MISSOURI IS BACK IN THE EXECUTION BUSINESS, DRAWING NATIONAL ATTENTION TO THE STATE’S HISTORY OF SECRECY AND INCOMPETENCE.

WITNESS ONE KILLER’S FINAL DAY.

By WILLIAM POWELL • Illustration by RICHARD MIA
Welcome to Bonne Terre, a fading mine town, where once the earth was full of lead and now killers become cadavers. It’s just after 10 p.m. on January 28, the air clear and cold, heading toward an overnight low of 1 degree. As you drive down this winding stretch of Highway K, the illumination of the Eastern Reception, Diagnostic and Correctional Center hits you before the prison comes into view, its dozens of light poles casting an eerie glow, the better to monitor comings or goings.

At the mouth of the driveway, a bundled officer asks the purpose of your visit. You’re here to watch Herbert Smulls die. State law requires that every execution be witnessed by no fewer than eight “reputable citizens.” It’s a single vestige of transparency in an increasingly secret process. When its executioner was deemed incompetent, the state of Missouri hired somebody else, then passed a law prohibiting the press from publicly identifying him or her. When the manufacturer of its lethal injection drugs said they weren’t intended to kill, the state got another drug from another source, then granted the pharmacy anonymity, too.

The pattern is consistent: When a problem arises, fix it, then shroud the process, to prevent future complaints. It’s proved an effective approach. Harmered by various issues, Missouri carried out two executions from 2006 to 2012. Now, though questions persist, Smulls will be the third to die in as many months.

The officer, friendly yet firm, checks your name against a list and tells you to sit tight in your car. These affairs are sched-uled by the Missouri Supreme Court, which issues death warrants, each good for a specific date. The Department of Corrections sets the execution for 12:01 a.m. on the appointed day, to build in leeway for legal delays.

Your cellphone rings, a call from somewhere inside the complex, a series of squat white buildings with green roofs, secured with chain link and barbed wire. The U.S. Supreme Court has granted Smulls a temporary stay of execution. As President Barack Obama delivered his State of the Union Address, Justice Samuel Alito decided his fellow judges should take a closer look at Smulls’ case. Go home and return at 11 a.m. tomorrow.

Cheryl Pilate, who heads Smulls’ legal team, has been furiously filing appeals for days, desperate to save her client’s life. At her Kansas City office, Pilate looks ragged, having cast aside any concern for fashion in favor of yoga pants, an old sweater, and white athletic socks. Her shoes stand by in some forgotten corner. She’s in for another long night, preparing briefs (actually many pages long) for the highest court in the land. Can she convince those justices? Smulls’ life depends on it.

But rather than dwell on the appeals, St. Louis County prosecuting attorney Bob McCulloch would like you to consider July 27, 1991. On that day, Smulls arranged to visit F&M Crown Jewels, an appointment-only store in the basement of a bank building at 361 Chesterfield Center, owned by Stephen and Florence Honickman.

Using the name Jeffrey Taylor, Smulls claimed to be shopping for a diamond for his fiancée. His 15-year-old companion, Norman Brown, was acting as his younger brother. The pair inspected the wares, then entered a back room for a private discussion.

Smulls emerged with a .45. He opened fire. Florence hid behind a door, but was shot twice, in the arm and side. Hit and bleeding, Stephen pleaded for his life, crying out, “Enough already, take what you want.” Smulls kept shooting. Brown ripped off Florence’s necklace and yelled at her to hand over her wedding ring. Then she played dead, lying in a pool of her own blood. The thieves made off with the jewels, but were apprehended within 15 minutes, when a policeman stopped them for speeding.

Once the criminals fled, Florence went to Stephen, held him, said she loved him. They were rushed to the hospital in sepa-
rate ambulances. Florence never again saw her husband alive.

That, McCulloch says, is what’s important. Questions about the state’s method of execution are “simply a diversion to take you away from what this guy is actually being executed for.”

**YOU RETURN TO BONNE TERRE** on the morning of January 29, the day Herbert Smulls is scheduled to die. In the light of day, the prison seems less intimidating. You pass through two checkpoints to the parking lot, then lock your phone in your car, as instructed. Contact with the outside world is not encouraged.

