IN THE MATTER OF:

JAMES W. CHAMBERS, CP-22
Potosi Correctional Center
Mineral Point, MO 63660

TO:

THE HONORABLE MEL CARNAHAN,
Governor of the State of Missouri

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

Respectfully submitted,

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IN THE MATTER OF:	)	
	)	
	)	**THIS IS A DEATH PENALTY CASE.**
JAMES W. CHAMBERS, CP-22	)	**EXECUTION IS SET FOR 12:01 AM**
	)	**NOVEMBER 10, 1999**
Potosi Correctional Center	)	
Mineral Point, MO 63660	)	
	)	

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

TO: THE HONORABLE MEL CARNAHAN, Governor of the State of Missouri:

COMES NOW James W. Chambers, by and through counsel, George Winger and Kent Gipson, and petitions the Governor for an order under Missouri Constitution Art. IV, Section 7 and Sections 217.800 and 552.070 R.S.Mo (1994), granting him a new trial, or order his sentence be commuted from death by lethal injection to life imprisonment without eligibility for parole; or, in the alternative, stay the execution presently scheduled for November 10, 1999, and appoint a board of inquiry under Section 552.070 to investigate this case or; stay the execution pending the completion of the investigation of special prosecutor Morley Swingle into allegations that Mr. Chambers' conviction and sentence of death was secured through the perjured testimony of several of the prosecution witnesses.

I.

SUMMARY OF REASONS JUSTIFYING EXECUTIVE CLEMENCY:

James Chambers' life should be spared because:

- No one else in modern times in the United States has received a sentence of death where the homicide occurred in the context of a bar fight. The death sentence given

to James Chambers is, therefore, grossly disproportionate to the facts of his case.

- Witnesses whose testimony would have helped prove that Chambers was acting in self defense, that the victim had a reputation for violence, and that this homicide was not premeditated, were not heard by the jury due to the incompetence of trial counsel.
- The only prosecution witness who claimed to have seen the shooting, Fred Ieppert, gave an inconsistent and possibly perjured account of events at the third trial which falsely bolstered the prosecution's theory that the shooting was planned and premeditated.
- Evidence of Chambers' borderline mental retardation which could have negated the deliberation element of the charge and provided powerful mitigating evidence in favor of a life sentence was not presented to the jury due to the incompetence of counsel.
- To execute James Chambers after he has spent 17 years on death row would constitute cruel and unusual punishment.

II.

INTRODUCTION

James W. Chambers, has been on Missouri's death row for over 17 years as a result of a barroom argument which culminated in the shooting of Jerry Oestricker outside the Country Club Lounge in Arnold, Missouri in 1982. James Chambers has had three trials, but he has not had three fair trials. Due largely to the incompetence of his different trial counsel, Mr. Chambers' story that he lawfully acted in self defense against a larger

man who was the initial aggressor and had a reputation as a violent barroom brawler, has never been effectively told and properly presented to a Missouri jury.

By all accounts, the facts of this case, essentially involving a barroom brawl resulting in a homicide, would not seen to warrant the imposition of the ultimately penalty of death by execution. Sadly however, the Supreme Court of Missouri, in the words of former Chief Judge Charles Blackmar in his dissent in State v. Reuscher, 827 S.W.2d 710 (Mo. banc 1992), in it's eagerness to affirm death penalty convictions in Missouri, has "continually refused to face up to it's responsibilities in proportionality review." Id. at 719 (Blackmar, J., dissenting). The facts in this case led former Supreme Court Judge Warren Welliver to conclude in his dissent in Chambers II: "I respectfully dissent. This is an ordinary barroom altercation..... Under these circumstances, I cannot impose the death penalty. I would reduce the sentence from death to life imprisonment without parole for fifty years; otherwise proportionality in Missouri is reduced totally meaningless. State v. Chambers, 714 S.W.2d 527, 534 (Mo. banc 1986) (Welliver, J., dissenting).

Apart from the disproportionality of the penalty to the severity of the crime, there are many other compelling reasons to spare Mr. Chambers' life. Because of the incompetence of his trial attorneys Karen Craft and Christine Grady, the jury did not hear compelling evidence regarding the true facts surrounding the crime which, at a minimum, would have resulted in a conviction for a lessor included offense of manslaughter or second degree murder. In this regard, the comments of jury foreman, Eric Chism are particularly appropriate. Mr. Chism, in a sworn affidavit, has stated that the experienced and skilled prosecutor Richard Callahan totally out performed and out classed the defense counsel at the third trial. Mr. Chism has now stated that he does not believe that Mr. Chambers

should be executed and has provided powerful evidence and insight indicating that if the case had been properly tried by competent counsel that Mr. Chambers would not be on death row. (Exh. 1).

