

IN THE MATTER OF:)
)
MICHAEL OWSLEY, CP 114) THIS IS A DEATH PENALTY CASE
) EXECUTION IS SET FOR 12:01 A.M.
Potosi Correctional Center) FEBRUARY 6, 2002
Mineral Point, MO 63660)

APPLICATION FOR EXECUTIVE CLEMENCY
AND/OR COMMUTATION OF A SENTENCE OF DEATH

TO: THE HONORABLE BOB HOLDEN

Governor of the State of Missouri:

COMES NOW Michael Owsley, by and through counsel, George M. Winger and Charles M. Rogers, and petitions the Governor for an order under Article IV Section 7 of the Missouri Constitution and Sections 217.800 and 552.0070, Mo. Rev. Stat., ordering that his sentence be commuted from death by lethal injection to life imprisonment without eligibility for parole; or, in the alternative, for an order staying the execution presently scheduled for February 6, 2002 and appointing a board of inquiry under Section 552.070 to investigate this case.

I.

SUMMARY OF REASONS JUSTIFYING EXECUTIVE CLEMENCY

Michael Owsley's life should be spared because:

- λ Michael Owsley was not wanted by his unwed alcoholic mother, who repeatedly tried to induce a miscarriage when she learned she was pregnant with Michael. Throughout his childhood, it was clear that Michael's mother preferred other sons to him. Michael was frequently abused in the home, and was a witness to repeated instances of domestic violence between his mother and her live in paramour. This extremely strong and compelling evidence in mitigation of punishment was never discovered by Michael's trial attorney and never presented to the jury which sentenced him to die.
- λ Marion Hamilton, Michael's co-defendant, who instigated and planned the robbery which resulted in the homicide, received a twenty year sentence for second degree murder as compared to the death penalty to which Michael Owsley has been sentenced. Michael Owsley's

sentence is completely and grossly disproportionate to that received by Hamilton, and to Michael's actual culpability in Iverson's death.

- λ No court has ever given Michael a fair hearing of his significant legal claims, and he has no viable means by which he can bring these claims before a court of competent jurisdiction.

These claims include:

- ν The existence of an irreconcilable conflict between Michael and his trial counsel, which he asserted more than a year before trial, which was the subject of 5 motions and 3 hearings, and which was effectively ignored by the trial judge;
 - ν His trial counsel's performance was woefully ineffective in that trial counsel pursued an intoxication defense, not cognizable under Missouri law, rather than a defense of mental disease or defect excluding responsibility, which would have been supported by credible evidence, while failing even to preserve for later review the claimed right to present an intoxication defense for later review;
 - ν Trial counsel failed to develop and present the compelling mitigation evidence of Michael's being an unwanted child, Michael's mother's repeated attempts to abort him, Michael's abusive childhood, Michael's mother profound alcoholism and the extensive and ongoing domestic violence which permeated the home in which Michael grew up;
 - ν Michael was arbitrarily denied an evidentiary hearing on his rule 29.15 motion by both the Circuit Court of Jackson County, Missouri and the Missouri Supreme Court, who applied a new procedural rule which was not firmly established and regularly followed to deny Michael's claims without a hearing. Also, Michael was improperly denied an evidentiary hearing in his federal habeas corpus proceeding. While the Federal District Court found no procedural bar to Michael's 29.15 claims, it incorrectly ruled that there had been no ineffective assistance of trial counsel without giving Michael a chance to prove that claim at an evidentiary hearing.
- λ Due to the incompetence of trial counsel in preparing for trial, the jury never heard evidence that Michael Owsley suffered from borderline schizoid or schizotypal personality disorder. The jury never heard that Mr. Owsley's personality disorder or possible psychosis effected his mental state at the time of the offense.

II.

