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APPLICATION OF REGINALD L. POWELL TO GOVERNOR MEL CARNAHAN FOR EXECUTIVE CLEMENCY, COMPRISED OF A STAY OF EXECUTION AND COMMUTATION OF POWELL'S DEATH SENTENCE TO LIFE IN PRISON OR, ALTERNATIVELY, FOR APPOINTMENT OF A BOARD OF INQUIRY

Reginald L. Powell was 18 years old at the time of his crime, November 14, 1986. He was convicted of first degree murder in March, 1988 and sentenced to death by the trial judge after the jury could not agree on his punishment.

On January 12, 1998 the U.S. Supreme Court denied Powell's petition for writ of certiorari, which sought review of the U.S. Court of Appeals' affirmance of the dismissal of his petition for writ of habeas corpus. Thereafter, the Missouri Supreme Court set Powell's execution for February 25, 1998. As a last resort Powell turns to Governor Mel Carnahan for a review of Powell's request for executive clemency under the facts of this case. Powell requests that the Governor stay Powell's execution and commute Powell's death sentence to life in prison without parole. Alternatively, Powell requests that Governor Carnahan appoint a Board of Inquiry to examine the circumstances that comprise the basis for Powell's request for clemency, particularly Powell's improper and grossly flawed representation at trial by his appointed public defender, Marianne Marxkors.

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INTRODUCTION

Powell killed the two victims, Freddie and Lee Miller, by stabbing them, after he and three others had severely beaten the Millers and broken most of their ribs.[1] At the time of the crime, Powell was very intoxicated and high on PCP, an illegal drug with notoriously violent side effects. The day after the crime, Powell was arrested and confessed. He has never denied responsibility for the crime. Accordingly, this clemency application addresses only his sentence, not his conviction.

For many reasons, this case should never have concluded with Powell being sentenced to death. In the first place, this crime might never have occurred, had the State of Missouri not abandoned Powell back to the streets at an early age; he was released due to overcrowding from Missouri Hills, a residential juvenile treatment and education center, the only positive structured environment of his extraordinarily difficult life. *See infra* at 24. Second, had the State not appointed Marianne Marxkors as his lawyer, a mentally unstable public defender trying her first death penalty case, he almost certainly would have received a life sentence.

With a competent lawyer the case likely would never have gone to trial. A competent lawyer would have recommended accepting the State's offer to plead guilty in return for a life sentence. Likewise, had Powell received competent representation in the penalty phase of his trial, untainted by Marxkors' significant errors of law and judgment, as set forth *infra* at 4-16, he likely would have received a jury verdict of life imprisonment.

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[1] The co-defendant in this case, Lee McDowell, received a 30 year sentence. Two juveniles, who were also involved, were never charged.

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REASONS FOR GRANTING CLEMENCY

Four significant factors form the basis for Powell's clemency plea: the hung jury on sentencing; the improper relationship and sexual conduct between Powell and his lawyer; Powell's mental retardation; and Marxkors' errors of law and judgment that were never reviewed on their merits in the courts.

Marxkors, the 34 year-old lawyer foisted on Powell by the State was unstable, mentally ill, and ill-prepared to represent him; she fell in love with him and had sexual relations with him during his trial. *Infra* at 4-5. The object of her desire and her client, Powell, was a border-line mentally retarded, 18 year-old youth with a family background so horrendous that it is virtually unimaginable. *Infra* at 17-28. In addition, Marxkors made grievous errors of law and judgment, some of which were never reviewed in the course of his appeals, because they were found to be procedurally barred. *Infra* at 4-16. Finally, despite Marxkors' emotional involvement with Powell and her lapses and failings in the course of her representation of him, his jury was unconvinced of the appropriateness of a death sentence. Because a jury of his peers could not agree on a death sentence, the trial judge alone made the sentencing decision. Powell v. Bowersox, 895 F. Supp. 1298, 1302 (E.D. Mo. 1995) (citing Respondent's Ex. B [state court legal file] at 105-06. These four interwoven strands of Powell's story form the basis of his clemency application.

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A. POWELL'S MENTALLY ILL, UNBALANCED, AND ILL-PREPARED PUBLIC DEFENDER FELL IN LOVE WITH HIM, RATHER THAN COUNSEL HIM, & HAD SEX WITH HIM RATHER THAN COMPETENTLY REPRESENT HIM.

Powell's State-appointed lawyer, public defender Marianne Marxkors, was mentally ill. Affidavit of Daniel Cuneo,[2] ¶ 6 ("Cuneo Aff."). Marxkors has been treated with psychological therapy and medication nearly continuously from well before his trial in 1979 until now. Cuneo Aff. ¶¶ 6-7, 14; Cuneo Aff. Ex. 2 (notes from Marxkors' therapy sessions).

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[2] Dr. Daniel Cuneo is employed by the Illinois Department of Human Services (DHS) as the Clinical Director of Chester Mental Health Center, the Illinois Maximum Security Hospital. He supervises the facility's patient treatment units and related clinical services of the 320 bed maximum security forensic hospital. He coordinates Southern Illinois University's practicum for both Law and Psychiatry interns at the Chester facility. He also serves on statewide and regional committees on mental health and law. He reviews all of the reports from DHS to the Illinois courts in regards to those defendants found Not Guilty By Reason of Insanity, and he coordinates the evaluations of individuals for DHS in connection with the Sexually Violent Persons Act. Cuneo Aff. ¶¶ 1-2.

