

IN THE MATTER OF: **CHUCK MATHENIA, CP 32**
Potosi Correctional Center
Mineral Point, Missouri 63660

TO: **The Honorable Mel Carnahan**
Governor of the State of Missouri

**APPLICATION FOR A REPRIEVE FROM, OR
COMMUTATION OF, A SENTENCE OF DEATH**

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I. INTRODUCTION

Chuck Lee Mathenia is scheduled to die by lethal injection at 12:01 a.m. next week on June 4, 1993. He is now being held in the pre-execution isolation cell at Potosi Correctional Center. The death warrant ordering Mr. Mathenia's execution was just issued on Tuesday, May 25, 1993. Thus, the Missouri Supreme Court has provided less than ten days notice.

Pursuant to Article IV, § 7 of the Missouri Constitution and Mo. Rev. Stat. §§ 217.800 and 552.070, Mr. Mathenia requests that the Honorable Governor Mel Carnahan to grant a stay of execution for sixty days in order to fully consider this application for a commutation of his sentence of death. Commutation is sought because Chuck Mathenia did not receive a fair trial.

In this application, Mr. Mathenia presents facts that his jury at trial did not hear: proof that he has suffered brain damage and mental retardation since he was a very young child -- defects so severe that he only had the mental ability of a six year old at the time of the crimes for which he has been sentenced to die. This petition for clemency will further show that Chuck Mathenia did not receive a fair trial because the jury that sentenced him to die was not impartial and was not willing to consider all relevant evidence in deciding the degree of his responsibility for the crime and the punishment to impose.

Chuck Mathenia does not seek to be released from prison. Rather, Mr. Mathenia requests that the Governor commute his sentence to a term of years, and perhaps place him in an appropriate and secure mental health facility. Alternatively, Mr.

Mathenia requests that the Governor commute his sentence to life in prison without the possibility of parole for 50 years pursuant to Mo. Rev. Stat. § 565.008. Commutation is proper because the death sentence is disproportionate to any crime Mr. Mathenia committed due to his brain damage and mental retardation and because Mr. Mathenia's death sentence is the direct result of constitutionally deficient representation by his trial lawyer, and an unfair selection process of jurors for his trial.

In support of this application, Chuck Mathenia submits the reports of clinical psychologists, psychiatrists, and the results of extensive neuropsychological testing, as well as a volume of psychiatric records, school records, affidavits, trial and hearing transcripts and legal opinions. Given this large quantity of evidence, and the complicated issues involved, it is simply impossible for the governor to review the facts and give full thoughtful consideration to this request for clemency before the scheduled execution.

At least a temporary reprieve, or stay of execution, of 60 days is necessary in order for the Board of Probation and Parole to conduct an adequate review and for the Governor to have the opportunity for personal consideration of this application.

II. FEDERAL AND STATE JUDGES HAVE PROCLAIMED THAT CHUCK MATHENIA'S DEATH SENTENCE IS UNJUST.

Even before this new evidence of Mr. Mathenia's severe brain damage became documented, judges in the Eighth Circuit Court of Appeals and the Missouri Supreme court have recognized that Mr.

Mathenia's sentence of death was unseemly and offensive to principles of fairness and justice.

In the Eighth Circuit Court of Appeals, the Honorable Myron H. Bright recognized, (even without the results from the evaluations of Dr. Richard Wetzel and Dr. William O'Connor), that Chuck Mathenia was "on the road to execution by reason of the carelessness and incompetence of his appointed public defender at trial." Mathenia v. Delo, 975 F.2d 444, 455 (8th Cir. 1992), cert. denied, 113 S. Ct. 1609 (1993) (Bright, J., dissenting). Judge Bright noted that it was even more egregious for Mr. Mathenia's attorney to fail to act in his defense in this case than in any other criminal case because trial counsel actually knew from available medical records that his client was mentally retarded, and had even given a false confession to an attempted rape charge less than one year earlier.

Dissenting in Chuck Mathenia's case, Judge Bright has declared:

The State of Missouri may put [Mr.] Mathenia to death, but only after a trial in which is he afforded a defense by a competent attorney; that judicial philosophy is in accord with the views of the United States Supreme Court and the judges of this court.

Mathenia, 975 F.2d at 459. That view is also in accord with the constitution, laws, and the spirit of justice intended for citizens of Missouri.

In the Missouri Supreme Court, dissenting on the direct appeal, Judge Blackmar declared that Mr. Mathenia's death sentence should be set aside because the jury at his trial was unfairly

stacked with jurors who had already decided that the death penalty was the only appropriate punishment for the crime charged. State v. Mathenia, 702 S.W.2d 840, 846 (Mo. banc 1986), cert. denied, 477 U.S.909 (1986). (Blackmar, J. dissenting).

The Missouri Supreme Court did not review the claim regarding counsel's ineffective representation at trial. Mr. Mathenia timely applied for post-conviction relief under Rule 27.26 in the Circuit Court of Jefferson County and requested an evidentiary hearing to determine the facts in support of his claim for ineffective assistance of counsel at trial. However, the motion court, Judge Timothy Patterson, refused to grant any hearing and entered summary judgment against Mr. Mathenia, signing the proposed "Summary Judgment" order that had been drafted and submitted by the prosecutor, John W. Reid, II. (See Exhibit 1).

The Missouri Court of Appeals affirmed the denial of post-conviction relief on May 3, 1988. Mathenia v. State, 752 S.W.2d 873 (Mo. App. 1988), and the Supreme Court refused transfer.

III. INEPT REPRESENTATION BY COURT-APPOINTED LAWYERS: THE JURY AT TRIAL DID NOT HEAR THE TRUE FACTS ABOUT THE LIFE OF CHUCK MATHENIA.

Mr. Mathenia has only recently had the opportunity to obtain the evidence which proves that he could not have been responsible for capital murder, and thus was not even eligible for the death penalty under the law of this state, because of mental impairments he has suffered since early childhood. Recent extensive psychological evaluations and neuropsychological testing confirm that Chuck Mathenia suffers from severe brain damage, mental

retardation, and other mental disorders, which existed before the time of his offenses, and which were so profound that he could not "deliberate" or "coolly reflect" on his actions at the time of the crime.

Richard D. Wetzel, Ph.D., a licensed psychologist and Professor of Medical Psychology in the Department of Psychiatry at the Washington University School of Medicine has examined Chuck Mathenia and conducted intelligence testing and extensive neuropsychological testing, which revealed serious brain damage. Dr. Wetzel is "certain beyond a doubt" that this brain damage was present before 1984, and states that the type of damage demonstrated on some of the neuropsychological tests would have been caused by one or several severe blows to the left side of his head when he was very young -- under age four. Dr. Wetzel summarizes his conclusions as follows:

"[I]n my opinion, Mr. Mathenia is moderately mentally retarded, brain damaged, and has a history of attention deficit hyperactivity disorder, alcohol abuse and stereotypy/habit disorder.

Mr. Mathenia was reared in a family that was extremely dysfunctional in its abuse of alcohol, its disregard of conventional social values and its lack of concern for its children. For most of his life, Chuck Mathenia was not cared for appropriately and only marginal efforts were made to socialize him. As a result, his ability to cope and to control his own behavior was equivalent to that of a six year old at the time of the killings.