INTRODUCTION

After only seven short years on Missouri's death row, Michael Owsley has exhausted all viable legal avenues to challenge his unfair, disproportionate and unconstitutionally imposed death sentence. Mr. Owsley fully accepts responsibility for the killing of Elvin Iverson on April 19, 1993, and agrees that he should be punished severely for that killing. However, Michael does not deserve the ultimate punishment; his sentence should be commuted to life imprisonment without parole. Michael's death sentence is the result of a break down in our criminal justice system - a breakdown which that system has refused to correct.

Michael's life story is full of emotional and compelling evidence which should have been discovered and presented to the jury which decided Michael's fate. However, the conflict between Michael and his trial attorney (and the attorney's impairment which created that conflict) precluded an adequate investigation into Michael's life history and the related mitigating circumstances. Therefore, the jury

never heard this evidence.

Michael's death sentence is even more unfair when contrasted with a sentence of twenty year imprisonment (with parole eligibility) imposed on Marion Hamilton. It is undisputed by anyone that Marion Hamilton planned and directed the robbery attempt which resulted in Elvin Iverson's death. According to the surviving victim, Ellen Cole, Hamilton ordered the death of Iverson, saying, "put the mother fucker to sleep." According to Hamilton, the shooting occurred accidentally, when Iverson tried to sit up and bumped the end of the flimsy shotgun Hamilton had given Michael to hold. The gross disparity in sentences is not a result of the relative culpability of Michael and Hamilton; rather, it is a result of sheer luck in the appointment of counsel. Mr. Hamilton was represented by the Public Defender's Office, who assigned the case to Pat Berrigan, an extremely talented and diligent attorney with an outstanding record of success in defending capital cases. Unluckily, Mr. Owsley was not appointed counsel through the Public Defender System. Rather, the court appointed James McMullin.

Mr. McMullin was at a low point in his long career. He had recently undergone hip replacement surgery and was taking medication during the time he represented Michael. Although McMullin was not on the Public Defender's list of approved counsel in capital cases, he had also been appointed to represent Michael Taylor in a capital case at the same time he was representing Michael Owsley. McMullin's befuddlement, including his inability to distinguish between Michael Owsley's case and that of Michael Taylor as well as other demonstrated incompetence of McMullin led to an irreconcilable conflict between Michael Owsley and his appointed lawyer.

Michael's frustration with his appointed counsel, James McMullin, began early in the case. Michael did everything in his power to bring this to the attention of the court and to have another attorney appointed to represent him instead of McMullin. Rather than hearing Michael's complaints and granting relief, the trial court repeatedly tried to convince Michael that his complaints were groundless. Unfortunately, the trial proved beyond any shadow of a doubt that Michael's complaints were well founded. Mr. McMullin's trial performance was even worse than Michael had feared.

Also unluckily for Michael, the trial judge assigned to the case, the Honorable David Shinn gave Michael's complaints short shrift. Rather than addressing the conflict between Michael and McMullin, Judge Shinn attempted to persuade Michael that the conflict did not exist. Even after the trial, when Michael detailed McMullin's ineffective representation in a 96 page Amended Rule 29.15 Motion, Judge Shinn denied the motion without a hearing based on an incorrect and hyper-technical reading of the rule.

Although the Federal District Court which decided Michael's habeas corpus petition correctly ruled that there was no procedural bar to Michael's ineffective assistance of counsel, it, too, denied that claim without an evidentiary hearing. Never, since Michael's trial, has any court been willing to review the merits of his claim that his trial attorney was ineffective - a conclusion which is inescapable from even a cursory reading of the transcript.

McMullin's incompetence lead him to attempt to present a defense of intoxication, which is not cognizable under Missouri law. In doing this, McMullin failed to investigate, was unaware of, or ignored two viable defenses; one based upon the facts of the case as known to Marion Hamilton, which make Michael (and Hamilton) guilty only of second degree felony murder, and Michael's own mental disease which made him incapable of deliberating upon the killing of Elvin Iverson.

