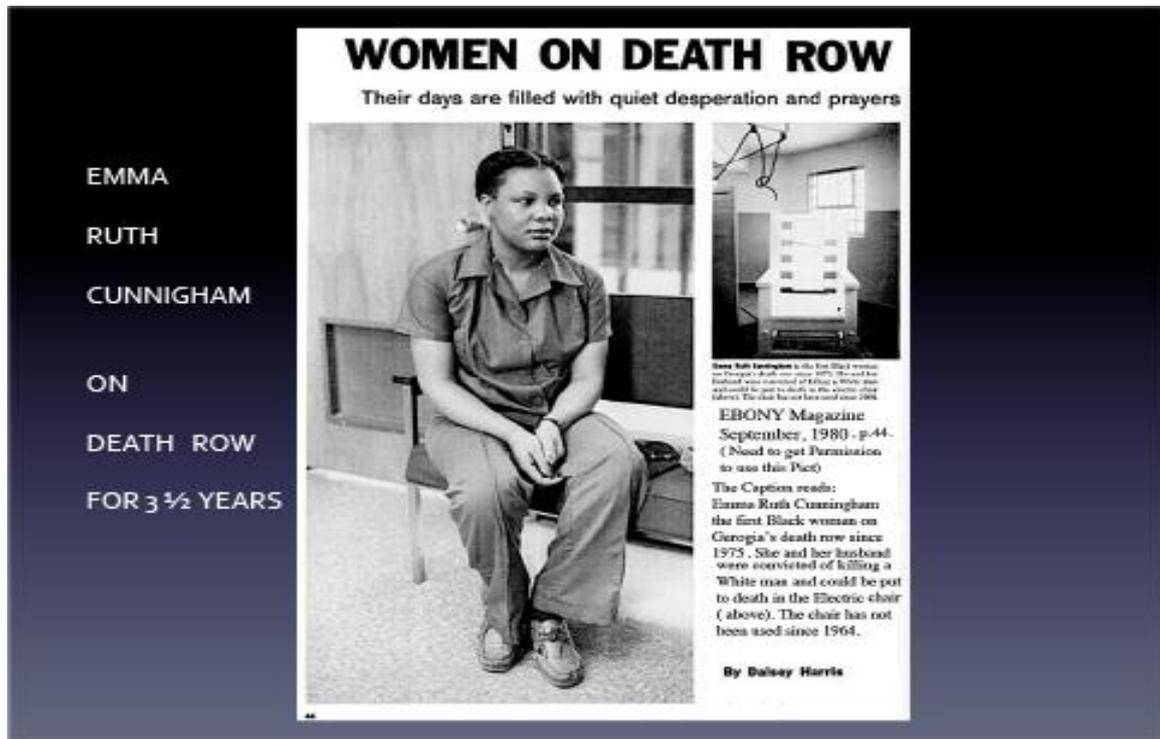


Figure 2: Ebony Magazine story on Emma 1980.

In 1983, Emma was transferred to a minimum security prison in Milledgeville, GA, which was a part of the Georgia Women's Correctional Institution called Colony Farms. She was an exemplary inmate who soon won fame as the soloist for the prison choir directed by Chaplain Susan F. Bishop. Emma’s remarkable soprano voice gained her the nickname of the Southern Songbird.<sup>5</sup> Her positive influence over other prisoners led one of the prison counselors, Luz Bolivar Roman to write in 1987 a letter of application to the Parole Board on Emma’s behalf, which was submitted with other supporting documents. Luz Roman enumerated that:

Inmate Cunningham’s participation in other therapeutic parts of the program at the institution has been outstanding. Participation in recreational and religious activities has been far above average. She has participated in drama festivals, Bible Studies, weekly worship services, and self-awareness groups. She always takes a leadership role in the religious activities in which she participates. Her most notable accomplishment in this area has been her participation in the Colony Farm Gospel Choir.<sup>6</sup>

I knew from experience,” Luz said “that the board was going to object because Emma had been on death row.” She continued, "I wrote to them that this objection should not be entertained in view that the Georgia Supreme Court had overturned this death

sentence in 1983 and that a new trial resulted in a life sentence with the possibility of parole." Luz argued that, "The stigma of having once been under the death sentence should not be held against her or be a factor in considering her for parole." <sup>7</sup>

Despite all of the recommendations and additional legal assistance from a prominent parole lawyer, named James Pilcher, Emma's first bid for parole was rejected on August 7, 1987, with no explanation of the refusal. She was informed in a letter signed by the Parole Board Chairman at that time, Wayne Snow, Jr. that she could apply for reconsideration in January 1994 after she had served 15 years in prison. <sup>8</sup>

Remarkably, in 1979, District Attorney Kenneth Goolsby, who had been the prosecutor at Emma's first trial, and Judge Robert Stevens, who handed down her death sentence that same year, argued in 1976 that a modification of the 1953 Georgia Constitutional Amendment that made the proceedings of the State Board of Pardons and Paroles confidential was "likely illegal." Over the years, other Georgia politicians have campaigned to weaken or abolish the Parole Board. From time to time, the legislature has threatened its, usually after controversial decisions. To date, no legislative attempts or public objections have dented the power of the Board of Pardons and Paroles. <sup>9</sup>

Despite the disappointment of parole denial, Emma continued to attract positive attention because of her unusually powerful voice. The *Atlanta Journal Constitution* sent a reporter to write a story about her. In a series of feature articles including one titled, "Update on Singer Emma Cunningham, who is serving a life sentence in the Georgia Women's Correctional Institution" the reporter, quoted Ruth Walker Hood, the now deceased older sister of the Pulitzer Prize winning author Alice Walker. Mrs. Walker, who had invited the prison choir to sing at the Georgia premier of the film version of her sister's book *The Color Purple*, said about Emma Cunningham, "I was blown away by her voice... It was so clear, so pure, and so sweet. And I asked myself, 'How could a voice like that be in a place like this?' " <sup>10</sup>

## State Board of Pardons and Paroles

Wayne Snow, Jr.  
Chairman



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ATLANTA, GEORGIA 30334

Mrs. Mamie B. Reese  
Member  
James T. Morris  
Member  
Mobley Howell  
Member  
Michael H. Wing  
Member

August 7, 1987

Ms. Emma Ruth Cunningham BP-122984  
Women's Correctional Institution  
P.O. Box 218  
Hardwick, Georgia 31034

Dear Ms. Cunningham:

Thank you for your letter concerning your parole. I understand your disappointment at being denied parole. However, the Board carefully considered all available information before a decision is made. Also I must regretfully say that the information in your letter is not sufficient reason for the Board to reconsider your case before your next consideration date set by the Board.

When you are again considered for parole in, January, 1994 I hope the facts in your case will justify the Board's granting parole.