At the front door, a corrections officer wants to see your driver’s license. Then an escort wearing a headset shepherds you to a wall of lockers where you can leave your things, through a metal detector, past a guard station where you flash ID again, out into the frigid yard, and into a second building, where you’re dropped off in a holding room. Every door is locked, and between each room is a purposefully empty buffer space.

The holding room contains your fellow witnesses, a table and chairs, a coffee pot, a cooler of bottled water, a TV you’re not allowed to watch, and three prison employees. In the somber silence, seconds tick by like hours, crawling across the face of a wooden clock, carved in the shape of Missouri’s state seal, two chubby bears high-fiving behind a knight’s helmet.

You’ll be stationed here until the Supreme Court lifts its stay. There’s no telling when that might be. Several boxes of chemically suspect Walmart cookies arrive, a bad omen, in the opinion of the corrections folks.

Motivational posters hang on the wall. The one with a photo of a tree below a waterfall says, “Change is life saving.”

**SITTING IN IGNORANCE**, you might assume the holdup is related to Missouri’s controversial execution protocol, and indeed, Pilate has filed petitions on that topic. But the Supreme Court issued its stay in a different matter; on a question about jury selection, known as a Batson challenge (named for the decision in *Batson v. Kentucky*).

At his first trial, in August 1992, a jury convicted Smulls of robbery, but deadlocked on the murder charge. The vote was 11–1 in favor of conviction, but the single holdout, who reportedly misheard Florence’s testimony, could not be swayed, resulting in a mistrial.

That second jury found Smulls guilty on all charges. At sentencing, the prosecution called him a career criminal, with 11 previous felony convictions. The defense countered that Smulls had been abandoned by his mother and dropped out of high school in ninth grade, and his right hand had become permanently disabled at 19 because of a gunshot wound. After a lengthy, difficult deliberation, the jurors recommended a sentence of death.

In 1996, when the Missouri Supreme Court considered an appeal related to the all-white jury, it upheld Smulls’ conviction, while also sharply criticizing Corrigan. In an opinion penned by Judge Ronnie White, the high court’s first African-American member, Corrigan’s remarks were characterized as “oafish and insensitive... The judge’s statement is not ambiguous. It reeks of racial animus.”

That claim might seem dubious, but Judge William Corrigan wasn’t comfortable ruling on race. He upheld the strike, saying, “I don’t know what constitutes black. Years ago, they used to say one drop of blood constitutes black.”

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Later, after that strong language was met with a strong objection from then–Attorney General Jay Nixon, the court withdrew and reissued its ruling, removing the section calling Corrigan names, but confirming its questions about how the racial issue was addressed.

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“How We Kill”

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“Batson is not race-neutral,” the revised opinion said. “It requires the trial judge to focus his or her attention solely on race... The trial judge’s gratuitous statements raise serious questions about his willingness to do what Batson requires.”

The court appointed a different judge to review Smulls’ case, but over years of wrangling, he was denied a new trial repeatedly. Ultimately, the Missouri Supreme Court wrote, “Even assuming the prosecutor’s reasons for challenging mail sorters and postal workers are non-sensical, this does not establish the reasons are inherently pretextual” to racial prejudice. The court placed significance on the fact that Waldemer had also removed a white postal worker from the jury pool, using the same rationale.

Now, with the execution waiting to begin, the Supreme Court is reviewing the issue again. In her recent filings, Pilate has included a fresh piece of information. Years after the trial, Waldemer applied for a job as a judge. On the application, he disclosed that from April 1976 until November 1980, he worked as a high-volume package sorter for United Parcel Service. The man who didn’t trust postal workers had been one himself.

“We have come to understand that the postal-worker gambit was something that was invented in the prosecutor’s office to give them a so-called race-neutral reason for striking black jurors,” Pilate alleges. “If you are trying to get the death penalty against a black defendant, I think many prosecutors would believe that job is made a lot easier if you have no blacks on the jury.”

McCulloch, who became county prosecutor in January 1991 and was Waldemer’s boss at the time of Smulls’ trial, denies that allegation. He says all jury-selection decisions are left to the individual attorneys, but “you don’t strike people for race or gender or any other matter that’s prohibited. We don’t allow that. The courts are certainly going to review it in every case.”

