

**Memorandum**  
**in support of**  
**Petition for Clemency**  
**For**  
**Richard Paey**

**Submitted by**  
**John P. Flannery, II**

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**I. PRELIMINARY REMARKS**

On December 6, 2006, the Court of Appeals for the 2<sup>nd</sup> District reached one startling conclusion that all three justices agreed was true: that Richard Paey, a chronic pain patient was serving an unjust sentence of 25 years for receiving the necessary pain medication for his chronic condition. That Mr. Paey needed this pain medication was evident as the prison doctor prescribed even more pain medication when Richard was confined to serve this unjust sentence.

While the three judges agreed that the punishment was severe, they could not agree on the appropriate remedy.

One judge thought that Richard's sentence had to be overturned as unconstitutional and as cruel and unusual.

The other two judges said that this injustice had to be corrected by the Governor, by an exercise of his clemency powers, and they commended Richard Paey to seek your clemency

On December 6, 2006, we wrote immediately to the Governor's office, requesting clemency.

But your office has required additional documents to confirm what the Court of Appeals in its decision plainly described, that is, the facts and circumstances by which this injustice obtained.

In any event, in the intervening days, between that first petition and this supplemental submission, hundreds have written letters in support of this petition seeking clemency, to the Office of the Governor, and thus to you, stating a variety of reasons, but basically because the penalty is severe and unjust. There have been various editorials also supporting clemency

I believe that even the government's counselor who made the oral argument on behalf of the State, Asst. AG John M. Klawikofsky, might agree that the appropriate relief her would be to grant clemency to Mr. Paey for the time he has already served on his sentence.

In order to give some perspective to this terrible circumstance, that we submit is worthy of your mercy, we are enclosing this "memorandum" on behalf of Richard Paey in support of his petition for clemency -- so that you, the Governor, may fairly invoke your discretion to do what, we respectfully insist, is right and just in this case.

We discuss below the facts that are pertinent and the legal arguments that we submit prove the injustice of this 25 year sentence, warranting your clemency.

## **II. REVIEW OF THE MATERIAL FACTS**

### **A. Richard's chronic pain – its origin and its effect**

Richard Paey is the chronic pain patient featured by Morley Safer on CBS's Award Winning Documentary Series, *Sixty Minutes*.

Mr. Safer and the media have focused on Richard Paey because he's in prison for twenty-five years for taking the opiod medication, the Percocets, that his medical condition dictated.

Richard has suffered severe and unremitting back pain ever since an auto accident in 1985 because of an unsuccessful surgery, the damage to his spine, and because of the deteriorating effects of Multiple Sclerosis (MS).

MS is a disease that disables. It attacks the sheath (or covering) that protects the axons that are the body's conductors of nerve impulses. When these myelion sheaths are attacked, they are replaced by scars (sclerosis). As a result, transmission through these axons (conductors) is compromised or eliminated. This disease has its ebb and flow meaning a patient recovers but then years later suffers a relapse with worse effect.

Richard has experienced several worsening attacks of MS over the years and, at this writing, his MS is in remission.

Without powerful pain medication, Richard's legs feel "as if they are on fire in a furnace".

Even with medication, on a scale of “0” to “10”, with “0” being no pain and “10” being excruciating, Richard says his pain could be about a “4” on an average day.

In other words, Richard must fight, suffer, and work with the pain that is an inextricable factor of his daily life, every day, all the time, and for as long as he may live.

Richard has, like others who suffer excruciating pain, not only thought about suicide but made an unsuccessful attempt on his own life.

If you are not a chronic pain patient, and want to understand what it is like, think of the last time that you had a muscle pain or a sore joint and it didn’t go away. You may have taken an Advil, a hot bath, perhaps a massage, wore that knee or back brace, retired to bed, took off work, and yet the pain lingered for days.

For a glimpse into Richard’s world, to have some idea what chronic pain is like, imagine your pain was a hundred times worse, and it did not get better.