In addition he is routinely appointed to conduct evaluations for the court as to fitness to stand trial, sanity and other issues; he testifies as to his findings in different state and federal courts. The majority of time he is subpoenaed by the *state*. Id. ¶ 2. He has given over 140 conferences on mental health and law issues and has authored numerous articles, book and assessment tools in these areas. Id. A copy of his vitae is attached. Cuneo Aff. Ex. 1.

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Powell's case was Marxkors' first capital trial. Cuneo Aff. ¶ 9. See Videotape of Cuneo Interview with Marxkors, dated Feb. 3, 1998 (submitted with Clemency Application) (hereinafter "Videotape"). Marxkors was ill-prepared for the experience and completely unable to handle the stress associated with it. Cuneo Aff. ¶¶ 8-20. Instead of offering counsel to Powell, her border-line retarded client, she relied upon him for comfort and support in handling her own uncontrolled emotions. Cuneo Aff. ¶¶ 11-14. She fell in love with him and entered into a sexual relationship with him during his trial before he was sentenced. Id. ¶¶ 9-13. See Videotape; O'Neil, *Lawyer Admits Sex With Client Before Sentencing*, St. Louis Post-Dispatch, Feb. 13, 1998, at 1, col. 6; Christian, *Lawyer-Client Intimacy Prompts Death Row Plea*, New York Times, Feb. 16, 1998 sec. A at 10, col. 5; Salter, *Condemned Man's Affair with Lawyer at Issue in Clemency Request*, Associated Press wire report, Feb. 15, 1998; Shelly, *No Outcry Arises Over This Sentence*, Kan. City Star, Feb. 4, 1998, Sec C at 1, col. 1; McClellan, *Man on Death Row Might Be Better Off If He Were A Woman*, St. Louis Post-Dispatch, Feb. 9, 1998, Metro sec. at 1, col. 1; McClellan, *Trysts Muddle Trial*, St. Louis Post-Dispatch, Nov. 19, 1997, Metro sec. at 1, col. 1. All of these articles are included in the addendum to this Clemency Application.

The extent of their relationship was not revealed until after the trial was completed. In 1989, more than a year after Powell's trial and sentencing, the Department of Corrections became suspicious of Marxkors' relationship with Powell after hearing rumors of her performing fellatio on him during inmate visits and after observing rocking motions and other odd physical conduct between her and Powell during visits. See Cuneo Aff. Ex. 4(A) (D.O.C. incident reports). The D.O.C. had ample reason to be suspicious: in July 1988 prison authorities confiscated a stack of letters from Marxkors to Powell that were found in Powell's cell. These letters confirmed the

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extent of their relationship, alternately in explicit, graphic sexual language, interspersed with a romantic, adolescent style reminiscent of high school love letters. Id. (handwritten letters).

B. POWELL'S LAWYERS MADE SERIOUS ERRORS OF LAW AND JUDGMENT THAT RESULTED IN PROCEDURAL BARS TO THE REVIEW OF ERRORS AT TRIAL AND IN POSTCONVICTION PROCEEDINGS THAT RESULTED IN HIS RECEIVING A DEATH SENTENCE.

1. The Issue Of Marxkors' Improper Sexual Relationship With Her Client During Trial Was Never Reviewed On Its Merits In The Courts.

Marxkors' improper sexual relationship with her client was never reviewed on its merits in any court. Her letters to Powell, including their reference to having sex in the holding cell at the trial court building were confiscated in the summer of 1988, within a few months of trial, and well before the postconviction hearings in April 1989. Despite the timing on the discovery of these letters, no mention of them or Powell's relationship with his lawyer was ever raised in the state courts. The failure to raise the issue of Powell's relationship in state court precluded review of the issue in the federal courts, though Powell's initial counsel attempted to bootstrap the issue into the previously raised "right to testify" issue. See Powell v. Bowersox, 895 F. Supp. 12998, 1304, 1306 (E.D. Mo. 1995). The postconviction lawyers for Powell and the State of Missouri, Dwight Warren and Scott Walters, have not returned the calls from Powell's counsel to explain why they decided to omit this issue and protect Ms. Marxkors at the expense of Powell's life.

The issue of a sexual relationship between lawyer and client is an extraordinarily disturbing and compelling one, particularly when the client is very young and retarded. The possibility of a conflict of interest between the lawyer and client looms large indeed. Marxkors and Powell agree that a sexual relationship occurred between them during trial. Marxkors recalls only having sex

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after the jury could not agree on the penalty, but she is not definitive on this point, couching her answers with "as I recall" and other such qualifiers. See Videotape. Powell recalls that the sex occurred earlier. See Cuneo Aff. ¶ 11. Regardless of when the sex occurred, the blurring of the line between attorney and client occurred much earlier. Cuneo Aff. ¶¶ 12-19. Before her feelings altered her judgment, Marxkors understood that the attorney-client relationship needed to operate on a professional level. Cuneo Aff. ¶ 19. She failed to withdraw once she crossed that line, and instead continued to represent him notwithstanding her conflict of interest as both lover and lawyer. We contend that Marxkors may well have kept Powell from testifying in the penalty phase out of concern that he might blurt out the fact of his improper relationship with her while on the stand.

A conflict of interest is an automatic, *per se*, ground for relief that does not require an additional showing of "prejudice" from the conflict, Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978); United States v. Levy, 25 F.3d 146 (2d Cir. 1994); Selsor v. Kaiser, 22 f.3d 1029, 1032-33 (10th Cir. 1994), as *is* required for showings of ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, however, prejudice is presumed when a lawyer has an actual conflict of interest. 466 U.S. at 692.

Marxkors' position as Powell's emotionally involved lover affected her ability to represent him immeasurably and placed her in a conflict of interest with respect to her representation when she chose not to allow him to testify in the penalty phase. Had this claim been raised or disclosed in a timely manner by either Marxkors, Walters or Warren, the conflict of interest would have been apparent and necessitated the granting of relief to Powell in the form of a new trial or a lesser sentence of life imprisonment.