As morning turns to afternoon, you flip through a 24-page packet of information that includes a biography of Smulls and a brief history of the death penalty in Missouri.

Long ago, but more recently than you might guess, executions were handled by county sheriffs and carried out by hanging. In fact, Missouri held the nation’s last public execution. On May 21, 1937, Roscoe “Red” Jackson was hanged at dawn, having been convicted of murdering a traveling salesman for his car and $18. Stone County Sheriff Isaiah H. Coin extended 400 invitations to the spectacle; more onlookers gathered outside the stockade and climbed trees to sneak glimpses of the gallows.

In September 1987, the state assumed execution duties, building a gas chamber at the Missouri State Penitentiary in Jefferson City. An inmate was strapped into a perforated steel chair. The warden would pull a lever, dropping cyanide pellets into 3-gallon earthen jars of sulfuric acid, producing the lethal gas. In all, 39 people died in Missouri’s gas chamber: 30 first-degree murderers, six rapists, and three federally convicted kidnappers.

In 1972, the U.S. Supreme Court voted 5–4 in the case of Furman v. Georgia to invalidate that state’s capital-punishment law (effectively tossing out the death penalty in every other state, too). The court held that the ultimate, irreversible penalty was being applied arbitrarily and capriciously, constituting cruel and unusual punishment, as forbidden by the Eighth Amendment.

The court stopped short, however, of banning executions altogether. Instead, it ruled that states needed to create clear criteria for which criminals would—and would not—be subject to the death penalty.

Missouri’s revised Capital Murder Law went into effect in 1977, but executions didn’t resume until the late ’80s, when the state legalized lethal injections. Starting with George “Tiny” Mercer in January 1989, Missouri has used a needle to put 70 men to death as of this January. Smulls will be No. 71.

On June 5, 2006, John Doe I, the state’s execution doctor, stood behind a screen. He was in a Kansas City courtroom because U.S. District Judge Fernando Gaitan Jr. compelled it, as part of an appeal filed by infamous death-row inmate Michael Taylor. Attorney General Nixon had fought to prevent Doe from testifying at all, but had to settle for protecting his identity.

The Department of Corrections’ stated reason for the anonymity of its execution team is that members, if outed, could face violent retribution from death-penalty opponents. Those opponents say the real reason is that no one would participate if their names were public. Also, though it seems natural for anesthesia, even in lethal doses, to be doled out by an anesthesiologist, intentionally killing a patient would violate every medical code of conduct. For that reason, finding a qualified doctor for an execution team has proven to be next to impossible.

Doe first consulted with the state before the execution of Mercer in 1989. The Department of Corrections had purchased a lethal-injection machine from Fred Leuchter, a man with no engineering or medical training, who is best known for denying the Holocaust. Doe advised the state on how to carry out the execution. He wasn’t hired as a long-term contractor until after the botched execution of Emmitt Foster on May 3, 1995. That execution team, which did not include a doctor, decided to inject Foster in the thumb, because his history of intravenous drug use made it difficult to find an acceptable vein. He took 30 minutes to die.

After that, Doe was given sole responsibility for devising and implementing the state’s execution procedure. But he testified that he sometimes mixed up the names and amounts of drugs. “It’s not unusual for me to make mistakes... But I am dyslexic,” he said. “I can make these mistakes, but it’s not medically crucial in the type of work I do as a surgeon.”

He related an anecdote about an execution that was carried out in the dark, using flashlights. He said that the team often included people with no medical experience; the day of the execution was “the first time probably in their life they have picked up a syringe.” He said he monitored whether enough anesthesia had been administered by looking at the inmate’s face through a window, which was partially covered by blinds. He had switched from using 5 grams of anesthetic to half as much, simply because the supplier started packaging it in smaller bottles, which made it trickier to get the right dose in the syringe.

At that time, the state’s lethal injections involved three drugs. The first, sodium thiopental, rendered the person unconscious. The second, pancuronium bromide, caused paralysis. And the third, potassium chloride, stopped the inmate’s heart. If the condemned received an insufficient dose of the anesthetic, his death could be excruciating, as the potassium chloride ripped through his veins—but he would be unable to cry out, because of the paralysis. In 2005, the weekly medical journal
The Lancet published an analysis of toxicology reports from 49 executions that found 43 of those inmates had received less sodium thiopental than would usually be used in surgery, while 21 were given doses low enough that they may have been aware of what was happening.

