

IN THE MATTER OF:

BOBBY LEWIS SHAW, CP-7)
Potosi Correctional Center)
Mineral Point, Missouri 63660)
_____)

APPLICATION FOR COMMUTATION OF A SENTENCE OF DEATH

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

INTRODUCTION

The final decision as to whether Bobby Shaw lives or dies now rests with the Governor of Missouri. As this petition is being written, the sole question remaining in Bobby's legal appeals, whether he is mentally competent to be executed, has been resolved against Bobby by Judge Robert Carr in Washington County, Missouri. Although all of the mental health experts appointed by the court or retained by counsel on both sides of the question agree that Bobby is mentally retarded, has severe brain damage and suffers from schizophrenia and dementia, Judge Carr entered an order finding that these conditions were not determinative of the very narrow legal question that was before him. While we disagree with Judge Carr's finding, it is important for the Governor to realize that Justice in this case extends far beyond the issue of whether Bobby knows he is going to die.

Every state in the nation and the federal government have given its chief executive the power to grant pardons, clemency and reprieves. With the decision in Herrera v. Collins, 506 U.S.

Supreme Court has transformed a Governor's clemency power from an elective act of mercy into a vital safeguard of justice. In denying relief for a prisoner who had new evidence to support his innocence, Justice Rehnquist wrote:

Clemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing a miscarriage of justice where judicial process has been exhausted. In England, the clemency power was vested in the Crown and can be traced back to the 700's...

* * * *

Executive clemency has provided the "fail safe" in our criminal justice system...It is an unalterable fact that our justice system, like the human beings who administer it, is fallible.

122 L.Ed.2d at 224, 226. As Alexander Hamilton noted, "The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel..." The Federalist No. 4, pp. 447-449 (C. Rossiter ed. 1961). Recently, the Missouri Supreme Court also noted that it is the proper role of the governor to act when the courts decline to correct an unjust conviction or sentence. State v. Wilson, 813 S.W.2d 833 (Mo. 1991) (en banc).

The Governor is not restricted in his clemency powers. He can grant or deny clemency for any reason, or for no reason. He is not bound by the doctrine of procedural default. He can freely review the facts of the case. He must answer only to his own conscience in making the final life and death decision that is before him now.

The governor is the last resort for justice and mercy for Bobby Shaw. The evidence is incontestible that Bobby suffers from schizophrenia, brain damage and mental retardation. Bobby's life should be spared because:

1. His mental condition prevented him from being fully responsible for his crimes, and he is so severely impaired now that there is no purpose to be served in killing him;
2. Bobby did not receive a fair trial because the jury and judge who imposed Bobby's death sentence were misinformed about Bobby's mental disabilities;
3. Because of procedural technicalities, the courts have failed to correct the injustice that has occurred.
4. The public opposes the execution of those with the degree of mental impairment Bobby suffers.

In spite of the undeniable fact of Bobby's mental illness, the courts have willfully blinded themselves to his condition.

The United States Supreme Court, interpreting the eighth amendment ban against cruel and unusual punishment, has proclaimed that modern standards of decency mandate an individualized assessment of the appropriateness of the death penalty. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court held that a sentencer cannot be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604. Such evidence is relevant "...because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems,

may be less culpable than defendants who have no such excuses."

California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring). This applies with special force where the offender is mentally ill or mentally retarded; the Court has specifically held in the case of mentally retarded persons that "full consideration of evidence [of mental retardation] is essential if the jury is to give a reasoned, moral response to the defendant's background, character and crime." Penry v. Lynaugh, 492 U.S. 302, 328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Finally, the Eighth Amendment to United States Constitution "prohibits a state from carrying out a sentence of death upon a prisoner who is insane." Ford v. Wainwright, 477 U.S. 399, 409-410, 106 S. Ct. 2595, 91 L. Ed. 2d 335, 346 (1986). Justice Marshall, writing for a plurality of the Court, held that "it is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." 477 U.S. at 417. Unfortunately for Bobby, these moral mandates of the Eighth Amendment were neither observed nor enforced by the courts in his case.

BOBBY'S MENTAL CONDITION

Bobby's mental impairment has been apparent since Bobby was enrolled in school. He had to repeat the first grade twice. He was finally allowed to advance when his younger sister, Martha, was enrolled. There were no classes for mentally retarded black children in Hayti's segregated school system, so it was up to

Martha to help her older brother. Bobby would cry a lot, get lost, and wander off. Martha would have to go get him, and lead him back to his chair. Bobby was often confused and disoriented. He would wander onto to neighbors' porches and try to get in, thinking he lived there. Mr. Shaw reports he would become frustrated with Bobby and thought Bobby "just wasn't paying attention". He would "whup" Bobby to make him stop, thinking it would "make him think harder the next time." At the same young age, Bobby also was acting restless, so a doctor prescribed phenobarbital to help him sleep. If Mrs. Shaw forgot to give Bobby his medication, Bobby would act even more bizarre, shaking his head and twirling around.¹

When Bobby was ten or eleven years old, the family moved to St. Louis. In the St. Louis school system, Bobby was tested and found to be mentally retarded. He was placed in special education classes, but was too ashamed to attend. At age 16, he dropped out of school.

Bobby has no juvenile court record, but he began to experience difficulty with the law when he was 18 years old. In 1972, he was convicted of second degree burglary and placed on

¹Dr. William A. O'Connor, Ph.D., identified this behavior as a classic indication of brain damage. The neuropsychological tests he administered, and the neurological examination conducted by Dr. Jonathan Pincus, M.D., revealed that the frontal lobes of Bobby's brain had atrophied, probably due to damage in the parietal lobe of the brain that occurred in childhood. Because the parietal lobe is responsible for sending sensory input to the frontal lobe, large portions of Bobby's brain simply never developed.

probation. A state probation and parole officer described him as "the product of an economically deprived, inner-city upbringing." In 1973, Bobby was convicted of attempted robbery and sentenced to four years in the Missouri Department of Corrections.