Further, I can state that Mr. Mathenia was mentally retarded, brain-damaged, and intoxicated at the time of his offenses in April, 1984. Chuck Mathenia did not and, in

fact, was incapable of deliberation or cool reflection before or during his offenses.

Exhibit 8_at p.2, paragraph 5 (emphasis in original).¹

Moreover, after performing a competent and extensive mental health evaluation, Dr. Wetzel is able to provide an answer to a question that any fair juror would want to know: "Why did Chuck Mathenia kill Daisy Nash and Louanna Bailey? How could such a thing happen?"

As a result of his evaluation, Dr. Wetzel has reached the conclusion, to a psychological certainty, that the offenses committed by Mr. Mathenia on April 24, 1984 were precipitated by behaviors of the victims that reminded him of his history of abuse, causing anger and rage that he could not control because of his impaired cognitive ability. The impaired cognition was directly due to his mental retardation, brain damage, history of abuse, and alcohol intoxication. Dr. Wetzel believes that Mr. Mathenia's relationship with the victims, Daisy Nash and Louanna Bailey, included a volatile component, which he perceived as "like" the abusive behavior he encountered as a child. Report of Dr. Richard Wetzel, Exhibit 8.

¹This "deliberation" or "cool reflection" was a necessary finding in order for Mr. Mathenia to be guilty of "capital murder". Thus, because these mental disorders rendered him incapable of "deliberation", Mr. Mathenia could only have been legally responsible for something less than "capital murder", such as "second degree murder" or "manslaughter". With a verdict of guilt on either one of those charges, the death penalty is not a possible punishment. Only "capital murder" was punishable by death.

William O'Connor Ph.D., a clinical psychologist, has independently determined the same. In the affidavit dated April 1, 1993, Dr. O'Connor made the following conclusion:

I further conclude, to a certain psychological certainty, that at the time of the offenses on April 24, 1984, Mr. Mathenia's cognitive functioning was severely impaired, and his actions were precipitated by behaviors of both Ms. Nash and Ms. Bailey that reminded him of his own abusive experiences as a child.

Mr. Mathenia's social history, including the evidence of child abuse, combined with Mr. Mathenia's brain damage, leads him to react in "situational queuing" manner, without thought or reflection on his actions. His inability to reflect before he acts would be even more seriously impaired if he had consumed alcohol in any quantity.

The jury at Chuck Mathenia's trial never heard any of this evidence. Mr. Mathenia's defense attorney, Donald Hager, presented no evidence in the guilt determination trial. He did not try to explain "why" at trial. In fact, counsel did not even permit the psychiatrist who examined Chuck Mathenia, Dr. Gary Bassett, to evaluate this. Counsel did not even request Dr. Bassett to determine whether he had the ability to "deliberate, even though counsel had actual knowledge that Chuck Mathenia was seriously mentally disturbed.

Finally, information about Mr. Mathenia's social background and mental deficiencies was readily available to Attorney Don Hager in 1984, more than one year before the capital trial, and would have been not only relevant to, but also essential for a competent mental evaluation prior to a trial where the death penalty is at

stake. A reasonable investigation would have revealed that Mr. Mathenia's life was a story of alcoholism, torment, abuse and neglect, mental retardation and severe brain damage. The jury never heard the following background story of Chuck Mathenia.

A. Alcoholism, Abuse and Neglect

1. Family Background and Early Childhood

Chuck Lee Mathenia is the child of Elsie Stafford Mathenia Davis and Joe Davis. His mother, Elsie, only attended school for two to three years and was functionally illiterate. She was one child in a family of six children who grew up in a tiny cabin without indoor plumbing. Her brothers included Bill Stafford, who went to prison for voluntary manslaughter, and Hank Stafford, who served at least two terms for aggravated assault and a stabbing. Both men were alcoholics. Her other siblings were Dorothy Stevens, Ester Gibson and Otto Stafford.

Elsie was single and 18 years old in the early 1940's when she became pregnant with her first child, a daughter, now Dolly Shaffer. Elsie married Tom Mathenia, the father of the baby, eight or nine months after Dolly was born, and she had two more children, Joyce St. Clair and Harold Mathenia.

Elsie and Tom Mathenia were both alcoholics, and they broke up over his drinking, her drinking and their infidelities before Chuck Mathenia was born. Tom Mathenia's whereabouts have been unknown ever since. Their children Joyce and Harold Mathenia grew up to be alcoholics, although Dolly is described as a "social drinker". Harold has spent time in prison and has lived on the streets.

At age 33, while still married to Tom Mathenia, Elsie became involved with and moved in with Joe Davis, a man who at age 74 was 41 years older than her. Joe Davis was also an alcoholic who did time in Washington State Prison for murder and other offenses. It is believed that Joe Davis is the biological father of Chuck Mathenia because Elsie was living with him at the time, and Tom Mathenia had been gone for more than nine months when Chuck was born on September 14, 1958. However, Tom Mathenia was listed as the father on Chuck's birth certificate because Elsie was still legally married to him.

Elsie Mathenia drank very heavily throughout her pregnancy with Chuck. Shortly after his birth, she and Joe Davis married and moved out to the state of Washington, taking the infant Chuck with them, but leaving the three older siblings behind. While there, Elsie's fifth and last child, Tom Davis, was born when Chuck was two years old.

Joe Davis, who reportedly was a cruel man, died of emphysema at the age of 77 in 1962, when Chuck and his brother Tom were still under four. Elsie had become very ill with heart disease by then, so she returned to Missouri with her young sons, Chuck and Tom, and moved in with her mother. (She apparently developed rheumatic fever at age 11 or 12, and began to show signs of congestive heart failure just before Chuck was conceived.) During this period, Elsie was so sick that she did not have the energy or time to attend to the boys, yet she remained their primary caretaker. She also spent part of that year in a hospital or TB sanitarium.

Chuck's older half-sister, Joyce St. Clair, who saw a good deal of the family situation during this time, has noted that even back then Chuck constantly "rocked back and forth".² When one interrupted the rocking, Chuck had a glassy-eyed stare and seemed unresponsive. (Mr. Mathenia still continues to do this rocking motion, especially when he becomes very frightened or upset.) Medical records from his mother's last hospitalization in 1965 also document that she reported to the doctors then that Chuck would frequently turn blue and "fall out" in a "fit" while playing. Exhibit 13 - C(4).

Elsie Davis died of complications related to her heart disease in 1965 when Chuck was only six years old. Nobody in the family really wanted to take Chuck. His four-year old brother Tom was more desirable because he had social security checks coming in from Joe Davis' death. However, Chuck was Tom Mathenia's putative child, and thus only had claim on child support from an unlocatable alcoholic father. Finally, Dorothy Stevens, a maternal aunt, agreed to take custody of both boys, and moved them up to the St. Louis just before the county welfare office could take them away and place them in a more stable environment.

2. Childhood and Adolescence

Chuck had a severe problem bed-wetting problem (almost daily) from the time he was very young until he was 16 or 17. Medical and psychiatric records from before the offense in 1984 state that

²Dr. Wetzel, states that this is important, because it suggests that Chuck had already sustained serious brain damage by that early age.

Chuck's Aunt Dorothy constantly beat him and threw him in cold showers because of this disorder. She forced Chuck to go to school in his urine-soaked clothes, where he was constantly ridiculed by the other children. Chuck was also routinely whipped for his poor school performance (even though teachers had told Aunt Dorothy that Chuck had serious learning disabilities and he had been in special education since second grade).

