

MATTER OF:)

RICHARD STEVEN ZEITVOGEL, CP-36)

Potosi Correctional Center)

Mineral Point)

Missouri 63660)

APPLICATION FOR COMMUTATION OF A SENTENCE OF DEATH

TO: HONORABLE MEL CARNAHAN
Governor of the State of Missouri

INTRODUCTION

"In a few days the State of Missouri is going to
kill me for a crime I did not commit."

[Extract from Richard Zeitvogel's Affidavit, Nov.26.1996,
Exhibit Z para.5]

The final decision as to whether Richard Steven Zeitvogel lives or
dies now rests with the Governor of Missouri.

The fundamental issue before the Governor in this Application focuses upon the indisputable unreliability of both Richard's conviction and sentence for capital murder. The unreliability is of such magnitude that to proceed with Richard's execution would be nothing short of a miscarriage of justice, laying Missouri's criminal justice system open to relentless, well-founded domestic and international criticisms that it seeks to levy the irreversibility of a death sentence upon a man who has had unknowingly stripped from him his fundamental right to a fair trial during the course of which he is adjudged by a jury of his own peers, based upon all the evidence in the case. Richard Steven Zeitvogel is unquestionably such a man.

Richard Steven Zeitvogel, by and through his attorneys, respectfully submits this Application, pursuant to Art. IV, Sec. 7 of the Missouri Constitution, and §§ 217.800 and 552.070 RSMo., to the Honorable Mel Carnahan, requesting that he exercise his constitutional and statutory powers to commute Richard Zeitvogel's sentence of death to the alternative sentence of life imprisonment without the possibility of parole for 50 years.

Richard Zeitvogel's mandatory appeals were exhausted on February 28 1996 and an imminent execution date has been set by the Missouri Supreme Court for Wednesday December 11 1996.

Richard Zeitvogel respectfully requests an opportunity to present evidence and argument in support of this Application to Governor

Carnahan and the Board of Probation and Parole, or to a Board of Inquiry. Richard Zeitvogel also respectfully requests that Governor Carnahan stay his execution, as contemplated by Rule 30.30, Missouri Supreme Court Rules of Criminal Procedure, so this Application will receive the full and fair review which it undeniably deserves, **Potts v. Zant** 638 F.2d 727,730 (5th Cir.1981) (Georgia Governor granted 90 day stay of execution pending clemency consideration); **Miller v. State** 473 S.W.2d 413, 414-415 (Mo. 1972) (stay of execution ordered by Governor of Missouri pending psychiatric review).

In **Herrera v. Collins** 506 U.S.390, the United States Supreme Court 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 declared,

"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," (ante 411) (emphasis added).

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. Indeed, in being able to freely review the facts of the case, he holds "a court of equity in his own breast, to soften the rigour of the general law, in such

criminal cases as merit an exemption from punishment", W.Blackstone (Commentaries).

The Governor now sits as the final purveyor of justice for Richard in this case and to that end, his life should be spared for the following fundamental reasons:

1. Richard's consistent claims of self-defense were so prejudicially obstructed by his own defense counsel that the jury at the guilt phase of the capital trial were never in possession of the full facts upon which to adjudge guilt such as to render Richard's conviction wholly unreliable.

2. The suppression of extensive exculpatory evidence by the State concerning Richard's mental retardation, history of epilepsy and brain damage and the failure of defense counsel to investigate and act led to the jury being placed in a position at the guilt and penalty phases of Richard's capital trial of not being in possession of significant facts in adjudging guilt and sentence such as to render his conviction and sentence as wholly unreliable.

3. The implementation of Richard's sentence, having endured a catalogue of suffering, evidenced by enduring twelve years facing a sentence of death; the issue of seven Warrants of Execution; dehumanising prison living conditions; and

**physical, sexual and emotional brutality would be to execute
a man who has already been severely punished.**

Richard Zeitvogel has never denied that he strangled his cell-mate Gary Wayne Dew on March 24 1984, whilst both were housed in the maximum security area of the Missouri State Penitentiary. However, the development of Richard's claim before the jury at the guilt phase of his capital trial, that he had acted in self-defense, in attempting to fight for his own life, was obstructed by the fundamental omissions, divided loyalties and abhorrent unethical behaviour of his trial counsel, Julian J. Ossman.

The full extent of such obstruction has, for reasons of Julian Ossman's deplorable non-disclosure, only very recently come to the attention of Richard's attorneys, that of the fact of and circumstances relating to the representation of both Gary Dew and Richard Zeitvogel by Julian Ossman, in such circumstances that defense counsel had direct knowledge of the murderous motive and desire of Gary Dew to kill Richard Zeitvogel. Knowledge which Julian Ossman chose to either recklessly ignore or intentionally suppress and in so doing shattered the fundamental duty owed to Richard throughout his capital trial, that of irrefutable loyalty.

The full extent of what amounts to nothing short of an unquestionable obstruction of justice in Richard's capital trial initiated and fostered by his own trial counsel highlights the

uniqueness of Richard's conviction and sentence as being nothing short of wholly unreliable such as to "merit" such "exemption" from the implementation of a sentence of death and it is in these circumstances that the Governor is requested that he acts as a "fail safe" in granting commutation of Richard's death sentence where the criminal justice system has most overtly proved "fallible", **Herrera v. Collins**, ante 414 and in so doing he would be unquestionably enhancing the justice which Richard's case most sorely deserves and demands.

BACKGROUND AND PROCEDURAL HISTORY

On May 22 1985, Richard Steven Zeitvogel was convicted for the capital murder of Gary Wayne Dew, which occurred on March 25 1984, and was sentenced to death. On March 25 1986, the Missouri Supreme Court affirmed Richard Zeitvogel's conviction and death sentence, **State v. Zeitvogel** 707 S.W.2d 365 (Mo.en banc 1986), cert.denied 479 U.S. 871.

Thereafter, on November 7 1986, Richard Zeitvogel sought post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 by the filing of a pro se motion. The Circuit Court denied Richard Zeitvogel's 27.26 petition on June 19 1987, and thereafter, the Missouri Court of Appeals affirmed the denial of Richard Zeitvogel's 27.26 motion, **Zeitvogel v. State** 760 S.W.2d 466 (Mo.Ct.App.) (1988), cert.denied, 490 U.S. 1075.

Richard Zeitvogel thereafter on May 26 1989 sought habeas corpus relief in the federal courts pursuant to 28 U.S.C. § 2254. While Richard Zeitvogel's petition for federal habeas was pending, he filed a motion for state habeas corpus and this motion was denied by the Missouri Supreme Court on April 30 1991, **Zeitvogel v. Delo**, No. 73714.