While serving this sentence, his condition deteriorated. He was tested at the Department of Corrections Diagnostic Center and was found to have the mental capacity of an eleven-year-old child. He was twenty-four. In addition, Prison records reveal numerous incidents of bizarre behavior. Once, Bobby grabbed another inmate and began sucking on his right breast. The prison psychiatrist evaluated Bobby's behavior and prescribed Mellaril, an antipsychotic drug. The incident, however, had caused so much difficulty with the other inmates Bobby had to be transferred to another facility.

During this same incarceration, Bobby also was attacked by another inmate and beaten with a pipe. His family believes that this attack traumatized him so severely that he was never the same afterward. After he was released on parole, he lived with his mother and father. They saw him talking to imaginary people, telling them to get away from him, and he would pour water over his head. He would sit on the back porch and mutter to himself, and in the middle of the night he would pack up his clothes and walk many miles to his old girlfriend's house. She was living with her new boyfriend, so she would send him home, but he kept going back. On other occasions, Bobby's family would search for him and find him wandering around the city with his sack of

clothes. His mother asked him, "Bobby, why do are you doing this? Why can't you stay home?" Bobby told her, "It's the people in my room, mama." Mrs. Shaw told him there was no one in his room, but he would not believe her. He was obviously afraid.

It was difficult for Bobby to carry on a conversation; he would forget questions that were asked of him, and would stop in mid-sentence and go to a totally unrelated topic. Although they were never told that Bobby had been prescribed antipsychotic medication while in prison, Bobby's mother and sister knew that Bobby needed psychiatric treatment. They tried to get him to go to a mental hospital, but he refused. The family relented, thinking that Bobby was simply having a difficult time adjusting to society after being incarcerated.

Bobby's sister, Martha Shaw, had a common-law husband, Calvin Morris, who took a special interest in Bobby and tried to help him. In September, 1975, Calvin was shot to death. Bobby's brother, Vancil Shaw, heard a shot, and then saw Bobby standing over Calvin's body. He told Martha that he just "woke up" and was standing over Calvin's body. Later, Bobby admitted hearing voices at that time. He said the voices had "picked Calvin a murderer. They picked me.. I don't know why. They picked me and I had to do it."

Bobby was convicted of Calvin's murder and sentenced to life in early 1976. No psychiatric examination was conducted for his defense in that case, and not one single witness was called in Bobby's defense. Even though they still were not told that

prison doctor suspected Bobby was psychotic, his family remained convinced that if Bobby shot Calvin, he did so because of his mental disease.

While Bobby was in prison, he continued to experience auditory hallucinations and engage in bizarre behavior. In February of 1978, he got in a fight with his cell mate after hearing voices. Another time, he was late for work at his job in the prison kitchen, and was found, undressed, standing in the doorway of his cell and staring into his cell. At the time he was sentenced for the homicide of Walter Farrow, he only had three conduct violations while serving his life sentence--the two incidents mentioned above, and one other for disobeying an order from a corrections officer. Mr. Jimmy Ohern, Bobby's caseworker, described his work and training reports as "reflect[ing] excellent work." Many of the most favorable reports were written by Walter Farrow.

The Department of Corrections conducted a thorough examination of Bobby for the first time in 1986. Prison psychologist Betty Weber noted that Bobby's "appearance was unkempt and disheveled; his verbal responses minimal, speech was soft and somewhat difficult to understand; his answers were incomplete and eye-contact was non-existent; and his affect was flat and mood appeared to be indifferent and/or depressed." A neuropsychological examination revealed "strong signs that a neurological impairment which interferes with cognitive functioning is present." (Report of Dr. Henry Bratkowski, D.O.,

March 5, 1988, p. 3). Bobby's thinking was described as "concrete," a psychological term that means that he is incapable of abstract reasoning. Dr. Philip Harris, a psychologist employed at the Fulton State Hospital, found that "there is [cerebral] impairment and in an overall sense it is to a moderate-to-serious degree, with some impairment being serious and some less so." (Report of Dr. Philip W. Harris, March 6, 1987, p. 8). Dr. Harris found "indications that in his daily functioning he is compromised at the cerebral level." (p. 9). Dr. Harris recommended as "decidedly important" that Appellant receive thorough neurological evaluation. (p. 8).² Bobby's history of hallucinations, among other factors, caused him to be diagnosed by a state psychiatrist, Dr. Ajans, as suffering from chronic, undifferentiated schizophrenia. (Report of Dr. Ajans, July 24, 1986). Dr. Ajans prescribed Mellaril, an anti-psychotic medication, and advised that Bobby needs close supervision and counselling.

Bobby was examined again in 1990 and 1991 at the expense of his court-appointed lawyers to determine his competence to be executed. Dr. William A. O'Connor, a psychologist, conducted an examination in 1990. Although noting that it is extremely difficult for him to determine Petitioner's degree of competence

²Bobby finally received a thorough neurological examination on December 30, 1992, by one of the finest neurologists in the country, Dr. Jonathan Pincus, chairman of the Department of Neurology and Professor of Neurology at Georgetown University Hospital. Dr. Pincus found that Bobby does indeed have brain damage, which greatly impairs Bobby's ability to cope with the symptoms of his schizophrenia.

or impairment at the time of the offense, Dr. O'Connor expressed the opinion that:

This is a long standing pattern of brain damage which extends to a period of time well before the commission of the acts leading to Mr. Shaw's conviction of capital murder. I would consider a very high probability that command hallucinations were actively involved in these two outbreaks of extreme violence for which Mr. Shaw can currently provide no rationale or motivation. At an optimal level, this is an individual whose basic processing of information and reality testing is impaired; during periods of relatively poor performance, Mr. Shaw is clearly actively psychotic and incapable of even rudimentary judgments and decision making.

