

IN THE OFFICES OF THE GOVERNOR AND THE MISSOURI
BOARD OF PROBATION AND PAROLE

IN THE MATTER OF:)
)
ANTONIO RICHARDSON, CP-104,)
POTOSI CORRECTIONAL CENTER)
ROUTE 2, BOX 2222)
MINERAL POINT, MISSOURI 63660,)
)
v.)
)
STATE OF MISSOURI,)
)
Respondent.)

APPLICATION OF ANTONIO RICHARDSON TO GOVERNOR
BOB HOLDEN FOR EXECUTIVE CLEMENCY
FOR COMMUTATION OF A SENTENCE OF DEATH

TO: THE HONORABLE BOB HOLDEN
Governor of the State of Missouri

After spending his entire adult life on death row at the Potosi Correctional Center, Antonio D. ("Tony") Richardson is currently scheduled to die by lethal injection on March 7, 2001, at 12:01 a.m. He would thus become the youngest criminal offender, at age sixteen years, seven months, to be executed in the history of the State of Missouri, and the second youngest in the United States during the post-Furman era.¹

Pursuant to Article IV, § 7 of the Missouri Constitution and §§217.800 and 552.070 RSMo., Applicant Tony Richardson, as a last

¹ Frederick Lashley, executed by the State of Missouri in 1993, was 17 years old at the time of the crimes for which he was convicted. Antonio Richardson could become the second youngest offender executed in the nation since Sean Sellers, age sixteen years, 3 months, was executed by the State of Oklahoma in 1999.

resort, turns to Governor Bob Holden for a review of his request for executive clemency. Mr. Richardson requests that Governor Holden exercise his constitutional and statutory powers and stay the execution as contemplated under Missouri Supreme Court Rule 30.30, and commute his death sentence to life in prison without the possibility of parole. Alternatively, Richardson requests that Governor Holden appoint a Board of Inquiry under §552.070 RSMo. to examine the circumstances that comprise the basis for this request for clemency, particularly Richardson's well-documented mental retardation and the fact that he was an abandoned 16 year-old at the time of the offense in April 1991.

INTRODUCTION

Tony Richardson was convicted as an accessory in the murder of Julie Kerry by a St. Louis City jury in March 1993. Julie Kerry and her sister, Robin, both drowned after being pushed off the Chain of Rocks Bridge into the Mississippi River in April 1991. Richardson was present at the scene, but did not push either sister off the bridge. The events set forth herein are taken from the testimony at trial, from the post-conviction relief ("PCR") hearing, and from statements made by Richardson to the police shortly after the occurrence. If requested, counsel for Richardson will provide any portions of these transcripts.

During the early morning hours of April 5, 1991, Tony Richardson, a sixteen year-old, was driven to the Chain of Rocks Bridge by an acquaintance, twenty year-old Reginald Clemons. The bridge was a local hang-out for teenagers on the North side of St. Louis. At the entrance to the bridge, Richardson and Clemons met up with Daniel Winfrey and Marlin Gray.

Earlier that evening, Richardson and Clemons were at the residence of Michael Schaffner in a St. Louis suburb. Daniel Winfrey, a fifteen year-old, and his friend, twenty three year-old Marlin Gray, were also there. Trial Transcript, pp. 1684, 1688, 1692, 1697 ("Tr. ___"). Gray suggested that they travel to the abandoned Chain of Rocks Bridge. Tr. 1686, 1690-91, 1697-98. The old bridge spans the Mississippi River between Missouri and

Illinois and had been closed to vehicular traffic for many years. Tr. 1387-88. Schaffner declined to go, but the others drove to the bridge around 11:30 p.m. Tr. 1686, 1690, 1699. Around the same time, Julie and Robin Kerry left their house in St. Louis to pick up their cousin, Thomas Cummins, to take him to the bridge to show him a poem they painted on the bridge deck. Tr. 1335, 1341, 1345, 1499. Cummins, a nineteen year-old from Washington, D.C., was in St. Louis visiting his grandparents. Tr. 1490-91.

The events that unfolded on the bridge leading to the deaths of the Kerry sisters were clearly orchestrated by Gray and Clemons, who easily dominated over Richardson and Winfrey. Gray and Clemons were not only older, but much bigger and stronger than Richardson and Winfrey. After getting onto the bridge, Clemons, Winfrey, Gray and Richardson walked over to the Illinois side and then headed back toward the Missouri side. Tr. 1703-04. On the way back, they encountered the Kerry sisters and Cummins. Tr. 1704. The two groups spoke for a short time, then parted in different directions. Tr. 1505-08, 1704-07.

Winfrey testified that Clemons then said to the others: "Let's rob them," and that Gray replied: "Yeah, I feel like hurting somebody." Tr. 1707. Winfrey testified that Gray orchestrated the robbery. Tony's statement to St. Louis police detectives confirms that it was Gray who directed the robbery. See Tab 1 at 11, 13. As Gray led the group back toward the Illinois side, he handed out

condoms to the others. Tr. 1708. Gray threatened Tony with bodily harm if Tony did not do what Gray said. Tab 1 at 13. They continued walking toward the Illinois side, and again met up with the Kerry sisters and Cummins. Tr. 1510, 1711-12.

As Cummins and the sisters began walking back toward the Missouri side, Gray led the others in following them. Tr. 1512, 1713. At a bend in the bridge, Gray threw Cummins to the deck and told him it was "a robbery." Tr. 1513-14, 1714. Tab 1 at 11-12. Winfrey testified that the sisters were then raped. Tr. 1715-20.²

Clemons robbed Cummins of his cash and watch. Tr. 1720-23. Cummins and the Kerry sisters were led to an open manhole on the bridge deck that led to a metal platform underneath. Tr. 1386, 1720, 1723. The platform permitted access to a concrete pier that supports the bridge structure, located several feet below the platforms. Tr. 1403.

