Application for Executive Clemency

TO THE HONORABLE ROGER B. WILSON, GOVERNOR OF MISSOURI:

COMES NOW the applicant, Stephen K. Johns, by and through his attorneys, Robert J. Selsor and John William Simon, and petitions the Governor for his order under Mo. Const. art. IV, § 7, and Mo. Rev. Stat. § 217.800 (1994), commuting the applicant's sentence of death to imprisonment for a term of years or to life imprisonment *with* eligibility for parole.

Summary

Stephen Johns is a fifty-four year old man who has spent the last eighteen years of his life in prison. In 1983 he was sentenced to death as an accomplice in the robbery and killing of a gas station attendant in south St. Louis the previous year. Before his arrest in this case, he had a relatively clean record—his only conviction having resulted from his employment in an adult bookstore. A Job Corps participant in the 1960's, he worked at a broad variety of jobs and helped take care of several members of his family.

The man with whom Stephen Johns was alleged to have participated in the crime immediately pleaded guilty to a noncapital homicide charge, and is now likely close to being released on parole. By contrast, Mr. Johns has maintained his innocence from the time of his arrest to the present and, after a trial in the City of St. Louis, he received the death penalty. In the direct appeal of his conviction and sentence, the Missouri Supreme Court noted that the evidence was such that either Mr. Johns or the admitted participant could have been the triggerman. The other individual did not testify at Mr. Johns's trial.

Stephen Johns completed presenting his constitutional objections to the state courts in the manner they required in 1988, and immediately filed a petition for habeas corpus in the federal district court in St. Louis. The federal district court took seven years to rule on his case, denying all relief after refusing to hold an evidentiary hearing.

The *first* reason for granting executive clemency in this case is that the courts have refused to correct their own mistakes in Mr. Johns's case, even after they have recognized them. While the

habeas corpus petition was pending in federal court, the Missouri Supreme Court decided *State v. O'Brien*,[1] in which it overruled its decision in Mr. Johns's case *by name* and held that it had "overlooked" a controlling principle of law which it held to require a new trial in the *O'Brien* case. This principle of law is that in a capital murder case, the judge must be instruct the jury that in order to be guilty, the accused citizen must *himself or herself* have *deliberated* on causing the death of the decedent. In Mr. Johns' case, the jury was instructed that it had to find that *either* Mr. Johns *or* the other accused person had deliberated on the killing. Appointed counsel returned to the Missouri Supreme Court to file a motion to recall the mandate, asking that body to reconsider Mr. Johns's case in light of *O'Brien*. The Missouri Supreme Court denied the motion without comment.

On appeal to the United States Court of Appeals for the Eighth Circuit, former Chief Judge Richard S. Arnold, dissenting, would have provided Mr. Johns a new trial because this refusal to correct an admitted mistake of such gravity violated the constitutional guaranties applying to capital cases:

> *O'Brien* appears on its face to indicate that Johns's case was wrongly decided under the law that should have been applied at the time. In denying Johns's motion to recall the mandate, the Missouri Supreme Court offered nothing to support an alternative view, nor did it say that the error, though fundamental, was harmless. So there is uncertainty as to Missouri law. I recognize that courts often summarily deny post-judgment motions. We do this ourselves every day. But this is a death case, and death is different. The Eighth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, requires a higher degree of reasoned certainty in capital cases than in ordinary criminal proceedings. In these unusual circumstances, I believe that putting Johns to death falls short of federal constitutional requirements.[2]

Judge Arnold was outvoted two to one. On rehearing he withdrew his dissent on the basis of a Missouri Supreme Court decision announced *after* the one in Mr. Johns's case to the effect that that court *never* applied decisions retrospectively unless the case was pending on appeal.[3] Mr. Johns's appointed counsel sought review by the Supreme Court of the United States. That court denied review in a conference held the same day as its oral argument in *Bush v. Palm Beach County*

Canvassing Board.

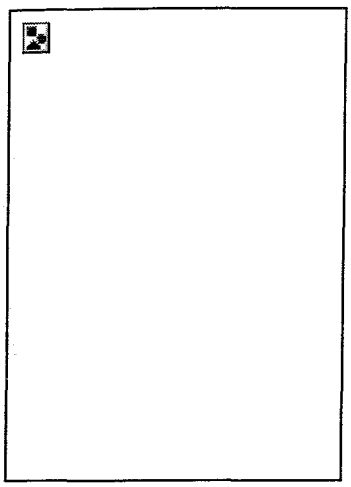
The Missouri Supreme Court's failure to recognize its own overruling of its decision in Mr. Johns's case, coupled with the federal courts' refusal to grant relief, is an adequate reason for exercising executive clemency. A Governor has the power to look beyond the highly technical aspects of the law and ensure that justice is done in a case before him on an application for clemency. This case is one where such action is warranted.

This initial basis for clemency lies at the heart of fundamental fairness. The courts of this state have held that Stephen Johns should be executed but that the defendant in *State v. O'Brien* should receive a new trial because of legal infirmities that are duplicated in Mr. Johns's case. The injustice of such an outcome is intuitive to most nonlawyers and repugnant to those who have spent their careers drafting and enacting just laws. It is a cruel irony that within days of denying review in this Missourian's case, the Supreme Court of the United States prevented the official recount of votes in Florida because it held that the state supreme court had thereby allowed "arbitrary and disparate treatment" of different votes on the basis of "uneven treatment" and changes in rules about hanging and dimpled chads.[4] Here, the same court declined even to consider another state supreme court's "arbitrary and disparate treatment" of different *lives* on the basis of an admitted error of federal constitutional proportions.

Besides the glaring inequity demonstrated by this first issue, there are at least four additional grounds that are also independently sufficient reasons for granting executive clemency.

The *second* reason is that the prosecution withheld from the defense the fact that the principal witness against Mr. Johns—the only one who claimed that Mr. Johns had told him he shot the attendant—was doing so in order to obtain a reward on Mr. Johns's conviction. The Eighth Circuit held that the failure to provide this information to the defense was not "material" because trial counsel impeached the witness's credibility in other ways. If the jurors had not only been given other reasons for disbelieving the witness, but had been told that he also had a financial stake in obtaining a conviction, there is a reasonable probability that they would not have believed the witness at all or at least not firmly enough to have given Mr. Johns the death penalty.

The *third* reason is that trial counsel, who was later disbarred, did not present *any* evidence in mitigation of punishment. A reasonable investigation would have yielded classic evidence in favor of life that has resulted in punishments other than death in one capital case after another. The affidavit of Mr. Johns's mother submitted with this application (App. 222-29) is a sample of this evidence, showing that Mr. Johns was denied any semblance of a normal, loving family life from infancy and was subjected to aversive conditioning from an abusive father whose Army career prevented the young Mr. Johns from spending more than two years in a row in any school or community. In spite of this treatment, Mr. Johns continued to try to please his father even after his parents were divorced and his father married another woman. While living with his mother, Mr. Johns helped his father take care of his deaf stepbrother and other new members of his family.



The *fourth* reason is that executing Mr. Johns after eighteen years imprisonment would be a disproportionate double punishment for the same alleged offense. Mr. Johns presented this grievance to the Eighth Circuit, relying on English decisions and an opinion by Justice Stevens in *Lackey v. Texas*.[5] By that time, the federal district court had taken seven years to process his case; the Eighth Circuit took three more.

When a person's execution comes so long after the offense of which he or she was convicted, there is not enough deterrent effect to provide an adequate basis for the punishment. When the condemned citizen is *both* executed *and* held in prison with this act looming over him for nearly a generation, the punishment is far in excess of the suffering resulting from the act of which he or she was convicted, with the effect that there is no adequate retributive basis for the punishment.

It would be different if Mr. Johns had filed frivolous pleadings to delay his supposed fate; but neither in the Eighth Circuit nor in the Supreme Court did even the Attorney General's Office accuse him of dragging out the proceedings. He cannot be blamed for participating in the process our society has defined to assure that the death penalty is practiced consistently with our fundamental values. What he has suffered for not becoming the author of his own death by giving

up the appeals *we* have established is nothing short of psychological torture of which the courts have been the presumably unwitting authors.

The *fifth* reason for granting executive clemency is the federal courts' misapplication of the Antiterrorism and Effective Death Penalty Act of 1996 to prevent Mr. Johns's appointed counsel from exercising their independent professional judgment in the selection of points on appeal in his federal habeas corpus case. Like most other federal appellate courts, the Eighth Circuit holds that even in a capital case, a petitioner's points on appeal are limited to the issues a court includes in a "certificate of appealability"—a decision made *either* by the district judge who has already denied relief *or* by an appellate court unfamiliar with the record. In almost any other case, of course, once it is conceded that a party has a right to appeal and to counsel in that appeal, the party's *counsel*—who has generally spent far more time examining the record and the law pertaining to the case—has the right to advance whatever arguments in his or her professional judgment may ultimately prove meritorious in the mind of even an initially skeptical judiciary. History is replete with examples of winning cases that have arisen under such circumstances. In this case, the statute in question neither requires nor authorizes a limitation on an advocate's professional discretion. Like the Missouri Supreme Court's refusal to correct its own admitted mistake on the verdict-directing jury instruction, this is a situation in which the federal courts have disentitled themselves to the deference they would enjoy if they came up to reasonable expectations of an independent judiciary.

Stephen Johns has now spent half of his adult life in a maximum-security prison contemplating his own execution. His recourse in the judicial system has now largely been exhausted. The Attorney General's Office has recently moved the Missouri Supreme Court to set an execution date.

Many of the doctrines, decisions, and statutory limitations on the federal courts' power to grant relief from convictions and sentences are intended not to determine ultimate outcomes, but to preserve the states' role in the federal system—not to make the enforcement of the law harsher against the individual, but to keep the federal government from overwhelming the several states. Nothing in these doctrines, decisions, and statutory limitations—and no decision denying relief on

the basis of
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them—has any *negative* implication concerning the authority of the Governor to grant clemency or concerning the appropriateness of doing so in any particular case. To the contrary, in *Herrera v. Collins*,[6] the Supreme Court of the United States *relied on* the power of chief executives to exercise clemency as a reason why the federal courts should deny relief in certain situations. If this power is *not* used, the rights of our citizens are in jeopardy, because the federal courts are relying on chief executives to remedy wrongs and to mitigate harsh results from which judges do not feel they have the authority to provide relief. This is one such case.

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that the question whether Mr. Johns should receive the death penalty has *never* been subjected to the adversarial testing the Supreme Court of the United States contemplated in authorizing the resumption of the death penalty in 1976.