The Federal District Court for the Western District of Missouri entered an order denying habeas corpus relief on February 18 1994, adopting the "Report and Recommendation" of the Magistrate, Sarah W. Hays, issued on April 1 1993. Richard Zeitvogel filed a timely motion pursuant to Rule 59(e) which was denied on May 25 1994. The district court on May 27 1994 issued a certificate of probable cause to appeal.

Richard Zeitvogel filed a timely notice of appeal to the Eighth Circuit Court of Appeals on June 21 1994 and the Court affirmed the denial of habeas corpus relief, **Zeitvogel v. Delo** 78 F.3d.335 (1996). Thereafter, Richard filed a "Motion for Rehearing or Rehearing En Banc" on March 26 1996. ?[En Banc Denial - Details]?

?[US Supreme Crt/ Cert. Denial - Details]?

Richard Zeitvogel has sought, on Wednesday December 4 1996, leave from the Eighth Circuit Court of Appeals to file a second, successor habeas corpus petition which details the very recent discovery of new evidence that, in regard to Richard's

constitutional claim of the ineffectiveness of trial counsel, Julian J. Ossman possessed direct knowledge of Gary Dew's motive to kill Richard Zeitvogel as a result of his former representation of Gary Dew who was found guilty of first degree assault and burglary following a prison chapel burglary a few months earlier in which Richard had provided assistance to the prison authorities in the form of a statement which identified Gary Dew as one of the perpetrators.

It is, however and despite the fundamental nature of the new evidence, the view of Richard's attorneys that it is extremely unlikely that given the new provisions of § 2255 Anti-Terrorism and Effective Death Penalty Act 1996¹, that leave will be granted such as to allow the merits of Richard Zeitvogel's constitutional claim of ineffectiveness assistance of trial counsel to be addressed.

Richard Zeitvogel will keep the Governor's office apprised of the status and progress of this petition to file a second, successive habeas corpus petition and of any other judicial proceedings in this case.²

¹ The Petitioner must show, "newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the underlying offense."

² In the unlikely event of leave being granted by the Eighth Circuit Court of Appeals then the successor Petition will be filed in the Federal District Court Western District of Missouri.

REASONS FOR COMMUTATION OF SENTENCE

I

Richard's consistent claims of self-defense were so prejudicially obstructed by his own defense counsel that the jury at the guilt phase of the capital trial were never in possession of the full facts upon which to adjudge guilt such as to render his conviction as wholly unreliable

SELF-DEFENSE

Richard Zeitvogel has always contended that he acted in self-defense. A Department of Corrections Report prepared on the night of Gary Dew's death recites the following information obtained from Richard,

"...he and Dew had argued earlier about Zeitvogel telling prison authorities about Dew and another inmate being involved in an unrelated assault at the prison chapel. According to Zeitvogel, Dew hit him in the face, the two struggled and fought for several minutes, and Zeitvogel choked Dew with a strip of sheet. Zeitvogel stated he tried to revive Dew and then tried to get the guard's attention by flashing the emergency light. An attempt was made to record the interview but the tape recorder malfunctioned. Zeitvogel later voluntarily gave Deputy Spicer fingernail scrapings and a blood sample," Exhibit H (I), (emphasis added).

Cole County Sheriff's Department David Spicer generated an Offense Report detailing the statements made by Zeitvogel immediately after the murder, Exhibit H (II). At trial, internal investigating officer George Brooks testified that Richard, in statements made to him and Sergeant Arthur Dearixon on March 26 and 27 1984, admitted killing Dew but claimed that he did so in self-defense, Exhibit A pp.335-338. The unquestionable consistency and truth of Richard's pleas of self-defense ironically originate from invaluable assistance he provided to investigative prison officials in May 1983.

THE PRISON CHAPEL BURGLARY AND ASSAULT - MAY 1983

(i) Factual Background

On May 15 1983, ten months prior to the murder, Gary Wayne Dew, (a.k.a. "Crazy") and two other inmates, Chester Allen Bettis, (a.k.a. "Animal/Kong") and John Patrick Methfessel, (a.k.a. "Roundhead") broke into the prison chapel in order to use a room for the purpose of engaging in homosexual activities. During the course of the burglary, Charles Robinson, another inmate, refused the demands of the inmates to access a room within the chapel. The consequence of Charles Robinson's refusal was that he was tied to a chair by the inmates and beat repeatedly over the head with the blade portion of a paper cutter. The assault ended only after Charles Robinson pretended he was dead and he was left, still bound to the chair, in a critical condition. As Reverend Joe Harriman described on finding Charles Robinson, "he was tied to a chair

bleeding from numerous wounds," Exhibit B. Charles Robinson was immediately hospitalized following this savage attack and that night investigators from the Cole County Sheriff's Department were dispatched to the penitentiary to investigate the incident. Deputy Sheriff David M. Spicer, who prepared the Offense Report a few months later in regard to Gary Dew's death, was responsible for the preparation of the initial Offense Report.

(ii) Richard's provision of invaluable assistance to the prison authorities

Richard, in an interview held at approximately 10:56pm on May 15 1983, informed prison investigators that he had seen, "three (3) white males sitting by the back steps. He (Zeitvogel) identified them by their 'Yard Names'; (1) Roundhead (2) Kong and (3) Crazy, at the prison chapel prior to the assault on Charles Robinson, Exhibit B. The information provided by Richard at interview led to Gary Dew, Chester Bettis and John Methfessel all being charged on July 1 1983 with a two-count Complaint in the Cole County Circuit Court.

Count I of the Complaint charged defendants with the class B felony of burglary for unlawfully entering the basement of the penitentiary chapel for the purpose of stealing, Exhibit C (I). Count II charged defendants with the class A felony of assault in the first degree for attempting to kill or to cause serious physical injury to inmate Charles Robinson, Exhibit C (II).

The Public Defender's Office was appointed to represent Gary Dew and Patrick Methfessel. After a preliminary hearing, Gary Dew and Patrick Methfessel were bound over for trial on both counts. On November 17 1983, an Information was filed in Cole County Circuit Court charging Gary Dew and Patrick Methfessel with burglary and assault, Exhibit D (I) Gary Dew was also charged with being a prior and persistent offender as he had previously been found guilty of two or more felonies, Exhibit C (III).

Gary Dew was convicted on both counts of first degree assault and burglary on January 12 1984, ³ Exhibit D (II), and the court ordered the preparation of a pre-sentence investigation report, a copy of which was later mailed to Julian Ossman, Exhibit D (III).