According to Winfrey, Richardson took one of the sisters through the manhole, and Clemons later forced the other sister and Cummins under the bridge. In an attempt to deflect culpability from himself and his friend, Gray, Winfrey testified that he then ran off the bridge in search of Gray, who supposedly left the

²Winfrey made a deal with the State, whereby he agreed to testify against Richardson, Clemmons and Gray in exchange for a recommended sentence of thirty years. Tr. 1737.

bridge several minutes earlier in search of Tony. Tr. 1720-23. But in fact, everyone present at the scene went under the bridge deck. Cummins testified that while under the bridge deck, he heard two "thuds," as if two more people had entered the manhole and jumped onto the metal platform. Tr. 1599-1600, 1637. This corroborates Richardson's account that he, Clemons, Gray and Winfrey were all under the bridge, along with Cummins and the Kerrys. Tab 1 at 18. Cummins was told to lay down on the platform and then to move down onto the concrete pier below. Tr. 1526-27. Robin and Julie Kerry then came down onto the pier and stood beside Cummins. Tr. 1527-28.

For no apparent reason, Gray punched Julie Kerry in the back of the head, causing her to tumble into the river below. Tab 1 at 12, 19-20. Clemons pushed Robin off the pier into the river. Tab 1 at 12, 20. Cummins was then told to "jump" from the bridge, which he did. Tr. 1529. Cummins testified it was Richardson's voice that told him to jump. Tr. 1533, 1652. His testimony on this point is dubious at best, as Cummins admitted at the trials of Clemons and Gray that he could not identify the voice he heard under the bridge telling him to jump as that of Richardson. Tr. 1650-51. In fact, only six weeks before, at Clemons' trial, Cummins was asked the following:

Q: And, okay, then what's the next thing that happened?

A: A voice told me to jump.

Q: You don't know who that was...?

A: No sir, I don't.

Tab 2.

A. Richardson's Tragic Upbringing.

The following social history is taken from records of the Missouri Department of Social Services, Division of Family Services ("DFS"), the Central Baptist Family Services, the St. Louis County Special School District and the trial transcript. See Tab 3. Additional information was supplied by various family members.

Tony Richardson was born September 3, 1974. He is the second of three boys born in close succession to Gwendolyn Williams. Tony's older brother, Cedric Richardson, was born in July 1973. His younger brother, Carlos Williams, was born in March 1976. Gwendolyn Williams was only 18 when she bore Tony, and only 19 at the birth of her third son, Carlos. Tab 3 at 5.

Tony has never known the love, attention and guidance of a caring and concerned father. For that matter, Tony has never really known of, much less been acknowledged by, his natural father. Tony's mother has never been married. Although the records alternatively indicate one Archie Cedric Richardson, as well as one Willie Gray, to be Tony's natural father, Gwen Williams is sure that Archie Richardson is Tony's father.

Willie Gray, as a surrogate father, has not been involved in any significant way in Tony's life. And while Archie Richardson early on acknowledged paternity of Tony's brothers, he refused to acknowledge Tony as his child, claiming that Tony looked different than him and was probably the result of Ms. Williams having fooled around with another man. Tab 3 at 39. In this regard, to hurt Ms. Williams, Archie Richardson would magnify his overt rejection of Tony by never allowing the youngster to call him "father," and by snubbing Tony from the attention he would give to Cedric and Carlos. Id.

By the time Tony was six or seven years old, Archie Richardson had gotten married for the second time (but not to Gwendolyn) and was now completely removed from Tony's life. By all accounts, Tony grew despondent over the lack of a father's attention, so much so that Tony would purposely get himself into minor scrapes so that he would draw the attention of male police officers.

Tony's childhood was marked by poverty and abject living conditions. His mother lacked even a high school education and could only muster part-time work at a local White Castle hamburger shop. Tab 3 at 35. She, and her three sons, were resigned to an existence subsidized by AFDC and food stamps. Their living conditions were squalid, as Ms. Williams and her three children crammed themselves into a small, one-bedroom apartment consisting of two beds and a couch.

As far back as 1981, when Tony was just shy of seven years, his mother became ill with kidney problems. Because of her illness, her children were forced to shuffle between various relatives. From this point forward, Tony's bouncing from one home to the next would become a sorrowful routine.

Indeed, by the time Tony was seven years old, he was routinely abandoned by his mother for weeks at a time while she co-habitated with a series of boyfriends, some of whom were seriously caught up in hard drug usage. At times, Tony was forced to seek refuge with an aunt or his maternal grandmother to escape the morass brought on by his mother's habitual drug use and never-ending cycle of boyfriends.

It comes as no surprise that the Division of Family Services became involved with Ms. Williams and her three children on several occasions. In 1981, Tony received a suspicious burn to his arm. Even though it was later determined that Tony accidentally burned himself on an iron while playing, the DFS case worker opened the case "due to a high risk of abuse" and the overwhelming task faced by Ms. Williams. Tab 3 at 36-37. The specific problem areas defined by the caseworker were: 1) lack of money; 2) Ms. Williams' illness, and 3) Tony's "behavioral problems." Tab 3 at 42.

In late 1987, DFS received a hotline call that Ms. Williams had left her children for three weeks, and had not been heard from since. Tony had not been in school for a month, and he and his

brothers were now living with their maternal grandmother, Irene Ramsey. Tab 3 at 10. After Tony was enrolled in school, he was suspended for bringing a toy gun to school, likely because there had been a recent publicity scare about toy guns that looked like real guns. He was only 12 years old at the time. Tab 3 at 16. The case was closed in August 1988.

In March 1990, DFS was called in again when Ms. Williams, acknowledged by DFS as a "frequent drug user," again abandoned her children. Tab 3 at 18-20. Tony's mother was apparently spending her social security payments on drugs instead of buying her children food. Tab 3 at 19. Tony and his brothers again went to live with their grandmother. The caseworker noted the boys did not want to return to their mother's home, because when they lived there, "they were frequently hungry." Tab 3 at 26. Although the atmosphere surrounding Tony's childhood was marred by his mother's excessive drug and alcohol abuse, he nonetheless took charge of raising his younger brother, Carlos. To this end, Tony did what he could to make sure Carlos would leave for school on time, and that he had enough to eat and clean clothes to wear. Tr. 2138, 2139, 2144, 2145, 2171, 2189. At age 15, Tony dropped out of school and enrolled in the Job Corp. Tab 3 at 30-31.