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The failure of the postconviction lawyers to mention this claim during postconviction proceedings is particularly disturbing because it raises the specter of the judicial system conspiring to protect one of its own to the detriment of Powell, the dead-end kid from the ghetto, even at the expense of his life. For this reason alone, Powell deserves clemency from Governor Carnahan.

2. Had Marxkors' Not Been Emotionally Involved With Powell And Under The Absurd Belief That He Could Only Be Guilty Of Involuntary Manslaughter, She Would Have Recommended And Powell Would Have Accepted The State's Offer Of Life In Prison Without Parole.

Marxkors' emotional attachment to Powell distorted her perception of him and his crime so significantly that she could not recognize that manslaughter was not a reasonable possibility. The facts were overwhelming: Powell confessed and did not dispute that he intentionally stabbed the Miller brothers. Her expert witness could not state that Powell's PCP and alcohol intoxication had induced psychosis; accordingly, intoxication provided no defense under Missouri law.

Nevertheless, Marxkors saw only Reggie, her retarded, dependent, needy client. She could not see the facts. Cuneo Aff. ¶ 15. She did not discuss the plea offer with him, based on her mistaken conclusion that no jury would convict him of first degree murder, apparently due to her belief that "he couldn't premeditate going to the bathroom" because of his retardation. See Videotape. Had she not been in love with him, she would have recommended pleading guilty in return for a life term, as any competent defense lawyer would have. Instead, she seemed surprised when the trial court rejected her proposed jury instructions on involuntary manslaughter as not being supported by the evidence. See Cuneo Aff. Ex. 5 (instruction conference in the guilt phase). Marxkors' emotional attachment to Reggie distorted her judgment and prevented him

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from accepting a plea bargain for a life sentence. We request that the Governor commute his sentence to life in prison without parole for 50 years to rectify the injustice of Powell receiving a death sentence due to his attorney's distorted judgment.

3. Marxkors' Inexperience And Emotional Attachment To Powell Rendered Her Completely Ineffectual In The Penalty Phase And, Inexplicably, Caused Her To Submit A Guilt Phase Instruction In The Penalty Phase Which Precluded The Jury From Considering Powell's Drug And Alcohol Intoxication As A Mitigating Circumstance Supporting Life Imprisonment. Powell's Subsequent Lawyers Failed To Raise This Mistake In State Court Or In His Federal Habeas Petition.

As noted above, Missouri law precludes a defendant from escaping conviction based on voluntary intoxication without psychosis. The trial court properly instructed the jury in the guilt phase of the trial that "mental disease or defect" sufficient to excuse guilt did "not include alcoholism without psychosis or drug abuse without psychosis." However, Marxkors made the horrendous mistake of submitting the same instructional definition in the penalty phase. See Instruction No. 36, Legal File at 117. This was a crucial error of law which has never been reviewed by any court.

On the night of the killings Powell had been drinking all day, was drunk and under the influence of PCP. Trial Transcript at 862-64, 999-1000, 1103; Transcript of Rule 29.15 Hearing, (hereinafter "PCR Tr.") at 207, 216, 253. Powell's alcohol and drug ingestion diminished his ability to reflect on his actions and to deliberate. Tr. 1062, 1101.

A related argument[3] that was presented in the state and federal courts missed the main problem with this instruction. Do not be misled by comments from the State Attorney General's office that this argument has been considered and rejected by the courts. It has not!

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[3] Both the state and federal courts were asked to find error based on the trial court's

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refusal to instruct the jury on the statutory mitigating circumstances that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. See Mo. Ann. Stat. § 565.032 (Vernon's Cum. Supp. 1997). The Missouri Supreme Court rejected this argument because it found these circumstances were not supported by the evidence. State v. Powell, 798 S.W.2d 709, 714 (Mo. banc 1990). The federal court of appeals rejected the argument because the mitigating circumstance instruction, while it did not specifically direct the jury to these mitigating circumstances, told the jury that it could consider these circumstances based on the catch-all instruction that the jury could "consider all the evidence." Powell v. Bowersox, 112 F.3d 966, 970 (8th Cir. 1997).

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The problem with this instruction cannot be cured by a catch-all statement to consider all of the evidence. See *supra* note 3. A general instruction to consider all of the evidence cannot reasonably be read to include the mitigating evidence of alcohol and drug intoxication without psychosis, see Tr. at 1104, 1119, when the jury instructions specifically stated that mental disease or defect did not include alcoholism or drug abuse without psychosis. L.F. at 112, 117, 166, 174. This violates Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (inappropriate to instruct jury to disregard mitigating evidence proffered on behalf of defendant because it did not provide a "legal excuse from criminal responsibility"). It cannot be assumed that a general instruction to consider all of the evidence, or all undefined mitigation, could overcome the instruction's explicit direction that mental disease or defect does not include substance abuse without psychosis. Thus, the mitigation instruction failed to advance a crucial part of the defense's case for mitigation, and expressly instructed the jury that it could not consider mental defects resulting from his alcohol and drug intoxication, as there was no evidence of psychosis.

The narrow, limited mental defect instruction created the possibility, indeed the probability, that the jury understood that it could not consider and give mitigating weight to Powell's evidence of diminished capacity from the combination of his mental deficiencies and non-psychotic alcohol and drug abuse. Compare Parker v. Dugger, 498 U.S. 308, 314 (1990) (evidence of large amounts of alcohol and various drugs, including LSD, is a valid non-statutory mitigating factor). A reasonable possibility exists that Powell's jury interpreted the trial court's instruction, that mental disease or defect did not include the effects of alcohol or drug intoxication without psychosis, to preclude the jury from considering Powell's mitigating evidence of alcohol

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and PCP intoxication without psychosis. Under Eddings, that possibility would have required reversal, had the argument ever been made.