Taylor's lawyer asked whether Doe ever did any calculations to determine how much of a drug to use.

"Heavens, no," he replied.

"Is any part of the execution procedure written down?"

"I've never seen it."

"There's no guide that you follow as you're doing it?"

"Absolutely not."

Doe supervised 54 executions. That was enough for Judge Gaitan to impose a moratorium.

A month later, in an extensive investigation, the St. Louis Post-Dispatch revealed Doe's identity. He was a doctor who had been sued for malpractice more than 20 times, had lied in court about those cases, and had his attending privileges revoked or denied at two Missouri hospitals. In 2003, he was reprimanded by the state Board of Healing Arts. Attorney General Nixon's office, which later tried to protect him in court, signed off on that censure.

In 2007, in the wake of the Post-Dispatch report, the Missouri General Assembly passed a law forbidding media outlets from identifying current or former members of the execution team. (For that reason, Doe's real name does not appear in this article.)

A LITTLE AFTER 2 P.M., A MESSENGER enters the room. Florence Honickman is sitting in another area with her family, and after more than two decades waiting for Smulls to die, she's not doing well with this final delay. She'd like to see Dean Waldemer.

The pleasant witness with a crew cut sitting across from you, who earlier joked about reading the coffee-maker instructions to pass the time, stands and is escorted out. Who knew the assistant prosecutor was here?

By 3 o'clock, having eaten nothing but cookies, you're getting hungry. At this point, Smulls' stomach might be grumbling, too. He was served his final meal yesterday at 4:30 p.m., expecting to die at midnight. Then again, it's possible Smulls still feels full from his Southern feast. Per his request, he'd been served fried chicken, New York strip steak, collard greens, macaroni and cheese, candied yams, cornbread, chocolate cake, and cola. (Legend has it that inmates ask for a 2-liter hoping the carbonation will cause an explosion during their autopsies.) Today, Smulls has been offered standard prison food, which he has declined, a hunger strike likely to be cut short.

Delivery pizza arrives in the witness room around the same time you receive word that the Supreme Court has vacated its stay, around 4:30 p.m. But the execution cannot proceed just yet. There is a second stay in effect, issued by the U.S. Court of Appeals for the Eighth Circuit, related to Smulls' Eighth Amendment claim that Missouri's current lethal-injection protocol puts him at risk of unconstitutional pain. Attorney General Chris Koster's office is asking the Supreme Court to overturn that order.

It took several years to clean up the mess revealed by the execution doctor's testimony. Then the state ran into other problems. In 2008, the Post-Dispatch penned another article about a member of the execution team. This time, it was a nurse who traveled to Indiana in 2001 to assist in the execution of mass murderer Timothy McVeigh. The catch: The nurse needed permission from his Missouri probation officer to take the trip. He had been charged with stalking his estranged wife's lover and had accepted a plea bargain.

In 2009, the Missouri House of Representatives voted 95–4 against a moratorium. A week later, the state executed murderer Dennis Skillicorn. He had become a model inmate, helping reform younger prisoners and founding a prison hospice program. Religious groups petitioned Gov. Nixon for clemency. Nixon declined.

In 2011, Missouri executed Martin Link, who had abducted, raped, and strangled an 11-year-old St. Louis girl. “The state says killing is wrong, so why do they do it?” Link asked at the end. “For revenge.”

At that point, the state ran out of drugs. Hospira had gone so far as to stop producing sodium thiopental altogether, rather than allow it to be used in lethal-injection cocktails. Even hospitals couldn't get it.

Stymied, the Department of Corrections decided to switch to a single-drug method. In May 2012, it chose propofol, an anesthetic famous for causing Michael Jackson's accidental death. That chemical had never been used in an execution. A group of 21 death-row inmates filed a lawsuit, saying that propofol could cause them to suffer.