Very Truly Yours,

Wayne Snow, Jr.  
Chairman

WSjr./pl

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Figure 3: Parole Denial

Ruth Walker Hood, appalled that Emma would not be eligible to apply for parole again until 1994, began to apply her considerable resources to the situation. Mrs. Hood said, "If you want to get something done, you also have to have good information and good publicity. I hired a Private Investigator and a PR firm in Conyers, Georgia. They found some of Emma's records for me and we obtained copies of both the local newspaper and Ebony magazine stories on Emma. Mrs. Hood also knew if she were going to get the Parole Board to look at Emma's case that she was going to have to have expert legal counsel. At considerable expense, she hired a well-known Florida attorney, James V. Johnstone, who was also licensed in Georgia, to represent Emma. Johnstone wrote a multi-page motion submitted to the board on

October 23, 1989, entitled "Request for the Reconsideration of the Life Sentence of Emma Ruth Cunningham Under the direction of Ruth Walker Hood the substantial file on Emma Cunningham was submitted to the Parole Board. When the Parole Board got the information that Mrs. Hood had assembled, she complained that, "They just stuck it in a file and didn't even look at it," Generally speaking, an inmate with a life sentence who is denied parole usually will face an uphill battle to secure it at a future time. As a rule, the inmate will not even be considered at a date earlier than the one stated in the rejection. 11

Emma was allowed to apply for parole because her death sentence had been overturned, but the attitude of the parole board was based on her pre-appeal conviction. "Someone on the board told me that they had no plans to release Emma at all—ever—because she was a convicted murderess." Ruth continued, "The Parole Board don't just release murderers back on the street. Particularly, when no one is pullin' for Emma. No family. No friends. nobody." She added, "They expected to keep her in jail for 25 years.<sup>12</sup>

"I was the first somebody to approach the board and say, 'Let this woman go,'" Ruth Hood remembered. "So I found out there was one African American woman, Bettye O. Hutchings, on the parole board. I called her personally." Mrs. Hutchings was married to a prominent funeral director in Macon, Georgia. Their facility had been in business since 1895 and the funeral home had an excellent reputation. Because of the longevity of the family business and her own public service, Mrs. Hutchings, who is now the director of the business, had well-deserved status in the Macon community and beyond. "When I spoke to Mrs. Hutchings," Ruth Hood says, "I asked her if had they looked at the petition that Mr. Johnstone had submitted and all the supporting documents." She said, "No, the board has not looked at the file because you know it's pointless." She pointed out that one of the main considerations in giving an inmate parole was a good residence plan which had to include, among other things, that the parolee would have access to necessary social services, transportation, to a job, and above all, a stable environment. "I don't think that you know," Bettye Hutchings said, "that Emma Cunningham's never going to ever get out because nobody wants her." Ruth said, "I want her. You know, if it takes becoming her surrogate mother and giving her my home as her home, I will reach for her. I will take her if you all will please look at the files. You know?" Ruth admitted, "I just broke down over the phone and just cried and just cried and begged Mrs. Hutchings to please look at Emma's file. So she said she couldn't promise me nothing, but she would see what they could do."<sup>13</sup>

Emma relates, "I know that a lot of people including Chaplain Bishop, Luz Bolivar Roman and Mrs. Ruth Walker Hood were all still working to get me out on parole, but I don't hold out much hope. One of the prison Chaplains got permission for me to go to Atlanta. When I ask why? She says, 'To sing *Happy Birthday*.' I just stare. I done sung for Governor Joe Frank Harris and for the premier of *The Color Purple* movie. Governor Harris even gets me to sing his mama's favorite song, *He's Coming Home Again* twice. "What the hell good they think it going do for me to sing that bitty song, but I always do what they tell me," Emma says ruefully. "We go to a big building, on an elevator and into an office that say Department of Corrections. There is a whole bunch of people in the room. The Chaplain introduces me to a nice black lady named Mrs. Bettye Hutchings. I sing *Happy Birthday* to her with all my best up high notes.

She smile, shake my hand and they all clap. We turn around and go back to Colony Farm." Emma says, "It don't make no never mind to me. I get out of the prison. I get a nice lunch," she laughs. "I done got used to singing what and where ever." Emma did not realize it, but she had just met the Parole Board. <sup>14</sup>



Figure 4: Ruth Walker Hood



Bettye Hutchings

The second time her case was presented the Board made a decision in Emma's favor and she was granted parole in 1990. I have known Emma almost 25 years. If anyone ever deserved parole it was she. While in prison both on and off death row her life was an example of how to overcome adversity. She now works in prison ministry, and who after all could be better qualified. She continues to be the Southern Songbird as she was called during her years in prison, inspiring others with her voice and positive message.

The unsupervised power of the Georgia Board of Pardons and Paroles and the inconsistency of its decisions is clearly illustrated by the circumstances of Emma's parole. She was exactly the same person in 1987, when she was denied parole in terms of her behavior and contributions, as she was in 1990 when the Board granted her freedom. For Emma to finally be paroled it took someone with money and prominence (Ruth Walker Hood) to hire a detective, an influential parole lawyer who wrote in Emma's defense, a special meeting by Emma with the Parole Board and personal sponsorship by Mrs. Hood. She was the only one of five women on death row with her to be paroled in under 20 years. At a concert at Thankful Baptist Church in Decatur, Georgia, the first Sunday she was out on parole, Emma sang to the congregation with clear, upward spiraling notes about what was now true of her life, "I sing because I'm happy. I sing because I'm free. God's eye is on the sparrow, and I know he watches me." <sup>15</sup>

## State Board of Pardons and Paroles

Wayne Snow, Jr.  
Chairman



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Member  
Bettye O. Hutchings  
Member  
David C. Evans  
Member  
Timothy E. Jones  
Member

November 20, 1990

Ms. Emma Ruth Cunningham,  
EF-122984  
Metro IC

Dear Ms. Cunningham:

After careful investigation and deliberation, the Parole Board has tentatively decided to release you under parole supervision. This means you will be allowed to serve the rest of your sentence(s) outside of prison where you may earn your own living and lead a normal life.

You are scheduled for release on parole on November 30, 1990  
This date is tentative until actual release.

Your Certificate of Parole will be delivered to you soon by your Superintendent or Warden, who will explain the standard conditions of parole which are found on the back of the Certificate and any Special Conditions which are found on the front of the Certificate. These conditions will be explained to you again when you first contact your Parole Officer. Pay attention to all of these conditions and make sure they are explained to you fully. Remember that the only way you can go back to prison is by violating one of these conditions. The only one who can send you back is you!

The name and address of your Parole Officer will be found on the front of the certificate. Report immediately as required by the conditions of parole and follow all instructions. You will find the officer to be a friend and advisor.