A. A competent investigation of Mr. Johns's history would have yielded a powerful case in mitigation.

B. Mr. Johns has never had a judicial hearing on trial counsel's ineffectiveness for failing to investigate and present these facts.

C. In the absence of competent representation at trial, the State of Missouri cannot be confident that Stephen Johns is a person who can be executed consistently with the Constitution and the values of its people.

IV. Executing Stephen Johns after imprisoning him nearly twenty years would be a disproportionate double punishment, sweeping beyond the purposes the United States Supreme Court held to justify the continued use of the death penalty.

A. The federal courts took nearly eleven years to process Mr. Johns's habeas corpus petition, which is part of the checks and balances we rely on to prevent the execution of the innocent and of other people who are not the "worst of the worst" offenders.

B. Mr. Johns is without fault for the delay in processing his case, because even the Attorney General's Office has not contended that he has filed frivolous, dilatory pleadings.

V. Mr. Johns deserves additional attention in executive clemency because the Eighth Circuit misapplied the Antiterrorism and Effective Death Penalty Act to limit the *points* Mr. Johns could litigate on appeal to the *issues* the certificate-granting court included in the certificate, as the Eighth Circuit did to Mr. Johns's prejudice.

A. The 1996 amendments to the statute on appeals from denials of federal habeas corpus did not authorize federal courts to limit the points on appeal to the issues included in the "certificate of appealability."

B. The Eighth Circuit's limitation of Mr. Johns's appeal to the issues it included in its certificate of appealability prevented him from briefing and arguing a point on which the Supreme Court of the United States resolved a conflict among the circuits against the Eighth Circuit and in favor of the position Mr. Johns had taken in the district court and in his application for certificate of appealability.

C. Like the Missouri Supreme Court's failure to correct the error it made in Mr. Johns's case even after it recognized it, the Eighth Circuit's refusal to allow him to brief and argue a point that the United States Supreme Court found meritorious in another person's case shows that one cannot rely on the courts' denial of relief in deciding whether Mr. Johns should be

executed.

Conclusion and Signatures

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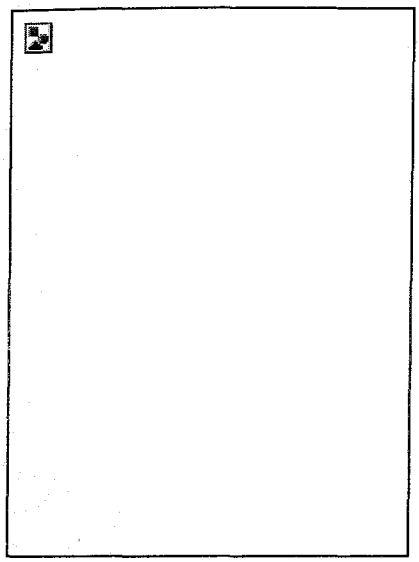
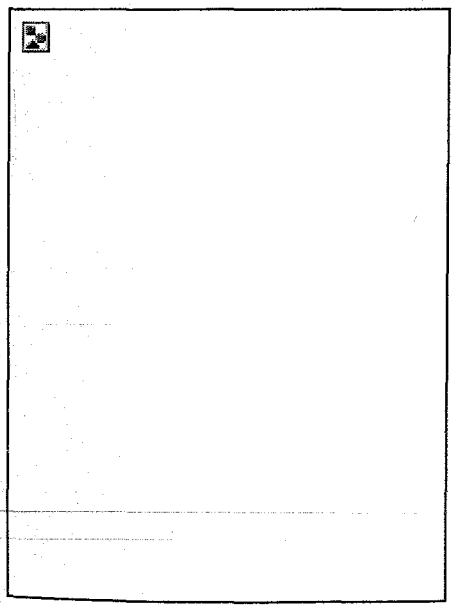
Statement of the Case

The Applicant

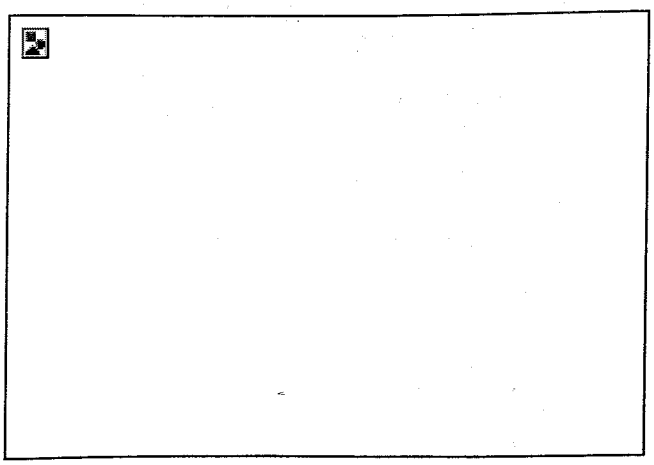
Stephen Johns was the second child born to John Johns and Margie Johns. As she explains in her affidavit at pages 222-29 of the appendix to this application, Margie grew up on a farm in Pulaski County, Missouri. She moved to St. Louis and married John. John came from a poor family in north St. Louis. He was abused as a child. He joined the CCC during the New Deal and lied about his age to get into the Army. He became a career Army military policeman.



Because of John's military career, his family became transients. Steve did not spend more than two years in a row at any school, and sometimes was switched from one school to another in the same academic year. When his father was based in Germany, his family went with him: even during this period, the family moved from Stuttgartt to Ulm. When the Army moved John around within the United States, sometimes the family went with him and lived on Army bases; sometimes they lived on Margie's father's farm at Crocker, Missouri, near Waynesville.



Just as John took his family with him to Army bases, he brought an ultramilitaristic persona from the base home with him. He expected Steve and his elder brother Mike to act like little soldiers, bending their will to the drill instructor or MP. He had no patience with children. For him they were to be seen and not heard. Mike more or less adjusted to this regimen; Steve generally did not. John was psychologically abusive toward him, and backed up the psychological abuse with corporal punishment. John took things out on Steve regardless who was responsible. Thus, Steve oscillated between having no father in the home and having one who treated him harshly and arbitrarily.

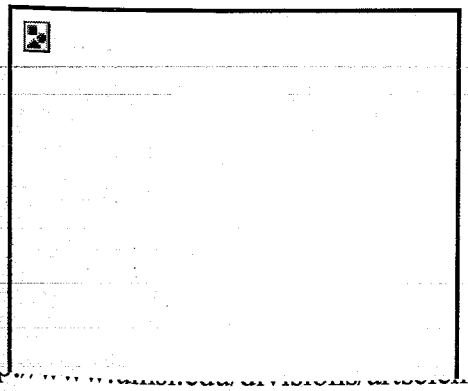


John's and Margie's eldest child, Michael, was born healthy, and lives in Jefferson County. Their youngest, Phillip, was born four years after Steve. He had multiple birth defects. He was deaf, and had to use a colostomy bag. At least one physician said he had brain damage. For most of his life Phillip lived at home and required laborious care. He was an embarrassment to John. In the early 1960's, when John was based at Fort Leonard Wood, Margie moved with the children to Fulton, so that Phillip could attend the School for the Deaf.

For fifteen years, the physicians told Steve's mother that Phillip had only a year to live. He died in his twenties.

Steve, too, was born with a debilitating condition, pyloric stenosis, and almost died of it. As a newborn he was losing weight rather than growing. All the milk he took in he would spurt out with great force. His mother took him to a pediatrician, who put him in St. John's Hospital in St. Louis, which at the time was on Euclid.

The physician told Margie that Steve had to lie still, and she could not pick him up. Even after he was released from the hospital, she was under doctor's orders not to pick Steve up and hold him. This withdrawal of human contact lasted several months after his birth. Today pyloric stenosis is treated by surgery; when Steve was a newborn, at least the physician to whom Margie took him did not know what to do. From his birth to his recovery, the newborn Steve was malnourished. After the pyloric stenosis abated, Steve became obese. He has felt self-conscious about his weight throughout his life.



While the Johns family was at Fort McPherson in California, Steve suffered a severe blow to the head at the age of three while playing with other children on the base. When he was sixteen and living in Fulton, he was in an automobile accident with a friend; Steve's head went through the windshield.

Steve was rarely a successful student. He had a short attention span. He had a hard time learning to read. Once he had overcome this hurdle, he became an avid reader. His problems were not intellectual but social and psychological: today they would be treated with medication and counseling; in the 1950's they were the object of blame and ostracism. One year Steve's family sent him to a private school on Lindell Boulevard that is no longer in existence. There were only about fifteen students, and five or six teachers. Steve thrived in this environment. His family could not afford to keep him there, and he was forced to leave.

One thing that Steve did to attempt to please his father was play football. He had played both offense and defense at Southwest High School in St. Louis. When Margie moved the children to Fulton, John contacted the football coach there and puffed Steve's ability. Shortly thereafter Steve dropped out of school. Margie told John that their marriage was not working, and they got a divorce.

John got Steve a job at a non-commissioned officers' club at Fort Leonard Wood, and Steve moved in with his father. Steve's next major move was to a Job Corps camp in Pleasanton, California. Steve's mother had high hopes for the Job Corps, which was then a new program. She hoped it would turn Steve's fortunes around by training him in a practical skill and getting him a steady job, but she later learned that the staff were trying to teach him to write poetry. This move was one more step in a long train of dislocations—more serious than most, in that Steve had no family at all with him in the Job Corps.

During Steve's stay in California in the 1960's, a girl died of a heroin overdose while Steve was dating her. Steve himself had a serious motorcycle accident riding to Las Vegas. He was using the wind to keep him upright while making a turn; the wind quit, and the motorcycle fell over and slid for about 500 feet. He tumbled and rolled down an asphalt road. He was not wearing a helmet, suffered head injuries yet again, and lost consciousness. Someone picked him up and took him on to Las Vegas, where he went to the first physician whose office they saw. This physician examined him and told him there were a lot of things that could be wrong, but he could not say

what was wrong on the basis of his examination. He advised Steve to go a hospital and get checked out thoroughly. Steve could not afford to do so.

After his Job Corps period, Steve returned to Missouri. He lived with his mother most of the time. When he was employed, he would get an apartment on his own or help pay for a larger dwelling for his mother and himself; he would move in with his mother when he was out of work. Steve's employment history included many changes of employment, but no pattern of failure to work. Indeed, the only criminal conduct on his record at the time of the offenses for which he is now imprisoned was for working as a clerk in an adult bookstore. Such a relatively clear record is somewhat unusual for a death row inmate and would have been a major factor in an effective penalty phase.