Dr. Wetzel specifically notes that Chuck Mathenia is not, and was not, an antisocial personality. All school reports show that his behavior at school was praised and acceptable. Exhibit 13-E. He desperately tried to please.³ Chuck did not play hookey or get into fights. Miss Nina Hamilton, one of his grade school teachers, reported that he was never a discipline problem. Trial Tr. at 422.

Dorothy Stevens reports that Chuck's body "outgrew his mind" when he was twelve or thirteen. At that time, she states she had more problems managing him. But, Chuck did not get into any trouble until he started drinking alcohol around age 16. He was still in grammar school at the time, much older than his classmates, and doing very poorly even though he was in special education. He had only one instance of trouble before liquor became involved. In 1975, when he was 16 years old, he threatened a girl whom he had known for years because she teased and taunted

³ After reviewing the narrative school reports of Chuck at age 16, Dr. Wetzel notes that the teachers discussed his behavior and progress as if her were only 7 or 8 years old. See Exhibit 8.

him. After that incident, he was examined then at Farmington State Hospital by R.K. Gupta, M.D. Dr. Gupta noted that Chuck had also been teased by neighbors and relatives and that his "coping mechanism reached a breaking point." Records of Farmington State Hospital, 1975, Exhibit 11.

As Chuck's use of alcohol increased, his behavior became episodically out of control. He dropped out of school at age 17 without having completed the 8th grade, because he could not handle the jeering and ridicule of the other children. He would sneak out of the house to drink and would stay with alcoholic relatives because Aunt Dorothy wanted him to abstain.

Four year later in 1979, Chuck was charged with disturbing the peace and was again evaluated at Farmington State Hospital. D. Tiffany, M.D., a psychiatrist concluded that Chuck was mentally retarded "with social economic deprivation" and was alcoholic. Dr. Tiffany further noted:

Due to his limited intellectual capacity, this patient's judgment is lacking. He is emotionally immature, and has low tolerance for frustration. Drinking accentuates this problem. He is also a tense and inadequate feeling young man, who feels anxious in interpersonal relationships.

Records of Farmington State Hospital, August 15, 1979, Exhibit 11 at p.2. Chuck went off to live with some relatives in Georgia for a brief period after this, but was unable to hold a job for more than a few weeks, and returned to Missouri, bouncing around from one alcoholic family member to another.

Within a year or so, around 1980, Chuck Mathenia met Daisy Nash and her sister, Louanna Bailey, who were neighbors of Bill Stafford, one of Chuck's alcoholic uncles. Daisy Nash found Chuck passed out on her porch one morning, and took him in. He was unable to work and received assistance from County Social Service Workers.

In 1982, Chuck Mathenia was taken to Farmington State Hospital, where he was evaluated by William Cone, M.D., a staff psychiatrist. Dr. Cone described the extreme emotional deprivation and cognitive disability that Chuck Mathenia had sustained in his early life, and observed that he had:

"sustained massive psychological trauma during early developmental phases. His personality disorder shows elements of many different conditions including schizoid avoidance, passive-aggressive, and other forms of personality organization."

Report of William Cone, M.D., December, 1982, Exhibit 12 at p.3.

Dr. Cone concluded that Chuck Mathenia was a "seriously damaged young man," with an "intellectual capacity [that] has been damaged, probably permanently," so that he was "not capable of performing any substantial employment . . . and not capable of handling his own funds." Dr. Cone stated that it was "likely that the damage could not be fully repaired". As a result , Chuck was declared "disabled" due to mental disorders, which allowed him to receive Social Security payments. Daisy Nash was named as his "payee", because his disability was so severe that he was unable to handle his own funds. Exhibit 12 at p.3.

People who knew Chuck Mathenia before this offense agree that he has always been afraid in social situations, even as an adult. He once wet his pants when some people in a car scared him as he was walking down the road. He has been unable to care for himself. He couldn't tie his shoes. He has never been able to drive a car. He has never been able to handle his personal hygiene, buy groceries or manage money. Although he could do some work, he has never been able to stay employed, because he has to be constantly watched and told exactly what to do before every individual task and is incapable of independent judgment. He had a lengthy history with the Madison County Family Services workers for many years before he was declared mentally "disabled" for Social Security in 1983.

All these facts about Chuck Mathenia were available to his defense counsel at trial, but were disregarded. These facts were relevant to an understanding of the factors that may have caused Chuck Mathenia to become violent. The information was critical for a competent mental evaluation to assess Mr. Mathenia state of mind at the time of the offense. Yet, that was never done.

B. Mental Retardation and Severe Brain Damage

1. Records available before Trial in 1984.

In addition to the true story of Chuck Mathenia's abusive and inept social functioning, defense counsel also knew of several facts which indicated that Mr. Mathenia was also seriously mentally disturbed -- brain damaged and mentally retarded. Yet these facts were also ignored.

For example, defense knew that only a few months before this offense, Chuck Mathenia had made a "confession" to an "attempted rape" charge, even though he had nothing to do with the offense. Shortly thereafter, the person who was really responsible for the attempted rape, David Porter, was arrested when he returned to the victim's home. Defense counsel knew about this previous "false confession", because he had represented Mr. Mathenia on that charge, as well. Probation and Parole Report, January, 1985,

Before these earlier charges were dismissed, Mr. Mathenia was given a mental examination at Farmington State Hospital in January, 1984, at the request of the prosecutor on that case, John W. Reid, II, who was also the prosecuting attorney in this capital murder trial. The "Personal/Family History" section of the "Social Service Assessment" from that hospitalization reports that Chuck described some of his abusive background then:

The patient describes harsh treatment at the hands of his mother's sister, who took him and his brother Tom into her home at Coldwater, Missouri . . . he describes having an anuretic problem until age 16 and gave explicit details on how his aunt would "put me in a cold shower" trying to resolve the anuretic problem. He also describes being made to sleep on the floor, of receiving numerous "beatings" for poor grades even though the school had alerted the aunt that he had a learning disability. In addition, he described not being allowed to attend church, given no money, and on one occasion being hit on the head with a can of peanut butter, thus sustaining a large gash.

Exhibit 9.

Enrique Vicioso, M.D., the psychiatrist at Farmington Hospital, reported his opinion that if Chuck Mathenia was involved

in the alleged offenses, then he "was incapable of understanding the nature, quality and wrongfulness of his act."

Report of Dr. Vicioso, January 1984, Exhibit 9 at 2.

A psychological evaluation done at that time by M.A. Felchlla reported that Mr. Mathenia was mentally retarded and that "organicity" (organic brain damage) was present:

He appears to suffer organic damage that affects the more complex abilities to handle abstract reasoning.

Exhibit 9 at 3. The psychologist specifically noted that "despite his social deprivation and abuse", Mr. Mathenia demonstrated honesty and genuine concern for others. Again, testing indicated that Chuck Mathenia did not have an antisocial personality disorder:

Results of personality testing indicated two predominant factors. He seems an emotionally immature individual who has a strong desire for nurturance and affection from others. He may experience difficulty in knowing how to cope with the emotions he feels and may cope with them primarily through rigidity.