You have our best wishes in your efforts to begin a new life. You went to prison because you failed to abide by society's rules. We think you are ready to abide by these rules and be an asset to your community instead of a liability. This is why we grant you parole.

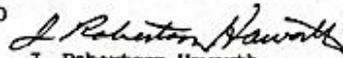
We wish you success and happiness.

Sincerely,

STATE BOARD OF PARDONS AND PAROLES

WAYNE SNOW, JR., CHAIRMAN  
JAMES T. MORRIS, MEMBER  
MRS. BETTYE O. HUTCHINGS, MEMBER  
DAVID C. EVANS, MEMBER  
TIMOTHY E. JONES, MEMBER

FOR THE BOARD

  
J. Robertson Heworth  
Director of Central Operations

cc: Warden

EQUAL OPPORTUNITY EMPLOYER

Figure 5: Letter Granting Emma Parole

## Death Row and Death Warrants: Kelly Gissendaner

Unfortunately because of the seemingly arbitrary pronouncements of the Georgia Board of Pardons and Paroles, many outcomes do not have the positive results of Emma Cunningham's case. Assessments often are concerned not just with freedom or continued time in prison but with the irreversible decisions of who lives and who dies. The State board not only handles paroles, it has the same complete and unsupervised control over Pardons and Commutation of the death sentence According to the State Board of Pardons, in its 60-plus year history, it has granted less than 5 pardons based on innocence.<sup>16</sup>

The Parole Board has the sole constitutional authority to commute, or reduce, a death sentence to life or to life without parole. Only after an inmate appears to have exhausted all appeals and other judicial avenues of relief will the Parole Board even consider granting a commutation to a death-sentenced inmate. At that time, the condemned inmate's attorney may petition the Board to grant executive clemency to his or her client. Commutation is even more rare and always controversial.<sup>17</sup>

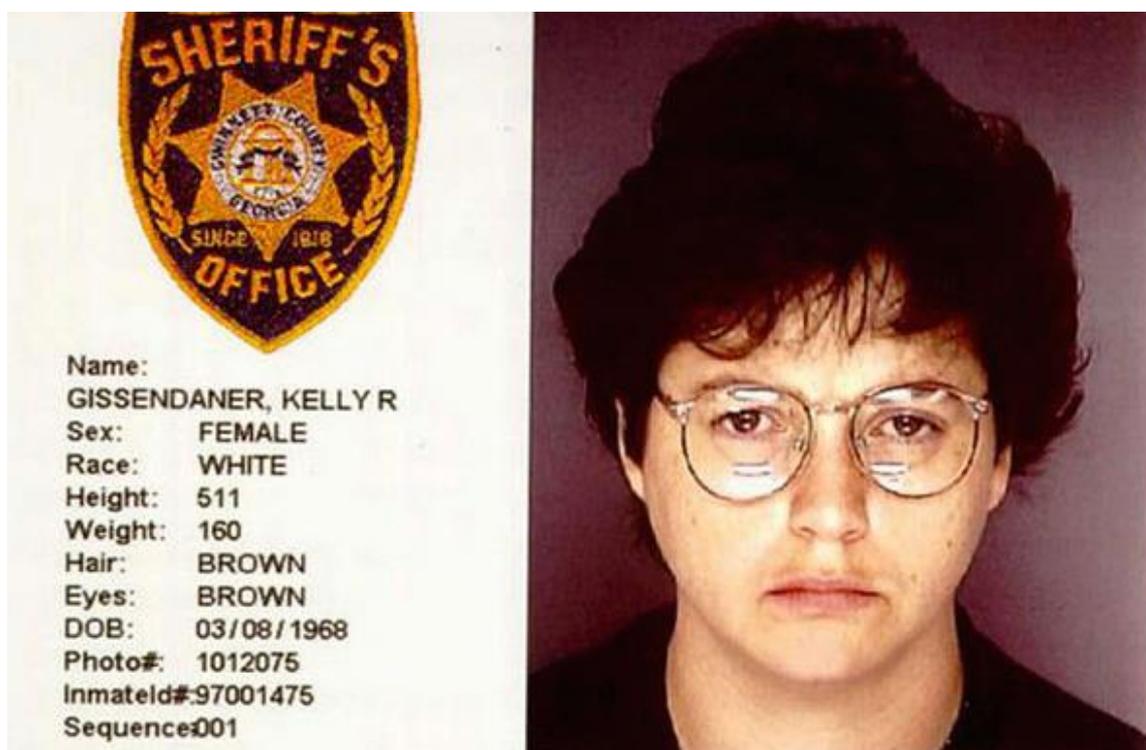


Figure 6: Kelly Gissendaner Mug Shot

In investigating the second case under consideration, that of Kelly Renee Gissendaner the concept of proportionality is of concern as well as the secrecy of the Parole Board and the issue of unusual cruelty connected with the death penalty under the Eighth Amendment of the US Constitution. Gissendaner was given the death penalty in 1997 for her complicity in the murder of her husband Doug. Initially Kelly denied having anything to do with the murder. Her then lover Gregory Owns admitted that he "beat Kelly's husband with a club and stabbed him and left him to die in the woods." Eventually, the remains of the victim were found in the shell of his burned out car, in a remote wooded area in Gwinnett County Georgia. At that point, Kelly was also

arrested for the crime, which was instigated over the supposed benefits of a life insurance policy.<sup>18</sup>



Figure 7: Gregory Owen testifying against Kelly Gissendaner

In return for a plea bargain of life, with the possibility of parole, Gregory Owen testified that Kelly went to the scene of the crime with him after the murder and that they set the fire together. He also maintained that it was she who planned the crime. "Plea bargains are a question of who can cut a deal first, which is not a very principled way to decide who could get the death penalty," said Stephen Bright, who teaches at Yale Law School and is president and senior counsel at the Southern Center for Human rights. "And it's troubling."<sup>19</sup>

Kelly was advised by her lawyers to go to trial, since the death penalty for women in the United States is unusual. This advice was based on the fact that only 5 other women in Georgia, including Emma Cunningham, have been given the death penalty in Georgia since 1973. All but one had her sentence commuted to life with parole and the other four, including Emma, are now free. The last, Janice Buttrum, had her sentence commuted to life without parole.<sup>20</sup>

Gwinnett District Attorney Danny Porter, who prosecuted Gissendaner, said she was not only as guilty as Owen but perhaps more so for crafting the plot. "She didn't actually strike the blow with the night stick, and she didn't actually stab him four or five times," Porter said. "(But) she was the instigator." The jury agreed and Gissendaner was placed on death row.<sup>21</sup>