Steve's serious weight problem had grave and unforeseen consequences. About five years before the murder for which he is under sentence of death, Steve sought medical help for his weight problem. A physician in Florissant prescribed an amphetamine. Steve began taking this medication as prescribed. He noticed that it helped his mood—combating his chronic depression, which was part of what he now believes to have been bipolar disorder. As the effect of this drug began to diminish because his system developed a tolerance to it, he began taking more than the physician prescribed. Eventually he began buying it illegally.

Steve began to experiment with illegal drugs, mostly other amphetamines. He was not a social drinker, but would sometimes spend the day drinking while he was between jobs. He was not given to partying with large groups, but would go to bars with one or two other people. While he was on amphetamines, he could drink twenty screwdrivers a night and not feel impaired.

During this five-year period he came to be acquainted with the individuals who ultimately testified that he was involved in the gas station robbery and murder which resulted in his only incarceration. These included Linda Klund. Steve met her when she was fifteen. She lived with her mother above a bar near one of the places Steve had lived, and hung out at the bar. By this time Steve was about thirty. At first he befriended her out of sympathy that she was in this environment; at the end of the period there was a sexual relationship between them. Klund's best friend was

Patricia Gregory, who dated David Smith. Smith testified that at some tavern, sometime in the past, Steve had said he "never left any witnesses." Smith also testified he believed Steve had stolen his car, and that he blamed Steve for his estrangement from Gregory.

They also included Al Keener, the only witness who said Steve said he had shot the gas station attendant. Steve knew that Keener was a drug addict who committed burglaries to support his habit. He nonetheless hung out with him at bars.

On one occasion Keener was playing pool with one of a group of three other men on a bet for five dollars. Steve was sitting on a barstool, drinking and watching the game. Keener lost the game. When the other men found that Keener did not have the five dollars, there was a fight. One of the other men knew that Steve was with Keener, and launched a preemptive strike on Steve. The man held a pool ball in his hand and struck Steve in the eye with it, knocking him unconscious. This was the third or fourth time in Steve's life that he had received trauma to the head severe enough to render him unconscious.

When Steve recovered consciousness, he saw that the three men had Keener cornered. In this neighborhood, no one called the police in situations like this. Though outnumbered, Steve went to Keener's rescue, sustaining yet another blow to the back of the head—this time with a truncheon. Eventually the three other men withdrew.

Even while Steve associated a disreputable group of people—who later served as the prosecution's witnesses in his trial—he was a loyal son to both of his parents. After the divorce, John had married a woman from Arkansas, Betty, with five children of her own. John and Betty had two more children between them, one of whom, like Phillip, was deaf. John retired from the Army and mellowed with age, and Steve accepted Betty and these children as part of his family. From time to time Steve would stay with them in Florissant and take care of his deaf stepbrother.

At Steve's trial, witness Smith testified to Steve's absence from the bars Smith frequented for days at a time. These absences were periods of time he spent with his father, in one case caring for John's children, including his deaf stepbrother, while Betty was in the hospital.

The Judicial Proceedings

Stephen Johns has been incarcerated under a sentence of death for nearly eighteen years. He was convicted of capital murder on October 22, 1982, in the Circuit Court of the City of St. Louis for a shooting that occurred in February of that year. The State of Missouri had charged that one Robert Wishon and Mr. Johns had held up a gasoline station, and that one of them had killed the attendant, Donald Voepel, Jr. Mr. Johns has steadfastly maintained his innocence of the crime and took the stand in his own defense at trial.

There was no eyewitness testimony to the murder. Wishon pleaded guilty to second-degree murder, and did not testify. The principal witness against Mr. Johns was Albert Keener. He testified that Mr. Johns told him he shot the attendant three times in the head. Linda Klund testified that she had been the driver for the robbery. At page 372 of the trial transcript, Klund testified that on the evening of the robbery she had seen Mr. Johns and Wishon handle a small handgun; that Mr. Johns had the gun before the robbery; that Wishon passed the gun *back* to Mr. Johns *after* the robbery; and that Mr. Johns passed her the gun so that he would not have it on him when he was arrested. This is a significant point. While the law often draws no moral line between an accomplice to a crime and a person who actually commits a killing, most reasonable people would find a qualitative difference between the two. This distinction is why the jury's instruction as to whether Mr. Johns deliberated before assisting in the killing is more than simply a technical defense of his lawyers.

David Smith testified that "[s]ometime in [a] tavern [Mr. Johns] said he never left any witnesses." On crossexamination, Smith admitted that he was jealous of Mr. Johns and considered him responsible for Smith's girlfriend breaking up with him. Smith also admitted that he believed Mr. Johns had stolen a car from him.

Mr. Johns admitted having purchased some bullets the day of the robbery, as a prosecution witness also testified, but said they were for Wishon. His testimony was not inconsistent with the rest of the evidence on this point. Mr. Johns and Virginia Jones (the owner of a bar he patronized) testified that he was elsewhere at the time of the robbery. While this evidence was significant, Mr. Johns's soon to be disbarred attorney apparently made little use of it in the end.

to a misdemeanor conviction for working as a clerk in a store that sold pornography—and that he had a "stable employment history."

In a hearing on the motion for new trial held December 13, 1982, Detective Ronald Skaggs of the St. Louis Police Department testified that the day after the shooting, three men from Onyx Oil Company came to the Homicide Division of the Police Department to discuss offering a reward. (App. 114.) Detective Skaggs testified that "Al Kenner" [*sic*] asked him "about the reward when we went to apply for the warrant . . . the day after the arrest." Sergeant Timothy Cunningham had arrested Keener in order to make it appear that he was a suspect rather than a prosecution witness; Keener gave Cunningham "information" about Mr. Johns. (App. 115-16.) Skaggs testified that Keener had asked about a reward before giving his statement, and Skaggs he told him he would not get it unless Mr. Johns were convicted. (App. 116-17.)

The prosecutor testified that he had read about the reward in a newspaper, but did not disclose any of the foregoing facts to defense counsel before or during trial. The prosecutor testified that he had not been assigned to the case at the time he had first read about the reward, and did not remember having read about it until "the testimony of the incident" jogged his memory. (App. 104 & 108.)

On January 7, 1983, the trial judge followed the jury's verdict of death. The same day, Mr. Johns filed a timely notice of appeal of his conviction and sentence to the Missouri Supreme Court. The parties had the direct appeal briefed on April 19, 1984. They argued this appeal on May 1, 1984. The Missouri Supreme Court affirmed the conviction and sentence on October 9, 1984.[7] (App. 126.) Mr. Johns filed a timely motion for rehearing on October 17, 1984, which the state supreme court overruled on November 20. Mr. Johns then filed a timely petition for certiorari in the Supreme Court, which it denied on March 4, 1985.[8]

In order to present his claims of ineffective assistance of trial counsel in the manner that Missouri law prescribes, Mr. Johns had to litigate a motion for post-conviction relief under then-applicable Mo. S. Ct. R. 27.26. The trial court denied relief, and the Missouri Court of Appeals, Eastern District, affirmed its judgment on November 3, 1987; the Missouri Supreme Court denied

Mr. Johns's application to transfer on January 20, 1988.[9] (App. 138-45.) Mr. Johns timely sought a writ of certiorari from the Supreme Court to review the state appellate court's decision, but it denied the petition on June 6, 1988.[10]

After exhausting his state remedies as required by the central statute defining federal habeas corpus,[11] Mr. Johns filed a pro se application for habeas corpus relief on June 23, 1988, in the United States District Court for the Eastern District of Missouri. The district court granted a stay of execution the next day, and appointed counsel for Mr. Johns on August 18, 1988. Both the Missouri Attorney General's Office and Mr. Johns completed their initial briefing by January 1989.

The following month, Mr. Johns filed a motion for evidentiary hearing. Over two years later, the Hon. Carol E. Jackson, then a United States Magistrate Judge (now a District Judge) scheduled a hearing.[12]

On July 2, 1992, the Attorney General's Office lodged in the Eighth Circuit a "Motion for Transfer from the United States District Court, Eastern District of Missouri, to the United States Court of Appeals for the Eighth Circuit." On July 14, 1992, Mr. Johns replied, *agreeing* that "it [was] difficult to defend the delay highlighted by the State of Missouri in its pending motion" (App. 160), but objecting to the *form of remedy* the Attorney General's Office had sought—arguing that the appropriate remedy was mandamus. (App. 163-64.) On July 31, 1992, the Eighth Circuit denied the Attorney General's Office's motion for transfer, and, considering it as a petition for a writ of mandamus, directed the district court to respond to the Attorney General's Office's statements regarding the delay in the proceedings. (App. 169.) On August 10, 1992, the district judge (the Hon. Edward L. Filippine) submitted his response. (App. 170-71.) The very next day, the district judge vacated the part of the magistrate judge's order that had granted Mr. Johns an evidentiary hearing. (App. 220.) On September 10, 1992, the Eighth Circuit denied a writ of mandamus. (App. 175.)

On November 5, 1992, the Attorney General's Office filed a "Motion to Recall the Mandate," seeking a writ of mandamus to expedite the district court's handling of the proceedings. Mr. Johns opposed this motion because the district judge had withdrawn the reference to the

magistrate judge substantially simultaneously with the Attorney General's Office's filing of his "Motion to Recall the Mandate." On November 17, 1992, the Eighth Circuit denied the Attorney General's Office's motion.

In November 1993 Mr. Johns filed a motion to recall the mandate in the Missouri Supreme Court after that court issued an opinion in another case holding that its decision in Mr. Johns's case had been "clearly overruled," and that *it had "overlooked" legal principles that were established at the time* it decided Mr. Johns's direct appeal. The state supreme court summarily denied the motion on January 25, 1994. Mr. Johns filed a supplemental habeas corpus petition in the district court as a result of the state supreme court's refusal to recall the mandate, asserting that the State had violated his equal protection and due process rights.

On May 15, 1996, the Attorney General's Office filed a petition for writ of mandamus in the Eighth Circuit, again seeking to expedite the proceedings in the district court. (App. 185-200.) Mr. Johns did not file any objection. (App. 201.) On June 21, 1996, a panel of the Eighth Circuit denied the petition. (App. 201.) On July 5, 1996, the Attorney General's Office filed a petition for rehearing with suggestion for rehearing en banc, which the Eighth Circuit denied on August 8, 1996. (App. 201.)