It is inescapable that there has never been a case in the post-Furman era where a state has executed a convicted murderer for a homicide that occurred in the context of a bar fight. If Mr. Chambers' execution is allowed to proceed as scheduled, the fairness of Missouri's criminal justice system will be forever tarnished by this aberration of justice. Effective counsel could have persuaded the jury that this homicide was a culmination of a barroom fight instigated by Jerry Oestricker, a violent man with a reputation as a barroom brawler, whose violent acts precipitated his own death. The jury that convicted and sentenced Mr. Chambers heard nothing of Oestricker's background. It was also not pointed out to the jury that the prosecution's star witness, Fred Ieppert, gave a drastically different account of the shooting in Mr. Chambers' third trial. Mr. Ieppert's change in his story went virtually unchallenged by the defense, who incompetently failed to point out to the jury the inconsistencies between Mr. Ieppert's account of the crime at the third trial and his previous testimony. Mr. Ieppert's changed story at the third trial, whether motivated by intentional perjury or his own lack of memory and overall credibility, made this homicide appear much more premeditated than it actually was. In particular, Mr. Ieppert's testimony at the third trial falsely suggested that Mr. Chambers lured Mr. Oestricker out of the tavern, checked his gun as he was exiting the tavern, and then shot Oestricker a "split second" after he walked out the door. In fact, Mr. Ieppert had previously testified that there was a ten to twelve second lapse between the victim's exit from the bar until the shot was fired. This would have provided plenty of time for Oestricker to attack Mr. Chambers before he

was shot, thus bolstering his claim of self-defense.

The other glaring failure of trial counsel in the third trial was their utter failure to put on any evidence regarding Mr. Chambers' borderline mental retardation, which could have rebutted the mental element necessary to convict of capital murder and provided powerful mitigating evidence to the jury that would have convinced them to spare his life at the penalty phase. Counsel's failure in this regard was inexcusable. For all the reasons that will be outlined below, elementary principles of justice demands that, at a minimum,[1] Mr. Chambers' disproportionate and unfairly imposed sentence of death be commuted.

III.

STATEMENT OF FACTS

On Friday, May 29, 1982, James Chambers spent the Memorial day weekend camping on the Meramec River with his wife, Darlene Chambers, her two sons, Eddy and Kevin, his brother, Dan Chambers, his cousin, Donny Chapman, and Chapman's girlfriend, Eleanor Hotchkiss. They spent Friday fishing and target shooting. Sometime in the early evening Chambers and Chapman decided to try to get a boat to take the children out on the river fishing. Chapman told Chambers that the Turners had a boat and both men along with Eleanor Hotchkiss, left the river to look for the Turners. They first proceeded to the Country Club Lounge.

The Turner family had however left the bar shortly before the group arrived. The

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[1]Based upon the facts of this case, justice would best be served if the Governor granted clemency with the understanding that Mr. Chambers would not raise any legal objection to a retrial. Alternatively, a commutation involving a parolable prison sentence for the lesser crime of second degree murder might be appropriate because a sentence of life without parole, like the death penalty, would also be excessive under the facts of this case.

Turners were asked to leave by Ken Vaughn, the bar owner, following a brief argument between Jerry Oestricker and Jackie Turner. Mr. Chambers went into the lounge and left without incident after realizing the Turners were not there. Chapman, Hotchkiss and Chambers then proceeded to the Turners' home which was located nearby. Jackie Turner told Chambers that their boat was dry docked, but a neighbor had a boat that he might be able to use.

Chambers and Jackie Turner returned to the Country Club Lounge to find the neighbor and see if they could get the boat. Chambers walked up to Jerry Oestricker an old acquaintance, and asked if Oestricker would buy him a drink. Oestricker responded : "fuck you," and an argument erupted between Chambers and Oestricker. Ken Vaughn requested that they stop or take their problems outside. Chambers headed for the door and Oestricker followed as the two proceeded outside. In the course of the ensuing fight, Oestricker was shot once in the chest by Chambers.

At trial, the defense contended that Chambers shot Oestricker in self defense. After exiting the bar, Oestricker hit Chambers and knocked him down and stabbed him in the arm with a pair of needle-nosed pliers.[2] Chambers then shot Oestricker from the ground as Oestricker was moving toward him. As Oestricker's momentum carried him closer to petitioner, Chambers struck Oestricker with the gun.

The prosecution's theory of the case was that this was a premeditated attack by Chambers to avenge the altercation between Jackie Turner and Oestricker earlier in the

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[2]The fact that Chambers was stabbed was corroborated by Robert DePew, a deputy sheriff who supervised the Jefferson County jail, who testified that he observed a puncture wound on Chambers' arm after he was arrested that night.

day. The State's star witness, Fred Ieppert, who of all the patrons and employees of the tavern, was the only person who claimed to have seen what transpired at the time of the shooting, testified that Mr. Chambers knocked Mr. Oestricker down by striking him in the head with the gun. He further testified that as the victim was attempting to get up off the ground, Chambers shot him once.

Witnesses testified that after Chambers struck Oestricker he returned to near the doorway of the bar displaying the gun and made threatening statements to the persons inside the tavern. He then walked to the car he had arrived in and was driven away.

The actual shooting occurred sometime between 10:15 and 10:30 p.m. Autopsy results revealed that the victim died of a single gunshot wound to the chest. Bruises were found on the victim's face and shoulders. The victim's blood alcohol level was .14. Mr. Oestricker's level of intoxication however, was probably higher than that because he had received intravenous fluids at the hospital during attempts to save his life.