Where did the state get the drug? Morris & Dickson, a company based in Louisiana, had shipped 20 vials by mistake. In November 2012, a sales representative showed up in Bonne Terre and asked the warden to give back the propofol. He wouldn't. The next day, the vice president of purchasing for Morris & Dickson, Dale Kelley, sent Department of Corrections Director George Lombardi an email.

“Please — Please — Please — Please HELP… this system failure — a mistake — l carton of 20 vials — is going to affect thousands of Americans,” the executive wrote.

The vast majority of propofol, an anesthetic used 50 million times a year in U.S. hospitals, is manufactured by a company in Germany, and the European Union, which vehemently opposes the death penalty, was threatening to cut off exports if Missouri used the drug to kill anyone. (According to Amnesty International, about 70 percent of countries have abolished the death penalty in law or in practice; those that haven’t include China, North Korea, Iraq, Iran, Sudan, and Afghanistan.)

As months passed, and pressure mounted, Nixon stood firm, saying Europeans had no power here. The Missouri Society of Anesthesiologists urged him to reconsider, noting that the drug is used in up to 95 percent of its surgeries. In a letter to Nixon, Markus Löning, Germany’s human-rights commissioner, didn’t mince words. “The use of propofol would almost certainly lead to strict export controls,” he wrote. “Subsequently there would also be a severe shortage of propofol in the United States for medical purposes.”

Finally, on October 9, 2013, two weeks before the next scheduled execution, the state returned the drugs.

W HILE KOSTER SUGGESTED FIRING up the mothballed gas chamber and state Rep. Rick Brattin, R-Harrisonville, proposed a firing squad, Nixon postponed the execution of Allen Nicklasen and instructed the department to find an alternative drug.

On October 18, the protocol was updated once again. The Department of Corrections would purchase pentobarbital, commonly used to put down pets, from a compounding pharmacy. The department then expanded the definition of its execution team to include “individuals who prescribe, compound, pre-
December 11. Neither man appeared to suffer.

Smulls was next. “It was really a jolt to us in many ways when this one-a-month pattern that we’ve seen was first unleashed,” Pilate says. “Frankly, the pace of executions does not allow enough time to properly litigate the issues connected with an execution.” (At press time, Missouri was on pace to put 12 people to death in 2014, the most ever in a single year. Nine prisoners were executed in 1999.)

Wanting to further investigate the drug supplier, Pilate asked for its name. The U.S. Court of Appeals for the Eighth Circuit ruled on January 24 that the Department of Corrections did not need to disclose the identity, overturning a district court decision. In its ruling, the court posed an interesting logic puzzle: If capital punishment is legal and constitutional, then some way to carry it out must exist.

“All allegation that all methods of execution are unconstitutional, therefore, does not state a plausible claim under the Eighth Amendment,” the court wrote. “Where, as here, there is no assertion that the State acts purposefully to inflict unnecessary pain in the execution process, the Supreme Court recognized only a limited right under the Eighth Amendment to require a State to change from one feasible method of execution to another.”

So if Smulls and his death-row fellows think compounded pentobarbital is inhumane, the court asked them to propose a viable alternative.

Judge Kermit Bye wrote an impassioned dissent. He said that the prevailing opinion misunderstood the legal precedents and, further, violated the laws of common sense.

As he put it, “the majority would require the prisoners to identify for the Director a readily available alternative method for their own executions.”

In a separate filing, Pilate requests a 60-day stay of execution for Smulls, to explore the drug issue. Again, the court denies the request. And again, Bye dissents.

“With regard to the balance of harms, Smulls faces the ultimate, irrevocable penalty in the absence of a stay,” he writes. “Missouri, on the other hand, merely faces the administrative work involved in obtaining a new date on which to execute Smulls.”

Meanwhile, in 2010, the American Bar Association convened a committee to analyze the death penalty here. The panel included professors, judges, defense attorneys, and prosecutors, both for and against capital punishment. Members were asked to consider to what extent Missouri’s “death penalty laws, procedures, and practices” conform to ABA guidelines.

After two years of research, the group published a nearly 500-page report, released in spring 2012, which made a series of recommendations, each reached by consensus. The experts found several areas in which Missouri’s criminal procedures were deficient, leaving the state open to the possibility of executing an innocent person.