On July 10, 1996—more than seven years after the matter had been initially briefed and submitted—the district court denied relief. (App. 21-96.) The district court echoed the earlier opinion of the Missouri Supreme Court that a rational trier of fact could have found beyond a reasonable doubt that petitioner's alleged accomplice could have been the one who actually committed the murder in question. The district court also held that although current jury instructions relating to accomplice liability "are clearer" than the instruction given in petitioner's case, the latter did not in its view violate the Due Process Clause. Finally, the court also held that although the prosecution had knowledge that a reward had been offered for information on the case, the prosecution did not have to reveal that information to the defense at trial, because the information had been published in one of the local newspapers. Mr. Johns filed a timely motion to alter or amend judgment, which the district court denied on January 31, 1997.

On February 28, 1997, Mr. Johns filed a timely notice of appeal from the district court's denial of relief, denial of an evidentiary hearing, and denial of his motion to alter or amend.

On April 1, 1997, counsel for Mr. Johns filed a motion for certificate of appealability (COA) under the Antiterrorism & Effective Death Penalty Act of 1996 (AEDPA).[13] Mr. Johns argued that AEDPA does not limit the *points on appeal* to the *issues* which the granting tribunal includes in its certificate. Any holding to that effect, he argued, would be a retrospective limiting of a convicted citizen's rights, which Congress *could* have sought to put into the statute, but did not. Instead, Mr. Johns argued that Congress established a threshold showing as a prerequisite to an appeal, not a prerequisite as to each point on appeal.

On September 19, 1997, the Eighth Circuit issued an order appointing counsel and granting a COA limited to only four out of the seven issues Mr. Johns presented as reasons for allowing him to have an appeal. (App. 97-98.) Mr. Johns challenged the application of AEDPA's appeal-limiting provisions to him, when he had filed his petition before the effective date. The Eighth Circuit rejected this challenge on the basis of *Tiedeman v. Benson*.[14] (App. 18-20.)[15] Mr. Johns also pleaded that the amended 28 U.S.C. § 2253 did not limit the appeal to the issues in the certificate.

On January 26, 1989, Mr. Johns tendered a petition for an interlocutory writ of certiorari from the Supreme Court on both of his AEDPA grievances.[16] The Attorney General's Office answered, in part, by pleading that Mr. Johns had not met the special standard for a writ of certiorari before judgment in the court whose decision is to be reviewed.[17] On March 30, 1998, the Supreme Court denied the petition for an interlocutory writ.[18]

Mr. Johns filed a corrected brief reflecting the denial of the petition for an interlocutory writ of certiorari, in order to preserve his two AEDPA grievances for further review. The Eighth Circuit heard oral argument on September 22, 1998, but a member of the panel—a Clinton appointee—died, and the Eighth Circuit had the appeal argued again on April 19, 1999. (App. 1 & n.2.)

On February 8, 2000, the panel announced its decision affirming the district court's denial of relief. (App. 1-13.) Judge Richard S. Arnold dissented on the basis that the Missouri Supreme

Court's failure to correct its admitted error in this petitioner's case was of constitutional proportions since it had overruled its decision in his case by name. (App. 13-17.) Mr. Johns sought review by the full Eighth Circuit, but it denied rehearing, with Judge Arnold writing to indicate that he was "no longer confident of the basis of [his] dissenting opinion." (App. 97-99.)

Mr. Johns filed a petition for writ of certiorari from the Supreme Court of the United States. Counsel had to seek an extension of time as authorized by 28 U.S.C. § 2101(c) because someone had stolen the computer containing counsel's draft of the petition, and state officials had interfered with one of Mr. Johns's counsel's conferences with Mr. Johns and all of his other clients at the Potosi Correctional Center. (The interference did not cease until counsel filed the motion for extension of time with the Supreme Court.) Before the Supreme Court decided to intervene in the Florida presidential recount, it had scheduled Mr. Johns's petition for conference on December 1, 2000. It went ahead and conferenced on this capital case and three others from Missouri on the same day it heard the first oral argument in the Florida recount cases.[19] It denied certiorari in each of the four capital cases. In announced its decision on December 4, 2000. (App. 221.) The State of Missouri has filed a motion to set execution date.

Reasons for Exercising Clemency

I. The trial court instructed the jury that it could find Mr. Johns guilty of capital murder whether he *or* the other man accused of the offense had *deliberated* on causing the death of the gas station attendant. This instruction was unlawful at the time of Mr. Johns's trial and appeal, as the Missouri Supreme Court later recognized and overruled its decision in Mr. Johns's case *by name*. When Mr. Johns brought this decision to the attention of the Missouri Supreme Court, it left the unlawful judgment against him in place.

In his state court trial for capital murder, the prosecution charged Mr. Johns with "acting with another"—Robert Shawn Wishon—to kill a gasoline station attendant in the course of a robbery. The judge instructed the jury that it could find Mr. Johns guilty if it found against *either* Mr. Johns *or* Wishon on four elements of the offense, one of which was *deliberation*: that *either* of the men "considered taking the life of [the attendant], and reflected upon this matter coolly and fully before doing so." The Missouri Supreme Court affirmed Mr. Johns's conviction and death sentence even though the verdict-directing instruction did not require the prosecution to prove beyond a reasonable doubt (or, indeed, *at all*) that Mr. Johns deliberated on taking the life of the victim. Eventually the Missouri Supreme Court overruled the decision in Mr. Johns's case *by name*, and held that verdict-directing instructions in murder cases in which the defendant can receive the death penalty must require the jury to ascribe deliberation to the defendant himself or herself, as distinguished from finding that either the defendant or another deliberated on the killing. That court specifically based its decision on established caselaw decided prior to its original decision in Mr. Johns's direct appeal, thus admitting that it had failed to follow its own precedent with regard to this appellant.

When Mr. Johns sought to have the Missouri Supreme Court recall its mandate to apply this correction to his case, it denied the motion without giving any reason whatsoever. Thus, one person convicted of capital or first-degree murder received a new trial, and Mr. Johns was left to die as a result of a verdict-directing instruction that was unconstitutional the day it was given and the day the Missouri Supreme Court affirmed his conviction. This arbitrary treatment violated Mr. Johns's right to governmental regularity under the Due Process and Equal Protection Clauses of the

Fourteenth Amendment—which right takes on special force when the treatment violates the specific guaranty of the right to trial by jury in the Sixth Amendment and the right to be free from cruel and unusual punishments in the Eighth Amendment.

In allowing this to occur, the judgment of the lower federal courts conflicted with the lines of the United States Supreme Court's decisions (1) forbidding a trial court from relieving the prosecution of its burden of proof to a jury beyond a reasonable doubt, which takes on special force as to the element of mens rea in a capital case, and (2) requiring sovereigns that choose to maintain the death penalty to provide "meaningful appellate review" in capital cases.[20]

In *Apprendi v. New Jersey*,[21] the Supreme Court recently emphasized that the recognition of the principles underlying its requirement of proof of each element of an offense beyond a reasonable doubt "extends down centuries into the common law" and reflects "constitutional protections of surpassing importance" today as well—"'"a profound judgment about the way in which law should be enforced and justice administered."'"[22] In *Apprendi*, the Court held that an accused citizen has a right to trial by jury, applying a standard of proof beyond a reasonable doubt, as to any fact (other than a prior conviction) which increases the maximum punishment for the offense charged. The Court held unconstitutional a state statute that conferred such a finding on the trial judge and specified that it be made by a preponderance of the evidence. Marshalling its prior decisions—and the prior doctrine of other courts and legal scholars—the Supreme Court held that Mr. Apprendi was "indisputedly entitle[d]" to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[23]

The Court emphasized that the Framers feared "that the jury right could be lost not only to gross denial, but by erosion."[24] It recognized that transfer of the finding of a mental state from the jurors to judges would do just that: "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"[25] For Mr. Apprendi this determination made the difference in sentencing exposure between ten years and twenty years in prison; for Mr. Johns, the difference is literally between life and death. Neither the Sixth Amendment nor the Eighth will suffer such erosion of the right to jury trial and to a jury finding of

guilt beyond a reasonable doubt.

To a federal court reading Mr. Johns's supplemental petition in 1989, the constitutional infirmities in convicting *A* of a capital offense on the basis of *B*'s mental state were obvious. If there were any question how obvious these federal constitutional violations were at the time of the proceedings in the lower courts, *the Supreme Court* has answered that question in *Apprendi*—much of which documents the long lineage of the guaranties the state courts violated in Mr. Johns's case. Taking away the prosecution's duty to prove *any* essential element of the offense beyond a reasonable doubt as to *this* applicant violated the Sixth and Fourteenth Amendment's guaranty of the right to due process of law and trial by jury as the Supreme Court recognized in *Winship* and re-articulated in *Sandstrom v. Montana*,[26] *Patterson v. New York*,[27] and *Mullaney v. Wilbur*.[28] Taking away the prosecution's duty to prove *this* element of capital murder also violated the Eighth and Fourteenth Amendment's guaranty of individualized consideration in capital sentencing reflected in, for example, *Lockett v. Ohio*[29] and *Enmund v. Florida*,[30] and their substantive requirement of a high level of subjective criminal intent (mens rea) set forth in *Gregg v. Georgia,*[31] the central decision at once authorizing and limiting the practice of capital punishment in the United States since 1976. Taken together, the intervening constitutional decisions have made these infirmities no less obvious.

To the contrary, in *State v. O'Brien*,[32] the Missouri Supreme Court has recognized the inadequacy of the verdict-director that the trial court gave in Mr. Johns's trial.[33] Yet it has refused to correct this inadequacy in Mr. Johns's case. That failure violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the underlying failure to instruct violated the Sixth, Eighth, and Fourteenth Amendments.

In *Village of Willowbrook v. Olech*,[34] the Supreme Court has construed the Equal Protection Clause of the Fourteenth Amendment "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." The Eighth and Fourteenth Amendments require that a sovereign behave with strict regularity when it sentences a

citizen to death.[35] In *O'Brien*, the Missouri Supreme Court recognized that its decision affirming Mr. Johns's sentence of death was wrong the day it was issued—because it allowed Mr. Johns to be convicted without attributing mens rea to him, and allowed the jury to convict him based on his alleged confederate's mens rea—but it let the conviction and death sentence stand. This failure to follow the law cannot be depreciated as "harmless error." It is a glaring case of the arbitrary and capricious treatment of accused citizens that the Supreme Court has warned American capital jurisdictions it will not tolerate. A citizen should have at least as much right to relief from government officials' arbitrary application of rules when his life is at stake that he would have over an easement or a building permit.