The jury, after due deliberation, convicted Chambers of first degree murder and returned a sentence of death based upon a finding of two statutory aggravating circumstances under Missouri law. The jury found that petitioner had a substantial history of serious assaultive convictions and that the homicide involved depravity of mind. The jury heard no evidence in mitigation of punishment, other than a brief plea for mercy from Chambers' wife.

IV.

PROCEDURAL HISTORY

After he was convicted and sentenced to death at his first trial in December of 1982,

the Missouri Supreme Court reversed the conviction because the trial court failed to give a self-defense instruction. State v. Chambers, 671 S.W.2d 781 (Mo. banc 1984). Mr. Chambers' conviction and sentence following retrial in 1985 was affirmed by the Missouri Supreme Court in State v. Chambers, 714 S.W.2d 527 (Mo. banc 1986), but later reversed by the Eighth Circuit Court of Appeals because he received ineffective assistance of trial counsel. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. en banc 1990), cert. denied 498 U.S. 950 (1990). Mr. Chambers' third trial commenced on October 28, 1991. He was again convicted and sentenced to death. This conviction and death sentence was affirmed by the Missouri Supreme Court on consolidated appeal in State v. Chambers, 891 S.W.2d 93 (Mo. banc 1994).

A petition for federal habeas corpus relief was denied by the United States District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals. See Chambers v. Bowersox, 157 F.3d 560 (8th Cir. 1998). Certiorari was denied by the United States Supreme Court in June of 1999. Mr. Chambers has, therefore, exhausted all legal remedies available to him. For the following reasons, executive clemency is warranted.

V.

JAMES CHAMBERS' SENTENCE OF DEATH IS GROSSLY DISPROPORTIONATE TO THE CIRCUMSTANCES OF HIS CASE

"*[A]n ordinary barroom altercation*" was the description given to this case by Judge

Welliver of the Missouri Supreme Court in his dissent in State v. Chambers, 714 S.W.2d at 534, after the second trial. The imposition of the death penalty in such a case is simply disproportionate to the gravity of the crime committed. The facts of this case clearly do not warrant the death penalty and justice demands that this travesty be rectified.

A. No other defendant has ever been executed for a barroom killing in modern times

The imposition of the death penalty is this case was arbitrary and fundamentally unfair. The only case counsel has been able to find in any state, including Missouri, where on similar facts the defendant was given the death penalty was reversed by the Supreme Court of the State of Nevada as disproportionate. The description by the Nevada court of the facts of that case fits this case almost perfectly:

> *"Biondi's crime, although violent, occurred in the context of a barroom confrontation among opposing strangers who were substantially intoxicated and emotional. Tempers flared, challenges were issued and a death occurred. While we do not in any sense condone such a senseless killing , we are nevertheless convinced that our course is clear under the proportionality mandate of the statute....we hold the death penalty imposed on Biondi is disproportionate."*

Biondi v. State 699 P. 2d 1062, 1066 -1067 (Nev. 1985).

The most factually similar Missouri cases, involving tavern homicides, have all resulted in lesser sentences. In 1998, for example, the Missouri Court of Appeals, Western District affirmed Larry McCoy's conviction for second degree murder and armed criminal action and his sentence of concurrent terms of twenty years for shooting a man in a altercation which had spilled out of a bar. State v. McCoy, 971 S. W. 2d 861 (Mo.App. W.D. 1998). The Southern District in 1993 affirmed Ronald Hill's conviction of second degree murder and sentence of fifteen years imprisonment for shooting an acquaintance

in a barroom argument. State v. Hill, 866 S. W. 2d 160 (Mo.App. S.D. 1993).

B. The penalty review procedure by the Missouri Supreme Court was inadequate

In order to prevent the arbitrary, and therefore unconstitutional, use of the death penalty, the Supreme Court of Missouri must, by law, independently review all cases where the death penalty has been imposed on a defendant. The Court must consider: "*whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.*" §565.035.3 R.S.Mo.(1984). The court must also cite references to those similar cases which it has taken into consideration in its proportionality review. Id. This process is intended to ensure that a fair and consistent distinction is made between those crimes for which the death penalty is deemed suitable and those for which it is not.

The starting point for a proper proportionality analysis, therefore, should be those cases which are factually similar to the case under review in terms of the crime committed, the evidence and the personal characteristics of the defendant. A comparison should then be made between the penalty imposed in those other similar cases and the case under review.

The seven cases cited by the Missouri Supreme Court as similar to Chambers' case clearly are not, under any stretch of imagination, remotely comparable to this tavern homicide. State v. Wilkins involved a stabbing of a store clerk committed during the course of a robbery. State v. Lingar involved a murder of a young man during a kidnapping that had sexual overtones. State v. Rodden was a double murder where the victims' bodies were set on fire after they were stabbed to death. State v. Grubbs, State v. Reuscher, and

State v. Feltrop also were particularly gruesome homicides that are categorically different from this case.