Victor Streib, a retired Ohio Northern University law school dean and death penalty authority, said it's not unconstitutional to hand down disparate punishments for the same murder. But there is an appearance it may not be just. Who gets a death sentence seems random, making it hard to justify from one case to another, Streib said. A hard childhood is rarely allowed as evidence in Felony crimes in the US. But those

circumstances no doubt contribute to the personality and emotional responses of the person who commits criminal acts. Kelly was the victim of molestation and rape from age 10 variously by her stepfather, and an uncle. She gave birth to a son two weeks after she graduated from high school, as the result of date rape.<sup>22</sup>

The issue of proportionality is clear in this case. The killer, Gregory Owens, was given life and the instigator, Kelly Gissendaner, was put on death row. In 1984 in a Supreme Court Case, *Pulley v. Harris* the majority opinion was that the Constitution does not require that a state appellate court, before it affirms a death sentence, compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. The possibility of such a comparison existed nevertheless. Although they might have, Kelly's lawyers made no mention of an oddly similar case with a reversal of the outcome in her situation.<sup>23</sup>

In 1975 Rebecca Smith Machetti was sentenced to death for the murder of her ex-husband and his new wife, Ronald and Juanita Akins. The Akinses were found shot to death in a secluded area of Bibb County, Georgia. Like Gissendaner, Rebecca Machetti was not present during the murders and was described not as the killer but as the initiator of the crimes, also based on a desire to collect on life insurance. Rebecca Machetti was granted a new trial in 1982 and she was sentenced to two consecutive life sentences. Her second husband, John Eldon Smith (AKA Tony Machetti), was the first person to be executed when Georgia resumed utilization of the death penalty in 1983. After 36 years in prison, Rebecca Machetti was released at the age of 71.<sup>24</sup>



Figure 8: Rebecca Machetti at her release

Cases like this one and that of Gissendaner are rare. Out of nearly 1,500 murders executed in the United States since the 1970's only four others were co-conspirators. In other cases the issue of proportionality has also been a significant factor. The US Supreme Court case of *Enmund v. Florida* addressed this issue by distinguishing the relative complicity of the actual killer from a bystander. The crucial difference in both the Rebecca Machetti and Kelly Gissendaner cases is based on the collusion of both women in the crime, despite the actual murders being carried out by an accomplice. These circumstances should be compared to those of Emma Cunningham, against whom only circumstantial evidence was ever presented.<sup>25</sup>

All individuals in the United States given the death penalty have the right of appeal, which is an extended and complicated process, which often leads to a gap of 15 to 20 years between sentencing and potential execution. The U S Eleventh Circuit Court of Appeals granted Gissendaner a certificate of appeal based on several of her claims for relief. One request was based on proportionality despite her instigation of murder. The brief maintained that her trial attorneys were ineffective for failing to "advocate for and negotiate a plea agreement for a sentence less than death, while the actual murder was given life with parole under a plea bargain. The second point argued was that "trial counsel rendered ineffective assistance during the penalty phase of her trial by failing to adequately investigate and present mitigating evidence of her alleged history of sexual abuse, physical abuse, and mental health issues." All of Gissendaner's appeals failed, including this one that raised the constitutionality of her death sentence for murder in light of the life sentence given to Owen. Kelly has said, "I deserve to be in prison but I don't deserve to die."<sup>26</sup>

Kelly was incarcerated for more than 14 years at Metro State Prison in Atlanta. Under the supervision of Rev. Susan Bishop, (who still directs the prison choir which was instrumental in the eventual parole of Emma Cunningham), a theological certificate program was sponsored by the Candler School of Theology at Emory University in Atlanta Georgia for the inmates. Beginning in 2009, Kelly was allowed to study theology in the classroom with the other women inmates. In 2011 Metro was closed and many of the women, including Kelly, were transferred to Lee Arrendale Prison near Alto, GA. Interestingly enough the required judicial citation of Kelly's appeal in 2013, cited warden Kathy Seabolt who allowed this privilege. Even after the transfer to Arrendale, Warden Seabolt continued allowing Kelly's attendance at lectures.<sup>27</sup>

With a change of leadership at Arrendale, classroom attendance was rescinded and Kelly was placed back in solitary at all times. She lived in Spartan 12-by-9-foot cell, where she spends about 16 hours a day. The door of her cell is solid steel, with a 6-by-9-inch window. The door has a slot, used by corrections officers, to slide three meals a day to her on a plastic tray. An orderly existence Everything she owns is contained in a small metal wall locker with no doors. It holds her shampoo, soap, deodorant and other toiletries. She keeps snacks in the locker: kosher dill pickles, Cheetos and saltine crackers. The furniture in her cell is made of welded steel and is bolted to the floor. Her metal bed has a sleeping bag-thin mattress. A stainless steel toilet and sink are attached to the cinder-block walls. Each time she leaves her cell, she must first extend her arms through the slot to be handcuffed.

When Gissendaner walks through a Georgia prison, she wears a tan prison uniform with Department of Corrections stenciled on the back.<sup>28</sup>



Figure 9: Gissendaner on her way to one hour of solitary recreation.

Since Kelly was not allowed to attend theology classes at Arrendale the professors came to her. One instructor, Rev Jennifer McBride, connected the imprisoned theology students with the German professor Jürgen Moltmann, who is one of the most distinguished living theologians. Moltmann's theology resounded with all of the inmates in the theology certification program at Metro and then for those transferred to the Lee Arrendale prison. This was especially true of Kelly who asked to correspond with Dr. Moltmann. Gissendaner sent Professor Moltmann a paper that she had written on Dietrich Bonhoeffer. He was impressed by her thoughtful point of view. The two Christians — a convicted murderer in Georgia and a retired theologian in Tübingen, Germany— became pen pals. In four years, they exchanged “20 or 30 letters.” They discussed “theological and faith questions.”<sup>29</sup>

Moltmann personally understands imprisonment and imminent death. As a young man he was conscripted into Hitler's army. Never a Nazi, he was appalled by the cruelty and carnage of the regime. He surrendered to the British as soon as was opportune. After having spent 3 years in the hell of war he devoted his time as a POW to considering the issues of Good and evil. "In the Spirit", he concluded, "we embrace the presence of God, but we also embrace community with people and all living things. "Moltmann says, "I am disgusted at the inhumanity of the American prison system. It is pure punishment, not educational justice. I am unconditionally against the death penalty." "There is always for everybody hope to change. And we

must not nail a person down to the crime once committed. We condemn the sins but we love the sinners. So we must separate the person from the deed, and give the person a new chance. "<sup>30</sup>

In 2011 Kelly was awarded her Theology Certification. To her delight Jürgen" Moltmann came from Germany to deliver an address at Candler School of Theology and later he made a speech to the graduates of the Arrendale class. Kelly was overwhelmed to meet her spiritual mentor and intellectual guide.