Had the argument not been precluded by Marxkors' offering of the flawed instruction, not to mention Powell's postconviction and habeas (district court) counsel's failure to raise the issue in their proceedings, the case would have been infused with reversible error. More significantly, the jury, which was hung on the issue of punishment as it was, likely would have been able to reach a verdict of life imprisonment had it not felt foreclosed from considering the valid mitigating factor of non-psychotic alcohol and drug intoxication. The jury instruction violated Eddings and Powell's Eighth Amendment right to be free from arbitrary and capricious imposition of the death penalty. Powell implores the Governor to correct this miscarriage of justice and commute his sentence to life in prison.

4. Marxkors' Failure To Allow Powell To Testify In the Penalty Phase Precluded Him From Telling The Jury Of His Remorse, Which Would Likely Have Resulted In The Jury Being Able To Reach A decision On Punishment And Sentence Him To Life Imprisonment.

Powell has pressed his right to testify issue in the state and federal courts. It has been rejected because the Missouri Supreme Court and Eighth Circuit opined that his proffered testimony likely would not have made a difference. We remain confounded by this conclusion, particularly in light of all of the other improprieties in this case, and request that Governor Carnahan revisit this issue, too.

First, the jury was *hung* on the sentencing issue! Almost anything that weighed in Powell's favor seems likely to have tilted the jury in favor of life. Nothing that Powell could have been asked in cross-examination would have added anything that wasn't already in evidence and

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before the jury in his taped confession. See Trial Transcript ("Tr.") at 1336. The State Attorney General and the courts have made much of the "last laugh" statement in the confession. However, as the jury heard that evidence anyway, it makes no sense to conclude, as the courts have, that Powell's testimony would have been harmful.

Attorney Marxkors was devastated by Powell's conviction. She cried the whole day in between the guilt phase and the penalty phase. PCR Tr. 104. See PCR Tr. 38. She "was real upset" and "didn't anticipate that they would come back with Murder First." Id. Marxkors did not discuss with Powell whether he should testify in the penalty phase or that the decision to testify was his to make. PCR Tr. 19-20, 23, 38, 39, 85. She never thought to discuss with Powell that he could testify in the penalty phase, PCR Tr. 87, and perhaps evoke a personal appeal for mercy. PCR Tr. 88. Powell never knew that he could testify in the penalty phase. PCR Tr. 204. Powell's post-conviction counsel, not Marxkors, raised the claim about her ineffectiveness in connection with the denial of his right to testify.[4] See PCR Tr. 102, PCR L.F. 75-77. Although Marxkors was critical of herself in many respects, she did not raise the issue that defendant was never told of his right to testify in the penalty phase, though she admits he was not.[5]

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4 Having transgressed the bounds of the attorney/client relationship, Marxkors labored under a conflict of interest at the penalty phase, undoubtedly fearing that Powell might blurt out the sexual extent of their relationship while on the stand. Because the district court did not hold a hearing on the newly revealed sexual relationship between attorney and her brain-impaired client, it was not determined whether the decision not to call Powell to testify--and the failure to include that as one of her failures constituting ineffectiveness--was the result of Marxkors' fear that her improper relationship with defendant would be revealed if he testified.

5 Among the many examples of Marxkors' failure to advise Powell that the decision to testify was his to make are the following:

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Q. Did you explain to him about his right to testify, either in the guilt phase of the death penalty trial, if he was found guilty, the punishment phase?
A. Not that I recall. (Tr. 20)

Q. Whose decision was it that he was not going to testify?
A. Mine.
Q. Did you explain to Mr. Powell that it was his final decision?
A. No. (Tr. 23)

Q. Whose decision was it that he would not testify in the penalty phase?
A. Mine.
Q. Did you advise him of the fact that it was his decision alone to make?
A. No. (Tr. 38)

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Thus, though Marxkors presented family members who said that Powell was not normally a fighter or a violent person, and that they didn't want him to die, PCR Tr. 1291-1315, she presented nothing that allowed him to personally express remorse for his crime.[6] Marxkors called only one other witness during the penalty phase, a corrections officer who testified that Powell had adjusted well to prison and wasn't a threat to others. PCR Tr. 1315-17. These witnesses gave the jury no insight into Powell's attitude about the crime. The penalty phase evidence then closed, without the jury hearing from Powell himself. Thus, the jury's only impression of Powell's attitude about the crime came from his confession the day after the crime, when he was still under the influence of alcohol and PCP: that he had had the "last laugh."

The right to testify, "to present [one's] own version of events in [one's] own words," is "[e]ven more fundamental to a personal defense than the right of self representation" upheld in Faretta v. California. Rock v. Arkansas, 483 U.S. 44, 52 (1987). See id. at 53 n.10 (collecting cases where the right has been treated as fundamental). "The right to testify on one's own behalf at a criminal trial ... is one of the rights that 'are essential to due process of law in a fair adversary process.'" Rock, 483 U.S. at 51, quoting, Faretta, 422 U.S. at 819 n.15. See Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J. concurring) (right to testify "essential to our adversary system"). See also Cooper v. Oklahoma, 116 S.Ct. 1373, 1381-82 (1996) (likelihood that incompetent defendant could not exercise fundamental rights, e.g., guilty plea and decision to

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[6] Content to rest on the evidence previously adduced in the guilt phase, the State presented no new evidence. Tr. 1285-86.