GARY DEW'S MOTIVE OF REVENGE - PLOT TO KILL RICHARD ZEITVOGEL

(i) Chester Bettis - Co-Author - Prison Chapel Burglary

Chester Bettis was Gary Dew's cell-mate at the time of the chapel burglary. Following arrest, "Gary Dew found out that Zeitvogel had rolled on him and he vowed to kill Zeitvogel". Exhibit F para.5

Chester Bettis in providing a statement to the prison authorities against his co-authors, Gary Dew and Patrick Methfessel, states in his affidavit that "Methfessel put a snitch jacket on me which is

³ Chester Bettis had provided a statement to the prison authorities in which he had admitted his involvement in the prison chapel burglary and named his co-authors. Chester Bettis provided oral testimony for the State.

why I am still housed in 5C in Jeff City. Methfessel and Dew promised each other that me and Zeitvogel would be taken out", Exhibit F para.3 & 5.

Gary Dew showed Chester Bettis, "copies of statements which his lawyer gave him about Zeitvogel snitching and Gary set himself up with a charge of 'dangerous contraband' so that he could get moved to 5C where Zeitvogel was housed at the time. Gary kept saying 'I gotta kill Zeitvogel'. The guards and the inmates all knew that they were enemies so I told Gary that he was 'crazy' if he thought the guards would put him near Zeitvogel. Finally, Gary hid a[n] ax blade or head in his cell and had another inmate tip the guards off by sending a kite on him. The guards searched the cell and Gary was thrown in 5C with Zeitvogel...[e]verybody, inmates and guards alike knew it was self-defense and nobody would have died if the guards hadn't put Dew in Zeitvogel's cell", Exhibit F para.6&7 (emphasis added).

(ii) Patrick Methfessel - Co-Author - Prison Chapel Burglary

Patrick Methfessel declares in his affidavit that, "Richard Zeitvogel, an inmate at MSP at the time, was questioned about who was involved in this [b]urglary and told the [c]ops that he had seen us near the chapel where the crimes occurred. Chester Bettis also snitched on all of us and Gary Dew and I agreed that we were going to take Chester and Zeitvogel out for rolling over on us. I was supposed to get Bettis and I agreed to help 'Crazy' (Gary Dew)

get Zeitvogel. But both Bettis and Zeitvogel were in 5C so we couldn't get to them," Exhibit E paras.3 & 4.

As Patrick Methfessel recalls, "Gary [Dew] managed to get transferred to Zeitvogel's area and I knew that he was good for his word. He told me, 'Don't worry about Zeitvogel, I know what I have to do'. After he got transferred, Gary sent a note to me saying that he was housed down the walk from 'our cousin', which was our code name for Zeitvogel. The next thing I heard, the guards had moved Gary into Zeitvogel's cell when they knew that these guys were known enemies. The guards and the inmates on the walk all knew that there was going to be a killing. When I heard that an inmate had died on 5C, I thought that Dew had killed Zeitvogel. Later, I heard it was the other way around, and I still don't understand how Zeitvogel caught a [m]urder charge when it was self-defense," Exhibit E paras. 4 - 6 (emphasis added).

GARY DEW AND RICHARD WERE CELLED TOGETHER WHILST GARY DEW AWAITED SENTENCING IN THE PRISON CHAPEL BURGLARY AND ASSAULT

Whilst awaiting to be sentenced Gary Dew was placed in the same cell as Richard Zeitvogel despite protests made by Richard and previous threats that Gary Dew intended to kill Richard, See ante and Exhibits A pp. 285-287 & 302-303, F para.6. As Patrick Methfessel declares in his affidavit, "Gary Dew was pissed off at Zeitvogel for snitching and I personally heard him threaten to kill Zeitvogel on several occasions", Exhibit E para.7.

THE DEATH OF GARY DEW

Several days of loud fighting and arguing ensued between Richard and Gary Dew. As inmate Johnny Smith notes in his affidavit, "[a]fter Rick and Dew were put in a cell together, they fought and argued constantly," Exhibit G para. 7.

On the day preceding Gary Dew's death, both Gary Dew and Richard requested prison officials that they be moved but they were told that this would not take place until the following day, Exhibit A pp.286-287.

At approximately 4.30pm on March 25 1984, Correctional Officer, ("CO"), James Clemons was conducting a routine count of Housing Unit 5C. Richard called CO Clemons to his cell and told CO Clemmons that his "his cellie [Gary Dew] was dead. Clemons asked [Richard] what he meant and [Richard] replied, 'I killed my cellie'," Exhibit H.

As inmate William Reed recalls in his affidavit, "[t]here is no doubt in my mind that Crazy assaulted Rick and that he was forced to defend himself. All of this could have been prevented if the guards had simply done their jobs," Exhibit R para.7 and see ante Exhibits E para.5 and F para.6.

RICHARD'S DEFENSE REPRESENTATION

(i) Howard L. McFadden

Richard Zeitvogel was charged with capital murder on July 31 1984 and Public Defender Howard L.McFadden was assigned to represent him and indeed did so at Richard's arraignment.

(ii) Julian J. Ossman

After arraignment but prior to trial Mr.McFadden was replaced by assistant public defender Julian J. Ossman who continued to represent Richard during all remaining phases of his capital trial.

The critical new evidence which has only recently been discovered on November 13 1996 by Richard's attorneys is that Julian J. Ossman represented Gary Dew at his trial for first degree assault and burglary Exhibits X & Y.

During the course of representing Gary Dew, Julian Ossman provided his client with a copy of the statement made by Richard to the prison investigators, Exhibits A p.299, B & F para.6. This act undoubtedly formed the basis of Gary Dew's motive to avenge his investigation and charge of first degree murder and burglary by plotting to kill Richard who had voluntarily assisted the prison authorities in providing invaluable evidence concerning Gary Dew's presence in the prison chapel on May 15 1983. As Richard recalls, "Crazy [Gary Dew] pulled out a copy of one report to show me when he confronted me with my so-called statement against him and his partners. I tried to make him understand that what was on that report wasn't right, that I didn't say anything," Exhibit Z, para.4.

The scandalous reality is that Julian Ossman has at no stage to date disclosed this flagrant conflict of interest, to either his former client, Richard, the Court or previous or existing attorneys of record. Indeed, Julian Ossman now claims that both Gary Dew's and Richard's files were destroyed by an accidental fire approximately two years ago, Exhibit Y.

On September 18, 1984, at the intial client meeting, Richard advised Julian Ossman that he had acted in self-defense, Exhibit I.

During the course of that interview⁴ a converstion took place which demonstrated conclusively that Richard advised Julian Ossman that Gary Dew was intent on levying revenge on Richard for implicating him in the prison chapel burglary,

"RZ: Gary Do (sic) is known as Crazy and I got arrested for the case that they got arrested on.

JJO: That's Do and Metafessel ? (sic)

RZ : Yea and Animal. They turned me loose, Roundhead and Do and all of them sent word out that I snitched on them because I said I'd seen them when I was going to lower the yard.

JJO: Who were they accused of...same guy?

RZ : No, they're accused of kidnapping this dude in the Catholic Church.