* * * * *

Also involved seemed [sic] feelings of insecurity and inadequacy. For these reasons he may tend to be reluctant to deal with his environment.

Exhibit 9 at 2.

Even before the charges were dismissed, the psychologist advised against incarceration if convicted:

Because of his strong desire for nurturance and affection and his immaturity, incarceration would likely lead to his emulation and identification with the inappropriate role models present in prison.

An alternative to incarceration that includes a structured environment, the learning of socially appropriate behavior and strong, positive male role models, is strongly recommended.

Exhibit 9 at 4.

Evidence that Chuck Mathenia was mentally retarded was also conspicuous. In addition to the Social Security Disability determination in 1982, other documents were readily available. Chuck Mathenia's school records included proof that in 1970 and 1973, at ages 11 and 14, he tested in the mentally retarded range with IQ scores of 68 and 59, respectively. On Iowa Basic Skills tests administered from 1973 to 1975, he scored in the lowest 1st to 4th percentile in almost all test categories. These records are consistent with mental retardation. See School Records of Chuck Mathenia, Exhibit 10. Yet these facts were never presented at trial.

No evidence at all was presented in Chuck Mathenia's behalf in the guilt/innocence phase of his capital trial. The jury returned two verdicts of guilt for capital murder, and then the proceedings began to determine whether Mr. Mathenia would be sentenced to death or life in prison.

Dr. Gary Bassett, a former psychiatrist, testified only in that part of trial. Dr. Bassett had examined Chuck Mathenia in November, 1984 for a few hours and administered the WAIS-R intelligence test. Mr. Mathenia scored in the mentally retarded range with a full scale IQ score of 68, and performance and verbal scales of 70. Dr. Bassett presented these results in the penalty

phase of trial, but this was the only evidence offered about Chuck Mathenia's mental condition.

Dr. Bassett did not review anything about Mr. Mathenia's background, including school or psychiatric records, and didn't question anyone who knew Mr. Mathenia about his level of functioning and socialization. In addition, Dr. Bassett never performed the psychological and neuropsychological tests necessary to determine whether Chuck Mathenia had brain damage, or the extent of his mental retardation on his ability to function. Trial Tr. at 395-415.

Thus, Dr. Bassett did not discuss the level of Chuck Mathenia's adaptive functioning, background or mental disorders on his ability to deliberate. He did not discuss why or how his abuse or retardation should mitigate against a death sentence. He made no evaluation, and thus could offer no explanation about why these killings occurred, and why Chuck Mathenia should not be executed.

Instead, Dr. Bassett's lack of preparation and lack of a thorough evaluation permitted the prosecutor to undermine the entire testimony and left the jury with the impression that Mr. Mathenia really was not retarded.

Dr. Richard Wetzel thoroughly discusses the incompetence of Dr. Bassett's evaluation and testimony in his Affidavit of April 7, 1993, at 2-10. For example, Dr. Bassett failed to note that the report of Dr. Vicioso, upon which the prosecutor relied, really misstated the level of Chuck's intellectual functioning. This was more than just a technical error. In fact, as Dr. Wetzel explains,

Dr. Bassett's failure to review the prior psychological records made the prosecutor's "quibbling about an IQ point or two seem much more important to a jury than it rightfully is." Exhibit 8 at 4-5, note 1.

More importantly, Dr. Wetzel explains that the IQ test is only one of three criteria for diagnosis of mental retardation. A point that was never made to the jury at trial. Chuck Mathenia not only satisfies that criteria, but his poor adaptive functioning places his adaptive IQ at a level below 50, in the more significantly impaired "moderately retarded." Exhibit 8 at 8.⁴

Mr. Mathenia has not been able to obtain any comment from Dr. Bassett about the conclusions of Dr. Wetzel and Dr. O'Connor because he is no longer practicing medicine or psychiatry, and no longer has a medical license. He has moved out of Missouri and refuses to review any of his prior work. Dr. Bassett has stated that he himself is "incompetent," suffering from an undisclosed illness. Exhibit 13-Q.

2. Review of Records by Daniel Cuneo, Ph.D. in 1990.

After a Petition for Writ of Habeas Corpus was filed in the Federal District Court in the Eastern District of Missouri, Daniel J. Cuneo, Ph.D., a clinical psychologist, reviewed Mr. Mathenia's mental health records, school records and the transcript. Dr. Cuneo recommended that a complete mental evaluation was necessary

⁴Less than 2% of the population are in the IQ score range of 70 or less. Chuck Mathenia's impairment is even more severe than that.

to determine Mr. Mathenia's ability to deliberate at the time of the crimes. Exhibit 2 at 1. Because of his indigence, Mr. Mathenia filed a motion with the court for funds for a mental evaluation, however, the district court (Honorable Judge John Nangle) rejected that request.⁵

At a limited hearing before the district court on December 19, 1990, Dr. Cuneo testified that according to his review of the records, Chuck Mathenia met all three criteria in the DSM-III-R for mental retardation, and noted specifically Chuck's impairments in adaptive functioning. Dr. Cuneo offered his opinion that Mr. Mathenia could not voluntarily, knowingly and intelligently waive his Miranda right. Dr. Cuneo testified that Mr. Mathenia certainly had a mental defect, including at least mental retardation and possibly organic brain disease. However, it would be necessary for a psychologist to personally examine Chuck to determine whether "organic" and other factors would have rendered him unable to deliberate at the time of the crime. Dr. Cuneo testified that an appropriate evaluation and testing at that time (December 1990) could very well be probative of Mr. Mathenia's mental status in 1984.

A short time later, petitioner obtained funds for a mental evaluation and neuropsychological testing from an independent source, not from the court, but the district court dismissed the

⁵Congress has provided for funds for necessary mental examinations and other investigation needed to support a constitutional claim habeas corpus in a death penalty case. 21 U.S.C. § 848, 18 U.S.C. § 3006A(E) (1).

petition anyway on April 22, 1991, before that evaluation could be performed. The district court refused to reconsider its order pending the results of a complete psychological evaluation, and merely stated that a current evaluation would be irrelevant to Mr. Mathenia's mental state at the time of the crimes, despite Dr. Cuneo's testimony otherwise.

The district court apparently ignored the entirety of Dr. Cuneo's testimony and the possibility of an organic mental disorder and rejected the claim without any expert evaluation. The court focused exclusively on petitioner's drinking and made the following completely unsupported conclusion:

"there is nothing in the record to indicate that petitioner suffered a cognitive breakdown from his drinking on the occasion in question, such that it should be considered grossly negligent for his trial counsel not to have developed and presented a defense of diminished capacity by intoxication."

Mathenia v. Delo, No. 89-88C, Slip op. at 13 (April 22, 1991) (copy attached as Exhibit R. Yet Chuck Mathenia does not, and never has, relied on his intoxication to prove that he was unable to deliberate. That is not necessary because of his serious brain damage and mental retardation. The District Court prevented Mr. Mathenia from proving that those conditions were relevant by denying his request for a mental evaluation.

3. Recent Evaluations: Conclusions from the Psychological Evaluations of Dr. Richard Wetzel and Dr. William O'Connor.

William O'Connor, Ph.D. and Richard Wetzel, Ph.D., licensed clinical psychologists, have individually evaluated Chuck Mathenia at Potosi Correctional Center within the last few months both Dr. O'Connor and Dr. Wetzel conclude that Chuck Mathenia is mentally retarded and severely brain damaged, and has been since early childhood.