The monstrous injuries inflicted by these defendants on their victims in these purportedly comparable cases are of a wholly different character from the homicide in this case. In Reuscher, the victim suffered multiple head wounds including a fractured skull and stab wounds to the chest, throat and testicles. In Rodden, the two victims died from multiple stab wounds and an attempt was made to burn the bodies; and, in Grubbs the victim had thirteen broken ribs, a cracked sternum, lacerations to face and liver, a broken nose and a brain hemorrhage. The victim in Wilkins suffered multiple stab wounds. In Lingar, the victim was shot, beaten, and run over by a car. In Feltrop, the victim bled to death after being repeatedly stabbed by the defendant, who then dismembered and disposed of the body in a pond.

C. The Federal Courts did not address this issue

Apart from the Missouri Supreme Court, no other court has considered the proportionality of the death penalty in this case. The District Court acknowledged that it was bound to reject the proportionality claim without consideration because of prior case law. Chambers v. Bowersox, 1997 WL 118366 (W.D. Mo.). However, Judge Sachs noted that "*a tavern related homicide may be an unfamiliar context for capital punishment.*" The Eighth Circuit was also unable to fully consider the question of proportionality because precedent precluded them from independently examining the determination by the Missouri Supreme Court that the sentence was proportionate. Chambers v. Bowersox, 157 F.3d at 570.

All similarly-situated defendants in Missouri, who have committed homicides in tavern fights have received sentences of imprisonment. James Chambers, therefore, has been given a death sentence for a crime for which no other person either in Missouri or anywhere else in the United States has been executed in modern times.

The last word on this subject should be heard from Judge Welliver of the Missouri Supreme Court:

> *"...I am unable to see any new or additional evidence that changes the case from a barroom altercation. Under these circumstances, I cannot impose the death penalty. I would reduce the sentence from death to life imprisonment without parole for fifty years; otherwise proportionality in Missouri is reduced totally meaningless."*

State v. Chambers, 714 S.W.2d at 534; (Welliver J. dissenting).

VI.

IF THIS CASE HAD BEEN PROPERLY TRIED WITH THE ASSISTANCE OF COMPETENT COUNSEL, CHAMBERS WOULD NOT HAVE BEEN CONVICTED OF CAPITAL MURDER

The State claimed the shooting of Jerry Oestricker was a premeditated attack in contrast to Chambers' claim that he acted in self defense. At trial the State had the burden of proving beyond reasonable doubt that the James Chambers did not act in self defense. The key issues in every self defense case involve whether the defendant; (a) reasonably believed it was necessary to use deadly force, and (b) to protect himself from what he reasonably believed to be the use of unlawful force that placed him in imminent danger of serious injury or death from the victim. Vital witnesses and evidence which established that Oestricker had attacked Chambers with a pair of pliers was not presented to the jury. As a result, the defense's contention that James Chambers reasonably

believed he was in danger of serious injury when he shot Oestricker was not effectively presented. Independent evidence and impeaching information, which undermined the prosecution's case that this was a premeditated attack, was also not utilized. Finally, the fact that Chambers was advised by counsel not to testify meant that it was almost impossible for a jury to determine what he reasonably believed at the time of the shooting, thus dooming his claim of self-defense.

A. Chambers' Lack of Premeditation Could Have Been Proven by Effective Counsel

The prosecution's theory that the shooting was premeditated and therefore deserving of the death penalty was largely unsubstantiated and incredible. Because he had incompetent attorneys, Mr. Chambers had no opportunity to effectively advance his version of events. The true reason for Chambers wound up at the tavern that night was to obtain a boat with which to fish on the river. It is for this reason that he traveled first to the Turners' house and then to the bar. When he discovered that the Turners' boat was unavailable, Chambers proceeded to the Country Club Tavern to see Jerry Hardesty about a boat. There were many witnesses who could have attested to this and, therefore, undermined the prosecution's argument that Chambers was on a mission to kill Jerry Oestricker at the behest of the Turner family. These witnesses include Eleanor Hotchkiss, Dan Chambers, Darlene Chambers, Phil Turner and Jack Turner. (See Exh.'s 5 - 8). None of these witnesses were called at the guilt phase of trial.

Even more pertinent is the fact that there was no grudge between Jerry Oestricker and Jackie Turner at the time of the shooting and hence no motivation for a premeditated killing by Mr. Chambers to "avenge" Jackie Turner. There was a fight that had occurred

earlier that day between the victim and Turner, but the two men reconciled. The reconciliation was verified by an independent witness, Beverly Melton. In a police interview, she stated she saw the two men *" shaking hands and patting each other on the back and Jackie went his way and Jerry went back to the pool table and so I assumed well they just figured they had both been drinking and that was it."* (See Exh. 3). This evidence was never heard and, as such, the jury was left with little choice but to believe the unsubstantiated and incredible "retaliation" theory advanced by the prosecution.