Although McMullin asked both a neuropsychologist, Dr. Robert Briggs, and a psychopharmacologist,

Dr. R. Lee Evans to evaluate Michael, he focused their attention on Michael's impairment from alcohol and drugs at the time of the trial. He also asked Dr. Briggs to look for evidence of brain damage, but he did not seek out any indication of other psychological or psychiatric disorders. In fact, the testing done by Dr. Briggs revealed that Michael suffers from a severe psychological disorder, probably schizoid or schizotypal personality disorder, but possibly schizoprenetic disorder or schizoeffective order. According to Dr. Briggs, and Dr. Dennis Cowan, another neuropsychologist, his psychological disorder would have substantially impaired Michael's ability to deliberate in causing the death of Iverson even if Michael had been sober and alert at the time. However, because McMullin never asked Dr. Briggs, the jury never heard this information.

III.

MICHAEL OWSLEY'S LIFE SHOULD BE SPARED BECAUSE
SUBSTANTIAL AND COMPELLING MITIGATION EVIDENCE
WAS NEVER HEARD BY THE JURY WHICH SENTENCED HIM
TO DIE. IF THE JURY HAD HEARD THIS EVIDENCE, THEY NEVER
WOULD HAVE SENTENCED MICHAEL OWSLEY TO DEATH.

Michael Owsley is the third of four sons born to his mother, Jolinda Owsley Johnson; each boy had a different father. Michael's three brothers were all named after their fathers, however, Michael was not. By the time the then Ms. Owsley learned she was pregnant with Michael, his father, William Harvey, had already left. Jolinda was angry with him, and remained angry with him throughout Michael's childhood.

Jolinda did not want to give birth to Michael. Of course, in 1960 and 1961 abortion was illegal. Jolinda tried everything she could do induce a miscarriage, relying on older women in the neighborhood for advice. She drank heavily while pregnant with Michael, and took a variety of street drugs while drinking. A woman in the neighborhood told her that quinine tablets would induce a miscarriage so she took them for several weeks. Relying on the advice of another woman in the neighborhood she chewed on camphor gum for several weeks, hoping it would cause her to lose the baby. Another "home remedy" she tried was sitting over a bucket of hot water mixed with turpentine for hours at a time. Again, a neighbor had told her that this would cause a miscarriage. *See* the Affidavit of Jolinda Owsley Johnson attached as Exhibit A and the Memorandum of interview with Jolinda Owsley Johnson attached as Exhibit B.

Jolinda Owsley Johnson was an alcoholic throughout the time she carried and raised Michael. When Michael was a small child, his mother would frequently drink until she passed out. Michael, then less than 2 years old, would find and consume whatever liquor was left when his mother passed out. His mother described several occasions on which she would wake up from a drunken stupor to find the toddler Michael passed out next to her, smelling like a still. *See* Exhibit B.

Jolinda Owsley Johnson was a very violent person. The home in which Michael Owsley was reared saw domestic violence on a daily basis. During most of Michael's childhood, Daniel Haney, Jr., the

father of Michael's younger brother Daniel, lived in the home. He was frequently physically assaulted by Jolinda; on at least six occasions she stabbed him. On other occasions, she shot at him with a pistol, but missed. Physical assaults with hands and feet were too numerous to mention; they happened almost every day, when Jolinda and Mr. Haney would get drunk together. In the Owsley household, drunken violence was the norm.

Michael was also frequently the victim of abuse at the hands of his mother. He was clearly her least favorite son, and frequently bore the brunt of her drunken rages. He was frequently beaten with a belt or an extension cord. In another incident, Jolinda grew angry at Michael and threw scalding hot oatmeal on him, resulting in scarring on his stomach and upper thighs.

Michael's older brother, Charles, suffered from sickle cell anemia. He was Jolinda's favorite and received the benefit of whatever positive parenting she had to offer. Interestingly enough, when he died at the age of 21, Charles was the only sibling who had not been sent to prison. Of course, in families where one sibling has a chronic debilitating illness, it is not uncommon for the other siblings to feel neglected and to act out in various ways.