Instead of temporary discomfort, for a few hours or days, it was a mind-altering knife-like pain cutting into your quality of life.

It persisted day after day, denying you the hope that it would end before your final mortal moment on this earth.

## **B. The “investigation” of Richard Paey**

In 1997, the State of Florida’s law enforcement officer secretly followed Richard around for three months unconvinced that he was a pain patient. It did not

matter that Richard had a surgical history and disease justifying pain medication, nor that he wore leg braces when he wasn't in a wheel chair.

Florida's officers couldn't believe that he was obtaining that many Percocet for himself.

Of course, the law enforcement surveillance uncovered no evidence that Richard ever gave or sold his medication to anyone else.

Also, they could find no unexplained source of funds that he might have derived from "trafficking".

Law enforcement was, however, quite certain that Richard couldn't possibly take all that medication—even though he was.

They were also certain that he didn't need the leg braces. They were for "effect". That's what they "believed" - and they believed this notwithstanding the evidence. They saw that Richard had muscular legs. They thus "concluded"- he must be faking his illness.

They never thought to ask Richard whether he exercised, whenever he could, because it eased his pain, and kept hope alive for him, for his wife and for their three children.

"Occam's razor" is a logical method of analysis, by which, one concludes that the simplest explanation of a set of observed phenomenon is often the correct one.

By this standard, you might think that law enforcement would conclude that their factually unsupported suspicion was wrong, and that the simplest explanation

was that Richard was instead what he appeared to be — a patient using the medication that he did need.

When law enforcement and the prosecutors look at Richard, they don't apparently see a "patient". They see a "user" or, worse, a "pusher" or "drug dealer." They are victims in a way of the bias of their own settled and unquestioned habits. Nor do they "think" of the prescription medication he uses as "medicine." They see only addictive "drugs."

Without any medical training or clinical understanding of chronic pain, they seemingly can't comprehend anything else but that patients on long term opiate treatment are "users" of "drugs".

Law enforcement, and it is not limited to this investigation, are therefore locked into, mentally imprisoned by, the perceptions and methods of conventional drug cases, with "drug kingpins", "mules" who deliver "drugs", guns, violence, all of it. This is the case of "Miami Vice" meets "Dr. Kildare".

The government is constrained by its "settled habits," a myopic horizon of ignorance and bias for "to a hammer, everything looks like a nail!"

In the case of Physicians, law enforcement believes that when a doctor is paid his "fee," they are convinced these are "drug proceeds".

"Proceeds" is the language that law enforcement uses for a hand-to-hand "transaction" in a conventional drug case from a retail street drug dealer to an undercover agent or rat informant "working off" his own criminal case.

For law enforcement, when a physician receives "profits", that is evidence

of “drug dealing,” rather than evidence of an ordinary medical practice.

Jefferson wrote, “A nation that expects to be ignorant and free expects what never was and never will be.”

Despite the failure of the surveillance to yield any evidence of Richard’s wrongdoing, they remained unconvinced that he was a chronic pain patient.

### **C. Investigative “techniques” employed**

The State law enforcement officers joined forces with the Drug Enforcement Administration (DEA) to squeeze Richard’s physician. DEA called Richard’s physician seven or eight times on the phone, and the physician did not return the call. DEA and the Florida investigators paid him a personal visit at his New Jersey office.

The joint task force of “drug police” told the physician in the presence of his wife, with his children playing in the room, that the physician could go to prison himself if he had issued Richard any out-of-state prescriptions for Richard’s pain medication.

“Did you know that?,” they asked the physician.

In response, the physician insisted that he hadn’t written any of the scripts for Richard that the drug police showed him.

The physician signed repeated affidavits swearing under oath that he had not issued any prescriptions.

Several Florida pharmacists, however, told the “drug police” that they had spoken to the New Jersey physician who confirmed to them that he had written the

scripts that Richard presented to the pharmacist; according to one pharmacist, the New Jersey physician assured him that Richard truly needed the high doses he had prescribed for Richard's chronic pain.