The other glaring shortcoming of defense counsel, apart from their failure to discredit the state's theory of motive and premeditation with credible evidence, was their utter failure to present to the jury the fact that the victim, Jerry Oestricker, had a notorious reputation for violence. The jury that convicted Mr. Chambers and ultimately sentenced him to death heard nothing about Jerry Oestricker's background and reputation as a barroom brawler. Available evidence could have been presented to show that Mr. Oestricker had prior convictions, had a reputation for violence, and was known to frequently engage in barroom fights. In fact, some of the injuries noted on Mr. Oestricker's body by the coroner after he was killed were inflicted upon him in a fight the previous night with a man named Russell Humphrey. Because of counsel's failure to provide the jury with with a true picture of Mr. Oestricker's violent tendencies, the result of the third trial was inherently unreliable and unjust.

In this regard, it is interesting to note that counsel for Mr. Chambers was recently contacted "out of the blue" by a man from Arnold, Missouri, named Bill Lee. Mr. Lee, after reading of Mr. Chambers' upcoming execution in the local newspaper, contacted counsel to provide information about a similar barroom confrontation that he had with Jerry

Oestricker in 1969. Mr. Lee has stated in a sworn affidavit that he was subjected to an unprovoked attack by Jerry Oestricker outside a bar in south St. Louis that was strikingly similar to Oestricker's confrontation with Mr. Chambers that led to his death some thirteen years later. (See Exh. 2). Mr. Lee's account of his confrontation with Mr. Oestricker in 1969 speaks volumes as to the victim's true character and history of violent behavior while intoxicated. Although no barroom brawler deserves to die, Mr. Oestricker's violent and belligerent nature and actions undoubtedly contributed to his death. Had the jury known of Mr. Oestricker's character and propensity for violence, there is little doubt that they would not have convicted Mr. Chambers of capital murder, nor sentenced him to death. The fact that Mr. Oestricker's violent behavior contributed to his own death also significantly bolsters Mr. Chambers' argument that the facts of this case are not appropriate for capital punishment.

The death penalty, in theory, in order to be consitutionally imposed, is supposedly reserved for a small percentage of the most heinous and atrocious murders. A common thread of the overwhelming majority of death penalty cases that have come before the Governor and the courts for review is that the victim was innocent and helpless. Never before in the modern history of this state's capital punishment system has a man been executed where, as here, it is clear that the victim's violent and provocative behavior contributed to his own death. For this reason alone, the death penalty is an aberration in this case that cries out for correction.

VII.

CHAMBERS' CONVICTION WAS SECURED THROUGH THE USE OF FALSE AND UNRELIABLE EYEWITNESS TESTIMONY

Fred Ieppert was the star witness for the State and his testimony was vital to the State's case for capital murder. He testified at the preliminary hearing and all three trials. Ieppert's testimony was critical to the issue of whether Chambers was acting in response to a perceived risk of serious injury or death. Ieppert testified at the third trial that Chambers shot Oestricker, without provocation, a split second after they exited the tavern.

Even the most cursory look at the transcripts of the three trials and the preliminary hearing reveal that Mr. Ieppert's testimony is totally inconsistent and self contradictory. Mr. Ieppert not only gives contradictory testimony between each trial but also contradicts himself within the same trial, sometimes within a few lines. Chambers' trial attorney did little to impeach Ieppert regarding the inconsistencies between his testimony at the third trial and his previous statements and testimony. If trial counsel had effectively challenged Ieppert as to these inconsistencies in his testimony, the jury would have reached the inescapable conclusion that his testimony was unworthy of belief. It is James Chambers' grave misfortune that Ieppert's credibility was not effectively challenged.

The most critical discrepancies involved Ieppert's testimony that he had seen the entire altercation, and had not seen Oestricker hit Chambers, his testimony as to when he saw James Chambers pull out a gun from his waistband and testimony that he did not see Oestricker holding anything in his hands before or during the altercation. This evidence was of critical importance to the question of whether the homicide was premeditated or involved self-defense.

The following examples clearly demonstrate the inherent unreliability of Ieppert's testimony. Mr. Ieppert's claim that he only lost sight of the two men for a split second was devastating to the defense. This "split-second" testimony completely undermined the

defense's contention that Chambers shot Oestricker after he was assaulted because counsel did not bring to light that Ieppert previously testified that he lost sight of the pair of men for 10-12 seconds, more than enough time for Oestricker to have stabbed Chambers before he was shot. The following excerpts from Ieppert's numerous accounts of the shooting underscore the material inconsistencies between his testimony at the third trial and his previous accounts of the homicide.

Preliminary Hearing at page 14

Q: What did you observe happen on the parking lot?

A: Well, **momentarily for a second** they got out of my view and I went to the door.

Trial One at page 486

Q: How do you know that (that Mr. Ieppert saw all the trouble)? Were they apart when you first saw them?

A: It's possible they might have **three or four seconds** from the time I walked from the stool to the door.

Trial Two at page 442

Q: Can you tell us in seconds how long the two men were out of your view?

A: From the time it took me from the barstool to that door. I would say approximately ten seconds.

Trial Three at page 350

Q: While you were walking to the door, did you temporarily lose sight of Jerry?

A: Possibly - a split second or so.

Preliminary hearing at page 37

Q: About how far from the door was he standing in the parking lot?

A: **About fifteen feet**, approximately Approximately fifteen feet.