The social history of Michael Owsley, attached as Exhibit C, documents and details this and other substantial and compelling mitigating evidence which the jury in Michael's trial never heard. Although Michael's trial attorney, James McMullin, did hire a mitigation investigator to do a social history of Mr. Owsley, he did not give her the information and direction she needed to do an adequate job of developing this information. Moreover, Mr. McMullin had so alienated Michael and his family that they were unwilling and unable to effectively cooperate with the mitigation investigator, Pat Bartholome. As a result, Ms. Bartholome was never able to break through the denial surrounding Michael's abusive childhood and Jolinda Owsley Johnson's alcoholism and violence. Despite this denial, Ms. Bartholome informed McMullin of Michael's reported abuse as a child and of Jolinda's alcoholism; McMullin did nothing with his information, and did not encourage Ms. Bartholome to follow up or make any other attempt to integrate this information into the penalty phase case. *See* Affidavit of Pat Bartholome attached as Exhibit D.

Although the jury heard that Michael was drunk and under the influence of PCP at the time Iverson was killed, they heard nothing which would explain how Michael grew up to be an alcoholic and substance abuser. Surely, a jury which knew and understood Michael's life story and how he came to be the way he was would not have sentenced him to death.

IV.

MICHAEL OWSLEY'S LIFE SHOULD BE SPARED BECAUSE HIS

DEATH SENTENCE IS GROSSLY DISPROPORTIONATE BOTH TO

THE SENTENCE RECEIVED BY HIS CO-DEFENDANT, MARION

HAMILTON, AND TO HIS DEGREE OF CULPABILITY IN THE OFFENCE.

There are two different versions of the events which lead to the death of Elvin Iverson; the testimony of Ellen Cole as heard by the jurors at Michael's trial and the account given by Marion Hamilton, Michael's co-defendant. *See* Affidavit of Marion Hamilton, attached as Exhibit E. Michael Owsley has very little actual memory of the events; he was drunk and under the influence of PCP, marijuana

and crack cocaine at the time. By contrast, Hamilton's version, set forth in Exhibit E, is coherent and consistent with the physical facts. Hamilton's Affidavit also contains a very graphic depiction of Michael's condition at the time of the offense. It is corroborated by the accounts of people who were with Michael earlier that day, including his girlfriend, Juanita Bailey. *See* Interview of Juanita Bailey attached as Exhibit F.

According to Juanita Bailey, Michael was drunk when he arrived at St. Vincent's Day Care Center to pick her up after work. Michael's mother, Jolinda Johnson, tells us that her late husband, James Johnson bought Michael a pint of gin that day and that Michael was already drunk. Other witnesses, including Alonzo Wren and Maddy Wright testified at trial about Michael's intoxication. According to Marion Hamilton, Owsley was intoxicated when Hamilton met him at the El Capitan, a bar in Kansas City. Hamilton took advantage of Michael's inebriation to talk him into going along with Hamilton's plan to rob Iverson and Cole. *See* Exhibit E.

As stated above, Ellen Cole's account of the events leading up to Iverson's death is substantially different from that of Hamilton; however, in either version, Hamilton is the person giving the orders and Michael Owsley is the person being ordered. Hamilton is the individual who was involved with Cole and Iverson and others in selling crack cocaine and black tar heroin; Owsley was not involved in that enterprise. Hamilton is the one who felt he had been victimized by Cole and Iverson the week before, and who wanted to rob them to get his money back. Hamilton is the man who provided the weapons, which were kept there at the drug house. According to Cole, Hamilton ordered Owsley to shoot Iverson. According to Hamilton, he gave Owsley the shotgun and told Owsley to hold it on Iverson; when Iverson tried to sit up, he bumped the gun and it went off. *See* Exhibit E. By any account, Hamilton is more culpable in the death of Iverson than is Michael Owsley; however, Hamilton was sentenced only to 20 years imprisonment and expects to be released on parole fairly soon. Michael Owsley's death sentence is grossly disproportionate to Hamilton's 20 year sentence.