Report of Dr. William A. O'Connor, November 13, 1990. Another psychologist, Dr. Dan Cuneo, examined Bobby in 1990 and in 1992. He concurs in Dr. O'Connor's assessment of Bobby's mental impairments. Bobby can parrot back words and phrases, but he has no understanding of them. Although Bobby admits that he hears voices, he believes they are real; he adamantly denies that there is anything wrong with him.

Other earmarks of Bobby's condition are that he "confabulates", meaning that he has gaps in his memory, and fills the gaps with whatever information is given to him. As a result of his dementia, he has virtually no independent memory of his own. His personal hygiene is poor. His speech is echolalic, meaning he repeats words over and over. He functions on the level of a three to five year old child, and his behavior and daily routine are that of a typical long-term residential psychiatric patient. According to the testimony of Superintendent Paul Delo, Bobby has been completely docile and

has caused no problems at all for the prison staff since he was sentenced to death. At this moment, Bobby is in an isolation cell in Potosi Correctional Center, vaguely aware that he is scheduled to receive a lethal injection, and very agitated and frightened because his daily routine has been disrupted.

All of the mental examinations ever performed on Bobby are being submitted with this plea for clemency. Although Judge Carr found that Bobby has no mental disease or defect, counsel for Mr. Shaw adamantly dispute that finding. Objections to Judge Carr's findings of fact and conclusions of law are being submitted separately. However, counsel also point out that no court has considered the broader questions of Bobby's mental state at the time of his crimes, and there is compelling proof that he should not be held fully responsible for his crimes. Because this proof surfaced late in Bobby's appeal, the courts found that they lacked the jurisdiction to receive the new evidence. The Governor is not so constrained.

THE JURY WAS NOT FULLY INFORMED ABOUT BOBBY'S MENTAL CONDITION

Of all the mental health experts who have examined Bobby, only one, Dr. S.D. Parwatikar, has ever concluded that Bobby does not suffer from a mental disease or defect. Before trial, Bobby was examined by Dr. Parwatikar, who concluded that although Bobby is mentally retarded, he did not suffer from a mental disease or defect that would completely excuse his conduct under Missouri

law relating to the defense of insanity.³ He was asked to supplement his opinion by addressing the defense of diminished responsibility. (Report of Dr. Parwatikar, September 11, 1979). For this purpose, he reviewed his notes of his previous interviews of Bobby and interviewed unnamed prison staff members, coworkers of the deceased, who told him that Bobby "was considered to be an average inmate devoid of physical, mental or behavioral problems."⁴ Based on this false information, he concluded that Bobby had the ability to form the state of mind necessary for first degree murder. (Report of Dr. Parwatikar, April 29, 1980). Prior to trial, defense counsel conducted no investigation into Bobby's psychiatric or medical history, and did not provide Dr. Parwatikar with any information whatsoever. School records, prison records, prior hospitalizations, and family information was totally lacking, even though there was an abundance of information establishing Bobby's retardation and mental illness.

In the last stages of Bobby's appeals, Dr. Parwatikar reviewed documents and reports collected during subsequent evaluations. The records included Missouri Department of Corrections documents that existed at the time of Dr.

³Dr. Parwatikar later concluded that this opinion was wrong because he was not fully informed of Bobby's mental health and behavioral history. He now believes that Bobby suffered from schizophrenia at the time of the offense.

⁴This was not true; prison records reveal that Bobby had been examined and treated in the prison infirmary for a mental condition involving auditory hallucinations before the stabbing of Officer Farrow.

Parwatikar's original evaluation, but which was not then made available to him. He executed an affidavit describing the significant information that he lacked at the time of his pretrial examination, stating, "I have recently learned of additional facts which cause me to believe that there is substantial probability that my opinion which was rendered prior to and at the time of trial was incorrect." (Affidavit of Dr. S. Parwatikar, April 26, 1991, emphasis added.) In his affidavit, he takes note of:

Mrs. Shaw's description of her son's hallucinations and unusual behavior after his release from prison in 1974; The February 1, 1978 incident in which auditory hallucinations are documented in prison files;

Mr. Shaw's history of treatment with Mellaril, an antipsychotic drug, and Dilantin.

Dr. Parwatikar concludes:

During my trial testimony I was asked a question about the probability of the success of suggestibility to a person who had the mental capacity such as Bobby. If I were to have understood the circumstances surrounding the crime, and had the information (aside from the other psychological and psychiatric reports) which is now available to me this certainly would have affected the diagnosis attributed to him as I now believe that he was suffering from the onset of early dementia, and possibly early chronic schizophrenia.

The above along with other detailed information about Mr. Shaw that was previously unknown to me casts significant doubt on the reliability and accuracy of an opinion that Mr. Shaw did not suffer from a mental disease or defect within the meaning of Chapter 552 of the Revised Statutes of Missouri at the time of the homicide of Walter Farrow.

Affidavit of Dr. S.D. Parwatikar, April 26, 1991. Dr. Parwatikar is not an expert retained by the defense at trial; he was a state-employed psychiatrist who was appointed by the trial court

to perform the pre-trial examination of Mr. Shaw pursuant to Missouri Chapter 552.

Unfortunately, Dr. Parwatikar was also the only one who testified at Bobby's trial, and the jury and judge relied on his testimony in finding Bobby guilty of capital murder and sentencing him to death. The verdict of the jury that Bobby committed a deliberate murder after cool reflection on the matter, and that Bobby does not deserve mercy because of his mental disabilities, rests on false testimony.