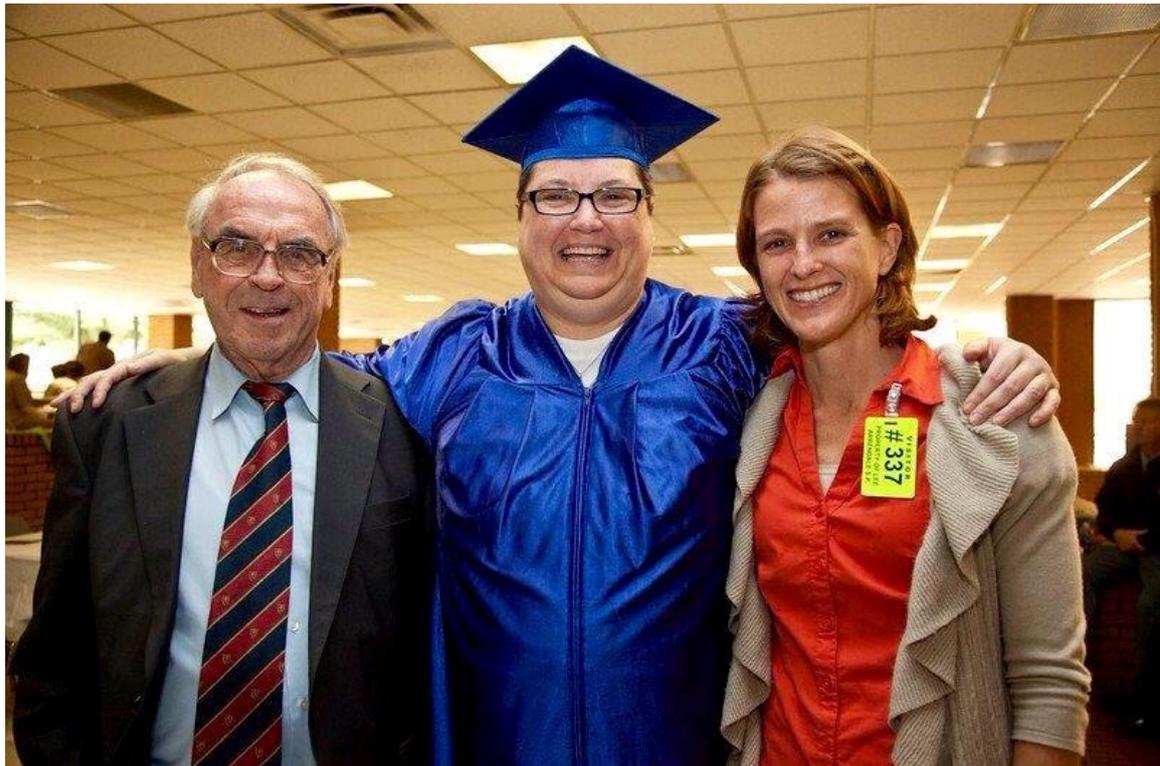


Figure 10: Professor Moltmann, Kelly and one of her teachers, Rev. Kathy Zappa

When all of Kelly's judicial appeals were denied Moltmann sent her a blue trimmed handkerchief for her tears "Dear Kelly," he wrote, "Friede sei mit dir" — peace be with you. The new administration at Arrendale Prison prevented the handkerchief from being given to the prisoner. Through the intervention of the prison chaplain the treasured gift was sent to Kelly's children, who were then allowed to give it to Gissendaner as a Christmas present.<sup>31</sup>

Despite her revolutionary change of character, with her appeals exhausted a warrant for Kelly's death was signed by Sam Olen, the Attorney General for Georgia on February 9, 2015. A remarkable petition to stay the execution on the grounds of proportionality and change of character was filed by Gissendaner's current lawyers, Susan C. Casey and Lindsay Bennett This 54-page document included letters of positive endorsements from inmates, wardens and concerned citizens. At the same time they filed an emergency application on her behalf for a 90-day stay of execution, which was also declined with no explanation.<sup>32</sup>

**Application to the Georgia  
Board of Pardons and Paroles  
on behalf of  
KELLY RENEE GISSENDANER**

**54 page document  
positive  
endorsements  
from inmates,  
wardens, religious  
leaders and concerend  
citizens.**

SUSAN C. CASEY  
Georgia Bar No. 115665  
[susancasey@outlook.com](mailto:susancasey@outlook.com)

LINDSAY BENNETT  
Georgia Bar No. 141641  
[lindsay\\_bennett@fd.org](mailto:lindsay_bennett@fd.org)

965 Virginia Avenue, NE  
Atlanta, Georgia 30306  
(404) 242-5195

Figure 11: Clemency Petition filed for Gissendaner

As has been noted, the only group authorized to grant commutation or a stay of execution in Georgia is the State Board of Pardons and Paroles. As is true of parole the decisions surrounding this process are secret. As of 2015 Kelly has been on death row for 18 years and two warrants for her execution have been issued but not yet carried out. Kelly was schedule to be taken to Georgia Diagnostic Prison for execution by a lethal injection of Penobarbital. A heavy winter storm on the Feb. 24 continuing until the execution date of Feb 25 precluded transferring Gissendaner to the death chamber in Jackson, Georgia. Two dozen or so priests and other ministers delivered 26,000 petitions to the Georgia Governor Nathan Deal's office asking him to use his influence to halt the now postponed execution. "We are purportedly a Christian state, but this execution is just state-sponsored mob violence," said the Right Rev. Rob Wright, bishop of the Episcopal Diocese of Atlanta. "It's a lynching." The Governor declined to intervene. As the weather cleared, despite further appeals for clemency, Kelly waited in her solitary cell for her execution to be rescheduled.<sup>33</sup>

**February 25, 2015**  
**For Immediate Release**

## **Parole Board Denies Clemency for Kelly Renee Gissendaner**

**ATLANTA** – Tuesday, February 24, 2015, the State Board of Pardons and Paroles met to consider a clemency request from attorneys representing condemned inmate Kelly Renee Gissendaner. The Board has voted to deny clemency.

In reaching its decision, the Board thoroughly reviewed all information and documents pertaining to the case. In addition to hearing testimony during the meeting on Tuesday, the Board, prior to the meeting, had thoroughly reviewed the parole case file on the inmate which includes the circumstances of the death penalty case, the inmate's criminal history, and a comprehensive history of the inmate's life.

Kelly Gissendaner was convicted of murder in the February 1997 death of her husband, Douglas Gissendaner. She was convicted of malice murder in 1998 and sentenced to death. Gissendaner's appeal to the United States Supreme Court was denied October 6, 2014.

Gissendaner is scheduled to die by lethal injection on Wednesday, February 25, 2015, at 7 p.m., at the Georgia Diagnostic and Classification Prison in Jackson.