Dr. O'Connor examined Mr. Mathenia on July 15, 1991 and December 6, 1992. On the July, 1991 visit, Dr. O'Connor was limited to meeting with Mr. Mathenia in a no-contact visit, through a glass screen, over the phone, because Mr. Mathenia was too frightened to handle a contact visit.

After about 20 minutes, Mr. Mathenia became very upset because he was required to remain in handcuffs and could not obtain a pencil needed for the testing. Dr. O'Connor stated that he appeared to become overstimulated, began screaming, and his speech became tangential, disorganized, and paranoid in content, with loose and poorly formulated associative processes. By that observation, Dr. O'Connor judged that he was functioning in a manner consistent with an acute psychotic state, although he noted that the observation required further evaluation.

In December 1992, Dr. O'Connor was first able to examine Chuck Mathenia in a face-to-face "contact visit" setting, without handcuffs. Dr. O'Connor interviewed Mr. Mathenia at length and performed certain intelligence tests and neuropsychological tests.

He also reviewed numerous documents pertaining to Mr. Mathenia, including school records and IQ test results from 1970 and 1973, Psychiatric Records from Farmington State Hospital, 1975, 1979, 1982, 1984 and 1985; Records from the Missouri Division of Family Services 1980-1984; Psychiatric Records from the Missouri Department of Mental Health, and Fulton State Hospital, 1987 and 1989; Records from the Missouri Department of Corrections, including mental health evaluations, 1985 to present; the report of Daniel J. Cuneo, Ph.D., 1990; transcript of the Penalty Phase of Mr. Mathenia's trial on December 14, 1984, including the testimony of Gary Bassett, M.D., Thomas Davis, Mr. Mathenia's brother, and Nina Hamilton, a former teacher of Mr. Mathenia, and the sworn statements family members, teachers and neighbors who have known Chuck Mathenia since childhood.

Dr. O'Connor has concluded, beyond a psychological certainty, that Chuck Mathenia is mentally retarded and severely brain damaged, and suffered from both of these mental impairments in April 1984, Dr. O'Connor declares that "without a doubt, Mr. Mathenia was not capable of cool reflection or deliberation at the time of the offenses." Affidavit of Dr. William O'Connor, dated April 1, 1993, Exhibit 7.

On the Weschler Adult Intelligence Scale - Revised ("WAIS-R"), administered by Dr. O'Connor on December 6, 1992, Mr. Mathenia obtained a Verbal Scale IQ of 65, Performance Scale IQ of 70, and a Full Scale IQ of 66 -- scores which place him in the mentally retarded range.

Mr. Mathenia's performance on the Weschler Memory Scale - Revised supports the validity of those scores and indicates that his level of functioning is limited to the level of a mentally retarded person. Dr. O'Connor noted that the Mr. Mathenia's dysfunction with both verbal and visual memory also suggested brain damage, and ruled out malingering or lack of motivation as a factor for his poor performance on the WAIS-R.

In reaching the conclusion that Mr. Mathenia is indeed mentally retarded, Dr. O'Connor also considered his level of functioning and adaptive behavior, as documented in the records listed above, and by his own interview and clinical evaluation. Dr. O'Connor noted that Mr. Mathenia had consistently demonstrated very poor adaptive behavior, which confirmed his diagnosis of mental retardation, and states that this is consistent with the determination by the Department of Health and Human Services in, late 1982, that Mr. Mathenia was not only so mentally impaired that he was eligible for disability benefits, but that he could not even manage his own funds, and had to be appointed a guardian.

Dr. O'Connor's neuropsychological screening for brain damage included the Stroop examination, where Mr. Mathenia's scored at the 2nd percentile, indicating a 96% probability that he has organic brain damage. On the Trails B section of the Trailmaking test, a part of the Halstead-Reitan Battery, Mr. Mathenia's performance absolutely revealed significant brain damage. Dr. O'Connor is certain that Chuck Mathenia's brain damage has been present since his early childhood.

Mr. Mathenia's inability to make good judgments, or think before he acts, was demonstrated on Mental Status Examination and the Brief Psychiatric Rating Scale ("BPRS"), where he rated in the severe range for suspiciousness, hallucinatory or perceptual experiences, and episodic anxiety. Dr. O'Connor noted that this result was consistent with the other evidence that Mr. Mathenia had been abused as a child.

As a result of complete evaluation and testing, Dr. O'Connor has concluded that:

Mr. Mathenia's cognitive functioning was so severely impaired at the time of these offenses that his actions were precipitated by behaviors of both victims that reminded him of his own abusive experiences as a child.

Dr. O'Connor opines that Mr. Mathenia's social history, including the child abuse, combined with Mr. Mathenia's brain damage, leads him to react in "situational queuing" manner, without thought or reflection on his actions even without excessive alcohol consumption. However, he adds that Mr. Mathenia's inability to reflect before he acts would be even more profoundly impaired if he had consumed alcohol in any quantity. See Exhibit 7.

Dr. Wetzel also reviewed the documents detailing Mr. Mathenia's educational, psychological, psychiatric and medical history, as were listed above for Dr. O'Connor. In addition, Dr. Wetzel studied the results of Dr. O'Connor, the Medical Records of Chuck Mathenia's mother, Elsie Davis, from her hospitalization and death in 1965, and the sworn statements of many individuals who have known Mr. Mathenia since early childhood, including family

members, teachers, and neighbors. Dr. Wetzel has also conducted personal interviews with Chuck Mathenia's family members and some teachers.

After evaluating and testing Chuck Mathenia, and conducting family interviews in the past two months, Dr. Richard Wetzel has also concluded that Chuck Mathenia's dysfunctional family background, as well as his brain damage and mental retardation, has contributed significantly to his inability to make good judgments, "deliberate," or "coolly reflect" on his actions. Dr. Wetzel maintains that "the love of a family and the support of a family are required for a child to learn to tolerate frustration and to inhibit anger at deprivation, frustration of desires or punishment." Yet, he noted that Chuck Mathenia never received that love and support:

"Chuck Mathenia had very little of that. He had that discipline that made life easier for the discipliner (Aunt Dorothy -- washing urine-soaked sheets), but not the discipline that insisted on or taught self-control. The ability to stop, reflect and coolly deliberate is something that must be taught and learned. It is much more difficult to learn for hyperactive children, for the retarded and for the brain damaged.

Coming from his family with its rampant alcoholism, indifference to social standards and disinterest precluded Chuck Mathenia from having those social opportunities and corrective experiences that might have allowed this mentally retarded and brain damaged man to reach a higher level of adaptive behavior and self-control."

Affidavit of Dr. Richard Wetzel, Exhibit 8 at 22.

Dr. Wetzel also conducted intelligence tests and extensive neuropsychological tests and concludes that "without any doubt", Chuck Mathenia was both mentally retarded and severely brain damaged at the time of his offenses in April, 1984, and was incapable of deliberation or cool reflection before or during his offenses. Affidavit of Dr. Richard Wetzel, dated April 7, 1993, Exhibit 8.

In making the diagnosis of mental retardation, Dr. Wetzel considered several components, as required by the standards of the American Association on Mental Deficiency (AAMD) in Classification in Mental Retardation, 1983 Revision, noting that the score on a standardized intelligence test is only the first factor to consider under the AAMD criteria.