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testify, among others, threatened " 'fundamental component of our criminal justice system' -- the basic fairness of the trial itself"), quoting, United States v. Cronic, 466 U.S. 648, 653 (1984).

At the penalty phase of a capital trial, questions of remorse are not measurable from the printed page alone. Mere words are not the only thing being evaluated by a jury when a defendant testifies; "demeanor can have a great bearing on [a defendant's] credibility, persuasiveness, and on the degree to which he evokes sympathy." Riggins, 504 U.S. at 142 (Kennedy, J., concurring). Moreover, remorse is a significant factor in the penalty phase. Commenting on the adverse impact upon testimony that is merely inhibited by medication (as opposed to the total denial of Powell's right to testify by his counsel's ineffectiveness), Justice Kennedy perceptively stated:

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. See Geimer & Amsterdam, Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Cases, 15 Am. J. Crim. L. 1, 51-53 (1987-1988).

Riggins v. Nevada, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring).

The transcript shows a petitioner who was brain-impaired, learning disabled, functionally brain-damaged as a result of his impairment, and in the bottom two or three percent of the population in verbal abilities. Tr. 1055-56, 1089-91. See *infra* at 17-21. Inarticulate though Powell may be, he expressed remorse repeatedly and spontaneously without leading questions, especially when questioned adversarially by the prosecutor and the judge:

Q.(by prosecutor): What did you want to testify about?

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A. ... I really wanted to testify that I was sorry for what had happened and that I wasn't aware what I was doing, that I was fully -- that I was very intoxicated and had been smoking Wack at that time, that I didn't mean no harm or hurt anybody. PCR Tr. 253

Q(by prosecutor): What does remorse mean to you?
A. Remorse seems like, well, like expressing bad feelings, if I'm not mistaken. I don't know.
Q. How do you feel about the incident, the murder of these two young men?
A. Badly hurt, destroyed about it.
Q. You're destroyed?
A. Yes.
Q. Because you're in jail, because of the way it's affected your family?
A. No, because how it affected my family and myself and also their family, too.
THE COURT: Also what, sir?
A. Their family, because they have loved ones, too. PCR Tr. 242-43.

See also PCR Tr. 239-40 (questions by defense counsel).

Powell's unprompted responses of sympathy for the victims' family is hardly the same as the cold and aloof picture that emerges if one only listens to the taped confession's "last laugh" statement made the day after the murders when he was still in an alcohol and PCP fog. The courts' characterization of Powell's potential penalty phase testimony "as extremely harmful" cannot be understood when that testimony is so dramatically better than the "last laugh" statement that was all his jury ever heard. In this case the jury could not reach a decision on death even when Powell had not testified and humanized himself to the jury. The halting responses and expressions of regret and sympathy uttered by Powell at his post-conviction hearing are a far cry from the "last laugh" statement that was all that the jury heard from Powell. Given the hung jury on sentencing without his testimony, the probability that the result might have been different had he testified must be sufficiently likely to undermine confidence in the outcome and the fairness of his trial.

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Powell submits that the denial of his fundamental right to testify adversely effected the fundamental fairness of the proceeding, and likely resulted in his being sentenced to death by a trial judge who never should have had the opportunity because his testimony would likely have convinced the jury to show him mercy. He begs the Governor to show him mercy now.

C. POWELL'S MENTAL DEFICIENCIES AND GROSSLY UNDERPRIVILEGED SOCIAL HISTORY MAKE HIM WORTHY OF CONSIDERATION FOR EXECUTIVE CLEMENCY.

Reginald Love Powell was born in St. Louis, Missouri on July 23, 1968 to Ursula Powell and Shelley Pearson, Jr. He is impaired both mentally and emotionally due to the effects of mental retardation, a childhood of abandonment, alcoholic and substance-abusing parents, indifferent relatives, unstable living situations, emotional abuse and the effects of abject familial poverty.

Reginald Powell has been diagnosed numerous times as suffering from mental retardation. There is no doubt that Powell is substantially limited in his mental functioning. Cuneo Aff. ¶ 5 (citing mental retardation diagnoses, social history and educational records, discussed in more detail *infra*). Powell belongs in the category of mild retardation which means that Reggie functions worse than 98% of the population of his peers. In 1980 Reggie was given his first psychological evaluation by Marilyn Maldonado, school psychologist for the St. Louis School District. Reggie scored on the WISC-R testing instrument as having a Verbal IQ of 64, Performance IQ of 71, and a Full Scale IQ of 65. ATTACHMENT A, St. Louis Public Schools Report of Results of Psychological-Educational Assessment, page 4.

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A 65 IQ is defined in the DSM-IV (DSM-III definition fits same criteria) as: "317 Mild Retardation."

> Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable." This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of Mental Retardation typically develop social and communicating skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. *With appropriate supports*, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994, page 41 (emphasis added).

On July 3, 1983, psychological testing was performed on Reggie, who was 15 years old, by the Northeast Regional Youth Center. The WISC-R Intelligence Test scored as follows: Verbal IQ 62, Performance IQ 80, with the Full Scale IQ scored as 69. ATTACHMENT B, Northeast Regional Youth Center Psychological Testing, page 1. "Reggie's performance on the WISC-R places him as functioning in the Mentally Deficient Range." Reggie's scoring on the Woodcock-Johnson Psychoeducational Battery placed him at a grade score of 3.6, indicating that Reggie performs or exceeds only 2% of his age group, or in the alternative 98% of his peer group performs better than he is capable of performing. Id. at 2. Martin Russo, Clinical Psychologist who administered the test instruments on Reggie offered the following analysis: "Reggie seems to have a poor self concept and tries to put forth a facade of self adequacy. His inability to read and write fosters a great deal of defensiveness. Reggie will need a structured environment." Id. at 5.