In Missouri, a murder can be charged as a capital crime if it meets one of 17 “aggravating circumstances.” Some are clear, like if the person has prior murder convictions or the victim is a police officer; but others are more open to interpretation, like if the crime is “outrageously or wantonly vile.” According to the report, that could be applicable to 90 percent of intentional homicides. Such a broad definition gives prosecutors too much discretion and might violate the Supreme Court’s holding that capital punishment should be reserved for a narrow category of the worst murderers, the committee wrote.

Anyone who has reviewed the academic research on the topic—or who’s seen My Cousin Vinny—knows that mistaken eyewitness testimony is a leading cause of wrongful convictions. But Missouri law lacks rules that would help prevent police or prosecutors from making mistakes in preparing witnesses. State law does require interrogations to be taped, but according to the report, “law enforcement agencies are entirely exempt from the recording requirement” under a variety of circumstances.

In recent years, DNA has helped exonerate many wrongfully convicted inmates, but Missouri does not require law-enforcement agencies to preserve biological evidence after a conviction. Additionally, state law provides no clear consequences for prosecutors who fail to turn over exculpatory evidence or who rely on false witnesses.
“Prosecutors often perceive their job is to get the conviction, when that’s really not the case,” says legal ethics expert Michael Downey of Armstrong Teasdale. “Prosecutors are supposed to make sure that justice is done.”

While Nixon and his colleagues in state government have gone to great lengths in updating the execution protocol, they have so far enacted zero of the ABA committee’s suggested reforms.

“Missouri is still executing people based on what our study showed to be very weak—not only laws, but weak jurisprudence from the Missouri high courts on things like eyewitness testimony,” says Saint Louis University law professor Steve Thaman, co-chair of the ABA committee, who notes that Missouri ranks among the top five states for most executions per capita.

Paul Litton, a University of Missouri associate professor of law who also co-chaired the committee, says research shows that updating eyewitness-identification procedures can have a profound effect. “A number of states have adopted those reforms to reduce the risk of wrongful convictions, but Missouri has not,” he says. “Let me give you a sense of some of the jurisdictions that have adopted these reforms: Texas, North Carolina, Ohio, West Virginia”—states where support for the death penalty is strong.

McCulloch argues that the ABA guidelines are just one more excuse to stop executions. “Some of the standards that the ABA sets up are just unattainable,” he says. “It’s sort of a backhanded way of opposing the death penalty.”

The Death Penalty Information Center, a nonprofit that opposes capital punishment, reports that 144 death-row inmates have been exonerated, including four in Missouri. But McCulloch takes issue with some supposed exonerations. “Some cases are reversed after 20 years,” he says. “Witnesses are dead. Others have recanted. Evidence may be lost. You’re just not able to proceed again, which has nothing to do with whether the guy did it or not.”

Inspired by the ABA report, state Sen. Joseph Keaveny, D–St. Louis, has proposed a bill that would reform the state’s criminal-procedure laws concerning confessions, eyewitness testimony, and biological evidence. “The intent of the bill is to actually help the prosecutors and to help the police departments,” he says. “If a guy makes a confession on tape, he can’t come back later and say, ‘I was forced to say that.’ Change is hard sometimes, but hopefully we can get some of these people to say, ‘This really isn’t a bad thing.’”

The Missouri Association of Prosecuting Attorneys testified against the bill, arguing that some of its legal specifics could lead to convictions being overturned on technicalities. The organization’s president, Matt Selby, did not return a call requesting comment, but his opposition would seem to conflict with one of the group’s recent press releases.

“The conviction of an innocent person is every prosecutor’s worst nightmare,” Selby wrote. “We are continually seeking ways to improve the best practices for investigations and prosecutions to keep citizens safe, while also maintaining the integrity of the criminal justice system.”

Keaveny has also filed a bill that would direct the state auditor to evaluate how much the death penalty costs. Death-penalty advocates sometimes argue that capital punishment saves money, eliminating the need to feed and shelter vile criminals. But studies in other states have consistently found the opposite to be true, with endless legal battles representing a drain on public coffers.