As Hamilton's affidavit makes clear, Michael Owsley did not intend to kill Elvin Iverson or anyone else. How, then, did Michael receive a death sentence for what, in reality, amounts only to second degree felony murder? Once again, Michael's trial lawyer dropped the ball. Michael could not give a detailed or accurate account of Iverson's death; Michael was totally impaired at the time of the shooting and had no reliable memory of events. However, Marion Hamilton's head was clear and he told his attorney what had happened. Inexplicably, Michael's trial lawyer, James McMullin, made no attempt to communicate with Hamilton's attorney, Pat Berrigan. McMullin did not participate in the deposition of Ellen Cole taken by Berrigan, where Berrigan substantiated information about the illicit business relationship she and Iverson had with Hamilton. McMullin made no attempt to delay Michael's trial until Hamilton's case had been disposed of so that Hamilton would be available as a witness for Michael. McMullin made no attempt to participate in the plea negotiations which resulted in a relatively lenient disposition for Hamilton. In short, Marion Hamilton received 20 years and Michael Owsley received death not because of their relative conduct, but because of the relative merits of their lawyers. It would be a travesty of justice to execute Michael Owsley for having been unfortunate enough to have James McMullin appointed as his attorney.

V.

MICHAEL OWSLEY'S LIFE SHOULD BE SPARED BECAUSE

NO COURT HAS BEEN WILLING TO ADDRESS THE MERITS

OF MICHAEL'S SUBSTANTIAL LEGAL CLAIMS.

Michael Owsley's irreconcilable conflict with his court - appointed attorney, James McMullin, was long standing and well documented. It had its genesis in McMullin's lack of interest in the case, condescending tone on those rare occasions he met with Michael in the jail prior to trial, and refusal to investigate the facts of the case or otherwise properly prepare for trial. When it became obvious to Michael that McMullin was not going to properly represent him, Michael began bringing the situation to the attention of the courts, by filing pro se motions to discharge McMullin and replace him with competent counsel. Those motions were given short shrift; on all three occasions when the trial court dealt with one of Michael's pro se motions to discharge McMullin, the Court's focus was not to deal with Michael's very real grievances, but, rather, to attempt to persuade Michael that McMullin was a good lawyer doing a good job. Michael, of course, knew better.

At the time of Michael's trial, McMullin was some 67 years old. He had recently undergone hip replacement surgery, and was taking medication during the time he represented Michael. At that same time, he was also appointed to represent Michael Taylor in a capital case involving the kidnapping, rape and murder of a young girl who was waiting for the school bus. McMullin frequently confused Michael Taylor and Michael Owsley. For example, McMullin called Michael Owsley's mother to ask for the names and addresses of Michael's sister; Michael Owsley has no sisters, but Michael Taylor does. *See Exhibit A.* McMullin even went so far as to file a notice of mitigating circumstances in Michael Owsley's case which did not pertain to Michael Owsley, but, rather, to Michael Taylor.

A neuropsychologist who worked with McMullin on the Michael Taylor case, Dr. Dennis Cowan, described McMullin, as "confused on the facts of the case, disorganized, and unable to stay on track...I would recommend that he receive a neuropsychological examination. I was also surprised at his attitude towards his client. McMullin told me that he believed that Mr. Taylor deserved the death penalty." *See Exhibit G. Affidavit of Dennis Cowan.*

Dr. Robert Briggs retained by McMullin to evaluate Michael Owsley, reached a similar conclusion regarding McMullin:

It seemed to me that Mr. McMullin was mentally confused on several matters. He seemed not be aware of the distinction between neurology and neuropsychology and there were other little things in the record that indicated that he wasn't tracking with the questions and answers. I was totally floored when I read the newspaper account of Mr. McMullin's closing argument to the jury. Mr. McMullin focused his arguments on motherhood and childhood trauma, but he had not asked me to address any of those factors. My testimony had very little relevance to the argument that McMullin actually made in the sentencing stage of the trial.