Q: Fifteen feet out the front door. What did you see him do out there on the parking lot while he was waiting for Mr. Oestricker?

A: Raise his shirt and draw a pistol.

Trial One at page 461

Q: As Chambers walked outside the door, how far outside the door was he when you saw him take an object out of his belt.

A: Well **as soon as he started out the door** he started to pull up his shirt and take out the object

Trial One page 463

Q: So, how far was Chambers inside the bar yet when Chambers took the gun out of his belt?

A: **Twenty feet inside the bar.**

Trial Two at page 428

Q: My question to you, and I want to clarify it, **he was in the doorway moving out the building when you saw him reach**?

A: Yes

Trial Three at page 361

Q: And you said (at the preliminary hearing) **he's still inside the bar, about a foot from the door when you see him reach** and pull something out?

A: Yes ma'am.

Trial Three at page 362

Q: And you're saying that Jim was still inside the bar when you saw him pull the gun out?

A: I didn't say that. I said he was moving as he raised up his shirt **going out the door**, all in one motion.

These are just two examples of the inconsistencies in Mr. Ieppert's evidence. Mr. Ieppert inconsistently has stated that Oestricker walked to the door of the bar (trial 1 page 483, trial 2 page 433) and also that he ran to the door (police interview page 2, trial 3 page 361). At the first trial (page 464) he gave evidence that Mr. Oestricker was not moving toward James Chambers before he was shot but in the preliminary hearing (page 46) and in the second (page 445) and third trials (page 364) he testified that Jerry Oestricker was in fact moving toward Chambers. Ieppert also testified in the preliminary hearing (page 46) and second trial (page 449) that he did not see James Chambers fire the gun but in the third trial (page 365) he said he did. In the third trial (page 349, 353), he testified, for the first time, that Chambers looked down at the gun as if checking to see if it was loaded. This was the first time he had ever mentioned this critical fact, which was effectively utilized by the prosecution to establish premeditation.

Other discrepancies lie in what Mr. Ieppert saw in Oestricker's hands. In the preliminary hearing (page 41) he said he didn't notice anything in Oestricker's hands as he left the bar, but in the first and second trials he said Oestricker did not have anything in his hands (page 467, 422). He also stated in the preliminary hearing (page 46) that at the

point when Oestricker got up off the floor he did not notice Oestricker's hands and could not say whether he had anything in his hands at that point. In trial two he agrees with defense counsel that this was his testimony (page 450) but then under redirect examination he then says he did notice Oestricker's hands after he got up and there was nothing in them (page 452).

Another significant inconsistency in Ieppert's testimony involved the relative position of Mr. Chambers and Oestricker when the fatal shot was fired. Ieppert testified at the third trial that the victim was crouching in a non-erect position when Mr. Chambers shot him. (Tr. 353). At the first trial Ieppert recounted that the victim was standing when he was shot by Chambers. (Tr. 1 at 464). Mr. Ieppert had also twice previously testified that the victim was standing and lunging at Mr. Chambers when the fatal shot was fired. (Prelim. Tr. 45-46; Tr. 2, 444-446, 454, 454-455). Counsel's failure to impeach Ieppert as the position of the victim when the shot was fired effectively prevented the defense from using expert testimony involving recreation of the shooting which would have significantly bolstered Mr. Chambers' theory of self-defense. (See Exh.'s 9 - 10).

Mr. Ieppert has contradicted himself at some point on virtually every aspect of the fatal altercation between Chambers and Oestricker. These drastic inconsistencies have led to the appointment of a special prosecutor, H. Morley Swingle, to investigate whether Ieppert committed perjury at the third trial. Swingle's findings and conclusions on these questions will be provided to Governor Carnahan in support of this application.

VIII.

COUNSEL FAILED TO PRESENT EVIDENCE AT TRIAL OF JAMES CHAMBERS' BORDERLINE MENTAL RETARDATION

Mr. Chambers was sentenced to death by a jury that did not hear vital evidence of his mental disabilities. Prior to Mr. Chambers' first trial, a mental evaluation was ordered by the court. The results of the tests carried out by state mental health expert Dr. S. D. Parwatikar contained much important information highly relevant to both the guilt and sentencing phase of Mr. Chambers' trial.

Dr. Parwatikar's findings stated that at the time of the offense, Mr. Chambers was suffering from depression, which seems to date from about eight weeks prior to the incident, and that he had an IQ of 78. He states further that this could constitute a mental disease or defect within the meaning of Chapter 552 and concluded that the disease is "quite likely" to have caused Mr. Chambers to act impulsively after provocation. This is critical evidence that shows that Mr. Chambers did not act with the mental state of 'cool deliberation' required under Missouri law to support a capital murder conviction. (Exh. 15).