In 1993, a Duke University study found that in North Carolina, “The extra costs of adjudicating murder cases capitally outweigh the savings in imprisonment costs. As it is currently implemented, the death penalty cannot be justified solely on the grounds of economy.” In Kansas, according to a 2003 audit, capital cases cost 70 percent more than life sentences. And a 2011 report found that since 1978, California had spent $4 billion on the death penalty.

“If we can save some money, why not just put people to life in prison without parole?” Keaveny asks.

Meanwhile, several state legislators, from both sides of the aisle, have filed bills or held hearings to sort out the ever-changing secret protocol. Sen. Jolie Justus, D–Kansas City, has a bill that would set up a commission to control the execution procedure, while imposing a moratorium until a new one could be established.

“If we are going to use the death penalty as a punishment, and we’re going to do it on behalf of the people of the state of Missouri, then we as Missouri citizens have the right to know that these executions are taking place in a legal manner and in an ethical manner,” she says. “Let it all be a completely open and transparent process.”

A ROUND 7 P.M., YOU GO IN FOR A SECOND helping of cold pizza. Just before 8 p.m., Mike O’Connell, communications director for the Department of Public Safety, comes in to provide an update. The Eighth Circuit stay is still in effect.

He mentions Florence and her family. “It’s a very trying ordeal for them,” he says. You try to maintain some perspective—you’ll sleep in your own bed tonight, unlike Stephen Honickman or Herbert Smulls—but the room is restless.

Witnesses suggest possible improvements, like turning on the TV or supplying magazines. O’Connell says he’ll bring some Diet Cokes and agrees that “everybody is frustrated by this process.” Previous executions usually happened at 12:01 a.m., as scheduled. This waiting is new, a result of the controversy.

At about 9:23 p.m., without explanation, the U.S. Supreme Court vacates the Eighth Circuit’s stay. Smulls, who was on the phone with an attorney, is taken to the execution chamber.

“We never even had a chance to say goodbye,” Pilate says later.

At 9:30 p.m., Lombardi, the corrections director, enters the witness room. He never looks up while reading a prepared statement. He is followed by David Dormire, director of the Division of Adult Institutions, who explains the process. In 20 minutes, you will be moved to the viewing area. A curtain will be opened. Five grams of pentobarbital will be administered to Smulls. If that doesn’t do the job, Smulls will be given 5 grams more. Suddenly, anxiety replaces the dullness of the day. You are about to watch a man die.

Meanwhile, Pilate files one last appeal to the U.S. Supreme Court. Throughout the day, while the stays were still in effect, she had been sending frantic emails to the attorney general’s office, making sure nothing happened prematurely. At 9:36 p.m., she writes the following:

“OUR LODGED APPLICATION FOR STAY IS NOW FILED IN THE SUPREME COURT AND WE HAVE TWO PENDING MOTIONS IN THE EIGHTH CIRCUIT:

“DO NOT EXECUTE MR. SMULLS.

“Please confirm receipt of this message immediately.”

Receipt of her message is not confirmed immediately—or ever. Her next two emails, at 9:49 and 9:54 p.m., also receive no response.

At 10:08 p.m., Dormire returns. He escorts you out of the witness room. In an architec-
Nixon, Who Did Not Respond to Interview Requests for This Article, Spent 16 Years as Attorney General Before Becoming Governor, a Position He Has Held for Five Years. He Has Been Involved with More Than 60 Executions.

The first time he ran for statewide office, a failed U.S. Senate campaign against Sen. John Danforth, was in 1988. That same year, Michael Dukakis’ run for president was wrecked by a man named Willie Horton. As governor of Massachusetts, Dukakis supported a prison furlough program, which let Horton, a convicted first-degree murderer, out of jail. He did not return from his furlough, instead committing assault, robbery, and rape.

Nixon may have noticed. “It’s hard to escape Nixon once called a death-row inmate’s thoughts and prayers.” Director Lombardi asks any legal impediments to the lawful execution of Herbert Smulls. “Missouri’s past history of scheduling executions before a death row inmate has exhausted his constitutional rights of appeal,” Nixon wrote, “As Governor, this is a power and a process I do not take lightly… These crimes were brutal, and the jury that convicted Smulls determined that he deserved the most severe punishment under Missouri law… I ask that Missourians remember Stephen Honickman at this time, and keep Florence Honickman and the family and friends of the Honickmans in their thoughts and prayers.”