A. Mr. Johns contested the element of the offense affected by the constitutional error, and the trial court did not omit it but affirmatively told the jury to find him guilty of a capital offense on the basis of someone else's mens rea.

Neder v. United States[36] does not support a denial of relief. The constitutional violation was substantially graver and more systemic here. The element of the offense on which the state trial court improperly instructed the jury was contested. *Apprendi* stands in the way of any suggestion that a state or federal appellate court could "dry-lab" the trial as to this critical element.

The Eighth Circuit cites *Roberts v. Delo*.[37] Although the *Roberts* opinion contains the *words* for which the Attorney General's Office cites it, the actual *decision* of the Eighth Circuit supports Mr. Johns*'s* position. A comparison of the two instructions makes the difference clear:

Johns	*Roberts*
Fourth, that the defendant or Robert Wishon considered taking the life of Donald Voepel, Jr., and reflected upon this matter coolly and fully before doing so,	Third [*sic*] that certain persons believed to be Robert Driscoll and Rodney Carr considered taking the life of Tom Jackson and reflected upon this matter coolly and fully before doing so,
then you are instructed that the offense of capital murder has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:	then you are instructed that the offense of Capital Murder has been occurred and if you further find and believe from the evidence beyond a reasonable doubt,
Fifth, that with the purpose of	Fifth, that with the purpose of

promoting or furthering the commission of capital murder, the defendant acted together with or encouraged Robert Wishon in committing that offense

then you will find the defendant guilty of capital murder.

promoting or furthering the death of Tom Jackson, the defendant acted together with or aided such other persons believed to be Rodney Carr or Robert Driscoll in causing the death of Tom Jackson *and reflected upon this matter coolly and fully*,

then you will find the defendant guilty of Capital Murder.[38]

In *Roberts*, the state trial court instructed the jury that it could find the defendant guilty of capital murder *only* if it found that Roberts had "acted together with or aided . . . [the others accused in the murder] in causing the death of [the victim] *and reflected upon this matter coolly and fully*."[39] In one set of instructions, the jury can find the defendant guilty of capital murder without finding that he deliberated on *anything*; in the second, the jury cannot find the defendant guilty of this offense without having first found that he *deliberated on* acting together with or encouraging others in causing the death of the victim. Stephen Johns received no such consideration.

The instruction the trial court gave in *Roberts* reflected the minimum correction *Enmund* required in the jury instructions unless, of course, a subsequent tribunal could constitutionally supply the missing finding as the Supreme Court's pre-*Apprendi* decision in *Cabana v. Bullock* appears to allow in some instances. In order to find Roberts guilty of capital murder—and proceed to the penalty phase—the jury had to find that Roberts had deliberated over the killing for which the jury was to deliberate over killing him. Although Mr. Johns does not suggest that any language like the emphasized clause in *Roberts* could "save" an affirmative duplicitous instruction as in his own case, *Roberts* shows what an attempt to do so would look like. There was none here.

Assuming the jury disbelieved Mr. Johns's alibi evidence, and believed that he was there when the murder was committed, the trial judge's duplicitous instruction was *worse* than the roll of the dice: it *loaded* the dice, because if Mr. Johns and Wishon were both present when the attendant

was killed—which the jury appears to have believed—and one of them killed him in the course of the robbery, the odds are almost inescapable that the jury would find *one* of the alleged perpetrators had deliberated on killing him. But that was all they *had* to find to convict Mr. Johns of capital murder, *even if* they understood Klund's testimony to be that Wishon had the gun after the robbery, and inferred that he had been the deliberator and/or shooter.[40]

It is hard to imagine a more structural error than to take away an accused citizen's right to a jury trial on the most important element of the offense, one foreshadowing the difference between life and death, and to confer it on an appellate court of a different jurisdiction to be rendered eighteen years later. In *Apprendi*, the Supreme Court's opinion gives no hint that anyone but a jury could supply the finding New Jersey had committed to the trial judge who had at least heard the evidence himself—whether this substitution of trier could be considered as "harmless error" review or as a new application of *Cabana v. Bullock*.

In *Roberts*, moreover, the Missouri Supreme Court actually engaged in a finding of fact that the defendant, Roy Roberts, had played a "continuing and intimate role in th[e] chain of events" in which several prisoners attacked and fatally stabbed a prison guard.[41] Unlike the Missouri Supreme Court or the district court in Stephen Johns's case, the Eighth Circuit made affirmative findings that "[t]he evidence in [Roberts's] case satisfied the *Enmund* standard," and that Roy Roberts "had the requisite intent for imposition of a death sentence."[42] It made these findings itself, and did not simply hold as a matter of law that there was sufficient evidence to support another tribunal's findings to the same effect.[43] In light of the Supreme Court's decision in *Apprendi*, moreover, it is at best questionable whether a court can "cure" a trial-court error by making a finding on a cold record that a fact exists which would expose the accused citizen to a greater or different punishment than he or she would face absent such a finding.

The Eighth Circuit relied on the Supreme Court's decision in *Neder v. United States*,[44] for the proposition that omission of an element from an instruction is not automatically reversible, but is subject to "harmless error" analysis. (App. 6.) But in constrast to Mr. Neder's failure to put the omitted element in issue by presenting evidence on it, Mr. Johns took the stand and *contested* the

element on which Mr. Johns has shown that the verdict-directing instruction was duplicitous. *Apprendi* makes clear that a scheme which allows a judge to make a finding that elevates an accused citizen's punishment may avoid constitutional condemnation in a particular case when the accused citizen *admits* the facts a jury would otherwise need to have found.[45] That occurred in *Neder*; it did not occur here.

Mr. Johns's trial judge did not just omit the element of deliberation: she instructed the jury that it had to find Mr. Johns guilty if *someone else* had deliberated on causing the death of the attendant, in a situation where the prosecution's evidence was that there were two perpetrators in the gas station at the time of the shooting. The jury had to find Mr. Johns guilty whether it found that *he* had deliberated (or was guilty on any of the other elements, for that matter) or *Wishon* had deliberated.

These facts distinguish the case from *Neder*: in light of these facts, the duplicitous instruction on this contested element *was* a structural error notwithstanding *Neder*. Telling the jury that it could find Mr. Johns guilty of a capital offense on the basis of his alleged co-defendant's deliberation is not like omitting an element, but is actually one way of instructing the jurors that they could convict a person on less than proof beyond a reasonable doubt: convicting *A* on the basis of *either A's or B's* mens rea is an aggravated case of convicting a person on the basis of less than proof beyond a reasonable doubt.

Whereas the facts in *Neder* were akin having a finger cut off, the facts in *Sullivan v. Louisiana*,[46] and in this case are like having cancer or poison in a finger: the cancer or the poison does not simply subtract from the hand or the body, but destroys or perverts the one or the other entirely. Expressly instructing a jury that it must find a person guilty of a capital offense without finding that *that person* had the requisite mens rea, but expressly instructing the jury to find him guilty on the basis of another person's mens rea, relieves the prosecution of the burden of proving the defendant guilty beyond a reasonable doubt on the most critical element of the offense.

These facts are also distinguishable from those in *California v. Roy*.[47] In *Roy*, the trial court had instructed the jury it could find the defendant guilty if it found that "Roy, 'with knowledge of'

the confederate's 'unlawful purpose' (robbery), had helped the confederate, i.e., had 'aid[ed],' 'promote[d],' 'encourage[d],' or 'instigate[d]' by 'act or advice . . . the commission of' the confederate's crime." In *Roy*, the trial court did not reach out to instruct the jury it could find Roy guilty if *either* he *or* the confederate had the mens rea it had required in some other part of the instruction. The error in this petitioner's instruction was affirmative rather than negative, going out of the trial court's way to allow the prosecution to convict Mr. Johns in the absence of proof beyond a reasonable doubt of every element of the offense.

Thus, "harmless error" analysis does not apply. The trial court expressly relieved the prosecution of the burden of proving beyond a reasonable doubt—or, for that matter, proving at all—that Mr. Johns deliberated on causing the death of the decedent. This was more than an erosion of Mr. Johns's rights; it was an abridgement.

B. The "harmless error" analysis of the Eighth Circuit fails to apply *Chapman v. California*, because the Attorney General's Office did not prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" as to guilt or punishment or both.

When the Eighth Circuit undertook to engage in "harmless error" review, it claimed to be applying the standard of *Chapman v. California*.[48] (App. 6.) Under *Chapman*, the prosecution must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." In this portion of the opinion of the Eighth Circuit, the voice is the voice of Jacob, but the hand is the hand of Esau.

It once more misconstrued the evidence concerning the "never left any witnesses" allegation. There was no evidence that the alleged statement was made at or about the time the robbery would have been planned. David Smith's exact testimony was: "Sometime in another tavern [Mr. Johns] said he never left any witnesses." The jury did not have before it the "evidence" on the basis of which the Eighth Circuit leads off its "harmless error" analysis; consequently, it could hardly have been satisfied of this element on the basis of it. In addition, Smith testified he was jealous of Mr. Johns and that Mr. Johns had contributed to the witness's losing his girlfriend; Smith testified he believed Mr. Johns had stolen a car from him.

The finding of no "harmless error" by the Eighth Circuit shows how the federal constitutional violations in this case run together: Keener was the witness who was seeking a reward for giving evidence leading to the conviction of the perpetrator of the robbery, which fact the prosecution did not disclose to the defense, with the consequence that the jury was never able to discount Keener's testimony in light of his pecuniary motive to fabricate. Rather that taking into account the impeaching evidence and the prosecution's failure to disclose the most damning part of it, the Eighth Circuit characterizes Keener as Mr. Johns's "friend." Keener's testimony hardly serves as a basis for there having been no "harmless error" when he was impeached—as Judge Arnold observed in oral argument—"six ways from Sunday" even in light of the prosecution's failure to disclose the "reward" evidence. If the impeachment *without* the undisclosed reward evidence was powerful enough to render the State's failure to disclose this pecuniary motive to fabricate less than "material," then Keener's testimony is of doubtful believability now—at least doubtful enough not to make the trial court's error "harmless beyond a reasonable doubt."[49]

In making its finding of "overwhelming evidence" of deliberation, the Eighth Circuit relies on the proposition that Mr. Johns was "present when the murder occurred." The latter finding depends on the testimony of Albert Keener, tainted as it was by (1) the information the Eighth Circuit found to weaken his credibility so much that the State's failure to disclose his financial incentive for convicting Mr. Johns wasn't "material," (2) the fact of the financial incentive itself, now that we know about it, and (3) the prosecutor's inexplicable failure to disclose this fact to the defense once the trial testimony had "jogged" his memory. Keener's testimony was disputed, in that Mr. Johns presented an alibi—both in his own testimony and in that of Virginia Jones. This case is therefore distinguishable from *Neder*. And even if one believed he were present at the scene of the crime, mere presence does not translate into the requisite element of deliberation, or else trial courts might as well *not* instruct on it, or , as here, allow jurors to find that somone else's deliberation is will "do" to put an accused citizen on Death Row.