B. Richardson's Mental/Psychological Profile

In connection with his trial and post conviction proceedings,

Richardson underwent behavioral, psychological and neurological examinations conducted by experts for the defense and prosecution. It was determined that Tony suffers from abnormalities to the frontal lobe of the brain, an organic mental disorder following brain damage of unspecified origin, and severe cognitive impairment that adversely impacts his behavioral and emotional controls. PCR pp. 118, 252, 269, 284, 605-06, 608, 610 See Tab 4, Neuropsychological Evaluation of Dr. Eric Engum.

Intelligence tests administered by the St. Louis Special School District when Richardson was thirteen years old indicate a verbal IQ of 67 and a performance IQ of 75, giving him a full IQ of 70. Tr. 2160-63; Tab 3 at 1, 71. The cut-off point for a classification of mental retardation is 70, with a score of 100 IQ being the average. Tr. 2163-64. By age 15, Tony had developed a drug and alcohol problem. He was diagnosed as alcohol dependent and the abnormalities in the frontal lobe of his brain were consistent with alcoholic encephalopathy. PCR Tr. at 284, 286. Later tests confirmed borderline retardation.

C. Richardson's Cooperation With Police Investigations.

Before the news of the death of the Kerry sisters was released, it is undisputed that Tony phoned the police the next morning to tell them what had happened. Tony was taken into custody and volunteered information to the authorities. He fully

cooperated, in a forthcoming manner, with the police investigation.

Tony made a complete confession detailing the actions of Gray and Clemons, and explaining his own involvement, and he led police onto the Chain of Rocks Bridge, giving them an on-the-scene re-enactment of the crime. Tony was then released by the police.

Richardson has steadfastly denied having pushed either of the Kerry sisters off the bridge. He has also denied ever intending that anyone would be killed. Further, he has consistently denied having aided or encouraged Gray or Clemons in the commission of the killings. In his statements to the police, Richardson explained that it was Gray and Clemons who pushed the Kerrys from the bridge and that Gray threatened Richardson with bodily harm if he did not "cooperate", or, if he told anyone about what happened on the bridge. Tab 1 at 13, 17. Winfrey also testified at the trials of Gray, Clemons and Richardson that Gray made the same threats to him. Tr. 1294.

As set forth below, there are several powerful reasons why clemency should be granted to Tony Richardson. The first, and perhaps most compelling reason, lies in the fact that Richardson has consistently tested in the IQ range of 70, considered by all experts in this case to place Tony in the mildly mentally retarded category. Second, there is a steadily growing consensus both in this country and abroad, that juvenile offenders should not be executed under any circumstances.

Third, a juror from the trial has stated under oath that the jury never found Richardson eligible for the death penalty, thereby mandating a punishment of life imprisonment under Missouri law. Fourth, Richardson was unwittingly led down a suicidal path of rejecting a plea agreement, contrary to the advice of counsel, by persons who held themselves out as Tony's confidants. One individual in particular preyed upon Tony's youth and mental retardation in pursuit of a misguided political agenda. Also, critical breakdowns by defense counsel at trial cast serious doubt as to the propriety of the infliction of the ultimate punishment in this case.

I. The State of Missouri Should Not Execute Tony Richardson, Who Has Documented Mental Retardation.

The exhibits to this application for clemency demonstrate that Tony Richardson is an individual with well-documented mental retardation that manifested itself when he was a young boy. As a sixteen year-old, Tony functioned with the aptitude of a third grader. This diagnosis has never been seriously challenged in the court system. A borderline mentally retarded child simply should not, and cannot, be held to the same degree of culpability and accountability for their actions to which we hold an adult. It is generally known that the mentally retarded tend to confess to crimes they did not commit. Similarly, the retarded have little will of their own and are easily misled into miscreant deeds by

others, particularly adults.

Richardson's intellectual and adaptive behavioral deficiencies, the hallmarks of retardation, were both manifested at an early age. For example, as early as 1981, when Richardson was only six years old, records from the State of Missouri's Division of Family Services indicate Tony's behavior changing to "depression and withdrawal;" that he was "sullen and depressed;" that his mother was "having trouble with Antonio;" that Tony's "academic progress was poor and he may have to repeat first grade;" and that Tony's report card for first grade "was mostly D's and unsatisfactory marks for social behavior." Tab 3 at 38; 40. Tony's first grade teacher in June 1981 advised DFS that "Antonio is a slow learner who has no attention span and is low to average intelligence." His teacher also advised that Tony "will not sit still, steals from others, always moving around and fighting and throwing crayons." Id. Tony was therefore required to repeat the first grade. Tab 3 at 41. In July 1981, DFS determined that Gwen Williams was in continued need of DFS services to correct "Antonio's academic and behavioral problems." Tab 3 at 50. As Tony made his way through the public school system, he was forced to repeat fourth and fifth grades as well. Tab 3 at 65.

Not surprisingly, due to his limited intellectual ability and his life of neglect, Tony Richardson eventually ended up in the juvenile court system at age 13 when he was caught stealing. At

age 14, the Juvenile authorities required Tony to fill out a sentence exercise. See Tab 5. Even a cursory glance at Tony's effort shows an extremely limited and simplistic thought process. For example, his responses to sentences 6 and 12 are that most kids think that Tony is "a food," and that "most black people is food like me Some Time."

In late 1987, DFS became involved with the Richardson family once again, this time because Tony's mother had abandoned her three sons for several weeks and had not been heard from. Also, Tony had not been in school for the past month. Tab 3 at 10. In early 1988, Tony's teacher from Airport School "was amazed that Antonio had not been sent to [the] Special School District while he was in the City." She also related to DFS that Tony "has no reading skills and that he is very much a behavior problem." Tab 3 at 15.

But it apparently was not until late April 1988 that Tony, at age 13, finally began to attend classes in the Special School District for the learning disabled due to "[t]he severity, frequency and consistency of the student's behavior...." See Tab 3 at 55.