At 10:11 p.m., the execution begins. Having been in the dark, your eyes struggle to adjust when the curtain swings open to reveal Smulls, lying on a gurney, a white sheet covering everything but his head. Wearing thick-rimmed glasses, he looks to his left, away from you and toward his witnesses, and appears to be saying something, though you can’t hear him through the window. The Honickman family sits in a viewing area in front of him.

Pentobarbital flows from a port in the wall, through a tube, and into his arm.

He takes two deep breaths, his chest rising and falling slowly, and then he stops moving. Smulls does not appear to suffer. You sit staring at his lifeless body for 10 long minutes. Silence hangs heavy.

The curtain swings shut. While the execution team is in the chamber, the shade must be closed, to protect their identities. At about 10:20 p.m., Herbert Smulls is pronounced dead. The curtain swings open again, and you spend several more minutes staring at his remains.

A few minutes later, the U.S. Supreme Court rejects his final request. It is the third straight execution that the state has carried out despite pending appeals. According to Koster’s office, federal law and legal precedents prevent executions from taking place when a stay is in effect, but an open appeal doesn’t carry the same weight.

Koster argues that because of the 24-hour death-warrant limit, defense attorneys simply file endless, redundant appeals, with no chance of success, to tie up the system. If the state waited until no motions were outstanding, it would be waiting forever: “In Hill v. McDonough...the United States Supreme Court held that a pending lawsuit does not entitle a condemned inmate to a stay of execution as a matter of course, and that the State and crime victims have an important interest in the timely execution of a death sentence,” Koster wrote in a recent filing.

After Allen Nicklasson’s execution in December, the Eighth Circuit rejected his final plea on the grounds that it was moot, since he was dead. Bye wrote another scathing dissent.

“Missouri executed Allen Nicklasson before this court had completed its review of Nicklasson’s request for a stay of his execution, a request he brought in a pending action challenging the constitutionality of Missouri’s execution protocol,” he wrote.

“That bears repeating. Missouri put Nicklasson to death before the federal courts had a final say on whether doing so violated the federal constitution.”

Then he took stock of the state’s track record. “Missouri’s past history of scheduling executions before a death row inmate has exhausted his constitutional rights of review, using unwritten execution protocols, misrepresenting dosage levels for drugs used in lethal injections, and providing unfettered discretion to a dyslexic physician to mix the drugs and oversee its executions, has earned from this federal judge more than just a...
healthy judicial skepticism regarding Missouri’s implementation of the death penalty,” he wrote.

“Its current practice of using shadow pharmacies hidden behind the hangman’s hood, copycat pharmaceuticals, numerous last-minute changes to its execution protocol, and finally, its act of proceeding with an execution before the federal courts had completed their review of an active request for a stay, has committed this judge to subjecting the state’s future implementation of the penalty of death to intense judicial scrutiny, for the sake of the death row inmates involved as well as adversaries and advocates of capital punishment alike.”

Florence Honickman, with two adult children at her side, addresses the media at about 11 p.m. She looks utterly exhausted, near tears, her face a mix of sorrow and anger.

“This has been a very difficult, a very grueling day,” she says. “My husband was brutally murdered. I was viciously attacked by Smulls. When we talk about cruel and unusual punishment, this is cruel and unusual punishment... It was a long day, and it could have been done a lot quicker and easier. It was easy on Mr. Smulls, more so than it was on my husband and myself.”

She explains her frustration with the legal system, incredulous that Smulls’ appeals could not have been dealt with in the few years after his conviction, long before this final day. She says these procedural and technical obstructions show disrespect for the jury’s decision. While the state has spent thousands of dollars keeping Smulls alive, officials wouldn’t pay for her travel expenses to attend the execution.

“I have been suffering from my wounds, both mental and physical, for over 22 years, and will most likely suffer forever,” she says.

She recounts the horrible night when she lost her husband, then describes Stephen in loving terms, lamenting that he never got to see their daughter, Mindy, get married, that he’ll never get to hold his grandchildren in his arms.

She says that “justice has finally prevailed.”

“However, make no mistake,” she continues, “the long, winding, and painful road leading up to this day has been a travesty of justice.”