⁴ Julian Ossman volunteered this transcript of a tape recorded interview at the 27.26 hearing.

JJO: What's his name?

RZ: I don't know...they assaulted. They kidnapped this dude down there and tied him up and beat him...

[Later in the meeting the following exchange occurs:]

RZ: Now if I can prove that I had a conflict between these people.

JJO: But you're going to have to take the stand to do it.⁵

RZ: No. The man knows it. If this so-called statement is in there and I was supposed to have made saying that I seen D[ew] and them and Methfessel and them by the chapel..

JJO: **Why do those names ring a bell with me?"** (emphasis added)

To date, Julian Ossman has at no stage advised Richard of his actual conflict of interest, clearly evidenced by the knowledge gained of Gary Dew's motive to kill Richard, following his representation of Gary Dew in the prison chapel burglary incident. As Richard declares in his recent affidavit, " [b]ut I never knew and was never told by Ossman that he had ever represented Crazy [Gary Dew] in any cases let alone that one, burglary and assault. I didn't even know Ossman knew this guy Crazy [Gary Dew]... [t]here was nothing my lawyer ever said to me that led me to believe that he was Crazy's [Gary Dew's] lawyer," Exhibit Z paras.2 & 7.

JULIAN OSSMAN - REPRESENTATION OF RICHARD'S PLEAS OF SELF-DEFENSE

⁵ This statement is patently incorrect as Julian Ossman himself as well as Law Enforcement Officers could have established Gary Dew's motive and desire to kill Richard.

(i) Pre-Trial Preparation

Julian Ossman had the unlimited benefit of a full time investigator, Ernie Creel, at his disposal in the preparatory period proceeding the guilt phase of Richard's capital trial.

Prior to the trial, Richard provided Julian Ossman with a list of potential witnesses. The list named Andre Montgomery (a), Steve Wright (b), Tim Rose (c), John Czajka (d), Frank Guinan and Duane Issac.

Despite the additional assistance of an investigator, none of the witnesses identified by Richard were called to testify on his behalf and Julian Ossman was able to provide no reasons whatsoever for such failings. *[NEED TO CROSS-REF to 27.26 transcript]*

Richard notes that, "I knew that Ossman wasn't doing anything on my case because he wouldn't talk to any of the witnesses I asked him to. If I had known then what I know now though, I would have asked for a new attorney," Exhibit Z para.3.

(a) Andre Montgomery - Valuable Defense Witness - NOT USED AT TRIAL

Ernie Creel's notes indicate that Andre Montgomery, who could have been called to give live testimony before the jury, was the 'walkman' where Richard and Gary Dew were housed and had advised a guard named Thomas that there had been fighting between Gary Dew and Richard.

(b) Steve Wright - Valuable Defense Witness - NOT USED AT TRIAL

Steve Wright, in an interview with Ernie Creel, could have provided live testimony before the jury that he had heard Gary Dew and another inmate talking about "getting the defendant [Richard]" and that sometime in July of 1983 he had heard Dew say he was going to 'get' the defendant. Steve Wright's cell was directly next to Gary Dew's and Richard's and he had heard Gary Dew threaten Richard and say, "don't go to sleep tonight if you know what's good for you". Steve Wright never heard Richard threaten Gary Dew but did hear Richard's reply, "whatever, do what you gotta do". Wright states that the guards and the administration knew Richard and Gary Dew were enemies but allowed them to cell together, as he remarked, "prison officials do this to let the inmates control each other which makes their job easier", *[Exhibit L - NEED ACCURATE REF]*

(c) Tim Rose - Valuable Defense Witness - NOT USED AT TRIAL

Julian Ossman was also aware that inmate Tim Rose had heard fighting and arguing between Richard and Gary Dew a few days prior to Gary Dew's death and that he had heard Richard and Gary Dew inform a guard named Dietrich that they needed to be moved.

(d) John Czajka - Valuable Defense Witness - NOT USED AT TRIAL

John Czajka could have provided live testimony that it was common knowledge that Richard had implicated Dew in the chapel incident, and that "prison policy dictated they should have been placed on 'no contact status'...let alone be allowed to cell together...A fact of life in the prison system is that if you snitch on another

man, regardless of how trivial the information may be, you are subject to being maimed or killed...The prison atmosphere in the 1980's at the Missouri State Prison was brutal, violent, and there was constant bloodshed...As much as I dislike and disrespect Rick Zeitvogel, I do not feel it was right to place him in a 'kill or be killed' situation" *[Exhibit M- NEED ACCURATE REF]*

(ii) Guilt Phase of Capital Trial

Despite the wealth of actual and potential evidence corroborating Richard's claim of self-defense which crucially included his own counsel's knowledge of Gary Dew's motives of revenge the only evidence that was presented on Richard's behalf in support of his claim of self-defense derived from the oral testimony from two inmates at Missouri State Penitentiary, Charles Stevenson, Exhibit A pp.284-294 and Chester Bettis Exhibit A pp. 295-304, both of whom provided evidence only of the threats made to Richard by Gary Dew but provided no evidence of the underlying motive for the threats made by Gary Dew to kill Richard.

Charles Stevenson

At trial, Charles Stevenson heard, on the day of Gary Dew's death, a conversation between Gary Dew and a guard, Gary Spence, whilst Gary Dew was taking a shower in which Gary Dew declared, "[m]an, you gotta get me out of that cell or else i'll do him [Richard] like I did that motherfucker down there in the chapel," Exhibit A pp.285-286. **This evidence represented the only reference throughout the entire proceedings before the jury to the prison chapel assault**

and burglary. Yet again, alarmingly, Julian Ossman did not seek in any way to develop the fundamental significance of the events pertaining to that incident in the context of Gary Dew's murderous intentions centered upon Richard in the light of Richard's repeated claims of self-defense.

Chester Bettis

Again despite Ossman's knowledge of Gary Dews' and Chester Bettis' involvement in the prison chapel case and despite the fact that Charles Bettis testified in Gary Dew's case, Exhibit X. Julian Ossman again failed to adduce any evidence from Charles Bettis concerning the prison chapel crime, in fact, the only questions asked of Charles Bettis by Julian Ossman concerned a conversation he had with Gary Dew as Gary Dew was being transferred to Richard's cell,

"Q. Did he say why he was going to 5C?

A. Yeah.

Q. What did he say?

A. That he was going to take care of somebody down there.

Q. Did he tell you who that was?

A. Yes.

Q. Who was it?

A. Rickie Zeitvogel.

Q. By taking care of him, what do you mean?

A. By killing him.

MR.OSSMAN: I have no further questions," Exhibit A pp.296-297.