1. Specific Examinations

Various intelligence tests were conducted by the Special School District in December 1987. The results conclusively indicated that Tony had a full scale IQ of seventy (70), giving him an "overall level of cognitive functioning ... in the Borderline

range of intelligence." Tab 3 at 66. An evaluation report indicates that Tony "is easily led by others," and that reading and spelling skills are developed to a late first grade level (1st percentile)." Tab 3 at 65; 67. The Special School District Diagnostic Team found:

[B]ased on the results of this evaluation, [the Team] finds this student to be Learning Disabled, Language Impaired and Behavior Disordered. Cognitive skills fluctuate between the mentally retarded to average range.... Reading is basically on a high first grade level.

Antonio demonstrates an inability to concentrate, can be on task but appears confused. These behaviors are understandable in light of his academic deficits. Inappropriate peer relationships, evidences of extreme paranoia and acting out behaviors toward peers have been displayed and continue even after counseling interventions.

Tab 3 at 69.

After his arrest and incarceration, Richardson underwent a battery of intellectual and neuropsychological testing. For example, Dr. Eric Engum, a clinical neuropsychologist, tested Tony in the areas of general information, reading recognition, reading comprehension, mathematics, spelling, and written language. Dr. Engum found that:

In terms of speech and language skills, Mr. Richardson demonstrates severe to profound impairments.

Overall, Mr. Richardson obtained a Grade Equivalent of 2.9 which reflected profound impairments in his

acquisition of basic information, reading recognition, reading comprehension, arithmetic skills, spelling, and written language skills.

In terms of general information, Mr. Richardson did not know the difference between an ocean and a lake, did not know the season that came after winter, did not know what made a sailboat move through the water, did not know simple nursery rhymes, did not know the country or even the state in which he lived, and did not know that one obtained green when mixing blue and yellow paint together.

It is quite apparent from the test results that Mr. Richardson is significantly compromised in all four of the basic functional units involved in all complex mental activity. Most noteworthy are severe impairments in attention and concentration, memory, learning, higher level problem solving, sequencing, speech and language skills, spacial and perceptual skills, and motor speed and coordination.

Tab 4 at 6, 9.

In May 1993, subsequent to his trial, Richardson was given the WAIS-R IQ examination, this time by Dr. Michael Armour, Ph. D. Tony tested with a full scale IQ of seventy-three (73), still within the range of borderline retardation. See Tab 6.

Dr. Bruce Harry, a forensic psychiatrist from Fulton, Missouri, examined Richardson in July 1994. His written evaluation and testimony from the post conviction relief proceedings are attached as Tab 7. Dr. Harry diagnosed Tony with organic mental disorder, and again, with mild mental retardation.

The term "mild retardation," as defined by the American

Psychiatric Association, aptly describes Tony:

Mild Mental Retardation is roughly equivalent to what used to be referred to as the educational category of "educable."

This group constitutes the largest segment (about 85%) of those with the disorder. As a group, people with this level of mental retardation typically develop social and

communicating skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without mental impairment until a later age. By their late teens, they can acquire academic skills up to approximately the sixth grade level. During their adult years they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in supervised settings.

Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, 1994, p. 41.

Dr. Robert Smith, a clinical psychologist from Cleveland, Ohio, administered the Vineland Adaptive Behavior Scales to Tony in May 1994. Dr. Smith testified at the PCR hearing in March 1995. The Vineland test measures an individual's ability to cope in everyday life in the areas of communication, daily activities and socialization skills. Tab 8 at 31. In the area of communication, Tony scored in the 1st percentile, with the age equivalency of seven years, two months. Tab 8 at 36. In the area of daily living skills, Tony ranked in the 5th percentile, with the age equivalency of twelve years, nine months. Id. In the area of social skills, Tony also scored in the 1st percentile, with an age equivalency of seven years, ten months. Tab 8 at 36-37. Dr. Smith concluded

Tony's adaptive behavior was "significantly impaired." Tab 8 at 41.

2. Missouri's Proposed Legislation Concerning Execution of the Mentally Retarded.

Currently, twelve states (Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, Tennessee and Washington) and the federal government have passed legislation forbidding the execution of the mentally retarded. Some states, such as Nebraska, have enacted legislation prohibiting the execution of persons with an IQ of seventy (70) or below. Other states, such as New York, have adopted statutory definitions of "mental retardation."³

During last year's term of the Missouri Legislature, in the 90th General Assembly, House Bill No. 1225 was introduced by Representative Michael Schilling and co-sponsored by, among others, Criminal Law Committee Chairman Craig Hosmer. The bill would have excluded the mentally retarded from the death penalty. The language of the bill came from a "fragile coalition" of

³ New York defines mental retardation as as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen." N.Y. CPL §400.27.12(e).

legislators, criminal defense lawyers, and prominent prosecuting attorneys.

An early draft of the legislation incorporated the definition of mental retardation from RSMo. §630.005, which is nearly identical to that of New York and other states: "significantly subaverage general intellectual functioning which: (a) Originates before age eighteen; and (b) Is associated with a significant impairment in adaptive behavior." A later version of the bill refined the definition of mental retardation as:

a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with related deficits and limitations in adaptive behavior such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which is manifested and documented before 18 years of age.

During this legislative session, State Senator John Schneider has sponsored Senate Bill 192, that prohibits capital punishment of the mentally retarded. Tab 9. S.B. 192 again incorporates the definition of mental retardation in RSMo § 630.005. Representative Hosmer has again sponsored proposed legislation (H.B. 265) to exclude the retarded from the death penalty, and Representative William Boucher has also introduced H.B. 369 (co-sponsored by at least a dozen legislators) to exempt the mentally retarded from death sentences. Tab 9. S.B. 192 will soon be voted out of the Judiciary Committee and is likely to be enacted into law this

session.

Tony Richardson would easily meet any of the generally accepted criteria used for exempting the retarded from eligibility for the death penalty, as well as the specific requirements of RSMo. §630.005. It would undoubtedly be a miscarriage of justice for the State of Missouri to recognize that the retarded should not be executed, yet proceed with Tony Richardson's execution because the legislation has not been made retroactive to his case. Tony Richardson is an appropriate candidate for continued incarceration.