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He further recommended that: " Placement in a structured facility such as Hogan Street or Sears is recommended." Id.

The Public Defender's Office of St. Louis requested a psychological evaluation based upon the charges for First Degree Murder. Reggie was 19 years old when this evaluation was performed. The evaluation took place on July 30th and August 4th of 1987 and was performed by Lynn J. McLaughlin, Ph.D., State of Missouri, Department of Mental Health. Dr. McLaughlin reports the use of drugs, beginning at the age of 13, by Reggie. Dr. McLaughlin reports: "On the WAIS Reginald achieved a Full Scale IQ score of 83, placing him in the Low Average range of intelligence. There was a large and significant difference between his verbal score of 74 (Borderline intellectual functioning) and his performance score of 97 (Average). *This was his best intellectual performance yet recorded and* ***could reflect some practice effects.*** However, it does confirm his limited verbal skills and the large discrepancy between his verbal and performance skills." ATTACHMENT C, State of Missouri, Department of Mental Health, Psychological Assessment, Dr. Lynn McLaughlin, Ph.D., page 2 *(*emphasis added*)*.

Dean L. Rosen, Ph.D., a private practitioner in St. Louis, Missouri conducted neuropsychological testing at the request of the Public Defender's Office. Dr. Rosen administered tests on January 1, 1988 when Reggie was 19 years and 5 months of age. Dr. Rosen addressed Reggie's substance abuse history including the prolonged use of PCP. Dr. Rosen was asked to determine the level of neuropsychological functioning regarding Reggie. Dr. Rosen interpreted the results of the Shipley Institute of Living Scale as: "It does substantiate that he is rather poor at problem solving and has a very limited vocabulary and shows brain impairment." ATTACHMENT D, Psychological Report, Dr. Dean Rosen, Psy.D., page 3. On the Trailmaking

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Test from the Halstead-Reitan Battery, Reggie scored in the average range on the easy Part A and in the more difficult Part B he scored slightly higher than the 92 second cutoff to diagnose brain damage. Dr. Rosen reports that on the final test administered:

> On the Booklet category Test, which is a portable adaptation the Reitan Category Test, Mr. Powell obtained 83 errors. This score is substantially higher that the 50 errors which are used as the cutoff to diagnose brain impairment on this test. This test of abstract reasoning and problem solving also requires flexibility in coming up with new solutions to the categorizing problems. *This test has been found to be a very sensitive indicator of generalized brain impairment.*

Id. at 4 (emphasis added) Subsequent testing has repeatedly indicated evidence of brain impairment. Dr. Barry M. Crown, a neuropsychologist, evaluated Reggie on August 20, 1997 and also found Reggie to be brain damaged. ATTACHMENT E, affidavit of Dr. Barry M. Crown.

In summary, the Presentence Investigation Report confirmed that Reggie was placed in the Special Education Program for the mentally retarded at age 12 and left school after 11th grade with only a third grade reading level. ATTACHMENT J, page 3. The PSI continued "The evaluation results from St. Louis Public Schools, as well as more recent private evaluations consistently indicate uneven intellectual development; with auditory/verbal area being in the range of retardation while the non-verbal area falls within the low average to borderline range of ability." Id. Powell functions in the Borderline Retarded/Mild Retarded range.

Reggie had no structure in his formative years which would have afforded him the opportunity to learn to deal with his mental deficits. Reggie was born to a 14 year old, single mother, Ursula, who had been born to a severely alcoholic mother and had no contact with her birth father until Reggie was born. Ursula herself had no positive family role models or

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experiences to pass on to Reggie. ATTACHMENT F, Social History, filed with Circuit Court 6/11/88, prepared by Deborah L. Carney, M.Ed., page 1. Reggie's parents were married six months after his birth and stayed together for a period of six years. Reggie's father, William Butch Pearson was not gainfully employed for any extended period of time and his mother worked at low paying jobs when she did work. Id. at 1. The family became part of the state welfare system. Id. Ursula and Butch maintained their relationship by using alcohol. The drinking binges led to violence in the home. Two other siblings (boys) were born to the family. Reggie and his two brothers witnessed the many violent outbursts in which Ursula was beaten severely enough to require hospitalization on several occasions. Reggie, as the eldest tried to intervene without success. Id.

Butch's relationship to his wife and sons was one of frequent abandonment and led to the family having to relocate on a constant basis. Records indicate that this was a family in crisis. Reggie's father was an unemployed, substance abuser of alcohol and drugs who was physically abusive to his wife. Reggie, from birth to the age of six experienced every moment of this turmoil. The family was most concerned with having a roof over their heads, not the normal development of their children. Because of his mother's inability to provide the basics for her children, Reggie would beg and then steal food for his family. He sought protection from others when his mother would come home drunk. Reggie seemed to bear the brunt of the neglect and was often forced to survive in the streets. No one intervened. Id.

Reggie's experience in the St. Louis public schools was one of constant upheaval. His school records indicate that the family relocated at least fourteen times in a ten year period. ATTACHMENT G, St. Louis Public School Records. There is no indication in any school

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records that his parents contacted anyone about Reggie's mental disabilities. It was the school district which finally requested that testing be done in order to properly evaluate Reggie. ATTACHMENT H, St. Louis Public School Records. Reggie was provided limited services by the educational system after he was tested and found to be learning disabled. The educational system did make an effort to provide him with the tools for learning, but there was inconsistency as he was constantly shifted from school to school. ATTACHMENT I, St. Louis Public School Records. Reports indicate that his parents did not respond to requests by the school district to meet with staff about Reggie.