During cross-examination Charles Bettis made two other vague references to the prison chapel burglary with no follow up questioning provided by Julian Ossman,

"BETTIS: No, he [Gary Dew] was upset because he didn't get his time yet, he was pretty upset because of people telling on him; that's--you know, he got some evidence reports from somewhere, I think it was his attorney, or somewhere, and as soon as he got that, he seen everybody's statements, and he was pretty uptight. And he had some violations for dangerous contraband, and I know Crazy pretty well, he's not at all sane, you know, and that's the reason why he got the nickname of Crazy. I know him pretty good," Exhibit A pp.299-300.

Charles Bettis further testified about Gary Dew's conviction on the chapel burglary and assault,

"BETTIS: Yeah, when he got busted. He told me he was going down, I tried talking him out of it but he wouldn't listen to me. You know, when he makes up his mind he does what he wants to do. He had a lot of time, and he was only doing seven years before this big time. I don't even think he got his time for the assault that he was charged with, and he was pretty upset about what happened, a jury found him guilty, and me and him was real good friends, and after he found out that, you know,

well, I made my little statement on the stand there, "Yeah, I'm guilty I was there," and all this stuff, and he got pretty upset about that. And that's the reason why I came to him, I wanted to get it straightened out. I told him if he wanted to kill me because I was a snitch, then, I'm not going to stop him; but he didn't do that, because we used to be cellies together, and we was real cool to each other.

Q. Okay.

A. Then he's also threatened--he's not only threatened me, he's threatened Methfessel, and that guy right here.

(Indicating [Richard Zeitvogel])," Exhibit A 302-303.

Even though Chester Bettis referred to the prison chapel burglary and Julian Ossman had direct knowledge of that crime and the involvement of his former client, Gary Dew, no other questions were asked of Chester Bettis.

Despite a plethora of evidence, providing support to Richard's claim that Gary Dew had an unchallengeable motive to kill Richard as a result of Richard "snitching" to the prison authorities in regard to the prison chapel burglary, the jury were never made aware of this crucial evidence and were left, in factual terms, totally in the dark.

FUNDAMENTAL ETHICAL REQUIREMENTS

(i) Lawyer as Witness

Rule 3.7 of the Rules Governing the Missouri Bar and the Judiciary, ("the Rules"), declares at (a),

"A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness

except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client." Exhibit J (emphasis added)

There can be no doubt that Julian Ossman possessed direct knowledge of the motive that Gary Dew would have had in declaring his uncomprising desires to kill Richard and that Julian Ossman, ethically, as an experienced practicing attorney, should have ceased immediately from acting on Richard's behalf. In so doing, Julian Ossman ought to have presented himself as a live witness on Richard's behalf in providing the critical evidence that was, at no stage, presented to the jury, that in providing Richard's statement to the prison authorities to his, now deceased, former client, Gary Dew, he was directly aware of the factual basis for the motive of revenge possessed by Gary Dew.

(ii) Conflict of Interest - Loyalty

Rule 1.7 of the Rules declares at (b),

"A lawyer shall not represent a client if the representation of that client may be materially limited...by the lawyer's own interests unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected;
- (2) the client consents after consultation." Exhibit K (emphasis added)

Additionally, the 'Comment' to **Rule 1.7** declares,

" Loyalty is an essential element in the lawyer's relationship to a client" Exhibit K (emphasis added)

Julian Ossman, in his capacity as an experienced criminal defense attorney, had direct knowledge of the potentially fatal significance of an inmate "snitching" upon another within the prison environment. Further Julian Ossman would have known that such a reprehensible act violated the cornerstone of inmate codes and culture and would lead almost certainly to a desire for retribution and revenge from the aggrieved inmate.

In violating the paramount concept of loyalty owed to Richard in the investigation and development of his claim of self-defense, the only rationale for Julian Ossman's callous and unethical disregard for Richard's claims of self-defense⁶ despite the existence of an

⁶ The "Preamble" to the **Rules** additionally provides that, "As Advocate, a lawyer **zealously asserts the client's position** under

overwhelming abundance of corroborating evidence was Julian Ossman's desires to protect his own involvement in providing a motive for Gary Dew to kill Richard.

The former representation of Gray Dew by Julian Ossman was not discovered by Richard's current attorneys until November 13 1996, Exhibit X. Additionally, under Missouri law the death of Gary Dew led to the charges against him being dismissed and the court record sealed, Exhibit D (IV), preventing access by Richard's attorneys to discover, in this case, the representation of Gary Dew by Julian Ossman.

It is the intention of Richard's attorneys to, as soon as practicable, report to the Missouri Bar, as ethically required of them, under **Rule 8.3**, Exhibit S, "that another lawyer [Julian Ossman] has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

CONCLUSION

Ultimately, the substantial evidential mountain supporting Richard's claim of self-defense, including the critical evidence pertaining to the prison chapel burglary and Gary Dew's clear motivation for revenge were at no stage placed before the jury.

the rules of the adversary system." (emphasis added)

Under Missouri law, the state of mind needed to sustain a conviction for first degree murder is that Richard acted "deliberately" which is defined as "cool reflection."⁷

Whether the substantial evidence in support of Richard's claim of self-defence was never placed before the jury was due to the unparalleled incompetence of Julian Ossman or due to his desires for self-protection from providing the original motive to Gary Dew to kill Richard, the crucial fact remains that the jury were at no stage, throughout the entire guilt phase of Richard's capital trial, provided with the critical evidence of the prison chapel burglary, the assistance in interview and statement form provided by Richard to the prison authorities and the resulting murderous motive of revenge exhibited by Gary Dew and corroborated by innumerable inmate witnesses including Gary Dew's co-authors, Chester Bettis and Patrick Methfessel.

In this case, the criminal justice system has displayed its overt fallibility in being nothing short of obstructive to Richard's claim that he acted in self-defense. It simply cannot be right to proceed with the execution of Richard where to do so would be to execute a man who has not enjoyed a fundamental right, that of a

⁷ Although self-defense is a complete defense to any homicide under Missouri law, Richard Zeitvogel would have been acquitted of first degree murder if his actions were the result of sudden passion provoked by the sudden acts of the victim, which would make him responsible for the non-capital crime of Voluntary Manslaughter, RSMo. § 565.023.

fair trial, a right which was unknowingly stripped from him by his very own defense counsel, Julian Ossman.

The fact that the jury, as judges of fact, never heard the substantial majority of evidence contained within this Application leads to there being no doubt as to the single conclusion in this unique case, that of, the fundamental unreliability of Richard Zeitvogel's capital murder conviction.

II

The suppression of material exculpatory evidence by the State concerning Richard's mental and medical history of epilepsy, mental retardation and organic brain damage and the failure of defense counsel to investigate such history led to the jury being placed in a position, at the guilt and penalty phases of Richard's capital trial, of not being in possession of fundamental facts when adjudging guilt and sentence such as to render his conviction and sentence wholly unreliable

LEGAL BACKGROUND

In the case of capital murder, Missouri law makes the defendant's mental condition relevant to culpability and punishment. Richard's mental condition was unquestionably relevant to both his intent to commit first degree murder which requires "deliberation", defined as "cool relection" and as part of the mitigating evidence, in both

cases representing crucial evidence that was never placed before the jury at the guilt and penalty phases of Richard's trial.