Dr. Wetzel reviewed the results Mr. Mathenia achieved on the WAIS-R administered by Dr. O'Connor in December, 1992, and also administered the WAIS-R to Mr. Mathenia himself on March 18, 1993. Their individual findings were consistent. Mr. Mathenia had scored a full scale IQ of 66 in December, 1992, and the full scale score in March, 1993 was only six points higher than that. Dr. Wetzel states that this small discrepancy is insignificant, and is due, at least in large part, by "practice effect". Regardless, Dr. Wetzel concludes that Mr. Mathenia's scores on the WAIS-R test definitely place him in the mentally retarded range.

Dr. Wetzel notes that the AAMD has dictated that a diagnostic evaluation for mental retardation requires an appraisal of adaptive behavior by a thorough clinical assessment of the person, including

review of information secured from informed people such as teachers, parents, and others who knew the person as he developed, as well as direct observation of behavior. Dr. Wetzel conducted such a thorough clinical evaluation on Chuck Mathenia and determined that his adaptive behavior is, and always has been, severely and significantly impaired.

For example, Dr. Wetzel has noted that Mr. Mathenia's academic performance has always been so poor that he was placed in special education programs and yet he still failed several grades. Chuck Mathenia was 17 years old when he finally dropped out of school in the 8th grade. Even though he was several years older than his classmates, he still scored in the lowest 1 percentile on 7 out of 15 categories of the Iowa Tests of Basic Skills that year, April 1975. On all except two of the remaining tests, he scored in the lowest 5 percentile. His best performance, on the two remaining test, was still in the lowest 10 percentile of all eighth-graders. Dr. Wetzel concludes that this is the level of achievement to be expected of someone with Mr. Mathenia's degree of Mental Retardation.

Dr. Wetzel noted that there is abundant evidence that Chuck Mathenia's adaptive behavior has always been severely impaired. The statements of those who knew him before age 18 relate his inability to perform basic tasks, lack of concentration and poor functioning socially, as well as academically. He routinely wet his bed, even up through his teen years. On the WISC Intelligence

test administered at age 14, Chuck Mathenia's full scale IQ score was only 59 -- substantially in the mentally retarded range.

The neuropsychological evaluation by Dr. Wetzel to determine whether Chuck Mathenia has organic brain damage included the Tactual Perception Test ("TPT"), which revealed that Mr. Mathenia has severe left parietal lobe brain damage. In fact, Dr. Wetzel states that the dysfunction elicited on the TPT is "the most striking and extreme" that he has ever seen.

Left hemisphere brain damage was also demonstrated on the "Trailmaking" portion of the Halstead-Reitan Neuropsychological Test Battery. On "Trails B", Mr. Mathenia scored in the "severely impaired" range.

Dr. Wetzel concludes that Chuck Mathenia has "clearly impaired frontal lobe dysfunction", as demonstrated on the Category Test, the most sensitive test in the Halstead-Reitan battery, which reveals that his frontal lobe thinking is so impaired that he cannot solve problems as "well" as a mentally retarded person can usually solve problems. Thus, not only is Mr. Mathenia mentally retarded, but is further impaired even beyond that in his ability to function.

Chuck Mathenia scored in the "demented" range on the Cambridge Exam, a dementia battery for persons with brain damage, which demonstrates that Mr. Mathenia's level of brain damage is so pronounced that he is unable to even take care of himself. Dr. Wetzel notes that this is also consistent with the determination made back in December, 1982, by William Cone, M.D., a psychiatrist

at Farmington State Hospital that Chuck Mathenia's intellectual capacity was permanently damaged, and that he was "not capable of performing any substantial employment" and was "not capable of handling his own funds and need[ed] a payee" to do so.

Dr. Wetzel acknowledges the significance that several family members and others who knew Mr. Mathenia throughout his life have related that, since a very young age, he has always "rocked back and forth" -- a behavior which still continues and is further documented in prison records. Dr. Wetzel notes that this "stereotype/habit" disorder is very common in people that are brain damaged and mentally retarded.

Dr. Wetzel notes that the interviews with Mr. Mathenia and statements from family members indicate that he was repeatedly abused as a child, both physically and psychologically. The abuse has substantially affected his personality and his ability to control his anger and rage adversely. He believes that Mr. Mathenia's relationship with the victims, Daisy Nash and Louanna Bailey, included a volatile component, which he perceived as "like" the abusive behavior he encountered as a child, and has reached the following conclusion "to a psychological certainty":

The offenses committed by Mr. Mathenia on April 24, 1984 were precipitated by behaviors of the victims that reminded him of his history of abuse, causing anger and rage that he could not control because of his impaired cognitive ability. The impaired cognition was directly due to his mental retardation, brain damage, history of abuse, and alcohol intoxication.

Dr. Wetzel notes that Mr. Mathenia made no attempts to conceal what he had done, or to protect himself in any way after the offense, which suggests that he did not fully appreciate the nature and quality of what he had done. (Exhibit 8).

IV. THE JURY THAT SENTENCED CHUCK MATHENIA TO DEATH WAS NOT IMPARTIAL OR WILLING TO CONSIDER ALL RELEVANT EVIDENCE.

On the direct appeal, Judge Blackmar voted to affirm the conviction of capital murder, stating that the evidence "amply supports the conviction". At that point in the proceedings, however, as at trial, the defense had not presented any evidence of Chuck Mathenia's severe brain damage or the full extent of his mental retardation, and did not present the evidence which we know now to be uncontroverted: that these mental diseases were significant impairments which made it impossible for Chuck Mathenia to "deliberate". Those facts do not support the conviction.

Nevertheless, Judge Blackmar dissented on the issue of punishment and stated that the death penalty should be set aside in this case (and remanded for a new penalty trial) because at voir dire, the trial court removed all potential jurors who said they would not consider the death penalty, but refused to excuse numerous jurors who said they would automatically impose the death penalty upon conviction, and would not consider a life sentence for punishment.

For example, at trial venireman Middleton stated several times that he would automatically vote for the death penalty for all violent crimes, but the trial court refused to strike this venireperson as long as he would answer "yes" to the court's

general question as to whether he would "follow the instructions of the court". Although a majority of the Missouri Supreme Court affirmed that decision, Judge Blackmar did not, and he noted that this general "rehabilitation" question was not sufficient to distinguish those jurors who would always give the death penalty, from those who really would seriously consider the full range of punishment, including life in prison, on a capital murder conviction. State v. Mathenia, 702 S.W.2d at 846.

At least 12 other persons on the venire were advocates of the death penalty for almost any capital murder (where there is "deliberation") or even second degree murder (where there is "premeditation"). These potential jurors were similarly unqualified, but were not dismissed for cause:

- a. Venireman Clark - believes in the death penalty "without any reservations." Tr. at 108
- b. Venireman Mobley - believes in death "if evidence comes up where it showed without a doubt the person was guilty." Tr. at 109.
- c. Venireman Bone - "I believe in death penalty if a person is proven guilty." Tr. at 110.
- d. Venireman Payne - "I can't say if somebody steals a package of Twinkies he should be put to death for it. But if he murders someone while stealing, that's a different story." Tr. at 112.
- e. Venireperson Eaton - "If they're found guilty if the crime that calls for capital punishment I believe they should be given capital punishment." Tr. at 116.
- f. Venireperson Brantley - "Yeah, I believe in the death penalty if it was proven that it was premeditated." Tr. at 116.