The Presentence Investigation Report prepared by the state indicates that: "It is apparent from reviewing his various file material that the defendant suffered from a lack of parental outer controls during his formative years. This officer has made several attempts to speak with his mother. Letters sent to her address remain unanswered and no contact has been made by phone." ATTACHMENT J, State of Missouri, Board of Probation and Parole, Presentence Investigation Report, Suzanne McClure, submitted 4/22/88. The Social History prepared by the Public Defender's Office of St. Louis states:

> Ursula had a difficult time adjusting to motherhood. Her own parents had never married and her father was absent from the home. Her father reentered her life after the birth of her children. He corroborates the opinions of other relatives and friends who reported that both Ursula and Butch seemed to resent Reggie's birth. Ursula became very depressed. She felt very trapped and confused and seemed to be envious of the other girls her age who enjoyed their youth and freedom. While her friends were at school, she was home alone with Reggie while Butch worked. She did not possess the parenting skills necessary to deal with her child.

ATTACHMENT F, Social History, filed with Circuit Court 6/11/88, prepared by Deborah L. Carney, M.Ed., page 1.

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By 1974 Ursula was 20 years of age and had three young sons, Reggie, William and Shelley. Her husband had abandoned her and she was ill equipped to survive on her own. Her birth father, Emmett Collier tried to connect to his daughter at that time and offered her the opportunity to enroll and complete a technical education course, which she failed to do. The juxtaposition of Collier's family in comparison to Ursula Powell's upbringing is telling. Mr. Collier married and accepted two step-children as his own, fathered three children, held a supervisory position at a chemical plant until his retirement, sent his five children to college and has stayed married to the same woman for more than 30 years. If only Reggie had been able to experience the same kind of stability, one wonders how different the outcome would have been for him. ATTACHMENT K, Affidavit of Rosanne R. Dapsauski, interview of Emmett Collier.

Ursula continually relocated because of financial crisis. Ursula reported, as accurately as she could recall by address, that the family moved at least 20 separate times before Reggie was 18 years of age. Various reports indicate that Ursula was not able to provide for her children. One report indicates that the two younger boys were removed from the home because of poor parenting. Numerous reports done on Reggie indicate a poor home environment and inadequate parenting. ATTACHMENT F, Social History, pages 1-2; ATTACHMENT L, St. Louis Public School Records.

Reggie had contact with juvenile services provided by the city of St. Louis beginning in January 22, 1981 with final termination on the date of February 24, 1986. He ran away from home at the age of ten. Respondent's Ex. C in federal district court, Transcript of Rule 29.15 Hearing, (hereinafter "PCR Tr.") at 156; see State Court Legal File at 23. He was placed in the custody of the Juvenile Court for stealing and resided at several state facilities, interspersed with

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stays at his mother's home and his father's home. ATTACHMENT F, Social History, page 2. By 1982, Reggie's father, Butch had relocated to another state and Reggie, who was 14 years of age was forced to live with his mother where there was constant conflict. He was abandoned again by his mother and forced to essentially fend for himself. He would stay with friends, extended family or mere acquaintances. Id. Several Youth Services workers report of trying to locate safe residences for Reggie. Id. Reggie was initially provided Group Psychotherapy on an outpatient basis in 1981 when he was 12 ½ years of age. In 1982, when Reggie was 13 years of age he attempted suicide by ingesting his brother's asthma medication. State Court Legal File 24-25. He received no follow-up psychiatric treatment in reference to this cry for help. Id. On October 6, 1982 Reggie was assigned to Missouri Hills, a state residential facility which provided educational studies to the residents. ATTACHMENT M, Report of Donald Swabo, Acting Director of Court Services, Circuit Court, Juvenile Division, page 1. Reggie was 14 years of age when he entered Missouri Hills where he was once again tested for achievement purposes. The results indicate that Reggie improved a grade level in spelling and one and a half grade levels in arithmetic at Missouri Hills, though he only rose to the 2nd grade 3rd month level for reading, the 3rd grade level for spelling and the 4th grade 7th month level in arithmetic. Id. at 2. Reggie was released from Missouri Hills because of *overcrowding*. Id. at 1. Reggie was assigned to the Long Middle School where he was enrolled in the non-graded STEP (Slow Learner) Program. Id. Reggie continued enrollment in the STEP Program until he left school in 1985. Reggie was re-evaluated in 1985 as a requirement of participation in the STEP program. He was again found mildly retarded: "WAIS-R FULL SCALE IQ falls within Borderline Range...." ATTACHMENT W, St. Louis Public School Records. He was recommitted to the Missouri Division of Youth

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Services on May 10, 1985 for residential care and discharged on February 24, 1986. Reggie was 17 years of age upon his final discharge from the Missouri Division of Youth Services. ATTACHMENT N, Report of Reexamination dated March 5, 1986, Div. of Youth Services.

Reggie became involved in drug use in his early teenage years. He began smoking marijuana at the age of 13 with his father's girlfriend and then at the age of 17 he began the use of PCP. In the pre-sentence investigation he admitted to trying everything he could get his hands on except for "shooting dope." Reggie did admit an increased use of chemicals in the fall of 1986. By that period of time Reggie was using PCP sometimes every day and at least once a week. ATTACHMENT E, page 2.