Affidavit of Dr. Robert Briggs, Exhibit H.

Dr. R. Lee Evans, a psychopharmacologist retained by McMullin to evaluate Michael Owsley states:

I suspect that Mr. Mullen has a memory disability. He continually confused Mr. Owsley's case with that of Michael Taylor, and he also confused me with Dr. Roger Sommi of Western Missouri Mental Health Center. He repeatedly referred to me as a neurologist, even after I corrected him.

Affidavit of Dr. Lee Evans, Exhibit I. With regard to McMullin's performance at trial, Dr. Evans states, "In the direct examination, he asked questions that surprised me, that took me outside of my area of expertise, and indicated a lapse of memory about what I was capable or providing in the case. I don't think Mr. McMullin understands my area of scientific and clinical expertise." Id.

After McMullin's wretched performance secured Michael the death penalty at trial, Michael filed a post conviction motion under Missouri Supreme Court Rule 29.15. Attorney John Kurtz was appointed to represent him. Mr. Kurtz filed a long and detailed amended motion. Unfortunately, however, the motion was creatively organized, and did not track the approved form for pro se motions under Rule 29.15. Seizing upon an appellate case from the Southern District of the Missouri Court of Appeals which had never been cited by any other appellate court, Judge Shinn dismissed the amended motion without an evidentiary hearing. In less than 2½ pages, Judge Shinn purported to dispose of the claims set forth in a 96 page amended motion. Actually, only one paragraph of Judge Shinn's order dealt with the claims of the amended motion, the rest merely recited the procedural history of the case and dealt with the claimed requirement that amended motions track Criminal Procedure Form 40. *See Exhibit J, Order by Judge Shinn dated July 2, 1996.* Upon appeal, the Missouri Supreme Court affirmed Judge Shinn's ruling, and did not consider the merits of any of Mr. Owsley's 29.15 claims.

In his federal habeas corpus proceedings, Mr. Owsley was able to persuade the United States District Court that the Court of Appeals case relied upon by Judge Shinn and the Missouri Supreme Court was not a firmly established, regularly followed procedural rule. The United States District Court found that Mr. Owsley's 29.15 claims were not procedurally barred. However, the District Court declined to grant Mr. Owsley an evidentiary hearing so that he could prove that McMullin had rendered ineffective assistance of counsel. Instead, the claims were denied by the District Court without a hearing because, the District Court concluded, Mr. Owsley had not demonstrated sufficient prejudice from McMullin's ineffective assistance. Moreover, the District Court denied Mr. Owsley a certificate of appealability and he was precluded from raising his claim of ineffective assistance of counsel or any of the other 29.15 claims in the United States Court of Appeals.

Substantial and compelling evidence in mitigation of Michael's punishment has been set forth above, as has the fact that McMullin failed to investigate and develop this evidence and failed to present it to the jury. Had McMullin done a reasonably competent job of presenting this evidence as part of a coherent penalty phase defense, Michael never would have been sentenced to death.

Evidence of Michael's psychological disorder is discussed below. Again, McMullin failed to develop this evidence through pretrial preparation and failed to present it at trial. As discussed more fully below, a reasonably competent attorney would have developed and presented this evidence rather than attempting to present an intoxication defense not recognized under Missouri law. Had the psychological evidence been properly presented and believed by the jury, Michael would have been acquitted of first degree murder and convicted of the lesser offense of second degree murder.

VI.