He has adjusted well to the structured environment of the Potosi Correctional Center. He has benefitted from the regulations of incarceration and will continue to do so if he is not executed.

II. Missouri Should Follow International Law Which Forbids the Execution of Juvenile Offenders.

Since the end of World War II, the death penalty for juvenile offenders has been expressly prohibited by numerous international norms, such as the provisions of the International Covenant on Civil and Political Rights ("ICCPR"),⁴ the United Nations Convention on the Rights of the Child⁵ and several other

⁴ Article 6(5), Dec. 19, 1966 6 I.L.M. 368, 370 (entered into force Mar. 23, 1976) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...").

⁵ Article 37(a), G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959) ("Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of

international agreements and treaties.⁶ In ratifying the ICCPR, the U.S. Senate passed a resolution containing a "reservation" purporting to nullify the exclusions of juveniles from the death penalty. But the existence of such an international law norm is now incontrovertible and undeniable. Indeed, numerous sovereign governments, including Sweden, The Netherlands, Finland, Germany, Denmark, Norway, France, Italy, Portugal, Belgium and Spain, filed "objections" to the U.S. reservation, in that the reservation was diametrically opposed to the object and purpose of the Covenant itself. See, generally, William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still A Party?*, 21 Brook. J. Int'l L. 277 (1995).

The prohibition on the execution of juvenile offenders is most clearly embodied in the Convention on the Rights of the Child, a multilateral treaty which the President of the United States has

age").

⁶ See, e.g., American Convention on Human Rights, Article 4(5), Nov. 22, 1969, I.L.M. 673, 676 (entered into force July 18, 1978) ("Capital punishment shall not be imposed upon persons who, at the time of the crime was committed, were under eighteen years of age..."). The United States signed, but never ratified, the American Convention.

signed without reservation and which every organized nation in the world, except the United States, has ratified. It is also expressed in three other multilateral treaties the United States has ratified, including the ICCPR. This norm has been expressed or agreed to by every competent international body. It is followed by almost every other nation in the world, excluding the United States. Almost every other country in the world adheres to one or more treaties forbidding juvenile executions.

Since 1990, only the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, the United States and Yemen have executed child offenders. At least two of these countries, Pakistan and Yemen, have since changed their laws to exclude the practice. In fact, in the last two years, the number of countries executing juveniles has dwindled to only three: Iran, the Democratic Republic of Congo and the USA. **The country which has carried out the greatest number of executions is the USA.**⁷

Although the United States has sporadically claimed to be excluded from the eighteen year-old norm, it has in essence acceded to it by its actions. The United States participated in the framing of the ICCPR, signed it, and permitted it to come into force without objection to this critical provision. The United

⁷ Information from Amnesty International CHILDREN AND THE DEATH PENALTY: Executions Worldwide Since 1990 ACT 50/010/2000.

States has also signed the Convention on the Rights of the Child without objection on this point. The United States has not provided a substantive response to the many international bodies and nations that have protested its failure to adhere to this norm.

It is ironic that the country which repeatedly proclaims itself to be the world's most progressive force for human rights, in fact leads a tiny circle of nations with a far less distinguished claim to fame--the execution of persons for crimes they committed as children.

The condemnation of the United States' practice of executing juvenile offenders, some as young as sixteen years old, has been universal. The United Nations Human Rights Committee--whose competence the United States has accepted--declared the United States' reservation to Article 6 invalid as being "incompatible with the object and purpose of the Covenant." U.N. Human Rights Committee, Report of the Human Rights Committee, Official Records of the General Assembly, Fiftieth Session, Supp. No. 40, U.N. Doc.A/40/50 (October 3, 1995), ¶ 279. Also, in late 1998, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions issued a Report condemning U.S. violation of the Covenant in regard to the provision against executing children under the age of eighteen at the time of the offense.

The result of a nearly unanimous world-wide sentiment has been the virtual elimination of the execution of persons for crimes

committed under the age of eighteen everywhere on earth except for Virginia, Texas, and Oklahoma. The Florida Supreme Court has recently visited this issue and has interpreted the Florida Constitution to prohibit the death penalty for sixteen year-old offenders. See Brennan v. State, 754 So.2d 1 (Fla. 1999). Other states are now considering imposing a higher minimum age than is mandated by the federal constitution, using their own State Constitution as the mandating authority.

The execution of a juvenile offender goes against the basic sense of decency to which a civilized society should adhere. The fact that juveniles carry a diminished capacity in their actions is reflected everywhere throughout our society and laws. In juveniles, we recognize that because of their immaturity and lack of experience, they are far less capable than adults. Our Courts have consistently recognized that the moral guilt of juveniles is less than mature, responsible adults. Justice Stevens of the United States Supreme Court has written: "the Court has already endorsed the position that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Thompson v. Oklahoma, 487 U.S. 815 (1988).

Social scientific literature and theorists overwhelmingly support the conclusion that adolescence is a period of life characterized by poor impulse control and poor judgment. As adults, many of us can now reflect on our own adolescence, and

perhaps that of our children, and recall episodes of impulsiveness, the inability to exercise self-restraint, poor impulse control or poor judgment. Adolescence is also characterized by an inability to foresee future consequences of one's actions; the false confidence generated by feelings of omnipotence, invulnerability or indestructibility. Taking these universally-accepted attributes, we see far less culpability in a mildly-retarded Tony Richardson, who was dominated and threatened by two grown men on the Chain of Rocks Bridge.

At the time of the crime leading to his death sentence, Tony Richardson was not old enough to vote, to gamble, or legally purchase alcohol or cigarettes, anywhere in the United States. He was not old enough to enlist in any branch of the armed services or to serve on a jury. In most states, he was too young to be married or to enter into a binding contract. All of these restrictions recognize an undeniable societal consensus and common knowledge that a lessened responsibility is a concomitant component of youth.

We are not asking that Tony Richardson be absolved or excused from his actions. We only ask that he not be killed by the State for something he did when he was a child.