- g. Venireperson Britton - "Yes, I believe that if a person's found guilty for murdering another person they should receive the death penalty." Tr. at 117.
- h. Venireman Bernard - "Yes, sir. I believe in the death penalty with no reservations, but I'd have to hear the facts to make a decision." Tr. at 119.
- i. Venireman Emmet Manes - "That's right, based on the evidence, I'd have to go along with capital punishment."
- j. Venireman Acre - "I believe in capital punishment, especially if its premeditated murder or just wanton murder." Tr. at 121.
- k. Venireman Johnson - "Strong believer. I believe in an eye for an eye and a tooth for a tooth." Tr. at 123.
- l. Venireperson Reba Capper - [Believes in capital punishment] . . . "if the circumstances and the evidence shows that they're guilty." Tr. at 123.

Two other members of the venire panel stated that they would give no credibility to psychiatric testimony, and indicated that they would probably automatically vote for the death penalty upon conviction. Venireperson Kevin Kelley stated the following at voir dire, yet was not discharged:

"I don't know what this case is going to come to, if you're going to bring me a psychiatrist or what, but to me, personally, in my mind I do not believe there is such a thing as the criminally insane. And you are asking everybody if they would have problems voting, you know on the death penalty. I would say I would be just the opposite way, if they can prove to me."

"I've always been for capital punishment and always will be, even if they're tried and proven criminally insane."

Tr. at 70, 120.

Venireperson Bachek also made it clear that he would "have problems believing a psychiatrist", Tr. at 67-68, and stated that he was in favor of the death penalty, but not for "stealing watermelons." Tr. at 114.

Thus, the defense was obliged to use valuable peremptory challenges to remove as many of those potential jurors from the panel. According to Missouri Law, these unqualified and biased persons should have been dismissed by the court.

Because the number of peremptory strikes afforded a criminal defendant are limited, at least 3 persons who actually served on Mr. Mathenia's jury, including the foreperson, were predisposed to give the death penalty in this case because alcohol was involved in the offense. These were the persons who decided that Chuck Mathenia should be sentenced to die, even though Missouri law at the time provided that a criminal defendant's voluntary intoxication could diminish legal responsibility for a crime, if it interfered with the ability to deliberate, premeditate, or act with a certain criminal intent. The following responses were made a voir dire by these jurors:

1. Foreperson Harry McMackin - Stated that he approved of the death penalty "on any premeditated crime or murder, death, or while under the influence of any mind-altering drugs." Tr. at 105. McMackin also admitted that he would not be sympathetic and might be harsher on the defendant if alcohol was involved. Tr. at 84-85.

2. Juror Claude Miller - Also responded that he would not be sympathetic if alcohol were involved. Tr. at 85. He added that he "strongly supports the death sentence." Trial Tr. at 109.

3. Juror Connie Longworth - Ms. Longworth stated that she would have "no sympathy" if the crime was alcohol related. Tr. at 86.

At least two other members of the jury that sentenced Mr. Mathenia to death had also stated on voir dire that they favored the death penalty as long as there was evidence of guilt. (Juror Stanton Papin, Tr. at 110 and Juror Leroy Patterson, Tr. at p. 115).

Since Mr. Mathenia's trial, the Missouri Supreme Court has acknowledged in other cases that Missouri law requires a new trial if there is not a full panel of qualified jurors, as where the trial court fails to strike a venireperson for cause who has stated that the death penalty always should be imposed if there was a capital conviction. State v. Wacaser, 794 S.W.2d 190 (Mo. 1990).

As Judge Blackmar argued on dissent in Mr. Mathenia's case, the general question about whether that juror could "follow the law" does not settle the issue of bias. The United States Supreme Court has echoed the reasoning of Judge Blackmar and held in Morgan v. Illinois, 112 S.Ct. 2222 (1992), that a venireperson's affirmative reply to general questions whether he or she could generally be "fair" or "follow the law" does not satisfy the constitutional requirements. In Morgan, the Court noted that jurors who would automatically impose the death penalty "could in all truth and candor" respond that they would be fair or "follow the law" because they may be "personally confident that such dogmatic views are fair and impartial." Morgan, 112 S. Ct. at 2233. Still, the Court recognized the inherent contradiction in such

responses, and held that any juror who would automatically impose death upon conviction simply "cannot follow the dictates of the law":

More importantly, however, the belief that death should be imposed ipso facto upon conviction of a capital offense reflects directly on that individual's ability to follow the law. Any juror who would impose death regardless of the facts and circumstances of the conviction cannot follow the dictates of the law. It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Id.

It is not necessary to show that a venireperson would automatically reach a specific decision in order to establish that he or she is not impartial. It is likewise not necessary that a potential juror's bias be proved with "unmistakable clarity" in order to justify dismissing that person "for cause." The Supreme Court has declared that "[t]his is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Wainwright v. Witt, 469 U.S. at 424.

Judge Blackmar noted that the fault of not excusing such potential jurors was aggravated in this case because those venirepersons who were opposed to the death penalty, venirepersons Ledoux and Lamprecht, were excused "for cause" by the court. This is a constitutional issue of the right to a fair trial and an

impartial jury -- yet the trial court ignored these rights at Chuck Mathenia's capital trial.

V. THE POWER OF THE GOVERNOR TO GRANT THE RELIEF REQUESTED AND THE NECESSITY OF DOING SO.

Throughout his life, mentally retarded and brain-damaged, Chuck Mathenia was forced to endure the unendurable, and was pushed to the rim of desolation and destruction. Must the state of Missouri be the final instrument of destruction? For while the execution of any man is lamentable, the execution of such a mentally ill and fragile person is obscene.

The founders of our democracy, the framers of our federal and state constitutions, were sagacious enough to recognize that there would be circumstances in which our legal system would fail to produce a just outcome. To avoid the application of such unfair and unacceptable consequences, they created a court of last resort. And that court, Governor, is you.

In rejecting monarchy and authoritarianism for democracy, our founding fathers created a system of intricate checks and balances. Governance by consensus. However, they carved out one significant exception. In regard to the dispensation of criminal sanctions, the denial of individual freedom or in the ultimate, the state's taking a human life, they recognized that no system was sufficient to safeguard such essential liberties. Thus, they vested in the chief executive extraordinary power to right the wrongs, to provide equity, to render justice.

As the United States Supreme Court explained in Ex Parte Grossman, 267 U.S. 87, 120-21 (1925):

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.

The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

The Supreme Court reaffirmed that confidence in the power of executive clemency just this past term. In Herrera v. Collins, 113 S. Ct. 853, 854 (1993), the Court refused to reverse a Texas inmate's death sentence, and went on to describe a state's executive clemency as "the 'fail safe' in our criminal justice system", rather than judicial intervention. The Court described the critical role of a state's executive clemency in "preventing miscarriages of justice":

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted.

Id. at 854.

Article IV, section 7 of the Constitution of Missouri (1945) provides:

The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for such pardons. The power to pardon shall not include the power to parole.

This grant of authority, which gives the Governor of Missouri the power to grant executive clemency, including pardons and commutation of capital punishment, has remained essentially unchanged since its adoption in the Constitution of 1875, Art. V, § 8.