On reading the opinion of the Eighth Circuit, one is left with a feeling of the panel's revulsion at the crime, a sense that Mr. Johns must have been involved in it somehow, and that

therefore he has no room to complain that the law was not applied to him equally. The short answer to this means of resolving his federal constitutional grievances is that if the law only protects people who refrain from associating with the Albert Keeners, Linda Klunds, David Smiths, and Robert Wishons of this world—if it only protects people who never meet or work with others who will lie under oath about them before a judicial court or a congressional committee—then the law has failed us all, from the bench of the Supreme Court, to the board room of every corporation, to the kitchen table of the humblest home in the land. "And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat?"[50]

If one permits the dilution in this *capital* case of the right to jury trial, to proof beyond a reasonable doubt, and to nonarbitrary appellate review (in those jurisdictions, *i.e.*, everywhere in the Anglo-American legal world, that *provide* appellate review), *no one* will have any right the lower courts or the political branches are bound to respect to *any* of these well-thought-out, time-honored protections of all citizens rightly or wrongly accused of crime. A magistrate sworn to protect and defend the Constitution of the United States cannot condone the execution of Stephen Johns without condoning the effective extermination of the rights the Supreme Court so eloquently upheld in *Apprendi* and in the long line of cases from the Supreme Court and other authorities it cited in *Apprendi*. In this sense, we are all Stephen Johns. This is anything but a case of "harmless error."

C. The Missouri Supreme Court's refusal to grant relief for its admitted constitutional error violated the expectation of governmental regularity common to the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Eighth Circuit acknowledges that "while Johns's habeas petition was pending in the district court the Missouri Supreme Court held that although a homicidal act may be imputed to an accomplice, the mental state of deliberation may not be [and] stated that its decision in *Ervin*[51] had overruled cases, including *Johns* itself, that had employed jury instructions similar to that used in *Johns's case*." It recognized that "[t]he Due Process Clause of the Fourteenth Amendment requires states to apply their laws 'in a manner that avoids the arbitrary and capricious infliction of

the death penalty,'" and that Mr. Johns had argued "the Missouri Supreme Court's denial of his motion to recall the mandate after declaring in *O'Brien* that *Johns* had been overruled by *Ervin* was so arbitrary and capricious as to shock the judicial conscience and violate substantive due process." (App. 7.) The Eighth Circuit did not hold that the Missouri Supreme Court's handling of Mr. Johns's case violated these constitutional guaranties, however, because it held that Mr. Johns would not have been entitled to relief had *Ervin* and *O'Brien* been in force at the time of his direct appeal. In so holding, the Eighth Circuit relied once more on the thrice-tainted testimony of Keener. (App. 7, lines 3-4.) In light of this "evidence" and the evidence that Mr. Johns had purchased ammunition earlier in the day, it held that "even under the instructions required by *Ervin* and *O'Brien* there is *no doubt* that the jury would have reached the same conclusion regarding Johns's guilt." (App. 8 (emphasis supplied), *citing Jones v. United States.*[52])

The Eighth Circuit thus applies "harmless error" analysis of a jury verdict to the behavior of an appellate court. In *Neder*, the Supreme Court held that the omission of an element was "harmless" because the question was undisputed before the *jury*. Like the "harmless error" doctrine generally, the rule of *Neder* originated from error arising *at trial*. In addition, the Eighth Circuit fails to deal with the fact that in Missouri, there is an exception to "harmless error" analysis for instructional errors in situations like this case: "when 'a substantial issue exists regarding a defendant's state of mind,' it is impossible to say the error is harmless beyond a reasonable doubt."[53] Here, Mr. Johns placed his state of mind at issue by testifying. The prosecution's only explicit evidence of the requisite mens rea came from a witness whose credibility was tainted in numerous ways, the most direct of which the prosecution failed to disclose to trial counsel. If the Missouri Supreme Court had applied its own law, it would have automatically reversed Mr. Johns's conviction.

As the Eighth Circuit would apply "harmless error," it would squarely deprive Mr. Johns of *both* a right to jury trial on the most critical element of the offense *and* a right to appellate review commensurate with the gravity of the punishment. *Neder* does not support such dismissive treatment of any element of an offense, and *Gregg* and its progeny will not permit it when the

offense is mens rea in a capital case.

Requiring a jury to make a finding of personal responsibility for deliberation in a capital case is no mere technicality. It is an essential guaranty that the death penalty will be applied only in situations in which our society's conscience will still permit it. The courts have failed to enforce the law in Stephen Johns's case. They have succumbed to the pressures from certain quarters that complain *whenever* a death-row inmate receives relief. They have told us, in *Herrera v. Collins*, that they will not grant relief in every case where a person should not be executed, because we have executive clemency to reach cases they feel they cannot. This is one such case.

II. The prosecution did not disclose to the defense the fact that the principal witness against Mr. Johns was doing so to receive a reward if Mr. Johns was convicted.

The Eighth Circuit held that the fact Keener was giving his testimony in order to obtain a financial reward was favorable to the defense, and that the prosecution had suppressed it. (App. 9.) It denied relief on this claim under *Brady v. Maryland*[54] because it held that this information was not "material." Its decision conflicts with the Supreme Court's decisions defining "materiality" as a "reasonable probability" that the wrongfully withheld evidence would have led to a different result as to either guilt or punishment. When the constitutional error has such a profound impact on the truth-finding process, and the courts will not correct it, one cannot rely on the verdict or the appellate affirmance to justify a conviction or a sentence of death.

A. The prosecution's withholding of the fact that the principal witness against Mr. Johns had a financial incentive to see that he was convicted had a "reasonable probability" of affecting the verdict, either as to guilt or as to punishment.

Having agreed that Mr. Johns had shown what he needed to establish the first two element of a *Brady* claim, as to materiality the Eighth Circuit quoted the standard as follows:

> "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[55]

It added, from one of its own opinions, that "materiality is not established by the mere possibility that the withheld evidence may have influenced the jury."[56] (App. 9.) By its account,

therefore, whether Mr. Johns lives or dies depends on the difference between a "mere possibility" and a "reasonable probability" that knowledge of the reward would have influenced the outcome of his trial.

There were no eyewitnesses to the shooting. Albert Keener was the prosecution's chief witness against Mr. Johns. He testified that Mr. Johns had admitted involvement in the crime at issue. Although there was circumstantial evidence that Mr. Johns shot the attendant, it was only that: the Missouri Supreme Court found "a fair assessment of the evidence supports the conclusion that identical charges could have been brought against both partners had Wishon not pleaded guilty to a lesser offense." (App. 128.) Linda Klund put Mr. Johns near the scene of the crime, but only Keener put his finger behind the trigger.

In light of the importance of this witness, and the obvious relevance of information that he had a pecuniary interest in convicting Mr. Johns, Mr. Johns has shown the requisite materiality. The Eighth Circuit disagreed, in less than a paragraph. (App. 9-10.) Its treatment of this question is riddled with errors of constitutional significance, misapplying the Supreme Court's precedents and setting an incredibly low standard of tolerance for prosecutorial misconduct.

Without Albert Keener, the prosecution had no way of persuading the jury that Mr. Johns was the triggerman—which, absent Keener's testimony, it never did. Linda Klund placed the gun in Wishon's hand coming out of the gas station: she testified he passed it back to Mr. Johns, who passed it to her. The Missouri Supreme Court itself opined that the evidence against Mr. Johns was circumstantial, and identical charges could have been brought against Wishon had he not pleaded guilty to a lesser degree of homicide. (App. 128.)

The "reasonable probability" of a different "result" extends to punishment as well as guilt or innocence.[57] Jurors may be willing to convict on circumstantial evidence, but it is another thing to impose the death penalty on the basis of it. Keener told them what the prosecution needed them to hear—yet his testimony was bought and paid for, and the prosecution hid this fact from the defense. The record does not prove that Keener did not ask about the reward on the day of the shooting, when he posed as a suspect in order to deflect suspicion about his role as an informant.

The Eighth Circuit makes much of the fact that Keener was impeached by other evidence, as if *any* impeachment *at all* is enough to bleach out the stain of a coverup of one of the most direct forms of interest or corruption. The Eighth Circuit dismisses the argument that the additional, concealed, facts about Keener's pecuniary motive to testify against Mr. Johns would have pushed the jurors over the edge.

The impeachment evidence the State didn't hide included the fact that from time to time Keener had used Dilaudid, which he began using as pain medication after he was hit by a truck, but had not used it later than New Year's Day 1982—seven weeks before the robbery. The fact that Keener had used a medication illegally is debatable as bearing on his credibility unless he was under the influence of it—and this influence debilitated his perception or recollection—at the time he said he observed the alleged facts to which he wished to testify.

The fact that Keener had been convicted of grand larceny was of relatively light weight as it came before the jury, because trial counsel allowed Keener to explain that he had not engaged in stealing, but had been "involved with a couple of sailors" who had used department store credit cards unlawfully. The fact that Keener was performing on a plea agreement in an unrelated case, which involved testifying in Mr. Johns's case, was something to which the jurors may well have been inured in light of many prosecutors' inability to restrain themselves from making such offers. [58] Trial counsel allowed Keener to give his side of the offense, such that if the jury believed him, it would think he was only pleading guilty to what he did—not to what the prosecution overcharged him with—such that he was not really getting any "bargain" which would cause him to fabricate. In any event, the charges were in another jurisdiction, and the prosecutor in this case had only intervened to the extent of promising Keener he "would not go to the penitentiary" for a minor property offense for which the normal disposition would be probation in any event. It does not hold a candle to the direct financial incentive he had to see that Mr. Johns was convicted in order to obtain the reward. (App. 116-18 (police told Keener Mr. Johns would have to be "convicted" for him to get a reward).)