The inequities of executing Tony Richardson are only magnified by the fact that he did not even typify the average teenager, as he functioned and reasoned on the level of a third-grader at best. His actions on the Chain of Rocks Bridge are entirely consistent

with his limitations. We humbly implore Governor Holden to lift the standards of State of Missouri above those of the other states in our nation, and in countries such as Iran and Iraq, who continue to kill juvenile offenders.

III. The Jury Was Misguided By The Instructions And Should Have Returned A Verdict For A Life Sentence.

During the penalty phase deliberations, the jury was given Missouri Approved Criminal Instructions ("MAI") 313.31, 313.32 and 313.40 (Instructions 33, 34 and 35) to decide whether Tony Richardson lived or died. See Tab 10. Instruction No. 35 specified eight (8) statutory aggravating circumstances for the jury's consideration. The burden was on the State to prove the existence of any of the aggravating circumstances. Unless the jury voted unanimously that the State met its burden of proving at least one of the aggravating circumstances, they were required under the law to return a verdict for life imprisonment. Tab 10 at 5. See also § 565.030.4 R.S.Mo ("the trier *shall* assess and declare the punishment at life imprisonment ... if the trier does not find ... at least one of the statutory aggravating circumstances").

Attached to this clemency application as Tab 11 is the affidavit of Ms. Joyce Lambert, a trial juror. Ms. Lambert has sworn under oath that she and another juror never agreed to any of the aggravating circumstances. According to Instruction No. 35, the jury, which deliberated for over nine (9) hours, was

automatically required under the law to return a verdict fixing the punishment at life imprisonment. Instead, the jury mistakenly returned a verdict indicating to the Court that it was unable to agree on punishment. Tab 10 at 6.

It would be the height of capriciousness and injustice to ignore the legal consequences that should have followed the jury's failure to agree on the existence of a single aggravating factor. Surely we cannot put someone to death because the jury failed to follow the instructions and return a verdict for life imprisonment.

We implore Governor Holden to rectify this mistake and commute Tony's death sentence to life imprisonment.

IV. To Inflict the Death Penalty in this Case Would Be a Grossly Disproportional Punishment.

Following the Supreme Court's landmark decision in Furman v. Georgia, 408 U.S. 238 (1972), the Missouri legislature, when it enacted §565.014 RSMo., recognized the constitutional impropriety in imposing the death penalty in a disproportionate manner. The statute mandates the Missouri Supreme Court to review all death penalty cases to determine:

- (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

The Missouri Supreme Court clearly overlooked and failed to review Tony Richardson's case with similar cases in accordance with the

statute. The Court ostensibly compared Richardson's case with those cases where the death penalty was imposed on defendants "who committed multiple homicides or attempted homicides; who committed murder in conjunction with other crimes involving force; [and] cases involving murder to avoid arrest or detection." State v. Richardson, 923 S.W.2d 301, 330 (Mo.banc 1996) (cites omitted). None of the cases relied upon by the Missouri Supreme Court involved anything close to a sixteen year-old mildly retarded defendant **convicted as an accomplice**. In fact, the Court repeatedly relies upon the purportedly "similar" case of State v. Marlin Gray, Richardson's co-defendant, who led the rapes of the Kerry sisters, the robbery of Thomas Cummins, and the eventual killings of the Kerrys.

Other "similar" cases cited by the Missouri Supreme Court underscore the disproportionality of Richardson's death sentence. See State v. Mease, 842 S.W. 2d 98, 103-104 (Mo.banc 1992) (where defendant methamphetamine dealer plotted to kill victim for several months, waited in woods for two days, using a shotgun at point blank range to kill and rob intended victim, his wife, and their paraplegic grandson); State v. Ervin, 835 S.W. 2d 905, 912-13 (where defendant carefully plotted to slowly strangle to death and rob 75 year-old victim and her son in their home); State v. Powell, 798 S.W.2d 709, 711 (Mo.banc 1990) (18 year-old defendant repeatedly jumped up and down on the chests of two helpless drunks who begged

for their lives, fracturing all their ribs, stabbed each victim three times in the abdomen, then robbed victims of \$3.00) and State v. Griffin, 756 S.W. 2d 475, 478-79 (Mo.banc 1988) (defendant and accomplice tied up husband and wife in their home during pre-planned scheme to rob, stabbing wife twice in the chest and four times in the throat with a steak knife, and hitting husband on the back of the head with a wrench, and stabbing him twice in throat with a steak knife and four times in the chest with a butcher knife). The facts of Tony's Richardson's case simply pale in comparison to these cases.

Additionally, in a number of cases involving much more egregious facts, only life sentences were imposed. In State v. Berdella, male victims were taken to the defendant's home where he drugged them and made them into sex slaves. The defendant injected Drano into the throats of the victims to prevent them from crying out for help. When one of the victims overdosed on the drugs injected into him, the defendant cut up the victim into pieces and placed the body parts into the garbage. Although the defendant confessed to killing seven people, the State waived the death penalty as part of a plea bargain.

In State v. Dunn, 731 S.W. 2d 297 (Mo.App. 1987), the defendant first struck one victim in the stomach with a shotgun and then shot him. Defendant then turned his handgun on his two accomplices and ordered them to shoot at the second victim with a

shotgun. After they shot her, the defendant also shot her in the back with the handgun. He then attempted to choke the victim's 9 year-old son and 5 year-old daughter. All four bodies were put in an automobile and driven into a lake. The children lived.

In State v. Clark, 711 S.W. 2d 928 (Mo.App. 1986), the defendant and an accomplice abducted a husband and wife in a parking lot after the couple had been Christmas shopping. The husband was shot to death in his own car, with his wife looking on.

The wife was driven to an abandoned area where she was raped, sodomized and forced to perform oral sex on the defendant. She was then shot in the face and head four times at point blank range. The bodies were dumped in an open field.

A 19 year-old was given life imprisonment in State v. Baskerville, 616 S.W. 2d 839 (Mo. 1981), when he shot and killed three people, including a 7 year-old boy who begged for his life. State v. Downs, 593 S.W. 2d 535 (Mo. 1980), involved the triple murder of a mother, father, and their 18 year-old daughter, who pleaded for her life. A jury sentenced defendant to life. Likewise, in State v. Turner, 623 S.W. 2d 4 (Mo.banc 1981), a defendant who stabbed and beat to death two men during a robbery was given a life sentence. The State waived the death penalty in State v. Brown, 665 S.W. 2d 945 (Mo.App. 1984), in which the defendant strangled a 7 year-old girl and then molested her after killing the girl's mother. Finally, in State v. Hemphill, 721 S.W.