Given the breath of your power, it is clear, Governor, that you have a wide variety of options which you may consider in devising an appropriate remedy in the case of Chuck Mathenia. You may grant a temporary reprieve, a stay of execution for at least 60 days, in order to permit a thorough review -- and to prevent a miscarriage of justice.

VI. THE PUBLIC OPPOSES EXECUTION OF RETARDED PERSONS.

Since he was incarcerated, Chuck Mathenia has spent most of his time alone in his cell, because he is a frightened and disturbed man. Due to his mental retardation and brain damage, Chuck Mathenia is a frightened young man, but he poses no harm. In opinion polls conducted on the issue, a majority of people oppose the idea of executing people who have mental retardation:

--In Georgia, where 75% of the public supports the death penalty, 66% oppose the execution of mentally retarded persons, while only 17% favor the practice. (Source: "Execution of Retarded Opposed:", Atlanta Journal, January 6, 1987, p. 1B.) Georgia has since adopted legislation to ban the execution of mentally retarded persons.

--In Florida, where 86% of the public favors capital punishment, 79% oppose the execution of mentally retarded prisoners. (Source: "An Analysis of Attitudes Toward Capital Punishment in Florida," Cambridge Survey Research, June, 1985).

--In Connecticut, where 67.6% of those surveyed support the death penalty, 83% oppose the execution of mentally retarded persons. (Source: "Capital Punishment in

Connecticut, Tuckel and Greenberg, Analysis Group, Inc, 588 East Street, New Haven, CT 06511, May, 1986).

--In Nebraska, where 68% of those surveyed favor capital punishment, 66% would be less likely to support the death penalty for mentally retarded persons. (Source: "The Nebraska Annual Social Indicators Survey," Johnson and Booth, University of Nebraska--Lincoln, Lincoln, NE 68588-0325).

--In Texas, 86% of the public supports capital punishment, but 73% oppose the execution of mentally retarded offenders. (Source: Dallas Morning News, November 15, 1988).

--In California, 64.8% of those polled stated that it is not right to execute mentally retarded persons. (Source: University of California--Santa Cruz, May, 1989).

--In New York, 82% of those polled oppose the execution of mentally retarded persons. (Source: Caddell Enterprises, New York, May, 1989).

In the past few years, there has been a flurry of legislation forbidding the execution of a mentally retarded person. At least eight states have recently passed such legislation, including Kentucky, Georgia, Maryland, Tennessee, New Mexico, Washington, Colorado, and Arkansas. North Carolina's proposed measure passed that state's House of Representatives this week, with a vote of 102 to 8. The federal death penalty also forbids the execution of mentally retarded persons.

Mental health advocacy groups with special expertise in the disabilities suffered by persons with mental retardation overwhelmingly oppose the execution of the mentally retarded. Examples of resolutions and position statements include:

Association for Retarded Citizens (ARC):

WHEREAS, the Association for Retarded Citizens has traditionally defended the rights and interests of vulnerable citizens with metal retardation and has shown

particular concern that such citizens be treated fairly in the criminal justice law processes and all of its stages; and

WHEREAS, to execute someone who lacks these basic mental capacities offends not only our notions of justice, but of ethical conduct of civilized people; and

WHEREAS, although these positions are well-founded in the common law, they are frequently breached in the rough and tumble of the adversarial justice system; and

WHEREAS, we recognize that protection of society is a paramount value, and that persons with mental retardation who commit crimes, when they could have conformed their conduct to the requirements of the law, should suffer some punishment; and

WHEREAS, recognition of these principles is not, however, inconsistent with the ARC taking a position that society should spare the lives of persons with mental retardation who lack the mental ability to be deterred by capital punishment; and

WHEREAS, unless we adopt this position, the legitimate ends of the criminal justice system will not be met;

Resolved, That the Legal Advocacy Committee of the Association of Retarded Citizens of the United States shall be empowered to present this position that the state not exact capital punishment upon a person when he is unable to comprehend the seriousness of the crime, or even the concept of death, to relevant correctional boards and judicial authorities.

(Adopted 1985)

The American Association on Mental Deficiency (AAMD):

"The imposition of capital punishment on individuals with mental retardation raises troubling moral issues. AAMD supports legal reforms in the states that conform to the standards of other civilized nations."

("Legislative Goals for 1986," AAMD, Washington, DC)

American Association on Mental Retardation (AAMR):

WHEREAS, the AAMR, the nation's oldest and largest interdisciplinary organization of mental retardation professionals, has long been active in advocating the full protection of the legal rights of persons with mental retardation.

WHEREAS, the AAMR recognizes that archaic stereotypes and prejudices notwithstanding, the vast majority of people with mental retardation are not prone to criminal or violent behavior.

WHEREAS, the AAMR recognizes that some people with mental retardation become involved with the criminal justice system and are often treated unfairly by the system. This mistreatment often results from the unusual vulnerability of individuals with mental retardation and from the failure of many criminal justice professionals to recognize and understand the nature of mental retardation.

WHEREAS, the United States Supreme Court has made clear that in all capital cases the judge or jury must consider any mitigating circumstances which would indicate that the death penalty is inappropriate or unjust. Among these mitigating circumstances are any which would tend to reduce the individual offender's personal culpability or moral blameworthiness for the act he or she committed.

WHEREAS, mental retardation is a substantially disabling condition which may affect an individual's ability to conform his or her conduct to the requirements of the law. Thus mental retardation always be considered to be a mitigating circumstance in selecting an appropriate punishment of a serious offense.

WHEREAS, the current system of permitting judges and juries to determine the relevance of mental retardation as a mitigating circumstance on a case-by-case basis has failed to prevent the unjust sentencing of several mentally retarded persons to death.

AND WHEREAS, the competence of individuals with mental retardation to stand trial or enter a guilty plea, and to face execution are always subject to question, raising serious doubts as to the legality of an execution in any particular case.

THEREFORE, the AAMR resolves that no person with mental retardation should be sentenced to death or executed.

(Adopted January, 1988)

The American Bar Association:

BE IT RESOLVED, That the American Bar Association urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed.

(Adopted by ABA House of Delegates, 2/7/89).

The National Legal Aid and Defender Association (NLADA):

BE IT RESOLVED BY THE National Legal Aid and Defender Association, that no person with mental retardation should be sentenced to death or executed.

One of the nation's leading experts on mental retardation, James W. Ellis, Professor of Law, University of New Mexico, and Vice President of AAMR, said:

Mental retardation is an underlying mitigating circumstance. The major factors that mitigate against capital punishment in persons with mental retardation are their inability to process abstract language, their vulnerability to the emotional stressors of everyday life, especially when devoid of community support, and their propensity to develop allied mental illnesses due to the nature of mental retardation itself.

Testimony of James W. Ellis before the Texas House of Representatives Committee on Criminal Jurisprudence, April 15, 1988.

VII. CONCLUSION

Mr. Mathenia requests a temporary stay of 60 days in order for the Governor to review this request of clemency, and requests an opportunity to present evidence and argument in support of this application to Governor Carnahan and the Board of Probation and Parole, or to a Board of Inquiry, as contemplated by Missouri Supreme Court Rule 30.30. Only through these processes can this application receive the full and fair review it deserves.

Respectfully submitted,

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