As was already discussed, numerous psychiatric, psychological, and neuropsychological examinations have been performed on Bobby during the period following his conviction. These examinations have been conducted by both State and private experts to address various questions, including Bobby's competency to be executed, the degree of Bobby's mental retardation and the extent of Bobby's brain damage. The reports of these examinations are virtually unanimous that Bobby Lewis Shaw has a mental disease or defect as defined under Section 552.060 RSMo., 1978.⁵

⁵. Affidavit of Dr. Parwatikar; Psychiatric evaluation performed by Dr. Bruce Harry on May 4, 1990; Psychological evaluation performed by Dr. Daniel Cuneo on August 6, 1992; Affidavit of Dr. Eric Nuetzel regarding evaluation performed on April 30, 1990; Neuropsychology Consultation Report by Dr. Philip Harris dated February 25 and 26, 1987; Mental Health Evaluation by Dr. William O'Connor dated November 13, 1990; Psychiatric Evaluation by Dr. Steven Kory dated October 1, 1992; Report of neurological examination of Dr. Jonathan Pincus dated January 5, 1993.

These interviewers have noted several common themes which run throughout the interviews with Bobby. First, despite the numerous examinations and the reasons for them, Bobby has been uniformly described as being cooperative.⁶ Rather than emphasizing facts which would help him, Bobby tries to downplay or hide from the examiner information such as his medication history, his history of severe head injuries, and his hallucinations.⁷

Second, Bobby's performance during these interviews consistently indicates that the nature of his mental impairment is extreme. Three different doctors noted that Bobby's memory was so impaired that Bobby could not remember even basic personal information such as the date of his birthday. Dr. Cuneo notes that Bobby states he was 39 at a time in which Bobby was actually 40.⁸ Similarly, Bobby stated two different dates of birth during separate interviews with Drs. Harry and Dr. Kory.⁹

Bobby has consistently shown an inability to understand ideas in any way other than in concrete and definite terms. During one interview, Dr. Nuetzel asked Bobby to interpret the

⁶. Psychiatric Evaluation by Dr. Steven Kory dated October 1, 1992; Psychiatric Evaluation performed by Dr. Daniel dated August 22, 1987.

⁷. Affidavit of Eric Nuetzel, supra; Psychiatric Evaluation by Dr. Harry, supra.

⁸. Affidavit of Dr. Daniel Cuneo, supra.

⁹. Psychiatric evaluation by Dr. Steven Kory dated October 1, 1992; Psychiatric evaluation by Dr. Bruce Harry dated May 4, 1990.

proverb, "people who live in glass houses should not throw stones". Bobby's response was, verbatim, "Glass Houses. People might see inside." Dr. Harry also observed this same level of functioning. While trying to assess whether Bobby was discouraged about his approaching execution date, Dr. Harry asked Bobby if he had "thrown in the towel". Bobby replied, "I don't throw the towel, I folded the towel."¹⁰ These responses are clearly indicative of a thought disorder.

The prison personnel have noted Bobby's isolation, flat affect and poor hygiene, all of which are classic indicators of schizophrenia. All examiners have also noted these symptoms. As Dr. O'Connor noted, "I think we are all seeing pretty much the same thing."

Because accurate information surfaced very late in Bobby's appeal process, the courts found themselves powerless to hear new evidence or grant Bobby a new trial or sentencing hearing. The Governor is free to hear whatever matters he chooses in deciding this plea for mercy.

Decent legal representation would have spared Bobby's life. At Bobby's trial, a competent investigation by his attorney would have enabled Dr. Parwatarikar to conclude that Bobby suffers from a mental disease or defect which would make him not guilty of capital murder under Missouri law. The trial attorney appointed to defend Bobby Shaw did not investigate Bobby's mental

¹⁰. Psychiatric evaluation by Dr. Bruce Harry dated May 4, 1990.

impairment, even after he decided that his trial strategy was to argue Bobby was not guilty by reason of mental disease or defect. There was no investigation into Bobby's psychiatric or medical history, and defense counsel did not provide Dr. Parwatikar with any information whatsoever. Dr. Parwatikar testified that although Bobby functions in the borderline range of mental retardation, his impairments did not constitute a defense to the charge of capital degree murder.

At the conclusion of Dr. Parwatikar's testimony, defense counsel withdrew Bobby's plea of not guilty by reason of mental disease or defect. The jury convicted Bobby of capital murder. In the penalty phase of trial, defense counsel presented no evidence whatsoever in the penalty phase of trial concerning Bobby's retardation and mental illness, even though such evidence was available. Although trial counsel requested an instruction to the jury submitting Bobby's mental retardation as a mitigating circumstance, the trial court refused the instruction. The jury sentenced Bobby to death.

In spite of the paucity of evidence about Bobby's mental condition, Missouri Supreme Court Justice Robert Seiler remarked in his dissenting opinion in Bobby's case:

Being a borderline mental defective goes to the existence of the state of mind which makes up the elements of capital murder, and inasmuch as capital murder is the only crime for which death can be the punishment, it also goes to whether this particular defendant deserves the death penalty. "It is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to

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either the particular offender or the particular offense." *Roberts v. Louisiana*, 431 U.S. 633, 637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977).

The report required of the trial judge by § 565.014.1, RSMo. 1978, on the questionnaire prepared by this court has a space to "list any nonstatutory mitigating circumstance indicated by the evidence, if any" to which the trial judge answered "low mentality." Why was it not, therefore, instructed upon?

* * *

It was for the jury to decide whether defendant's mental defect raised a reasonable doubt as to whether or not he acted with required mental intent. The jury should have considered this both at the guilt phase and at the punishment phase, but in the absence of MAI-CR2d 3.74 being given in the guilt phase and the absence of any mention of mental defect in the sentencing stage in the instructions, the jury's attention was deflected elsewhere. The practical effect was to minimize the jury's consideration of relevant mitigating factors, contrary to the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

State v. Shaw, 636 S.W.2d 667, 678 (Mo. 1992) (Seiler, J., dissenting), cert. denied, 459 U.S. 928 (1982).