### Figure 12: Denial of Clemency

Gissendaner's execution was rescheduled for Tuesday, March 2, 2015. If it were not so tragic, what happened on that day resembled a Keystone Cops film. On March 2, early in the morning, Kelly was transferred from Arrendale to Jackson State Prison for her execution. Kelly had tried to prepare herself for death and she was allowed to record her last words. She said: "I just want to tell my kids that I love them and I'm proud of them and no matter what happens tonight, love does beat out hate. You keep strong and keep your heads up. I love you." Abruptly, after she had made the recording, with no explanation or warning, she was transported back to Arrendale. Her solitary cell had been cleared so she asked Chaplain Bishop for shampoo and soap so that she could take a shower.<sup>34</sup>

Within minutes of her arrival at Arrendale, even before she could clean up, a Department of Corrections van arrived and she was transported to solitary confinement at the only other women's prison in Georgia, Pulaski State Prison. The reason given was that Gissendaner's support system at Lee Arrendale Prison was too involved with her personally and that many were committed to having the death penalty rescinded. At that point the public was told only that Kelly's execution had been postponed for a second time within slightly more than a week.

Georgia Attorney General Sam Olens called three times the night of March 2, first to say the execution was off, then on, and then finally off for that evening, Gissendaner's attorneys claimed in a new court filing. Eventually the Georgia Department of Corrections issued a statement indicating that Gissendaner's execution was again postponed because the drug Pentobarbital, used for lethal injections was found to be filled with particulate, and was determined to be unusable.<sup>35</sup>

A new brief filed on Kelly's behalf, maintained that the state did not inform her lawyers until the next day that Gissendaner wouldn't be executed within the window specified on her death warrant, which was good until March 4. The "hours of indecision" caused grave fear in the prisoner, enough to amount to "cruel and unusual punishment" barred by the Eighth Amendment, the attorneys said. This brief was filed simultaneously with a second petition for stay of execution to the US Supreme Court.<sup>36</sup>

There have been various examples of botched executions in the United States because of problems with lethal injections. One of the most recent was in Oklahoma in 2014 with the execution of Clayton Lockett, who languished for more than an hour before he finally died of a heart attack. In 2011 the European Union banned the export to the US of drugs which could be used in lethal injections. The American pharmaceutical company Hospira ended the manufacture of lethal injection drug sodium thiopental. These decisions have made execution drugs very difficult to obtain in the US.<sup>37</sup>

On Monday June 29, 2015, the US Supreme Court heard cases from Oklahoma, Ohio and Arizona on use of execution drugs. Chief Justice John G. Roberts Jr. and Judges Scalia, Kennedy, Thomas, and Alito joined the majority opinion. The Supreme Court affirmed Oklahoma's right to use an experimental drug midazolam in lethal injections. Justice Stephen Breyer responded that the majority "misses" the point, which is that the death penalty is applied too randomly to be legal. Justice Sonia Sotomayor concurred. This dissent marked the first time since the early 1990s that two sitting Supreme Court justices have openly questioned the legality of capital punishment.<sup>38</sup>

"The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary," Breyer wrote. "From a defendant's perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?" Sotomayor, writing for the liberal justices in the principal dissent, expressed outrage at Alito's insistence that prisoners must identify a humane way to be executed. "But under the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: because petitioners failed to prove the availability of sodium thiopental or pentobarbital, the State could execute them using whatever means it designated," she wrote. Despite the obvious bifurcation in the decision, once the drug was legalized, Oklahoma immediately scheduled the execution of three death row inmates.<sup>39</sup>

In the aftermath of this Supreme Court ruling, on August 11, 2015 federal judge, Thomas Thrash, dismissed the lawsuit filed on behalf of Kelly Gissendaner maintaining that her Civil Rights had been violated under the Eighth Amendment of the US Constitution. Gissendaner's attorney's argued that she had suffered thirteen hours of anxiety before the announcement, not knowing whether the state would proceed with her execution and what drugs it might use. Her lawyers also maintained that the problem with the lethal injection drug means she could be subject to cruel and unusual punishment when her execution date is rescheduled. The judge ruled negatively. Thrash wrote, "The period of uncertainty between the cancellation of her execution and the announcement that the state would not pursue her execution before

the court-ordered window had ended did not constitute cruel and unusual punishment because there's no evidence state officials intended to inflict pain."<sup>40</sup>

In total, 141 countries have either abolished the death penalty by "law or practice."—meaning they have not executed anyone for at least 10 years and have a long-standing policy of not executing." Since 2010, the majority of executions in the world have taken place in China, Iran, North Korea, Yemen and the United States. That list is startling considering the American ideals of liberty and justice. Public opinion in the US is still divided about the death penalty. Local politics, the state in which the crime was committed, plea bargaining and "pure chance" make it a "lottery of who lives and who dies." Since the reinstatement of the death penalty in 1976, 82% of all executions have taken place in the South and West. Yet, "Actions of the legislatures, lower-court judges and governors can be interpreted by the Supreme Court as signs of 'evolving standards of decency' in society," which the U.S. Supreme Court may eventually see as justification for striking down capital punishment."<sup>41</sup>

The refusal by the Governor of Georgia as well as both State and Federal law courts to provide her relief means that for Kelly Gissendaner the slow evolution towards abolishment of the death penalty in the United States may come too late. In the wake of the circumstances around this case, on July 1, 2015 Act 43 of the Senate of the Georgia State Legislature became effective. The law is entitled: *Pardons and paroles; provide input and transparency relative to granting a parole or commutation of a death sentence to a life sentence*. How much this law will influence the secrecy issue around the decisions of the State Board of Pardons and Paroles remains to be seen. This law comes too late for Kelly Gissendaner as well, since to date her appeals have been exhausted.<sup>42</sup>

As of August 2015, Gissendaner is confined to a solitary cell at Pulaski State Prison, with no access to those officials from Lee Arrendale prison that provided compassionate supervision and spiritual comfort for much of her incarceration. Gissendaner's fate could be determined by the issuance of a third death warrant at any time.

## **Conclusion**

Emma Ruth Cunningham, was placed on death row and spent nearly twelve years in prison for a crime, the murder of a white businessman in Lincolnton, GA, she almost certainly did not commit. At play in her death row sentence clearly was racial discrimination. Her lawyers opted for a Bench Trial because they were aware of the mind-set of the mostly white jury, which had already given her husband the death penalty. To their horror, the presiding judge also sentenced Emma to death. Even though blacks and whites are murder victims in nearly equal numbers of crimes, 80% of people executed, since the death penalty was reinstated in 1976, have been executed for murders involving white victims. This problem was endemic in 1979 when Emma was incarcerated and even today nearly 98% of all prosecutors responsible for the death penalty are white. A second trial, which ended in a plea bargain of life with parole placed Emma in jail for nearly ten more years because of her lawyers fear that a new jury would again give her the death penalty. Only influence, money, determined supporters and personal contact with the Parole Board ultimately gained freedom for Emma Cunningham. 43



Figure 13: Emma Cunningham with her lawyer, now a Georgia Circuit Court Judge, Roger Dunaway.