Reggie did attend numerous schools in the St. Louis Public School system. His first year of formal education began in the fall of 1973 when he was enrolled in kindergarten. He attended Hodgens school for the entire school year and for the first two months of first grade. In November of 1974 he transferred to Wyman School and continued there for the second and third grade until the fall of 1977. He then transferred in 1977 to Mullanphy School where he completed the 4th grade. In the fall of 1978 he enrolled at the Chouteau School for the 5th grade. Beginning in the fall of 1979 Reggie attended 5th grade at L'ouverture School for 3 months. He then transferred to Bryon Hill School for three months, Griscom for one month, and he finished the school year by transferring back to Byron Hill School. ATTACHMENT G, St. Louis Public School Records.

Reggie was provided remedial reading instruction in 1980 when he was in the sixth grade. Records indicate that he was reading at a 2nd year 5th month level. ATTACHMENT P, St. Louis Public School Records. On November 30, 1980 written comments on the Social History

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form stated: "School hasn't taken the time to work with him & help him but mother hasn't either & father wasn't in home." ATTACHMENT Q, St. Louis Public School Records. Reggie was provided remedial reading instruction in 1980 when he was in the sixth grade. Records indicate that he was reading at a 2nd year 5th month level. In the 1980-81 school year Reggie attended two new schools, Adams and Griscom Schools; he was enrolled as a sixth grade student. ATTACHMENT G, St. Louis Public School Records.

School records for the 7th grade indicate that Reggie was living at the Echo Home, a state juvenile facility where he had been placed by an order of the Juvenile Court. ATTACHMENT R, St. Louis Public School Records. His father, William Pearson also had custody of Reggie during that school year. ATTACHMENT S, St. Louis Public School Records. Records from that school year indicate that the school district was making a concerted effort to meet Reggie's educational needs, but that Reggie was a slow learner.

In that next school year, 8th grade, Reggie was suspended several times for non-cooperation with teachers and staff. The principal wrote on the suspension form: "*Reginald is a pathetic young man growing up much on his own without the normal family and social supports we tend to expect a youth to have. Ideally, Reginald needs a more sheltered live-in, school setting at this time in his life. His is a difficult age at best. There has been little support in his background other than that which jelled last year. Perhaps, a live-in, structured environment can be contracted with him. While we request and recommend his removal from this setting, a mere school assignment is not likely to meet Reginald's actual needs.*" ATTACHMENT T, St. Louis Public School Records.

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In the eighth grade the school records indicate that he attended Adams School and Adams (SP). In the 8th grade, school years, 1981-82 the records show numerous transfers: Adams (SP), Adams (SP), Griscom, Adams (SP), Griscom, Adams (SP), Adams (SP) and Langston Schools. Tenth grade records record a transfer in March of 1983 to Long Middle School. ATTACHMENT U, St. Louis Public School Records.

Reggie was enrolled at Roosevelt High School in 1984-85 with a transfer to McKinley High School in the spring of 1985. ATTACHMENT V, St. Louis Public School Records. Records indicate that in October of 1985 Reggie was transferred back to Roosevelt High School with no further notations made on the records. Reggie dropped out of school in 1985. Reggie Powell attended 12 different schools with 20 recorded school transfers in a 10 year period.

On May 15, 1985 Reggie was again tested by the St. Louis Public School District. His teacher estimated that he was functioning on the 3rd grade level in both mathematics and reading. ATTACHMENT O, St. Louis Public School Records. His WAIS -R IQ test results were: Verbal IQ 67, Performance IQ 86 and Full Scale IQ 73. ATTACHMENT O - St. Louis Public School Records. Reggie was 16 years and 10 months of age when the test was administered. The statement of present level of performance indicates an estimated mental age of 11 years and 11 months. ATTACHMENT W, St. Louis Public School Records.

Reggie at the age of 16 fathered a son and at the age of 17, two daughters. ATTACHMENT J, Presentence Investigation Report, page 3. He has maintained contact with them where possible. His daughters do visit him at Potosi Correctional Center when they are able to do so.

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Reggie has been on death row since 1988. Reggie has adjusted to the confines of his incarceration. On November 7, 1990 Reggie was given the Peabody Individual Achievement Test. His average grade equivalency score was 4.6, with Mathematics at 7.0 and Reading Comprehension at 3.1. It was recommended that Reggie could benefit from continued instruction in all pre-GED course work. ATTACHMENT X, Peabody Individual Achievement Test Interpretation. He was working on obtaining his GED, though unsuccessfully due to his limited abilities, has been involved in employment at the penitentiary and has not been written up for any serious violations. Reginald Powell is an appropriate candidate for continued incarceration. ATTACHMENT E. He has adjusted well to the structured environment of the institution. He has benefited from the regulations of incarceration and will continue to do so if he is not executed.

CONCLUSION

As Barb Shelly of the Kansas City Star noted, Reggie Powell was given a badly confused lover for a lawyer, a child for a mother, and a hard line judge (who did not know of his lawyer's inappropriate conduct) for a sentencer. He has never gotten a fair chance at a decent life. In many ways, prison has probably been the best environment that he has ever had, with the probable exception of Missouri Hills, which threw him out because of overcrowding many years ago.

Our court system does not allow review of gross errors by his trial counsel, who abused her position and entered into an emotional and sexual relationship with a borderline retarded youth. Society condemns and jails Mary Kay LeTourneau for falling in love with an intelligent 13 year old (while protecting her youthful lover). It is hard to understand how we can be so willing

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to execute a retarded youth who was denied a fair trial by a mentally ill lawyer who entered into the same kind of relationship with her client, Reggie Powell.

We implore the Board of Probation and Parole to recommend that Governor Carnahan stay Reginald Powell's execution and commute his sentence to life in prison. No matter what that body recommends, we beg Governor Carnahan for the leniency, mercy and chance at life that Reggie Powell has always been denied.

Respectfully Submitted,

____
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