The drug police still insisted that Richard had forged the prescriptions.

In a forensic lapse that would make CSI devotee's cringe, law enforcement, neither state nor federal, took any handwriting samples from the physician or his staff to confirm that the scripts were forgeries. They never obtained any handwriting exemplars from Richard either.

#### **D. The prosecution**

The first trial ended in a mistrial because of misconduct by the state prosecutor; the second trial ended in a mistrial as Richard was unable to assist his counsel at trial because he was ill with the pain; the third trial resulted in a conviction on seven of the eight counts of "trafficking in illegal substances".

How could the prosecutor have convicted Richard?

At the last of the three trials in 2005, the prosecutor got to have it both ways.

In a spectacular rhetorical pirouette, the prosecutor argued in his final summation to the jury, that, if the jury found that the physician had committed a crime, by issuing an invalid prescription in bad faith, then the prescription was invalid for all purposes, and the jury had to convict Richard for possessing the controlled substances generated by the illegal prescription.

Trial counsel objected that guilt was "personal", that Richard could not



possibly be held accountable for what his physician may have done wrong when he did nothing wrong.

But the trial court disagreed and stood silently by while the prosecutor used this preposterous argument to the jury, ascribing the acts of the physician to the patient, in a vengeful rant.

The prosecutor argued, if the jury thought that the physician did anything wrong, then it had to find Richard guilty for, if Richard didn't have a valid prescription, then he was as much at fault as the physician.

The prosecutor told the jury not to concern itself with what happened to the physician—if he (the physician) had committed a crime.

The prosecutor didn't tell the jury that nothing had or would ever happen to the physician in the sense of a prosecution.

This jury instruction was not enough, however, to convince the prosecutor he could win.

The prosecutor told the jury that Richard hadn't explained his behavior. No matter that the prosecutor's job was to prove the government's case, and Richard had an absolute right to keep his mouth shut in our system of "justice" and to "explain" nothing.

The government still didn't think this was enough so it piled on with a constellation of slanders connoting values and images that cause the average person to recoil.

The prosecutor insisted the pain "medication" were "drugs". The

prosecutor did not call Richard a patient. No! He called him instead a “user,” “abuser”, a “dealer” “an addict” and even a “monster.”

The *coup de grace* was a jury instruction that “trafficking” in drugs didn’t really mean “trafficking” or “distributing” drugs. Simply “possessing” the medicine was enough to prove “trafficking.”

**E. “Trafficking” in Florida doesn’t mean “trafficking”, it can mean “possessing” drugs**

Justice England in *State v. Benitez*, 395 So. 2d 514 (Fla. 1981), said that this drug “trafficking” statute “was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution from the importer-organizer down to the pusher on the street.”

Justice England understood “trafficking” meant “distribution”, “importing,” and “pushing” drugs, and not simply possession for personal use.

The prosecution and the courts, however, are treating “possession” as “trafficking” even if the amount is “4 grams or more of any mixture containing” Oxycodone -- no matter how insignificant the fraction of that “mixture” that is the controlled substance.

The tragedy of such legal imprecision is enormous when you consider that, depending on whether you “possess” 4 grams, 14 grams, or 28 grams, you are exposed to a mandatory minimum sentence of 3 years, 15 years, or 25 years.

Richard was convicted of 7 counts and each involved one hundred 5 milligram Percocets, and that amounts to 3.5 grams of Oxycodone “total” for all

counts.

That is ½ gram less than the first mandatory minimum tier, at 4 grams, by which Richard could be found to be a “trafficker.”

99.85% of every Percocet tablet that Richard had, however, consisted of Tylenol—acetaminophen, an NSAID (Non-Steroidal-Anti-Inflammatory Drug) sold over the counter without prescription—mixed with the Oxycodone.