Kelly Gissnedaner admits her complicity in the murder of her husband. This is no longer the issue. Inmates, wardens, chaplains, and more than 25,000 members of the public has petitioned for clemency for Kelly because of her 18 years of incarceration and her remarkable transformation during that time. Professor Moltmann said of Kelly Gissnedaner, "I have found her very sensitive, and not a monster, as the newspapers depicted her. And very intelligent." She has been rehabilitated. She has changed her heart and mind," he said. None of this commentary nor direct observation of Gissnedaner's exemplary behavior and spiritual growth has had any impact on the State Board of Pardons and Paroles or on either the State and Federal legal systems. The application of the death penalty in the United States is based on decisions, which are arbitrary by any standard. From a humane standpoint in the case of Kelly Gissnedaner, despite legal decisions to the contrary, her death sentence in the minds of many does constitute cruel and unusual punishment.<sup>44</sup>

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## **NEWS RELEASE**

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Figure 14: The last plea for Clemency was denied

Hope remains for general abolition of the death penalty in the United States with recent decision in Connecticut, which "banned applying the death penalty to anyone convicted of what had been a capital crime as of April 25, 2012, the effective date of the repeal." On August 13, 2015 this law was made retroactive by commuting the death sentences of eleven death row inmates, who had been sentenced previously. There is a growing movement in the United States away from "the barbarity of the death penalty – Connecticut this month, Nebraska in May (though there's a move there to reinstate it), Maryland two years ago. Four other states have governor-imposed moratoriums, rooted in skepticism about the fairness of the system." The evidence that the judicial system is arbitrary in dispensing death sentences and in determining who ultimately gets executed, may ultimately be enough (despite the latest Supreme Court Decision allowing the use of lethal drugs) to persuade a majority of justices to finally end what amounts to state sanctioned murder.<sup>45</sup>

The early 20th century reporter Dorothea Dix summed up what are even now the current ideas of those against the death penalty in the United States. "While we diminish the stimulant of fear, we must increase to prisoners the incitements of hope. As we extinguish the terrors of the law, we should awaken and strengthen the control of the conscience."<sup>46</sup>

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<sup>2</sup> How the Parole Board Works: Georgia Government State Board of Pardons and Paroles , Mission Statement [http// www. pap. georgia.gov](http://www.pap.georgia.gov)

<sup>3</sup> Carter, Ruth J., "Emma: Did she wrongfully spend years on death row?"  
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<sup>4</sup> 458 U.S. 782 102 S.Ct. 3368 73 L.Ed.2d 1140 Earl ENMUND, Petitioners. FLORIDA. No. 81-5321. Argued March 23, 1982. Decided July 2  
Hicks , Victoria Loe Parole Board is a law unto itself March 28, 2015 - The Atlanta Journal-Constitution  
<http://w.sharethis.com/button/buttons.js>

<sup>5</sup> Susan Bishop, personal interview, June 26, 2008.

<sup>6</sup> Georgia Department of Corrections., The parole application letter on behalf of Emma Cunningham, p. 3 content section pp. 4 & 6, written originally to support elevation to Trusty status. The title of Trusty is no longer used nor are the privileges available to current GDOC inmates Trusty Status in Georgia Prisons as defined at the time Emma was given that classification: "Trusty status, which is a security classification for inmates, is defined by Rules of Board of Corrections Rule 125-3-1-.02 (5) (e) (former Rule 415-3-1-.02 (5) (e), formerly Rule 125-2-4-.02 (4) (e)) as follows: "An inmate assigned to this category must have proven himself... clearly trustworthy, having no adjustment problems; be fully cooperative, and have no current alcohol or drug addiction problems. Such inmates require occasional checks by correctional officers both inside and outside the security boundaries of the institution." The following case both defined Trusty Status and dealt with an assault by a Trusty named Anthony Brown against Linda Tolbert. *Tolbert V. Tanner et al.* 72459. (180 Ga. App. 441)(349 SE2d 463) (1986) <http://www.lawskills.com/case/ga/id/414/29/index.html>.

<sup>7</sup> Luz Bolivar -Roman, personal interview, July 26, 2008.

<sup>8</sup> GDOC, Letter p. 5. written originally to get Emma Trusty status and repeated for her first parole application.

University School of Law. 58 years since James B. Pilcher was first licensed to practice law.

State	License status	Year acquired	Last updated by
			Avvo

<sup>9</sup> Williams, Vinnie, "Judge questions validity of law on parole board." *The Augusta Chronicle*, November 18, 1979, sec. B. THOMSON, Ga.—"A Toombs Superior Court Judge said Saturday he was "Inclined" to believe illegal the Georgia Constitution amendment that made the, proceedings of the State Board of Pardons and Paroles confidential."

<sup>10</sup> Schmidt, William E. , "A Premiere Down Home for *The Color Purple*," *New York Times*, January 18, 1986, Book Section. "The musical stage adaptation of *The Color Purple* premiered at the Alliance Theatre in Atlanta in 2004 and opened on Broadway in 2005. <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-998>.

<sup>11</sup> Parole Handbook, (Atlanta, GA: Law Offices of the Southern Center for Human Rights, 2007). The Parole Process in Georgia: Item 2 "A person whose death sentence for a crime committed in 1977 or later is commuted to life imprisonment by the Board must serve 25 years before becoming eligible for parole consideration." The courts struck down the Board's 90% policy in 2005. <http://www.pap.state.ga.us/images/Parolee%20receiving%20MH%20counseling%20sm.jpg>.

<sup>12</sup> Ruth Walker Hood, personal interview, February 4, 2006.

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<sup>13</sup> Hutchins, Bettye O., Funeral Director. Funeral home Address: 536 New Street, Macon, GA. <http://www.superpages.com/bp/Macon-GA/Hutchings-Funeral-Home-L2056118622.htm>. Past Georgia Parole Board Members. Members and Chairs of the Georgia Board of Pardons and Paroles, from its inception in 1943 to the present. Parole Board member, Bettye O. Hutchins served 7.3 years from September 16, 1987-January 9, 1995. [http://oldweb.pap.state.ga.us/past\\_members.htm](http://oldweb.pap.state.ga.us/past_members.htm).

<sup>14</sup> Mabe, Logan D. , "The Cage Bird Sings," *Atlanta Magazine*, (March 1991):59. Joe Frank Harris, Democrat, served as governor of Georgia from 1983 to 1991. Emma Cunningham, personal interview, February 22, 2004.