SUPPRESSION OF FUNDAMENTAL EVIDENCE BY THE STATE

At the guilt phase of Richard's capital trial the state withheld material, exculpatory evidence from the defense by failing to disclose numerous hospital records held by The Missouri Department of Corrections. The records would have undoubtedly assisted Richard in his defense. The Magistrate's "Report and Recommendation," dated April 1 1993, stated that there were a number of issues regarding the suppression of the prison records which were,

"unclear including what Zeitvogel's trial counsel actually requested from the State, what information was produced, what representations were made as to whether any other records existed and whether any portion of petitioner's file was produced...[upon] the basis of the current record, the Court cannot make a factual finding that records were not suppressed," Exhibit U pp.26-28, (emphasis added).

(i) Fulton State Hospital - Mental/Medical examination - 1975

The first of the suppressed reports is dated January 28 1975 and relates to a mental examination of Richard, undertaken at Fulton State Hospital over a thirteen day period, whilst he was incarcerated in Missouri State Penitentiary, Exhibit N. The Report identifies Richard's childhood diagnosis of epilepsy,

"Presently, Mr. Zeitvogel states that he has a history of epilepsy, possibly of the petit mal variety. He states that he started having seizures as a child and that he was on anti-convulsive medication throughout most of his childhood and teenage years. Presently, he states that he discontinued his anticonvulsive medication about one year ago and since that time has had four or five seizures...[e]ducationally, Mr. Zeitvogel completed the fifth grade and thereafter spent several years in special education classrooms because he was a slow learner."

The conclusionary "[p]sychiatric impression" stated that Richard suffered from "[b]orderline mental retardation" and "[g]roup delinquent reaction".

The second of the suppressed documents indicates that on February 3 1975, during the course of Richard's examination, an electroencephalogram was performed which confirmed the existence of organic brain damage, Exhibit O.

"Electroencephalogram recorded 3 Feb 75 found some irregularity in his brain wave pattern with slowing of four to seven cycles per second, especially in the frontal lobes. This slow dysrhythmia is compatible with a history of seizure disease."

"He can recall past episodes of 'dizziness', where he may wake up and find himself on the ground. This could be compatible with a history of petit mal seizures".

(ii) Classification and Assignment Report

The third suppressed exculpatory document is a classification and assignment report prepared upon Richard's arrival at the Missouri State Penitentiary which found that Richard needed "prescription drugs, including psychotropic and other controlled substances". The report noted an "indication of drug use, alcoholism, mental deficiency, or other special problems". The examiner declared there was a "major disorganisation" of Richard's family and that he was suffering from a "mental deficiency", Exhibit P.

(iii) Post-Capital Trial - Expert Opinion - Suppressed Records

The suppressed records, having finally been released by the State,⁸ were submitted to an independent Licensed Clinical Psychologist, Dr. Gregory Sisk Ph.D, for his analysis. In his opinion, Dr.Sisk concluded that, "Mr Zeitvogel may have been unable to control his actions due to mental illness, or may not have fully comprehended the wrongfulness of his acts..." and that "the most prudent course

⁸ Currently instructed attorneys filed a "Motion for Court Order to Require Production of Petitioner's Prison File" on July 31 1989 following a written request dated April 19 1990 addressed to M. Finkelstein, Missouri Department of Probation and Parole. This Motion was virulently opposed by the State in "Suggestions in Opposition" dated August 14 1990. A "Motion to Withdraw Petitioner's Motion for Discovery" was filed on October 11 1990 and granted on October 15 1990 as the attorneys had obtained an ex parte production order from the Circuit Court of Washington County and had been granted access to the sought after records.

of action would seem to be a current psychological evaluation,"
Exhibit Q.

Dr.Sisk subsequently examined Richard and found he met all the diagnostic criteria for borderline intelligence and organic personality syndrome⁹ and in so doing made a provisional diagnosis of dementia.¹⁰ *Exhibit [NEED DETAILS]*. Dr.Sisk concluded that a neurological examination of Richard and additional information regarding his social history would be necessary to confirm or rule out a diagnosis of dementia.¹¹ If a diagnosis of dementia could be confirmed, the diagnosis of organic personality syndrome would be inappropriate. Dr.Sisk noted that Richard's disabilities raised several issues that could be resolved by an appropriate mental evaluation,

"There are several issues raised by this evaluation. For example, due to his apparent organic disorder, Richard may not have been able to resist aggressive impulses in the past. With his impaired judgment, he may not have understood the wrongfulness of his actions. Also, his apathy and indifference

⁹ These criteria are affective instability, recurrent outbursts of aggression or rage, impaired social judgement, suspiciousness, apathy or indifference.

¹⁰ The diagnostic criteria for dementia are intellectual impairment of sufficient severity to interfere with social or occupational functioning, memory impairment, impaired abstract thinking, impaired judgement, aphasia and apraxia, and constructional difficulty.

¹¹ The Court denied the necessary funds to pursue this diagnosis.

may have rendered him unable to assist in his own defense,"
Exhibit T para.* [NEED DETAILS]*

(iv) Conclusion

The suppressed medical records, which are unquestionably relevant in their conclusions of epilepsy, organic brain damage and borderline mental retardation were at no stage presented to the jury as part of their assessment of Richard's state of mind. Indeed, it is clear that had the records been properly disclosed by the State then this would have led to the instruction of a suitably qualified medical and mental expert to assist in Richard's defense.

The conclusion of this material incident of suppression, whether intended or otherwise is simply that the jury were yet again placed in a cavern of darkness, unable to adjudge effectively Richard's mental state of mind in causing the death of Gary Dew and the consequent appropriate sentence. Both of which can only be considered as wholly unreliable as a result.

FAILURE OF DEFENSE COUNSEL TO INVESTIGATE RICHARD'S MENTAL HEALTH

(i) Arraignment Defense Counsel - Howard L. Mcfadden

The only investigation that defense counsel conducted into Richard's background and character is set out in its entirety in the record on arraignment:

"MR.MCFADDEN: Now, how about a mental evaluation? You have had one recently?

DEFENDANT: No, I don't need one. The only thing I want is to go to trial.

MR.MCFADDEN: All right. Has there been any change in your mental condition since the last evaluation?

DEFENDANT: You mean, am I nuts?