Trial counsel in this case attempted to pursue a defense based on Bobby's mental disabilities. However, his pursuit of that defense was so poor that he could not even get a jury instruction on Bobby's only defense. Bobby was denied an adversarial trial on the central issue in the case.

While the previous administration characterized its clemency powers as "interfering with the judicial process," Bobby's death sentence is the product of a complete breakdown of the adversary system. The true defense in this case has never been inside a

courtroom, and it never will. The purpose of exercising of clemency in this case would be to salvage the failure of the judicial process.

THE PUBLIC OPPOSES EXECUTION OF RETARDED PERSONS

Since he was appropriately diagnosed for the first time in the mid-1980's, Bobby has not presented a hazard of any kind to corrections officers or other inmates. It is fair to say that had his condition been diagnosed sooner, and appropriate treatment and/or security precautions been given, the incident for which Bobby was condemned to death would never have happened. In fact, Mr. Delo, the Superintendent of Potosi Correctional Center, described Bobby as a docile, simple-minded individual who poses no risk of violence, and who has not presented any problems since the stabbing of Officer Farrow. In essence, once the nature of Bobby's problems became known, the Department of Corrections was able to take effective steps to neutralize any risk that Bobby might pose to other inmates or corrections officers.

Bobby just turned 42 years in November, 1992. He is a troubled individual who has struggled all his life with mental disease and mental retardation. 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).

These surveys reflect a public opinion that has ancient roots. From the thirteenth century on, execution of the mentally incompetent has been regarded as "savage" and as an act of "extreme inhumanity and cruelty." E. Coke, Third Institute 6 (1644). Doctrines that would permit execution of the incompetent have been preached and practiced in National-Socialist Germany, but they are repugnant to the moral traditions of Western civilization. As one of our 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.

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 should 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.

Examination of Bobby's case reveals that every justification for exempting persons with mental retardation from capital punishment apply specifically to him. His ability to conform his conduct to the law was unquestionably impaired. He is unable to

comprehend the nature or finality of death. His memory and

ability to communicate are too impaired to participate in his trial defense or in his appeals. In fact, in the entire time he has been represented by the undersigned counsel, he has not once contacted his attorneys, not even on any of the three occasions when warrants were issued for his execution.

THE EXECUTION OF MR. SHAW VIOLATES ALL MODERN AND ANCIENT STANDARDS OF DECENCY AND HUMAN DIGNITY BECAUSE OF HIS SUBSTANTIAL MENTAL DISABILITIES.

Bobby has been examined by a number of mental health professionals. Regardless of whether the experts were appointed by the court, retained by Bobby's attorneys or by the Attorney General, they all agree that Bobby suffers from a mental disease or defect within the meaning of Chapter 552 of the Revised Statutes of Missouri, and they have all observed the conditions described above. The only subject of disagreement is whether Bobby's condition makes him incompetent to be executed. The experts hired by the Attorney General have concluded that because Bobby can tell them that he is going to receive a lethal injection for killing Walter Farrow, he is competent to be executed. Other experts have concluded that although Bobby can parrot back appropriate phrases about his impending execution, he has no memory of having killed Walter Farrow, and does not understand that after he receives a lethal injection he will never wake up again. Lawyers on either side of the case disagree what the appropriate legal test for Bobby's competence should be. He is completely unable to articulate any rationale for sparing

his life. Dr. A. E. Daniel, a state's psychiatrist who found Bobby competent in 1987, warned then that Bobby's condition will deteriorate with added stress as an execution date approaches.

Because of his schizophrenia, compounded by his mental retardation and brain damage, Bobby Lewis Shaw is unable to understand why the state of Missouri seeks to harm him. As a schizophrenic, he faces the terror of his impending execution without the capacity that a competent person has to understand his life and make peace with his life and his death.

This additional suffering - beyond the norm for execution - has prompted a public outcry for mercy in the sentence of Bobby Shaw. In praising former Governor Ashcroft's decision to stay an execution scheduled last December, an editorial in the St. Louis Post-Dispatch read,

"The next step should be clemency, so the state does not kill a man who does not even know what death means. Such a punishment would degrade a system that is supposed to be just; by blocking Shaw's execution, Governor Ashcroft has ennobled the system instead." ¹¹

At common law execution of the incompetent was prohibited as a "savage and inhuman" act, 4 W. Blackstone, Commentaries on the Law of England 24 (1768), and "a miserable spectacle . . . of extreme inhumanity and cruelty," E. Coke, Third Institute 6 (1644). When the Eighth Amendment was framed, this prohibition was considered an "ancient" rule, dating from at least the thirteenth or early fourteenth century. 2 J. Stephen, A History

¹¹. Editorials, December 1, 1992.

of the Criminal Law of England 151 (1883) (citing the written laws of Edward II (1307-26) and Edward III (1326-77)).¹²

Although the rule prohibiting the execution of the presently incompetent was firmly entrenched, universally applied, and indeed mandatory in the common law, the commentators emphasized different reasons for the rule. No less than five rationales were advanced. Coke explained it on grounds of fundamental humanity and decency: "[W]hen a mad man is executed, . . . [it is] a miserable spectacle, both against law and of extreme inhumanity and cruelty. . . ." Coke, at 6. Accord Blackstone, at 24; Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 State Trials 474, 477 (Howell ed. 1816), (republished from, 3 State-Tryals 651 (1719)). Hale explained that execution of the incompetent was unfair because of the inability of such persons to defend themselves as the law might still allow: "[W]ere [the incompetent] of sound memory, he might allege somewhat in stay of judgment or execution." Hale, at 35. Accord Blackstone, at 395-96; Hawles, at 476.¹³ Hawles explained that the rule existed as well to enable the condemned to prepare for death: "[I]t is

¹² See also N. Hurnard, The King's Pardon for Homicide Before A.D. 1307 159 (1969) (tracing the treatment of insanity prior to Edward II); Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32) (citing Fitzherbert, Natura Brevium 202 (1534)); S. Glueck, Mental Disorder and the Criminal Law 124-25 (1925). Accord Royal Commission on Capital Punishment, 1949-1953 Report 13 (1953).