With regard to the penalty phase, Dr. Parwatikar's report stated: *"mitigating circumstances as discussed should be taken into consideration to determine the degree of his offense or the sentence if found guilty".* However, at the penalty phase where the prosecution placed before the jury a list of Mr. Chambers' prior convictions and the facts of the crime, the only evidence that was heard for the defense was a brief plea for mercy from Mr. Chambers' wife. Without the benefit of evidence showing Mr. Chambers' borderline mental retardation and mental instability at the time of the offense, there was no compelling reason for the jury to spare his life. Jury foreman Eric Chism, after reviewing this evidence, has stated under oath that the jury would not have sentenced him to death if they had known about Chambers' mental limitations. (Exh. 1). Governor Carnahan

should reach the same conclusion.

A. James Chambers' Mental History

James Wilson Chambers is the eldest of the five children of parents Raymond and Brenda Chambers, a machine operator and housewife. James shared a bedroom as a child with his two brothers. At age six, he experienced a bad fall and cut his head open, losing consciousness for at least three hours and was admitted to hospital overnight. Darlene Chambers, his childhood friend and now wife, stated under oath that James was regularly beaten and that his father was an alcoholic. Mr. Chambers will not comment on these statements. During his lifetime, Chambers has spent time in five mental hospitals for periods of evaluation and treatment.

At the age of fourteen James, was first documented as having mental problems when he failed to achieve at school, was disruptive and was '*nervous and scared to be left alone*' . Consultant psychologist Dr. Harvey Austrin diagnosed him as 'mildly retarded' and stated that his general judgement appeared to reflect this. He recommended a special education placement. James dropped out of school a year later. This is only time that any educational or social institution gave James any medical attention despite the numerous findings of mental impairment. Any evaluations made after this point were made with a view to determining James' competency to be tried for criminal offenses and never with a view to providing him with the stability and structure that many mental health experts said he needed. (See for example reports of Dr. Heisler 1977, Dr. Guhleman 1978)

At seventeen, James was evaluated by Dr. Alejandro Carillo at St. Louis State Hospital at the request of the Prosecuting Attorney of Jefferson County. His conclusions

were that Chambers suffered from: *"Mental retardation, borderline, with psycho social environmental deprivation".* A neurological evaluation to rule out brain damage was recommended however, this was not carried out at that time, and to this date no testing of this kind has ever been done. It is, therefore, unknown as to whether Mr. Chambers actually has brain damage although these mental health experts strongly suspect that he does.

In 1977, three years after his incarceration, a report was prepared for the Missouri Board of Probation and Parole by Dr. Gerald Heisler which diagnosed Mr. Chambers as suffering from *"incipient paranoid schizophrenia".* No action was taken on this diagnosis.

A year later, Dr. Henry Guhleman commented on this diagnosis stating:

> *"Although the psychologists suggest that he may represent elements of an incipient paranoid schizophrenia, it is difficult for us to compare with that impression. He does, however, fit a group of personality disorders whom we have not infrequently seen within the institution who, can under conditions of stress, train pressures which they feel completely unable to cope with, decompensate for varying periods of time, appearing very much like a paranoid schizophrenia, but who revert to their previous personality patterns once the stress is alleviated."*

Mr. Chambers mental instability and retardation have been clearly chronicled throughout his life. It was clearly inexcusable and incompetent for trial counsel not to have presented this documented evidence of Chambers' mental illness to the jury at the third trial. If this had been done, the result would have been different.

The presentation of evidence detailing mental retardation was even more vital in the light of Mr. Chambers outward appearance of competence. His character is such that he appears extremely confident and outwardly adjusted. It is stated in numerous reports that his attitude to life is that he must appear physically and mentally perfect or people will take

advantage of his weaknesses.

Commenting on James Chambers' approach to life Dr. Heisler stated:

'He is a person who has a high need for approval and yet feels that most people are against him. He is not used to seeing people react warmly and views conflict as being a common part of life.'

"He appears to be a person who puts on an act of being over confident and yet is very insecure underneath'.

'He is extremely frightened and tries to compensate by being an angry young man who will reject others before he feels that he is rejected'.

It is easy to see how a jury without any evidence to contradict this outward veneer would suppose Mr. Chambers fully cognizant and culpable for his crime. It is now inescapable that the evidence of Chambers' borderline mental retardation and mental illness, as indicated by jury foreman Eric Chism, would have convinced the jury to spare James Chambers' life. Governor Carnahan should follow suit.

IX.

EXECUTING JAMES CHAMBERS AFTER SEVENTEEN YEARS ON DEATH ROW WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Mr. Chambers has now spent over 17 years on death row in Missouri. This delay is not the result of his own frivolous appeals, calculated only to delay the inevitable. It is instead due entirely to the State of Missouri's failure to provide him with a legally and constitutionally fair trial. Twice the courts have struck down his conviction, and three times he has been forced to endure the mental anguish of being returned to death row by prosecutors determined to obtain a death sentence. The growing chorus of legal and humanitarian opinion that compelling someone to endure such a delay on death row before execution is cruel is cruel and unusual punishment is now so loud that the State of

Missouri can no longer ignore it. (See Exh. 16). The twin justifications for the use of the death penalty: retribution and deterrence, can hardly justify the execution of Mr. Chambers after such a long delay. Mr. Chambers has suffered retribution enough by being forced to endure the years of uncertainty, endless delays and anxiety. Deterrence, if it is to be a justification for executing an offender must mean that the sentence is carried out swiftly and with great certainty. In this case, neither of these justifications for capital punishment presently exist.