It is that “mixture” of Tylenol with Oxycodone that constitutes a Percocet that, in the aggregate, ran up the amount in weight to more than 28 grams, and that exposed Richard to the 25 year mandatory minimum sentence.

Richard was therefore sentenced to 25 years for the crime of “possessing” Tylenol.

This “mixing” aspect of the statute leads to absurd and unfair consequences.

If we take a single Oxycodone tablet of 5 mg and mix it into a 12 oz. coca cola, we have made a mixture well over 28 grams since a coke weighs about 341 grams, and that aggregate mixture is—or could be treated as—“trafficking in illegal drugs.”

Let’s consider a more likely example:

A resident in a nursing home has his medication ground up by a nurse, and mixed into a 3 ounce dish of ice cream or tapioca, but if his prescription was “invalid” - unbeknownst to the patient, then he might be considered to be a “trafficker.” After all, Richard was. Pain medicine mixed into a 3 ounce dish of

ice cream is 3 times the amount that qualifies as the worst level of “trafficking”.

Could we possibly mean to expose a nursing home resident to a 25 year mandatory sentence because of something his prescribing physician got wrong?

There are nursing homes across Florida where food is being prepared for the residents mixing Oxycodone and other controlled substances into “mixtures” in excess of 28 grams.

May we truly punish anyone by such an elastic and arbitrary yardstick?

We are presently punishing Richard by this yardstick.

### **III. DISCUSSION OF THE LAW of Cruel and unusual punishment**

#### **A. The basic argument**

The Supreme Court, in *Robinson v. California*, 370 US 660, 666, 82 S. Ct. 1417, 1420, 8<sup>th</sup> Ed 2d 758 (1962), found it “cruel and unusual punishment”, a violation of the 8th Amendment, to make it a crime to be an addict:

“A State may not punish a person for being ‘mentally ill, or a leper or . . . . afflicted with a venereal disease’, or for being addicted to narcotics.” Id.

The Court said “To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being.”

In *Robinson*, the crime of addiction was a misdemeanor, and so the punishment was not as severe as in Richard’s felony case. The Court said the fact “[t]hat the punishment is not severe, ‘in the abstract,’ is irrelevant”. It is the disproportion between the conduct and the penalty. “Even one day in prison,” the

Court said, “would be cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.*, at 667, 82 S. Ct. at 142. We insist that twenty five years for the crime of being a chronic pain patient—Richard—is no less cruel or unusual

In Orwell’s 1984, the right to be let alone was extinguished. The private act of keeping a diary was a crime, for which the penalty was 25 years to life. Today, the once private and confidential relationship of the physician and patient is a crime that the state intrudes upon when the physician prescribes an opioid, and the penalty for that may be 25 years in custody—as Richard learned the hard way.

When Richard was confined in prison after the trial, the Florida prison doctor eased Richard’s pain with a morphine pump - more medication than he was convicted of taking. The Florida prison doctor got it; the Florida prosecutor had not.

### **B. Argument before the Court of Appeals**

In February 2006, we made an oral argument before a panel of three judges in the Court of Appeals in Florida, charging that there had been a miscarriage of justice for various reasons including that the sentencing of a patient for taking his prescribed medicine was both “cruel and unusual”.

### **C. The Court of Appeals Decision**

Eight months after the oral argument, the Florida Court of Appeals reached a split 2-1 decision.

The only issue that they considered in their opinion was what was discussed at oral argument, that is, whether the punishment of twenty five years was “cruel

and unusual” and unconstitutional as the law was applied to Richard.

All three judges agreed that the sentence was unjust but two of them didn’t think that the courts could do anything about it.

The Majority said that “because of the unusual circumstances present in this case, reasonable people might come to different conclusions about the wisdom of the twenty-five-year mandatory minimum sentences...”

While the Court’s remark was well-intended, what “reasonable” person could conclude that a 25 year sentence for taking your medicine was wise, or that letting such a sentence stand showed wisdom?