As the Supreme Court has made clear in *Williams v. Taylor*,[59] the "reasonable probability"

of a different result is not an outcome-determinative standard: it does not require the accused citizen to show that it was more likely than not that a different result would have occurred but for the violation; it may be satisfied by a lesser showing. *Williams* involves the construction of *Strickland v. Washington*[60] rather than *Brady* and its progeny. But it was from the test of materiality in the latter body of law that the Supreme Court selected the "reasonable probability" test for prejudice in ineffective assistance of counsel cases.[61]

In light of the importance of this witness, and the obvious relevance of information that he had a pecuniary interest in convicting Mr. Johns, Mr. Johns should have received relief. If the sovereign can withhold such information from the defense in a capital case and get away with it because defense counsel managed to come up with some other, less direct, evidence affecting the witness's believability, then there as been a marked departure from the principles the Supreme Court set forth in *Brady*.

B. The Eighth Circuit's refusal to apply *Brady* to this grievance undermines the confidence one can have in the jury's verdict as to either guilt or punishment.

Like the requirement of instructing that the jury must find each element of an offense attributable to an accused citizen in order to find him guilty of it, the *Brady* principle is no mere technicality. It is fundamentally unfair for a prosecutor to put on a man who is being paid to give his testimony, and will get the payment only if the accused citizen is convicted, and not disclose this fact to defense counsel. Violations of the rule as egregious as occurred in this case cause the conviction of innocent people: Mr. Johns has steadfastly maintained that is he one of them. Because the courts have relied on technicalities instead of enforcing simple justice, he calls on the Governor to do so.

III. Trial counsel failed to provide Mr. Johns the effective assistance of counsel when he presented absolutely no evidence in the penalty phase, with the result that the question whether Mr. Johns should receive the death penalty has *never* been subjected to the adversarial testing the Supreme Court of the United States contemplated in authorizing the resumption of the death penalty in 1976.

Mr. Johns's trial counsel put on *absolutely no evidence* whatsoever during the penalty phase

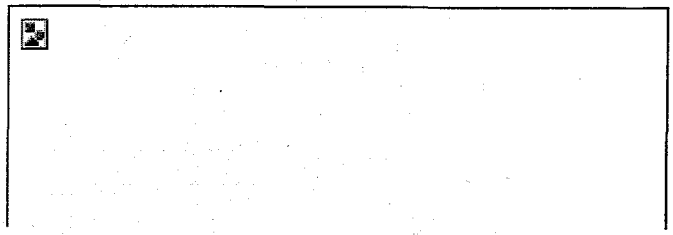
of Mr. Johns's trial. Public records would have shown that—with the exception of a single charge of selling pornography, which would probably have been legal today—Mr. Johns had been a lawabiding, productive citizen prior being charged in this case.

A. A competent investigation of Mr. Johns's history would have yielded a powerful case in mitigation.

It was remarkable that Mr. Johns had not had more contact with the criminal justice system in light of the excruciating childhood he endured. Due to its limited means, the Johns family was always on the brink of medical indigence: trips to the doctor did not occur except in cases of dire necessity. From birth he suffered deprivations that one would expect to have severe consequences for his social adjustment. He was born with pyloric stenosis, a gastro-intestinal condition that prevents a child from digesting food. Today it is treated with surgery, but when Mr. Johns was a baby, the pediatrician to whom his mother took him ordered her not to pick him up and hold him until he recovered, with took several months. For this formative period, he was both malnourished and deprived of human contact.

Mr. Johns had a younger brother with multiple birth defects requiring laborious care. He was born when Mr. Johns's father was based on Georgia, and the Army flew him to Walter Reed Hospital when the physicians thought he would die. This younger brother lived at home with Mr. Johns and his mother throughout Mr. Johns's childhood. When Mr. Johns was attending Southwest High School in St. Louis, his mother moved the family to Fulton so that his brother could attend the School for the Deaf. For fifteen years, the physicians told his mother he had only a year to live; he died in his twenties.

Mr. Johns's father was a career Army military policeman during the Cold War. During parts of Mr. Johns's upbringing, there was no father in the home. For most of his youth, the father had his family follow him from base to base, from California to Germany. Mr. Johns did not spend more than two years in the same elementary school; there were years in which he had to switch schools in the same academic year.



Mr. Johns's father was psychologically and sometimes physically abusive, behaving like a 1950's drill instructor in his own home. Mr. Johns never had a father who treated him like a child. Mr. Johns did not react with hatred, but tried to please his father by playing high-school football. When his mother moved the children to Fulton, his father—more concerned about how what Mr. Johns did reflected on *him* than on what was good for Mr. Johns—interfered by calling up the football coach and puffing Mr. Johns's abilities. Mr. Johns dropped out of school. Years later he resumed his education in the Jobs Corps.

Rather than giving up on pleasing his father after the Fulton High School matter, Mr. Johns accepted a job his father got him at Fort Leonard Wood, and even moved in with him. After his father and mother were divorced, and his father remarried, Mr. Johns continued to associate with his father's new family, taking care of his stepbrothers and stepsisters while his stepmother was in the hospital.

We have enjoyed the benefit of having men like Mr. Johns's father stand up for our country, and allow themselves to be moved around the world as we needed. Mr. Johns paid the price in lack of self-esteem, continuity of friendships, and a normal education.

A minimally effective mitigation investigation would also have uncovered that Mr. Johns suffered multiple head traumas—usually resulting in unconsciousness—throughout his life, from one at the age of three, to going through a windshield at the age of sixteen, to a motorcycle accident without a helmet in the 1960's, to an unprovoked blow in a bar after which he saved the life of Al Keener, who testified against him for a secret cash reward. In his twenties Mr. Johns suffered two deaths of persons close to him—his younger brother whom he had helped care for, and his girlfriend to a drug overdose.

Immediately after recovering from pyloric stenosis, Mr. Johns became obese as an infant. Throughout his life, though an active boy, he never shook this condition. After he returned from the Job Corps, he sought professional help. A physician prescribed an amphetamine. Mr. Johns

began to overuse this medication, and then to use illegal substances, to self-medicate for depression. For the first time in his life, he began to drink heavily. It was during this period that he fell in with a group of younger individuals who testified he had been involved in the Onyx robbery and murder with them or instead of them.

This social history contains several factual themes that would have been the basis of a successful penalty phase. *Transcience* resulting from his father's military career has a tendency to limit a growing child to shallow friendships and interpersonal relationships, causing growing alienation and a "Me" versus "They" mentality; it destroys or diminishes his or her sense of "place," leaving the child with a sense of vulnerability and powerlessness; it exacerbates the failure of public institutions such as school districts to monitor a child's development; where—as here—it included a change in the composition of the family (with the father at home some of the time and on base at other times), it interferes with establishment of parental bonding and discipline.[62] *Malnutrition* as an infant, resulting from pyloric stenosis, is an obvious source of neurological damage, of which learning disability would be a logical consequence. Learning disability in turn causes peer rejection and creates a false sense of sloth or rebelliousness on the part of adult authority figures who do not recognize the disability; it may even have accounted for Mr. Johns's father's taking things out on him regardless who was responsible.[63] *Head trauma as a child or youth* presents an independent source of neurological damage resulting in learning disability and other psychological deficits. *Deprivation of human contact* even from his mother, resulting from the regimen the pediatrician imposed, just as logically points to alienation. An *abusive father who was frequently absent from the home* combines the creation of a negative role-model with deprivation of love and guidance we expect of fathers, placing a disproportionate burden on a mother who had a terminally ill son to care for as well.[64] *Head trauma* is an obvious cause of neurological damage that previous counsel does not even appear to have asked about, let alone followed up on, in spite of its clear potential for causing learning disability. *Loss of a loved one to death*—especially when, as here, the person may well feel some responsibility for the death or deaths—exacerbates the emotional disturbance in a vulnerable person, to the extent, in some cases,

of causing post-traumatic stress disorder.[65]

In spite of all of these overlapping deficits that he did nothing to create, Stephen Johns did not turn out to be a monster, but a loyal son *to both parents* with one borderline criminal conviction and a record of substantially constant employment (albeit with substantial turnover).

B. Mr. Johns has never had a judicial hearing on trial counsel's ineffectiveness for failing to investigate and present these facts.

The foregoing social history of Mr. Johns has never been presented to any court. Trial counsel failed to develop a case in mitigation. Under Missouri law, the "exclusive remedy" for acts and omissions of trial counsel is a motion for post-conviction relief (PCR) under Mo. S. Ct. R. 27.26 at the time Mr. Johns's case was in the state courts, and under Mo. S. Ct. R. 24.035 or 29.15 today. Mr. Johns's PCR counsel did not develop the claims and issues trial counsel should have developed. In federal habeas corpus, PCR counsel's failure to present these claims and issues was a "procedural default" barring their presentation to the federal courts, with the effect that appointed counsel could not present this evidence absent a showing of "cause" and "actual prejudice" or, in the alternative, "actual innocence."[66]

One would think that PCR counsel's failure to find these facts and present them as evidence of ineffective assistance of counsel would be "cause" for overcoming the procedural default resulting from his failure to present them to the PCR motion court.[67] But it is the law in the Eighth Circuit that acts or omissions of PCR counsel cannot be "cause," on the theory that the Sixth Amendment does not guarantee a right to counsel in PCR proceedings, with the effect that acts or omissions of PCR counsel—however egregious—cannot be the basis for overcoming the procedural defaults they create.[68] The Missouri Supreme Court has reinforced this prohibition on independent judicial review of federal constitutional claims by holding that although Missouri's PCR rules create a right to counsel for PCR movants, this right is not a right to constitutionally effective counsel.[69] Thus, this reason for granting executive clemency is one on which the federal courts are relying on executive clemency as the sole check on the execution of a person who, given the quality of representation the Supreme Court contemplated in authorizing the resumption of the

death penalty, would not be selected to receive it.

The record will reflect that even in spite of the abject failure of trial counsel to present any of this information, the jury agonized over the penalty that it eventually dispensed. Even a modicum of effort on the part of trial counsel could have spared Mr. Johns from the death penalty. These facts and others support a finding that in the trial court, Mr. Johns did not receive the effective assistance of counsel to which he had a right under the Sixth Amendment.[70]

The federal district court fixated on Mr. Johns's request of counsel not to call his *mother* as a penalty-phase witnessCas if she were the only conceivable witness, rather than the only one trial counsel appears to have even *thought about* calling. (App. 41.) Whereas defense counsel are obliged to listen to their clients, they cannot discharge their duty to investigate by failing to go beyond what their clients know, understand, or tell them.[71] Although defense counsel is entitled to make strategic decisions, the failure to investigate a case undercuts subsequent invocations of "trial strategy."[72]

The affidavit of Margie Johns submitted with this application illustrates how a proper investigation of this mitigation evidence would have begun. When Mr. Johns thought that trial counsel would just call his mother to the stand and expect her to cry and plead for his life to a jury that had found him guilty of capital murder, it is understandable that he would not want to put her through such gratuitous humiliation. If the reality had been that trial counsel would adduce facts from her that would have assisted the jury in making a fair decision about the death penalty, that would obviously have been a completely different question than Mr. Johns in fact confronted.