2d 86 (MoApp. 1986), the State again waived the death penalty where the defendant shot and killed three people in a bar and wounded two others.

It is simply not possible to reconcile these more heinous killings, in which the defendant received a life sentence or the State waived the death penalty, with a much less heinous case as presented in Richardson's appeal. It is also hard to identify a single aggravating factor that warrants the execution of this juvenile offender. The foregoing cases are by no means an exhaustive compilation of the terribly heinous cases where the defendant received something less than death. However, they do sufficiently demonstrate that the failure of the Missouri Supreme Court to consider these and other death-waived cases resulted in a great disparity of punishment.

Had a true proportionality test and review been employed by the Missouri Supreme Court, as the law mandates, Tony Richardson's sentence would have been commuted to life. That is the relief that should be granted now so that the principles of justice set forth by the Missouri legislature are protected and carried out.

V. Defense Counsel Failed To Present Evidence of Tony's Mental Retardation and Tragic Upbringing in Either Phase of Trial.

The public defender's strategy at trial was to admit Tony's presence on the bridge, to not challenge his participation in one

rape, and to argue that his actions only amounted to second degree murder. Defense counsel's theory was consistent with Tony's statement to the police. But to mount this defense, counsel had to offer **some** evidence to negate the "deliberation" element needed to support Tony's culpability as an accessory. This critical evidence, which was readily available, was Tony's documented mental retardation. Counsel, however, failed to offer **any** evidence of retardation in the guilt phase, thus virtually assuring a conviction for first degree murder.

Tony Richardson's only chance to escape the death penalty (beyond the plea agreement that he was talked out of) was to present compelling mitigating evidence of retardation during the penalty phase. On March 27, 1993, the penalty phase was argued and submitted to the jury. This phase of trial was handled by Ms. DiTraglia, who had never previously witnessed a penalty phase in her legal career. Tr. 2198. The prosecution presented eleven (11) victim impact witnesses, comprising the parents, relatives and friends of Julie Kerry. Tr. 2069-2130.

The evidence in mitigation presented by defense counsel was marginal. Gwendolyn Williams, Richardson's mother, in her one (1) page of testimony, said she "love[d]" her son. Tr. 2131. Essie Brassie, Richardson's aunt, testified briefly about Tony's impoverished and lonely upbringing. Tr. 2132-42. Michael Henderson, Richardson's uncle, testified that Richardson's mother

abandoned both he and his little brother, Carlos; that Richardson was forced to live in an overcrowded and dirty environment, and was frequently absent from school as a child. Tr. 2142-51.

Linda Pryor, a social worker with the Division of Family Services ("DFS") in St. Louis County, testified that tests administered to Richardson at age thirteen by the St. Louis Special School District showed a full scale IQ of 70, indicating "borderline" mental retardation. But Pryor was not an expert. Tr. 2163-64. The State rebutted the results of the IQ tests with the testimony of Dr. Leonburger, a Ph. D. and clinical psychologist. Dr. Leonburger speculated that the IQ results were inherently unreliable. Tr. 2198-2200. Prior also testified that records from the DFS documented Gwen Williams's heavy involvement in drugs and alcohol. Tr. 2161-73.

Finally, Richardson's grandmother, Irene Ramsey, testified she suspected her daughter, Gwendolyn Williams, was involved with drugs. She also testified that Richardson was in the Job Corps, and that he attended as many as seven (7) different schools. She characterized his life as a "bad situation". Tr. 2189-93.

Prior to trial, defense counsel hired and endorsed Dr. Eric Engum, a clinical neuropsychologist, as an expert witness to testify as to Tony's retardation and organic brain damage. Engum examined and tested Richardson and his written report, Tab 4 was produced to the prosecution. The report concludes "severe

impairment in attention and concentration, memory, learning, higher level problem solving, sequencing, speech and language skills, spatial and perceptual skills and motor speed and coordination."

The report also included the following findings:

- 1) Richardson functioned at approximately the third grade level;
- 2) he did not know the difference between a lake or an ocean, or in what state or county he lived;
- 3) his reading and comprehension skills were substantially limited and he functioned at a level indicating brain damage; and
- 4) Richardson had sustained significant head injuries and trauma.

For what was subsequently labeled as a "strategic" reason, defense counsel did not call Dr. Engum to testify in the penalty phase. The jury therefore was presented with no expert testimony as to Tony's well-documented mental deficiencies. Even so, the evidence presented was enough to embroil the jury as to whether Richardson lived or died. After deliberating his sentence for over nine (9) hours, the jury remained deadlocked, and so informed the court. Under Missouri law, the judge then became the sentencer. Had the jury heard Dr. Engum's compelling mitigation testimony and seen his report, it is likely they would have returned with a life sentence.

Prior to the Court's assessment of punishment (the determination and weighing of aggravating and mitigating circumstances), defense counsel attempted to put Dr. Engum on the stand and to admit his report into evidence. The Court refused to hear or consider the evidence, and proceeded to determine the aggravating and mitigating circumstances of the crime.

The court found 6 aggravating circumstances and only 1 mitigating circumstance, that being Tony's age at the time of the crime. The Court pronounced the punishment at death, reasoning that R.S.Mo. §565.030 mandated that the assessment of death must be "based solely upon the evidence that was heard at trial and the evidence that was heard in the punishment phase" and that the evidence was now "closed." Tr. 2285, 2295. Having refused to consider Engum's testimony prior to assessing death, the court indicated it would listen to Dr. Engum's testimony only for the purpose of **sentencing**, but made it "perfectly clear" that he would **not** consider it as "**evidence ... dealing with the assessment of punishment.**" Tr. 2307-08 (emphasis added).