¹³ Hawles explained that incompetency at execution could prevent the condemned from asserting "circumstances lying in his private knowledge, which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take upon them his defense. . . ." Id.

inconsistent with religion, as being against Christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it." Id. at 477. Coke provided a fourth rationale: that execution of the incompetent could not deter others from committing homicide since it "can be no example to others." Coke, at 6. Finally, Blackstone explained, the incompetent are not executed, for "ferocious solo furor punitor" -- madness is punishment in itself. Blackstone, at 395-96. See also Hale, at 37. Notwithstanding these differing explanations for the common law rule, there was no disagreement concerning the rule: "[W]hatever the reason of the law is, it is plain that the law is so." Hawles, at 477.

This uncommonly uniform evidence of rejection is further reflected in international practice. United Nations reports reveal that the prohibition is virtually universal. All reporting countries with capital punishment laws exclude the mentally incompetent from execution. Department of Economic and Social Affairs, United Nations Doc. ST/SOA/SD/10, Capital Punishment: Developments 1961-1965 10 (1967); Department of Economic and Social Affairs, United Nations, Doc. ST/SOA/SD/9, Capital Punishment 15-16, 88 (1962).

The universal repudiation of the execution of the incompetent leads inescapably to the conclusion that such an execution is an intolerable event that would deeply offend the conscience of the community. Execution of the incompetent has been prohibited and disapproved as savage, cruel and inhuman for

centuries, and it still is today. The "miserable spectacle" of execution of Mr. Shaw should be rejected as readily as any other "barbaric" punishment would be rejected today.

Doctrines that would permit execution of the incompetent have been preached and practiced in National-Socialist Germany, but they are "repugnant to the moral traditions of Western civilization and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assume the continuance of the ancient and humane principle that has long formed part of our common law." Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953). If objective standards of morality and human decency are the test, there could be no better evidence of those standards than the long-standing and continued repudiation of execution of the incompetent by Anglo-American jurisprudence.

Through the work of scholars who have studied the process of dying, it is now known that those who know they are facing imminent death experience common psychological "stages": first denial, then anger, and then depression. However, the dying often "work through" these stages, by taking care of "unfinished business" and by mourning the impending loss of all that is known to be meaningful. Through this process people are able to die with dignity: at peace and in a stage of acceptance. See, e.g., E. Kubler-Ross, *On Death and Dying* (1969); O. Brim, H. Freeman, S. Levine, and N. Scotch, eds., *The Dying Patient* (1970); S. Stephens, *Death Comes Home* (1973); R. Williams, *To Live and to*

Die -- When, Why, and How (1973); E. Kubler-Ross, Questions and Answers on Death and Dying (1974). The suffering and anguish of those who know they are facing death is thus ameliorated by this universal psychological process.

This suffering is not ameliorated, however, for Mr. Shaw, for he has lost the capacity to experience the normal psychological processes associated with dying. This loss is strikingly revealed in Mr. Shaw's case, for his incompetency is due to schizophrenia. Characterized as "the most tragic chronic disease remaining in twentieth-century western civilization," E. Torrey, *Surviving Schizophrenia* at 4, "'[s]chizophrenia' is a cruel and discordant term, just like the disease it signifies," *id.* at 1, for it thoroughly undermines a person's ability to perceive accurately and to understand what is happening in his or her life.

Schizophrenia is marked by delusions, hallucinations, and disorders of thought; it attacks the will, clarity of thinking, the emotions -- in short, those mental processes that differentiate us from the other organisms in our environment. . . . The schizophrenic is often frightened of the world around him or her. Things and people appear menacing. The world is confusing and unpredictable. Eventually, the schizophrenic's terror, coupled with an inability to direct and control his or her own thought processes, brings about an abrupt withdrawal from society. This withdrawal, while it may temporarily ease the schizophrenic's sense of threat from the environment, only serves to deepen the isolation and loneliness.

R. Restak, *The Brain* 273-74, 276 (1984). The social history of Bobby Shaw is replete with tragic examples of the terrible

ordeals his mental illness has put him through. His execution would only be the final and most cruel of them.

When a person in this condition must face death, he is denied access to the process that leads to dying with peace and in a state of acceptance: in short, he is denied the opportunity to die with dignity. Unable to sort out the reasons that he will be killed, to reflect upon his life in an attempt to find meaning in it,¹⁴ to identify the "loose ends" or unfinished business of his life (much less to attend to those matters), or to engage in the crucial process of making peace with God, the schizophrenic person is without the normal human tools necessary to prepare for and accept death. The schizophrenic who faces execution faces the terror of death without the capacity that the competent person has to understand his life and to make peace with his life and his death.

Mr. Shaw, for example, has at best only minimal contact with the events of the external world. Because of his schizophrenia, the effects of which are compounded by mental retardation and brain damage, Mr. Shaw's ability to reason is occluded,

¹⁴ As Dr. Kubler-Ross recounts, toward the end,

Many of my dying patients have relived experiences from their past life. I think this is a period of time when the patient has switched off all external input, when he begins to wean off, when he becomes very introspective, when he tries to remember incidents and people important to him, and when he ruminates once more about his past life in an attempt to, perhaps, summarize the value of his life and to search for meaning.

E. Kubler-Ross, Questions and Answers on Death and Dying at 35.

disorganized and confused when thinking about his possible execution. He can make no connection between the homicide he committed and the death penalty. Further, Mr. Shaw's world is filled with terrifying voices and events that we can neither know nor understand. In this condition the terror inherent in facing execution will be many times amplified for Mr. Shaw by the terror and confusion produced by his illness. He experiences the terror but is denied the ameliorative effects of understanding.