A glance at the history of the case is sufficient to show that Mr. Chambers has been ill served by the justice system. His first conviction was overturned because the trial judge did not instruct the jury on the issue of self-defense. An incompetent State-appointed lawyer at his second trial gave him constitutionally ineffective assistance by failing to call a key self-defense witness.

By the time of his third trial in 1990, Mr. Chambers had been forced to spend over eight years on death row because of unfair trials that had condemned him to die. Eight years in which he had to endure the inhumane conditions in the Missouri State Penitentiary, conditions which infringed upon death row prisoners' rights to the extent that they successfully sued the state to rectify these squalid conditions. In Chambers' third unfair trial, he was represented by inept state appointed counsel who failed to prepare her witnesses, failed properly to cross-examine key State witnesses and failed to present important evidence relating to Mr. Chambers' guilt and moral culpability. As a result, once again Mr. Chambers has been forced, through no fault of his own, to endure the long wait for a date to be set for his meeting with the executioner.

For a human being to spend seventeen years on death row is cruel and inhuman

punishment. A series of foreign country's highest appellate courts have overturned death sentences because of such excessive and cruel delays. In Great Britain, the Privy Council held that a period of more than five years on death row would be 'inhuman and degrading' punishment, that violated the Jamaican Constitution. In Zimbabwe, the Supreme Court ruled that delays as short as three years violated its constitutional safeguard against cruel punishments. The European Court of Human Rights held that the extradition of a man wanted for capital murder in Virginia would be in breach of the European Convention on Human rights because he could expect to face a delay of up to eight years. Since Justice Stevens of the United States Supreme Court issued his opinion in Lackey v. Texas in 1995 urging the Federal and State Courts to consider this issue, several Judges have ruled in dissenting opinions that they consider delays of the length suffered by Mr. Chambers violate the eighth amendment. In many of these cases, the courts found that the reason why the prisoner's claim lacked merit was the fact that the prisoner had brought the delay on himself by vexatiously pursuing unsuccessful appeals. The same cannot be said of Mr. Chambers. His first two appeals, as noted earlier, were successful.

Mr. Chambers respectfully asks that the Governor take note of the international authority that the prolonged incarceration of a prisoner on death row is psychological torture and commute his sentence of death on the grounds that permitting his execution would be excessively cruel and would serve no social purpose.

X.

CONCLUSION

James Wilson Chambers will surely die at midnight on November 10, 1999, unless

Governor Carnahan intervenes to remedy this obvious injustice. In most cases, where an accused is provided competent counsel, a fair and just result occurs at trial. Or, if an unfair trial occurs, appellate courts will come to the rescue. Because of the fact that Mr. Chambers had three trials, there was an incredible amount of inertia during the appellate process not to grant him a fourth trial regardless of the merits of his case. As a result, as expressed by jury foreman Eric Chism, the reviewing courts overlooked the fact that defense counsel at the third trial were totally unprepared and out classed by a skilled prosecutor.

James Chambers is no angel, but neither was the victim. Jerry Oestricker's history of aggressive and violent behavior, particularly occurring while he was intoxicated in taverns, is illustrated by the attached affidavit of Bill Lee. Mr. Lee was also subjected to an unprovoked attack by Mr. Oestricker at a tavern in 1969. Simply put, although no one deserves to die because he is a belligerent drunk, Mr. Oestricker's violent acts against Mr. Chambers contributed to his own death. Certainly, in light of this fact, Mr. Chambers' case cannot be considered one of the small percentage of particularly heinous murders for which the death penalty is, at least in theory, supposed to be reserved for. Elementary principles of justice demand that this death sentence not be carried out.

Respectfully submitted,

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US COMMENTATORS ON THE 'DEATH ROW PHENOMENON'

The raw terror and the unabating stress that the condemned prisoner experiences is torture; torture in the guise of civilized business in an advanced and humane polity...whatever one believes about the cruelty of the death penalty itself, this violence done to the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.

Judge Liacos (concurring) in
District Attorney v Watson 411 N.E.2d 1274 (1980)

Torture is intrinsic to the death penalty. We can argue about how much torture there is to the electric chair, or gas chamber, or even lethal injection, about what people feel physically. But I can witness, in fact, that people have dies a thousand times mentally before they've died physically. You can't condemn a person to death and not have them anticipate their death, imagine their death, and vicariously experience their death many, many times before they die.

Vicki Quade quoting Sister Helen Prejean
A.B.A. Sec. Of Individual Rts. & Resps, Summer 1996 at p. 12

One night on death row is too much, and the length of time spent there by some inmates constitutes cruelty that defies the imagination.

Clinton T Duffy.
Sometime Warden of San Quentin prison, California

The stressful environment and isolation from nearly all human contact create mental agony properly characterized as psychological torture...[furthermore] the repeated rescheduling and withdrawal of execution date exacerbate mental suffering

Kathleen M. Flynn
Washington and Lee Law Review (Winter 1997) 291