<sup>15</sup> Mabe, "Caged Bird." p. 58. Ethel Waters, "His Eye is on the Sparrow," *His Eye is on the Sparrow*, 1960, Word 3100. "His eye is on the Sparrow" was written in 1905 and is most closely associated with Ethel Water's who used the song as the title of her autobiography. Conversation with Emma and Susan Bishop. Mabe, "Caged Bird," p.127. The lyric is cited incorrectly in the article. I have quoted the lines as written by the lyricist Civilla D. Martin .The words are a reference to Matthew 10:29-31. This is one of several songs that Emma actually sang.

<sup>16</sup> Cook, Rhonda . " Death deliberations a secret on state parole board," *The Atlanta Journal-Constitution*, 7 September 2008. Parole Handbook, "Step 4: The Parole Members Vote," (Atlanta, GA: Law Offices of the Southern Center for Human Rights, 2007) 16 & 25. [http://www.schr.org/files/parole\\_handbook.pdf](http://www.schr.org/files/parole_handbook.pdf). "Board of Pardons." West's Encyclopedia of American Law. 2005. Retrieved August 9, 2010

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<sup>17</sup> Georgia State Board of Pardons and Paroles. *Annual Report*, <http://oldweb.pap.state.ga.us/06Annual%20Report.pdf> ( 2006).

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<sup>19</sup> Stephen Bright, TV Interview, Frontline. June 17, 2004. [www.pbs.org/.../frontline/shows/plea/interviews/bright.htm](http://www.pbs.org/.../frontline/shows/plea/interviews/bright.htm)  
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<sup>21</sup> Campos, Carlos ,Death Penalty GA - A death row all to herself ,Atlanta Journal-Constitution (Sunday, Jul 18, 2004)  
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<sup>23</sup> Pulley v Harris Pulley v. Harris 465 U.S. 37 (1984)  
<http://www.capitalpunishmentincontext.org/resources/casesummaries/pulley1984>

<sup>24</sup> Kerns, Jeannie , (July 3, 2010). After 35 years in prison, one time death row inmate Rebecca Machetti released, Society & Culture <http://www.examiner.com> Some sources say Machetti was in prison for 36 years.  
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Kelly Renee GISSENDANER, Petitioner–Appellant, v. Kathy SEABOLDT, Warden, Metro State Prison, Respondent–Appellee. No. 12–13569. Decided: November 19, 2013 The brief also alleges that the State violated its obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to disclose the prosecution team's handwritten notes from the final pretrial interview of her codefendant and accomplice, Owen; and  
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<sup>29</sup> Death Row Inmate Finds Common Ground With Theologians. (February 28, 2015 A13) , New York edition: New York Times

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<sup>31</sup> Interview with Susan Bishop, July 13, 2015

<sup>32</sup> Beasley ,David, Judge halts Georgia execution of man who killed woman  
[http://www.cbsnews.com/8301-201\\_162-57570660/georgia-executes-andrew-allen-cook-whose-lawyers-claimed-was-mentally-ill](http://www.cbsnews.com/8301-201_162-57570660/georgia-executes-andrew-allen-cook-whose-lawyers-claimed-was-mentally-ill) (2013). There has also been one stay of execution Nicholas Cody Tate, 32 who pleaded guilty to the murders of Chrissie Williams and her three year old daughter during a home invasion decided to appeal two hours before his scheduled execution on Jan 31, 2012.  
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[dawsonadvertiser.com](http://dawsonadvertiser.com)

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<sup>34</sup> Connor , Tracy (Mar 7 2015 )News Lethal Injection, Kelly Gissendaner Left Message for Kids Before Execution Was Postponed  
[nbcnews.com](http://nbcnews.com) Email from Susan Bishop and Kelly Gissendaner's Lawyers, March 2, 2015

<sup>35</sup> Wolf, Richard , (May 21, 2014) Supreme Court halts execution by lethal injection due to botched executions. Usatoday.com

The execution chamber itself is housed in a separate building and the condemned inmate is moved to a cell in that location before the death sentence is carried out by the use of lethal injection. At the time of his incarceration, James Cunningham was one of about 60,000 prisoners held by the Georgia Department of Corrections. This is fifth largest prison system in the United States and it is also responsible for supervising nearly 150,000 individuals on parole and probation. A 1990 report maintained that, "the single most reliable predictor of whether someone will be sentenced to death is the race of the victim."

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<sup>36</sup> Clemency Urged on Eve of Execution of Georgia Woman Kelly Gissendaner (March 2015).

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<sup>37</sup> The Cruel and Unusual Execution of Clayton Lockett:

The untold story of Oklahoma's botched lethal injection—and America's intensifying fight over the death penalty, Atlantic Monthly

<sup>38</sup> Barnes , Robert, (June 29, 2015 ) The Washington Post

A divided Supreme Court on Monday turned aside claims by death-row inmates that a drug to be used in their executions would lead to an unconstitutional level of suffering, a narrow but unequivocal ruling that made clear that states have leeway in carrying out the death penalty. Supreme Court upholds use of controversial execution drug; 2 justices question death penalty. (June 29, 2015)Associated Press

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New York Times

<sup>40</sup> Brumback, Kate, ( Aug. 10, 2015) Thrash decision Judge tosses inmate's suit filed after execution drug issue

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<sup>42</sup> Next scheduled Ga. execution will test parole board transparency law ( May 6, 2015)

Macon Telegraph. Georgia has just passed into law new rules that will dramatically increase transparency into death row inmates' efforts to save their own lives. Put into effect July 2015

But the jury's still out on how revealing the new measure will actually be.

The processes in question are clemency proceedings, in which defense attorneys argue before the state Board of Pardons and Paroles that inmates have changed since their

conviction and don't deserve to die. Prosecutors, on the other hand, contend that the jury got it right and a scheduled execution should proceed.

Up until now, members of the parole board have never had to explain why they bought either argument and what prompted their decision.

<http://www.macon.com/news/local/article30231732.html#storylink=cpy>

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Jürgen Moltmann shares about his friendship with Kelly Gissendaner

Moltmann was featured in a New York Times article on death row inmate Kelly Gissendaner ( February 28, 2015)The featured photo from the article was taken at Gissendaner's graduation from a prison theology program in 2011 and duplicated in this paper.

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<sup>44</sup> Bright, S. Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty, 35 Santa Clara Law Review 433, 453-54 (1995)

<sup>45</sup> Berman, Mark (August 13, 2015)

Connecticut Supreme Court says the death penalty is unconstitutional and bans executions for inmates on death row

<sup>46</sup> Brock, Martha (January 17, 2015), Preserve the true legacy of Dorothea Dix in North Carolina  
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