MICHAEL OWSLEY'S LIFE SHOULD BE SPARED BECAUSE THE JURY
WHICH SENTENCED HIM TO DEATH NEVER HEARD EVIDENCE THAT

MICHAEL SUFFERED FROM SCHIZOID OR SCHIZOTYPAL PERSONALITY
DISORDER OR POSSIBLE PSYCHOSIS WHICH AFFECTED HIS MENTAL STATE

AT THE TIME OF THE OFFENSE

Michael's trial attorney, James McMullin, retained two well qualified experts to evaluate Michael's mental state at the time of the offense as it related to his consumption of alcohol and PCP. There is no question that Michael was seriously impaired with the consumption of alcohol, PCP, marijuana and crack cocaine. *See Exhibit E.* However, McMullin's own shortcomings prevented him from discussing the case thoroughly with those experts, and from asking for further evaluation which would have disclosed that, at the time of the offense, Michael was also suffering from a psychological disorder which prevented him from coolly reflecting on the death of Elvin Iverson. The difference is especially significant since, under Missouri law, voluntary intoxication, whether with drugs or alcohol, may not be used as evidence that the defendant did not have the culpable mental state required for the commission of the offense, Mo. Rev. Stat. §562.076. However, a mental disease or defect which negates the existence of a culpable mental state required for the commission of the offense is relevant, admissible and extremely probative evidence. In other words, McMullin directed the experts to focus on an area which could never have provided a defense to first degree murder, and, under McMullin's direction, a viable defense to first degree murder was overlooked.

Dr. Robert Briggs is a neuropsychologist who examined Michael Owsley at Mr. McMullin's behalf. Dr. Briggs tells us his pre-trial contacts with McMullin were "quite minimal" and that he first met McMullin face to face "when I appeared at trial to testify." Exhibit H. There was no discussion of the mental state for first degree murder, and Dr. Briggs was unaware of the provisions of Section 562.076 prohibiting the consideration of voluntary intoxication or drug use for the purpose of negating a mental state which is an element of the defense. Moreover, there was no discussion with McMullin as to whether Michael had a mental disease or defect. Although Dr. Briggs found that Michael had no brain damage, he found that Michael was "impaired due to a possible schizoid personality disorder and a PCP intoxication." However, because of McMullin's referral questions, Michael Owsley's psychological condition was not covered in Dr. Briggs' testimony. Had it been, Dr. Briggs believes there would have been a different outcome.

Dr. Briggs concludes, based upon his subsequent discussions with Michael's later counsel and his review of his data that Michael's psychological profile "is consistent with that of a person with a severe personality disorder, such as schizoid, or schizoidtypal personality disorder." He also concludes, "it is evident that the severity of Mr. Owsley's personality disorder or possible psychosis affected his mental state at the time of the offense. Drug use would certainly have exacerberated his already impaired condition, but his underlying mental and emotional problem is quite serious even without intoxication." Exhibit H. This is evidence that, had McMullin spent time talking with Dr. Briggs prior to trial, would have been readily available. This is evidence which, if heard and believed by the jury, would have resulted in a verdict of second degree murder rather than first degree murder at the guilt stage of the trial, making Michael ineligible for the death penalty.

McMullin also retained Dr. R. Lee Evans, a psychopharmacologist, to evaluate Michael. At that time, Dr. Evans was the chair and professor of the Division of Pharmacy Practice at UMKC and also a professor in the Department of Psychiatry at UMKC. Dr. Evans is now Dean of the School of Pharmacy of Auburn University. Dr. Evans "found the case very frustrating because Mr. McMullin

seemed ill-prepared and spent very little time prior to court discussing the case with me... I never met with Mr. McMullin prior to trial to discuss the scope of my expert opinions or to prepare me for the questions that would be asked." With regard to his assessment of Michael, Dr. Evans states, "It was apparent to me that Mr. Owsley's mental health was compromised without his use of drugs. However, I was not asked to address the effects of drugs and alcohol on a pre-existing psychological impairment." *See Exhibit I.* Had McMullin spent the time and effort to discuss the case thoroughly with Dr. Evans prior to trial, he could have called Dr. Evans to give admissible, relevant and persuasive testimony which might well have lead to a verdict of second degree murder at the guilt phase of Michael's trial.