MR.MCFADDEN: Yes

DEFENDANT: No" Exhibit A p.230

(ii) Trial Defense Counsel - Julian Ossman

No investigations of whatsoever nature regarding Richard's background, character and mental health were initiated by Julian Ossman.¹² The Governor's attention is specifically drawn not only to the previously suppressed exculpatory evidence indicating Richard's history of epilepsy, brain damage and mental retardation detailed above but also to the Social History Report, (including exhibits), contained at Exhibit I, which contains a wealth of relevant facts.

¹² **The American Bar Association** details the standard pertaining to defense counsel's duty to investigate as,

"Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to the fulfillment of these functions."

Again, despite the plethora of available mitigative evidence which could have easily been obtained by defense counsel, particularly as he had available to him the assistance of an investigator and funds to employ a medical expert to evaluate Richard's mental condition, Julian Ossman failed to provide any mitigating evidence before the jury at the penalty phase of Richard's trial. His sole effort in preparing to defend Richard's life in the penalty phase of his trial was to read the list of statutory mitigating circumstances. It appears that he was clearly unaware that non-statutory mitigating circumstances and evidence could be presented. As Dennis Goodden, the public defender appointed on November 20 1986 to represent Richard on his 27.26 proceeding, declares in his affidavit, "upon consulting Richard and his mother, it occurred to me that a reasonably competent defense in this case would involve investigation of Richard's history of epilepsy, head injuries, and related disabilities," Exhibit W para. *[NEED REF.]*.

At the 27.26 evidentiary hearing Richard's mother, Delores Buttry, testified that she was never contacted by anyone concerning the trial of her son. Mrs. Buttry testified that her son was late in all development stages and in the fourth grade was diagnosed as having brain damage and epilepsy. She also testified that her son was placed in a special classroom for the learning disabled and later placed in a special private school in Brenham, Texas, at the age of fourteen. Mrs. Buttry would have been willing to testify at her son's trial had someone contacted her. During the course of cross-examination Mrs. Buttry testified that the doctors had told her that

Richard's brain damage "could have been caused through birth,"
Exhibit V.

(iii) Conclusion

There can be no doubt that the substantial failing of defense counsel Julian Ossman prevented the jury from possessing fundamental evidence with which to adjudge guilt and sentence. These failings coupled with the suppression of exculpatory evidence by the State led to the jury not being in possession of all the relevant evidence upon which to adjudge Richard's state of mind and sentence. With such inherent unreliability it cannot be right to proceed with Richard's execution, or to do so would accept the notion that the jury in Richard's capital trial, despite not being in possession of the fundamental facts, reached an unimpeachable decision with the finality of death as its consequence.

III

The implementation of Richard's sentence, having endured a catalogue of suffering evidenced by enduring twelve years facing a sentence of death; the issue of seven Warrants of Execution; dehumanising prison living conditions; and physical, sexual and emotional brutality whilst incarcerated would be to execute a human being who has already been severely punished

CATALOGUE OF SUFFERING

(i) Background

Set against an unimaginable background of childhood and teenage physical and emotional abuse and neglect by his family, as highlighted in Exhibit I, Richard was received at Missouri State Penitentiary on May 11 1976.

(ii) Facing a Sentence of Death for Twelve Years

Richard has been incarcerated on death row for approximately twelve years. "His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract."¹³ "[W]hat man experiences at such times is beyond all morality...[h]aving to face an inevitable death, any man, whatever his convictions, is torn asunder from head to toe. The feeling of powerlessness and the solicitude of the condemned man, bound up and against the public coalition that demands his death, is in itself an unimaginable punishment."¹⁴ "[I]n Death Row, organised and controlled in the grim caricature of a laboratory, the condemned prisoner's personality is subjected to incredible stress for prolonged periods of time."¹⁵

¹³ J.P.Sartre, "Being and Nothingness" 685-687 (Barnes ed. 1969).

¹⁴ "Reflections on the Guillotine, in Resistance, Rebellion and Death," A.Camus, (1960) at 155-156.

¹⁵ West, "Psychiatric Reflections on the Death Penalty," in voices against death 290-291 (P.Mackey ed. 1976). See also Robert Johnson & John L.Carroll, "Litigating Death Row Conditions:The Case for Reform," in Prisoners & the Law 8-3 (I.Robbins ed. 1988)(quoting Robert Johnson, "Under Sentence of Death:The Psychology of Death Row Confinement," 5 L.& Psychol.Rev.141

There can be no doubt that Richard has already endured, as a result of the twelve year "interval between sentencing and execution...[,] a significant form of punishment," **Coleman v. Balcom** 451 U.S.949 (1981) (Justice Stevens) (majority opinion), which has already exacted, "a frighful toll", **Furman v. Georgia** 408 U.S. 238, 288-289 (1972) (Brennan,J., concurring).

(iii) Seven Warrants of Execution

The severe punishment already inflicted by the prolonged wait on death row is aggravated, not only by Richard's knowledge of twenty-two fellow inmates being executed since 1989¹⁶, but with his knowledge of the issue and subsequent final hour stays of six Warrants of Execution, those executions being scheduled on November 19 1986; December 19 1986; March 17 1987; April 16 1987; June 19 1987; and July 17 1987.

The effect on Richard is illustrated by events surrounding one of the execution dates *[NEED DETAIL OF DATE]* where Richard hysterically telephoned the Public Defender's office late in the afternoon because a stay had not been issued. Mr.Goodden was in court on another matter and so Robert Murray, an assistant public defender, went in Mr.Goodden's stead to the Cole County Circuit Court to seek a certificate for a stay of execution. Mr.Murray was directed to Presiding Judge Byron Kinder. Mr.Murray explained to

(1979)).

¹⁶ These executions included a close friend, Frank Guinan who was executed in 1993.

Judge Kinder, "that Mr. Zeitvogel was scheduled to be executed that night, that [they] had not had an opportunity to investigate his case, and that his Rule 27.26 motion had not yet been ruled on." Mr. Murray presented the certificate and asked Judge Kinder to sign it. Judge Kinder refused, "laughed, and said, 'Let's smoke him. We have not smoked anyone in Missouri in a long time'". Mr. Murray was finally able to subsequently obtain the certificate from Judge McHenry as the case had recently been assigned to his docket, Exhibit b paras. * [NEED REFERENCE] *.

On another occasion * [NEED DETAILS - WHEN?] * the Public Defender investigator had to travel to the Lake of the Ozarks to find Judge McHenry, who was on a fishing boat, and obtain his signature for the certificate. The judge signed the order and the stay was rushed back to the Missouri Supreme Court a few hours prior to the scheduled execution.

(iv) Dehumanising Prison Living Conditions.

For a period of approximately four years, from May 22 1985 to early May 1989, Richard was housed on death row in the basement of the Missouri State Penitentiary, ("MSP"), located in Jefferson City.