The Majority also made the startling remark that “Mr. Paey’s arguments about his sentences does not fall on deaf ears, but it falls on the wrong ears.”

We were all taught as law students, the latin phrase, “Ubi injuria, ibi remedia” - where there is a wrong, there is a remedy.” But not in Florida, not for Richard Paey.

The Majority passed the buck to the Governor in the final days of his Administration and, by default, to the incoming Governor, suggesting executive clemency was the only answer.

The Governor has a range of powers including clemency but when asking for clemency, it is an act of grace, meaning you have no right to obtain clemency.

Associate Judge James H. Seals disagreed with the Majority. His dissent shows that while justice is blind, it need not be stupid. Judge Seals was firmly of the view that not only was there a wrong, but there was an available constitutional

remedy and it was to overturn the sentence as cruel and unusual.

Judge Seals explained that the purpose of mandatory minimums was to cabin off certain crimes so “egregious or so threatening to public health”.

Given this analysis, Judge Seals insisted that Richard Paey’s “offense” didn’t fit this category of “egregious” offenses as Richard had not committed any “odious, parasitic activity.”

The state statute cast an “expansive net”, Judge Seals said, when drug “trafficking” caught up “mere knowing possession” and that sweep, Judge Seals found, was “beyond [the statute’s] logical limits.”

In his discussion of the *Benitez* case, Judge Seals said “this [trafficking] statute ended on the street” and “[i]t did not go into the home of the consumer” where we find Richard.

Judge Seals focused on what Richard did, his moral guilt, and not what “might have” occurred—had he not really used the medication himself.

The U.S. Supreme Court said that “[t]o be constitutionally proportionate, punishment must be tailored to a defendant’s personal responsibility and moral guilt.”

By this standard, Judge Seals found a twenty-five year sentence for “the mere possession of unlawfully obtained medicine for personal use” to be “illogical, absurd, unjust and unconstitutional under both the Eighth Amendment and article 1, section 17.”

It was “cruel”, Judge Seals concluded, for a “man with an undisputed

medical need for a substantial amount of daily medication management to go to prison for twenty-five years for using self-help means to obtain and amply supply himself with the medicine he needed.”

Judge Seals found it “unusual” that Mr. Paey could “go to prison only to find that the prison medical staff is prescribing the same or similar medication he had sought on the outside but could not legitimately obtain.”

Judge Seals found that the fact that Richard was receiving similar medication in prison was proof of “his intent for purchasing the drugs” for his medical condition, and lamented this “tragic irony”.

By allowing this conviction to stand, Judge Seals concluded that the State had evaded the rule of law that guaranteed “fairness, probity and equity.”

The State, the court noted, said it had offered a lesser prison term before trial and Richard Paey had declined their offer. Judge Seals argued that “the State’s willingness to offer a much, much lighter sentence [before trial]... compounds the absurdity of the [charging] decision and further highlights and magnifies the disproportionality between the real crime and the lengthy mandatory sentence.”

The federal and state constitutions were intended as a shield to protect Richard from a prison term that was cruel and unusual, Judge Seals said, but, instead of shielding him, the majority opinion “merely expresse[d] sympathy, proclaims them to be the wrong shields, and suggests that executive clemency is the proper shield.”




Judge Seals said he would have vacated the mandatory sentence for these reasons and remanded for re-sentencing to the trial court in line with the sentencing guidelines for a defendant who had never been in trouble with the law before.

#### **IV. CONCLUSION**

Afterwards, Richard did what the Majority opinion suggested he should do, and asked the Governor for clemency, to commute his 25 year sentence to the two years that he has already served because all three judges agreed the sentence was unjust and one thought it was constitutional infirm and cruel and unusual.

**RESPECTFULLY SUBMITTED,**

A handwritten signature in blue ink, reading "John P. Flannery". The signature is written in a cursive style with a large initial "J" and a long, sweeping tail.

**JOHN P. FLANNERY**

Counsel for Richard Paey