As it was, McMullin called both Dr. Briggs and Dr. Evans to testify at the penalty phase of Michael's trial, after the jury had already found guilty of first degree murder in the absence of mental health testimony.⁽¹⁾ Although he was called to testify in the penalty phase, Dr. Evans:

[F]elt that there was a lot of mitigating information that I was never given an opportunity to divulge. I was excused from the witness stand without having educated the jury about the effects of PCP, and the evidence in the case that indicated that Mr. Owsley's extreme PCP intoxication. I did not have an opportunity to explain how PCP works on the human body to totally alter perception and induce violent impulses.

See Exhibit I. It is clear that, had Dr. Evans been properly prepared and examined by McMullin, the jury would have gotten a far more sympathetic picture of Michael Owsley.

Had Mr. Owsley's trial attorney, James McMullin preformed in a reasonably competent manner, the jury would have heard compelling evidence that Mr. Owsley suffered from a mental disease or defect which prevented him from having the culpable mental state required for murder in the first degree. There is a reasonable probability that the jury would have convicted Michael not of first degree but rather of second degree murder. Even had Michael been convicted of first degree murder, an adequate and effective presentation of this evidence would certainly have lead to a verdict of life imprisonment in the penalty phase. Instead of painting Michael as a drugged crazed assassin, the jury could have seen the psychological impairments which, coupled with the substance abuse which Michael was taught, literally, in the cradle, landed Michael in the situation which led to the death of Elvin Iverson. A jury which had been shown the entire picture would never have sentenced Michael to death for this offense.

VII.

CONCLUSION

Michael Owsley will surely die at one minute after midnight on February 6, 2002, unless you, Governor Holden, intervene to remedy this obvious injustice. In most cases, where an accused is provided competent and effective counsel, a fair and just result occurs at trial. Or, if an unfair trial occurs, appellate courts will remedy that injustice. However, in Mr. Owsley's case, the system broke down.

Mr. Owsley was represented by an incompetent attorney, with whom he had a irreconcilable conflict. The incompetent attorney failed to present substantial, compelling evidence in mitigation of

punishment which would have saved Michael's life. The unfairness of Michael's situation is in stark contrast to the sentence of 20 years received by his admittedly more culpable co-defendant Marion Hamilton, who had very competent counsel. In Michael's case, the appellate courts have not acted to correct the injustices which occurred; rather, they have compounded them. The appellate courts have looked for excuses, technicalities if you will, upon which to deny review on the merits of Michael's claims. No court has conducted, and no court will conduct an evidentiary hearing at which Michael can prove, beyond any doubt whatsoever, that James McMullin was totally ineffective and incompetent in representing him. Moreover, Michael suffers from a psychological disorder about which the jury which sentenced him to death was never told.

Michael Owsley has no viable remedies left through the justice system. His only hope of survival is the power which the Missouri Constitution places in you, Governor Holden. We implore you to exercise that power and show mercy to Michael Owsley by commuting his sentence to a sentence of life imprisonment without parole. Justice demands no less; mercy can ask no more.

Respectfully submitted,

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Attorneys for Applicant

1. McMullin proffered the testimony of Dr. Briggs and Evans as evidence of intoxication in the guilt phase. When the trial court properly indicated that that evidence would not be admitted, McMullin asked that there penalty phase testimony be considered an offer of proof as to what their testimony at the guilt phase would have been. However, in proffering this testimony at the guilt phase, McMullin failed to preserve the issue of the constitutionality of Section 562.076 for later federal review. In fact, the Missouri Supreme Court ruled that the issue had not been preserved and the U.S. Court of Appeals for the Eighth Circuit agreed.