The additional suffering -- beyond the norm for execution -- that Mr. Shaw must experience is analogous to the additional suffering experienced by a person who is treated with a therapy causing painful side effects but who cannot understand why the treatment is necessary. Such a situation was addressed in Superintendent of Belchertown School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977), where the court held that the guardian of a profoundly retarded man could properly decide not to permit radical chemotherapy treatments for the man's terminal illness. In approving the guardian's exercise of judgment, the court reasoned,

"If he is treated with toxic drugs he will be involuntarily immersed in a state of painful suffering, the reason for which he will never understand. Patients who request treatment know the risks involved and can appreciate the painful side-effects when they arrive. They know the reason for the pain and their hope makes it tolerable." . . . Saikewicz would have no comprehension of the reasons for the severe disruption of his formerly secure and stable environment occasioned by the chemotherapy. He therefore would experience fear without the understanding from which other patients draw strength.

373 Mass. at 750, 754, 370 N.E.2d at 430, 432 (emphasis

supplied).

Similarly, because Mr. Shaw faces execution without the ameliorative effects of understanding, his execution would inflict suffering beyond that involved in the humane extinguishment of life. As already noted, the common law commentators understood this added suffering though they expressed it in the intellectual context of their times.¹⁵ There can be little doubt that this awareness informed the universal condemnation of such executions as "a miserable spectacle . . . of extreme inhumanity and cruelty." The standard of decency that accords with human dignity should be no less today.

THE ORDER OF JUDGE ROBERT CARR FINDING BOBBY MENTALLY COMPETENT FOR EXECUTION SHOULD NOT BE RELIED UPON TO DENY BOBBY CLEMENCY

There are two reasons that the Governor should not rely upon Judge Carr's Order in reaching a decision on this Clemency Application. First, as noted above, the scope of the questions addressed at that hearing were incredibly narrow, and were confined to the statutory questions involving competence to be executed as defined in the Missouri Chapter 552. Even if we accept, for the sake of argument, Judge Carr's finding that Bobby presently understands that he is going to be executed for the murder of Walter Farrow, that finding is in no way relevant to

¹⁵ See Hawles, Remarks on the Trial of Mr. Charles Bateman at 477. "[I]t is inconsistent with religion, as being against christian charity to send a great offender, as it is stiled, into another world, when he is not of a capacity to fit himself for it".

the issue of whether the jury that convicted him and sentenced him to die should have been able to consider his mental illness before reaching a verdict. However, we feel strongly that Judge Carr's Order is simply wrong.

Judge Carr correctly states that "accomplished physicians . . . described [Mr. Shaw's] condition as one who suffers from dementia secondary to a physical organic brain syndrome, and possible chronic undifferentiated schizophrenia." (Order, p. 2). However, the next statement of the court, that "evidence submitted by the state refutes such opinions," is incorrect. The evidence submitted by the state consists of Exhibits A, B, C and D. Exhibits C and D, the psychiatric reports of Dr. Stephan M. Kory, M.D., and Dr. Bruce Harry, M.D., respectively, both conclude that Mr. Shaw has a mental disease of defect. Dr. Kory's report lists the diagnosis as follows:

AXIS I - Organic personality syndrome. Rule out schizophrenia, chronic residual type. Mixed substance abuse, by history.

AXIS II - Borderline intellectual functioning.

AXIS III - History of closed head trauma, complaints of sinus problems.

(Exhibit C, p. 6). In medical terminology, the use of the phrase "rule out" schizophrenia means that schizophrenia is a possible diagnosis, but additional information is required to confirm or rule out this possibility. Since this diagnosis was listed as an alternative to a diagnosis involving organic brain damage, we consulted Dr. Jonathan Pincus, a neurologist, to complete Dr. Kory's examination. He established conclusively that the primary

diagnosis for Mr. Shaw is schizophrenia, with organic brain damage as a contributing factor.

Similarly, Exhibit D reveals that Dr. Harry also found that Bobby suffers from a mental disease. His diagnosis is as follows:

AXIS I - Dementia as manifested by problems with recent memory, documented moderately severe neuropsychological impairment, impaired abstract thinking, and affective blunting. Possible alcohol abuse, by history, possible mixed substance abuse by history, adjustment disorder with depressed mood.

AXIS II - Borderline intellectual functioning (it is not possible to determine the cause of this from the available information; it is conceivable that this related to his dementia or could be independent of it).

AXIS III - History of closed head trauma, history of possible chemical insult to the central nervous system, complaints of chronic headache and sinus problems.

AXIS IV - Level of psychosocial stresses: severe.

AXIS V - Current level of adaptive functioning: 50.

(Exhibit D, p. 19). Dr. Harry concluded that "it is the opinion of this examiner that Mr. Shaw has a mental disease or defect as described under Section 552.010 RSMo." (Exhibit D, p. 21).

Judge Carr's finding that this evidence refutes the opinions of the "accomplished physicians" who testified at the hearing that Mr. Shaw is mentally incompetent is not at all supported by the record. The state's evidence supports the diagnosis reached by Dr. Cuneo, Dr. Parwatikar, Dr. O'Connor, Dr. Harris and Dr. Pincus.