A Complaint was filed on August 19 1985, Exhibit c, in the United States District Court Western District of Missouri¹⁷, seeking declaratory and injunctive relief from the intolerable and unlawful conditions prevailing for inmates facing a sentence of death. On

¹⁷ Case No. 85-4422-CV-C-5.

January 15 1986, the Court, the Honorable Scott O.Wright, granted the Plaintiff's motion for class action status and the certified class included all existing, which included Richard, and future inmates confined under sentence of death at MSP, Exhibit d. The Complaint alleged that Richard was "confined under conditions which [were] unconscionably oppressive and degrading and which violate[d] [Richard's] basic constitutional rights." The Complaint detailed fifty-two independent facts specific to death row at MSP, being, inter alia,

cell confinement for an average of 23 1/2 hours per day;
2 1/4 hours of outdoor recreation per week; 3, often
cancelled, showers per week, lasting 10-15 minutes each;
no dayrooms or common areas; available cell area of 20 square
feet; extremely limited natural light due to paint and
frosting on windows; overflowing of sinks and toilets
into cells; unsanitary drinking water; inadequate
ventilation; noxious air; poor bulb lighting in cells;
extremely high noise levels; roach and fly infested cells and
walks leading to the spraying of insecticide whilst inmates in
cells; mattresses were never cleaned and blankets were cleaned
once a year; squalid seclusion cells; cold and unsanitary
food; denial of food for 17 1/2 hours per day; no group
religious services; no access to law library and limited
access to legal materials in cells; inadequate medical, dental,
psychiatric and counseling care; limited access to telephone;

tampering with legal and other mail and inadequate fire safety."

Richard alleged in the Complaint that he had suffered and was suffering violations under the First, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The Complaint resulted in a settlement embodied in a Consent Decree ("the Decree") in 1986, Exhibit e. The Decree, although not representing findings of fact or conclusions of law, indirectly affirmed the legitimacy of Richard's allegations in detailing remedial steps to be taken "with the utmost speed", in regard to, inter alia,

"medical services; mental health care; recreation; telephone access; facilities for indoor recreation; plumbing; recreation works; food service ramp; fire safety; visiting; education; lighting; sanitation; window screening; feeding; legal mail and materials;

classification and additional staffing."

Although various steps were taken by the prison authorities to effect the contents of the Decree a dispute arose between the parties over certain aspects of the implementation of the Decree. The dispute ultimately led to the appointment of a Special Probation Officer on October 15 1987, Exhibit f.

It was not until the moving of Richard to Potosi Correctional Center in early May 1989 *[TO CHECK]* that such constitutional requirements were ever fully met with the consequence that Richard endured cruel and dehumanising prison conditions magnified by the lack of attention he received from the prison authorities in regard to his mental and medical diagnosis.

(v) Sexual, Physical and Emotional Brutality Whilst Incarcerated

Prior to Richard's incarceration on death row, Richard was exposed to an unimaginable, anti-rehabilitative prison environment. As inmate William Coleman describes Richard in his affidavit, "he looked like a little boy, young and stupid," Exhibit a para.5. Indeed, in an interview conducted between Beverly K. Marchbank, Richard's current investigator and inmate Gary Merritt on July 19 1994, Gary Merritt described Richard as being a "beautiful child...who was destined to be abused in the penitentiary system."

Richard, in an an interview with Beverly Marchbank on November 15 1993, advised that he was raped on his first night in MSP and that the rapes continued for some six months.

William Coleman states, "Rick was only 17 or 18 when he first came to prison and he looked like a little boy, young and stupid. For the first couple of months he was locked up at MSP, he was physically and sexually abused by the older gangsters there. I'm not talking about 3 or 4 men here, I am talking about anybody who

wanted to do anything to Rick did...[h]e was passed around from inmate to inmate..." Exhibit a para.5, (emphasis added).

A further illustrative incident of physical abuse is highlighted in the affidavit of inmate Johnny R. Smith, "Jimmy Lynch, Jimmie Ferguson and I got Rick up into our cell in A hall and we beat the living daylights out of him. Ferguson watched the door and Jimmy Lynch and I busted him up good. We broke his nose, busted his lips and blackened both of his eyes. Rick was put into protective custody for a while...", Exhibit g para.5.

(vi) Conclusion

In proceeding with Richard's execution, in the light of the combination and cumulative effect of the numerous instances of punishment thus far levied upon him, would be to erode the social purposes of levying a sentence of death, being that of retribution and deterrence.

Retribution by the State has been unquestionably exacted upon Richard. As to deterrence, who among us would not consider Richard's catalogue of suffering an insufficient deterrent?

Richard has undeniably suffered enough at the hands of the State.

IV

Conclusion

Richard Zeitvogel's conviction and sentence for capital murder on May 22 1985 is wholly unreliable as the jury were never provided with the full facts upon which to adjudge Richard's state of mind or, in the event of conviction, his sentence.

For the first time Richard Zeitvogel stands before the Governor, who is, for the first time during the course of Richard's entire litigative proceedings, in a position to exercise unrestrained mercy with the uniqueness of Richard's unquestionably wholly unreliable conviction and sentence, aggravated by his appalling catalogue of suffering whilst incarcerated.

As one of the members of the Georgia State Board of Pardons and Paroles declared in commuting the death sentence of Freddie Davis on December 16 1988, "The scales of justice were just out of balance on this one."¹⁸ In the case of Willie Lee Jester, Governor of Ohio, Richard F. Celeste commuted his sentence of death on January 10 1991 on the basis that Willie Jester's deprived environment and multiple mental disorders were not made known to the jury at his capital trial.

Ultimately, the scales of justice in Richard's case have been toppled over and cast away. Consequently, in exercising his power of clemency the Governor would be acting in such a fashion as to immeasurably enhance the justice which Richard's case has never

¹⁸ Tract Thompson, "Panel Commutes Davis Execution to Life Sentence," Atlanta Const. Dec.17 1988.

received, treating Richard as a "unique individual human being" and not as a "member of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty," **Woodson v. North Carolina** 96 S.Ct.2978, 2980 (1976). A failure to exercise such a power would be to accept the unpalatable and regressively historic notion that a man may be put to death without the benefit of a fair trial, the cornerstone of Missouri's or indeed any other criminal justice system.

The execution of Richard, should clemency be denied, despite the overwhelming weight of evidence indicating the wholly unreliable nature of Richard's conviction and sentence, would amount to nothing short of a miscarriage of justice upon which the domestic and international community would adjudge Missouri's criminal justice system¹⁹ as being nothing short of a "sham", boasting fatal consequences for those who fall prey to its inherent inadequacies.

¹⁹ The Inter-American Commission of Human Rights, in a note dated December 3 1996, has advised the Government of the United States to stay Richard's imminent execution pending their investigation of facts contained within a Petition, filed on November 26 1996. Case No. 11.700 United States.