On July 2, 1993, at formal sentencing, Dr. Engum testified that Richardson functioned within a "retarded" range of intelligence, that his academic skills were substantially below someone with a seventh grade education, and that neuropsychological testing suggested that the mechanisms through which he attends to, receives and processes information were "compromised." Richardson

showed no signs of malingering or deception. Sentencing Transcript, 7/2/93, pp. 13-35, 52, 54, 61 (hereinafter "ST"). Even the State's rebuttal expert testified that Richardson "certainly" could be categorized as having "borderline intellectual functioning," at a level below 96% of the population. ST. at 105.

Both during and after the presentation of this evidence, the court stated he "would not take this testimony insofar as a determination of the assessment of punishment in this case," and that the hearing was conducted "subsequent to punishment." ST 11, 109. Prior to formally sentencing Richardson to death, which by now was a foregone conclusion, the court again stated it held the sentencing hearing *subsequent* to the assessment of punishment.

The travesty that befell Tony Richardson during his penalty phase is that neither the jury (that deadlocked on punishment) nor the Judge (who sentenced Tony to death) ever considered the fact of his severe mental impairment in their respective deliberations. Evidence of Tony's retardation during the guilt phase would have been powerful evidence that likely would have resulted in a conviction for second degree murder. We now implore the Board and Governor Holden to carefully consider the circumstances presented, to do the right and moral thing, and commute Tony Richardson's sentence to life imprisonment.

VI. Tony Richardson Was Duped Out of a Life Sentence.

Tony Richardson's plea for clemency should not be construed as a refusal to acknowledge his involvement, albeit limited, in the events that culminated in the tragic death of Julie Kerry. Just the opposite is true. Indeed, Tony has never denied nor made excuses for his involvement, but instead he has fully cooperated with law enforcement authorities investigating the tragedy.

Rather, the irony underlying Tony's clemency plea is that he would not now find himself on Missouri's death row, but for the unwarranted and uninvited intervention of a self-interested person who preyed upon Tony's youth and ignorance in furtherance of an ill-conceived political agenda--and beguiled Tony into rejecting a plea agreement that would have spared his life. At bottom, Tony's plea for his life does not appeal for anything more than that which the State was prepared to accord him on the eve of his trial in March 1993.

As detailed above, all psychiatric professionals that have treated or otherwise reviewed Tony Richardson's mental status uniformly confirm that he is mentally retarded, being possessed of an intelligence quotient no higher than a third grade level. It is similarly true that Tony's mental deficiencies rendered him readily susceptible to the influences of others, and, sadly, to undue influences by those who were unconcerned with his best interests and welfare.

Indeed, throughout his life, Tony has never experienced a

stable home-life, much less the guidance and support from those with a perspective placing Tony's best interests and welfare as paramount. Rather, Tony's young life was marked by abject poverty and rampant parental drug usage, and one where he was alternately subjected to parental neglect or outright rejection, as well as an indifference from extended family members.

Bob Williams, a local photographer and a member of the so-called "Coalition for Justice", fully injected himself into and interfered with plea negotiations that would have spared Tony's life. Notwithstanding that Marlin Gray and Reginald Clemons both were convicted of first degree murder and received death sentences for their roles in the murders of the Kerry sisters, Bob Williams coerced Tony into rejecting a plea agreement by continuing to proclaim that Gray, Clemons and Tony to be innocent of any crime. Williams accused Tom Cummins to be the true killer of the Kerry sisters.

Attached as Tab 12 are various press releases, letters to prosecutors and public defenders and "amicus curiae" filings prepared by Bob Williams. Unfortunately for Tony, Bob Williams was living in a dream world. He concocted his own version of the facts, alleging racial motives on the part of "the system." He simply had absolutely no right to meddle in this life and death situation.

Williams' "press releases" portray Tony Richardson as a martyr

in a racist class struggle, referring to the case as "a legal lynching." Tab 12 at 2, 3. Williams accused the media of blocking out the real "truth" regarding the killing of the Kerry sisters, so he manufactured his own, calling it The Chain of Rocks Bridge Mystery Case. Tab 12 at 3, 5.

Williams prepared a letter for Tony to sign on the eve of trial, wherein Tony requested that his public defenders be removed from his case because they told him "to plead guilty to a crime that [he was] innocent of." Tab 12 at 12. Shortly before this letter was prepared, Williams wrote to Circuit Attorney Dee Joyce Hayes on February 1, 1993 alleging "a possible unethical and unlawful relationship" between the prosecution and defense counsel. Tab 12 at 7.

Williams visited Richardson in jail on the morning of February 19, 1993 - the same day Richardson was prepared to plead guilty in exchange for a life sentence. Tab 12 at 13. When Richardson appeared in court, the prosecuting attorney, upon learning that the plea was rejected, stated on the record that all previous offers extended to Richardson were "hereby withdrawn." Tab 13. Williams acknowledged to a local newspaper columnist that he, in fact, was responsible for talking Tony out of taking the deal for life imprisonment, contrary to the advise of his counsel. Tab 12 at 14.

CONCLUSION

Tony Richardson was given two ill-prepared public defenders for lawyers who did not bother to offer expert testimony on his documented mental retardation to the jury. The evidence presented to the jury during the penalty phase failed to show the true picture of an abandoned and disturbed mentally retarded youth with the aptitude of an eight-year-old. Missouri has already recognized, as have twelve other states and the federal government, that we cannot execute the mentally retarded. With both co-defendants being found guilty and sentenced to death, combined with the lack of any meaningful effort by his lawyers, the outcome of Tony's trial was a foregone conclusion. His only chance to escape the death penalty was to take the deal for life imprisonment offered by the State. Tony was going to accept the plea until a local radical, motivated by racial animosity, changed his mind.

The United States now stands alone as the only major democracy in the world that continues to execute juvenile offenders. This practice must stop. Tony Richardson has family and friends who continue to love him deeply and who now beg for a commutation of his sentence. See Tab 14. We implore the Board of Probation and Parole to recommend that Governor Holden stay Tony Richardson's execution and commute his sentence to life in prison. But no matter what the Board recommends, we beg Governor Holden for the

leniency, mercy and a chance at life that Tony Richardson never had.

Respectfully submitted,

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