The balance of Judge Carr's finding is based upon the testimony of prison officials who described Bobby's activities in

prison. Bobby occasionally plays board games with other prisoners, and during exercise times, he walks alone in the exercise yard. He remembers when it is time for him to take his medication. The testimony of the prison officials was described in detail to Dr. William A. O'Connor, who was formerly the Chief Psychologist at Osteotomy State Hospital in Kansas. Dr. O'Connor was asked whether this information was in any way inconsistent with his findings. He replied:

Well, it's really exactly what you would expect and exactly it's my experience of him. He is almost classic or typical for a long-term state hospital or very, a domiciliary patient. When people first experience an acute psychotic break they are pre-agitated but after a while they settle into a routine. And typically state hospital patients get up, they watch television, they play cards or checkers or something and they go to the canteen. They may have some episodic flare-ups but the longer you are institutionalized the more this kind of settles down to a low-grade functioning. If you remember 'One Flew Over The Cuckoo's Nest', here are all of the people on ward playing cards. Sometimes people aren't really playing the cards, it kind of depends. But the point is that there is no reason someone at this level of functioning can't learn and actually enjoy any kind of simple routine.

(Competency Hearing Tr., p. 186). The undersigned, in the course of our experience as criminal defense lawyers, have had experience in visiting clients in mental hospitals, and we have observed the same behavior on the part of long-term residential patients. Dr. O'Connor further explained that to someone in Bobby's condition, routine is very important. By fitting into a familiar routine, doing the same thing day after day, a mentally ill person like Bobby will "learn that routine and . . . and learn to fit and look as normal as possible and not be

embarrassed. And because of the repetition and familiarity you can actually function quite well." (Competency Hearing Tr., p. 187). The behavior that Judge Carr describes in his Order is not evidence of Bobby's mental competence; it is further indication that Bobby should be placed in a mental health care facility, and not executed as a vicious criminal.

The court is mistaken in one of its most important findings. On page 3 of his Order, Judge Carr states that Bobby "can answer his attorneys' questions and converse about matters in extenuation, arguments for executive clemency, or reasons why his sentence should not be carried out." We described Bobby's lack of participation in his case to the court:

I can tell you, as the testimony yesterday indicated, and I will tell you now as an officer of the court, that Bobby has never called his attorney. Even when he is faced with an execution warrant and told by Mr. Delo that you are going to be executed on such and such date and I recommend that you call your attorney, he has not done that. He's been lead to a telephone that he can use for free and he has never called me and has never called Mr. Wolff. In the many years that he and I, Mr. Wolff has been on his case far longer, but I have been helping Mr. Wolff since 1990 and he has never picked up the phone and called his attorney. When I visit him, he's never asked me to do anything for him. He's never been able to give me any information that I could use in his defense. When his life depended on it, he could not disclose his voice He's incapable, your Honor, of appealing to the mercy of the court. What you see here is what you get. Every time I come to interview Bobby or meet with him, that's probably been about six times, he gives no sign of recognizing me, I feel. And I do introduce myself to him every time, even though he probably knows who I am.

(Competency Hearing Tr., pp. 196-197, Closing Statement of Mr. O'Brien). Mr. Delo testified that the telephone records of the prison can verify that the above quoted statements of counsel are

the absolute truth. Bobby's mental impairment is such that he does not even have the wherewithal to call his lawyer when an execution warrant is issued.

Although Judge Carr believes that he offered Mr. Shaw a full and fair hearing, he did not permit lawyers for either side to cross-examine the mental health experts. A vigorous cross examination of the experts who testified on behalf of Mr. Shaw at the hearing would have revealed that these experts were telling the truth and that their opinions rested upon objective history and observation. All of the experts agreed with the sentiment that Dr. Cuneo expressed after the first day of the hearing. He stated that he wanted to be cross examined so that the Judge could see that his opinion as to Bobby's incompetence could withstand vigorous challenge. Furthermore, counsel believes that cross examination could reveal serious limitations in the conclusions of Dr. Kory and Dr. Harry. Dr. Kory did not conduct a sufficiently thorough examination to permit him to either confirm or rule out schizophrenia as the primary diagnosis. Dr. Harry, even though he finds the existence of a mental disease, had his finding of competence, stating that Mr. Shaw has "very limited understanding of the matters and extenuation, arguments for executive clemency, and reasons why the sentence should not be carried out." (*emphasis added*) (Exhibit D). The truth is that in all of his interviews, and in all of his dealings with counsel, Mr. Shaw has not been able to utter a single reason that

his sentence should not be carried out, even though there are many compelling reasons to spare his life.

Even if Bobby's mental competence to be executed were the sole basis upon which to exercise the power of clemency, Judge Carr's Order would not be a sufficient basis upon which to allow this execution to go forward. Nevertheless, we urge the Governor to recognize that the narrow legal question before the court at the Competency Hearing is but one small aspect of the universe of reasons why this unjust sentence should not be carried out.

To grant clemency to Bobby would mean that instead of being executed, he would be sentenced to life without the possibility of parole for 50 years. Under his special circumstances, that is not a tremendous measure of mercy to extend. The imposition of the death penalty on him is nothing more than the needless imposition of pain and suffering. However, granting clemency which merely commutes Bobby's sentence to life without parole would be an incomplete remedy because he should be in a residential psychiatric care facility. The picture of Mr. Shaw that was painted at the competency hearing is that of a docile, long term, residential psychiatric patient. Under Missouri Chapter 552.040, an acquittal by reason of mental disease or defect would have resulted in Bobby's commitment to the Department of Mental Health for care, custody and treatment. Under Chapter 552.050, a prisoner such as Bobby should be transferred to the Department of Mental Health for treatment. We urge the governor to fashion a remedy for Bobby that not only

relieves him of his sentence of death, but which further eases the pain and suffering that mental illness has inflicted upon him and his family.

An order granting Bobby clemency would not be merely an act of compassion or sympathy; it would reflect the fact that Bobby has a disability which prevents him from harboring the level of culpability which would make death an appropriate punishment. It would also demonstrate that Missouri is a state in which an individual who suffers disabilities similar to Bobby's will be treated with dignity and humanity. The failure to extend this modest consideration to Bobby would violate the evolving standards of decency expected of a civilized society.

Respectfully submitted,

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