Trial counsel's failure to put on any mitigation evidence at all is yet another breach of the promise of governmental regularity and individualized consideration that the Supreme Court demanded of death-penalty jurisdictions in *Gregg*. Mr. Johns's trial counsel is a case in point of the American Bar Association House of Delegates' first ground for urging jurisdictions with the death penalty to refrain from using it until they satisfy minimal professional standards. Failure to present mitigation evidence is a leading complaint running throughout section I of the report accompanying the recommendation the ABA adopted on February 3, 1997.[73] Trial counsel's

failure to present mitigation evidence in Mr. Johns's case was not an exercise of trial strategy, but a failure to provide the "counsel" the Constitution guaranteed Mr. Johns.

C. In the absence of competent representation at trial, the State of Missouri cannot be confident that Stephen Johns is a person who can be executed consistently with the Constitution and the values of its people.

Mr. Johns received no advocacy at all in a critical stage of the proceedings against him. Counsel was not the "counsel" presumed by the Sixth Amendment and contemporary authoritative applications of it. There was no adversarial testing of the prosecution's demand for death as opposed to any other punishment. There was no opportunity to present to the federal courts the evidence submitted with this application. If the jurors could hear, today, the evidence a proper penalty phase would have included, they would agree that Mr. Johns has suffered enough already. In light of trial counsel's abject failure to develop an intelligent case in mitigation, no Chief Executive can rely on the jury's verdict or any subsequent judgment as having satisfied contemporary standards for the infliction of the death penalty.

IV. Executing Stephen Johns after imprisoning him nearly twenty years would be a disproportionate double punishment, sweeping beyond the purposes the United States Supreme Court held to justify the continued use of the death penalty.

At the time of the offense for which Mr. Johns was convicted, the General Assembly provided the jury a choice of two punishments if it found Mr. Johns guilty of capital murder: death or life imprisonment without eligibility for parole. Through no fault of his own or of his attorneys, if he is executed he will have received far more punishment than the General Assembly or the jury contemplated—far more than is justified in light of the purposes said to support the continued use of the death penalty.

A. The federal courts took nearly eleven years to process Mr. Johns's habeas corpus petition, which is part of the checks and balances we rely on to prevent the execution of the innocent and of other people who are not the "worst of the worst" offenders.

Since 1972, the Supreme Court of the United States has required additional levels of review before a person is executed under the jurisdiction of the United States, in order that capital

punishment not be carried out in an arbitrary manner,[74] and in order that "[w]hen a defendant's life is at stake," the courts will be "particularly sensitive to insure that *every safeguard* is observed."[75] These checks and balances do not exist solely or even primarily for the benefit of the condemned citizen, but for the conscience of the society whose representatives seek to put him or her to death.

Normally a person sentenced to death files a direct appeal (with a petition for a writ of certiorari from the Supreme Court of the United States from an adverse judgment on direct appeal), a post-conviction relief action (with an appeal from an adverse judgment in the motion court and a certiorari petition from an affirmance), a federal habeas corpus action (with an appeal from a denial of relief and a certiorari petition from an affirmance), and a clemency application. There is nothing dilatory about seeking relief by each of these avenues, which have been created by the same sovereigns that seek to execute their citizens rather than by writ-writers, defense lawyers, or death-penalty opponents.

As a matter of federal law, a condemned person must "exhaust" his or her state remedies by presenting his or her federal constitutional claims to the state courts in the manner state law requires.[76]

In Mr. Johns's case, the state proceedings were completed within five years of the conviction and sentencing. The Supreme Court of the United States denied certiorari to review the Missouri Court of Appeals decision affirming the denial of post-conviction relief on June 6, 1988.[77] On June 23, 1988, Mr. Johns promptly filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. That court appointed counsel, and the parties had completed their initial briefing (amended petition, response to show cause, and traverse) by January 1989.

The federal district court did not rule on Mr. Johns's petition until July 10, 1996. It denied relief on each ground, often relying on procedural avoidance mechanisms unique to federal habeas corpus. Mr. Johns filed a timely motion to alter or amend judgment under Fed. R. Civ. P. 59(e) . The district court did not deny it for another six months. Mr. Johns filed a timely notice of appeal

to the United States Court of Appeals for the Eighth Circuit on February 28, 1997. Due to new procedural roadblocks that Congress imposed in the wake of the Oklahoma City bombing, Mr. Johns's appeal of the district court's denial of relief was held up for still more months. Counsel argued the case one time on September 22, 1998, but one of the judges on the panel died on October 21, 1998. The Eighth Circuit scheduled it for argument to the panel with a new judge on April 19, 1999.

On February 8, 2000, the panel announced its decision affirming the district court's denial of relief. Judge Richard S. Arnold dissented on the basis that the Missouri Supreme Court's failure to correct its admitted error in Mr. Johns's case was of constitutional proportions since it had overruled its decision in his case by name. The Eighth Circuit denied rehearing, with Judge Arnold writing to indicate that he was "no longer confident of the basis of [his] dissenting opinion." Proceedings in the Eighth Circuit did not become final until April 5, 2000—over three years after Mr. Johns filed his notice of appeal.

B. Mr. Johns is without fault for the delay in processing his case, because even the Attorney General's Office has not contended that he has filed frivolous, dilatory pleadings.

Mr. Johns's punishment has included imprisonment at close confinement under the threat of death for eighteen years. Mr. Johns has not abused the judicial process, but has properly sought to vindicate his meritorious claims that his conviction and sentence conflict with the law of the land. By its order granting leave to take an appeal, the Eighth Circuit recognized that at least three of his claims in addition to this one reflect "a substantial showing of the denial of a constitutional right."[78]

This punishment would not merely have been "unusual" in England or America in 1776 or 1791: *it simply wouldn't have happened.*[79] Whatever legal consequences one may attribute to the Constitution's recognition of the existence of the death penalty in the abstract do not apply to the novel punishment the State of Missouri seeks to inflict on this petitioner. A state government would have to work hard to find a more cruel punishment than to allow a prisoner to suffer the

anguish of awaiting a sentence of death that *could* be carried out relatively swiftly, but to make him live with that debilitating uncertainty for a generation while his uncertain fate is pondered by the system.

It will not do to say that the review process in capital cases is for Mr. Johns's benefit: *he* did not choose to be sentenced to death; *he* did not choose to retain the death penalty, yet hedge it about with substantive and procedural guaranties that can result in delays of the proportions they have reached in his case. *We* in the courts, the legal profession, and the public at large have made these contradictory demands on the individual judicial officers whose dockets include capital cases. We are estopped to deny the novel cruelty of executing Stephen Johns *after eighteen years or more* for pursuing the very avenues *we told him* were the proper means of vindicating his constitutional rights. As the Judicial Committee of the Privy Council explained in *Pratt v. Attorney-General*,[80] when a sovereign chooses to retain the death penalty and also adopts certain procedures for assuring itself that it is not carried out in error, the condemned person should not to be faulted for employing the means the sovereign has told him to use if he wants to save his life; if the sovereign cannot process his case within a reasonable time, it is the sovereign who bears the blame and may therefore be denied the dubious prize of its citizen's head.

Pratt's refusal to blame the citizen who lawfully asserts his rights under the system that seeks to kill him is especially applicable in Stephen Johns's case: even the Attorney General's Office, when given the opportunity to do so, failed to come up with a single dilatory act on the part of Mr. Johns or his counsel—only that Mr. Johns "pursued appeals during the period he has been on death row," which our society considers a necessary guaranty of reliability in imposing the death penalty in the first place.

Executing Mr. Johns after imprisoning him for eighteen years or more would not be a penalty known to the common law or to the Framers.[81] By separating the punishment from the crime for nearly a generation, it fails to come within the deterrent rationale for not holding the death penalty to be a gratuitous infliction of pain (especially in light of the absence of prior or subsequent allegations of criminal acts or dangerous conduct by Mr. Johns). Because it adds suffering over

and above anything the homicide victim suffered, it fails to come within the retributivist rationale. It is thus not within the scope of *Gregg*.

The Eighth Circuit relies in part on the fact that Mr. Johns did not amend his petition in the district court to plead his present claim for relief. It would be hypocritical to argue that Mr. Johns could have tried to get the district court to hurry up its proceedings. On the grounds set forth in the previous reasons for granting the certificate, Mr. Johns believed—and still believes—that he has a right to relief under the Constitution of the United States. The response that "he could always have waived his appeals" would force a petitioner with claims he or she believes to be meritorious to choose between the moral equivalent of suicide and the unprecedented penalty this petitioner is suffering. It would violate still more fundamental principles of *our* legal tradition, because it would have the secular sovereign rely on radical despair to lead prisoners to abandon nonfrivolous attacks on their death sentences, and to depart this life as accessories to their own death—killing an additional human being, this time without a locus poenitentiae.[82] The kings and judges who made the common law and the lawyers and other patriots who drafted the Bill of Rights had too strong a sense of their own mortality—and of the account *they* would have to give for their own actions—to make such a practice the law in England or America.

Two Members of the Supreme Court have found in a published opinion that this grievance is an important one. JUSTICE STEVENS, who wrote the memorandum in *Lackey*, believed the point was "sufficient to warrant review by the Supreme Court," but that for the same reasons, the Court would profit from other courts' decisions on it. JUSTICE BREYER added that he "agree[d] with JUSTICE STEVENS that the issue is an important and undecided one." The length of the district court's delay in processing this case combined with Mr. Johns's freedom from fault in causing it make this case one in which there is no need to let the issue percolate in the courts while Stephen Johns dies an death of exaggerated cruelty.

The Attorney General's Office is estopped to contend that the district court's delay was acceptable, because on three separate occasions, the same office applied to the Eighth Circuit for transfer of the case to the Eighth Circuit, for a motion to recall the mandate, and for a writ of

mandamus to require the district court to speed up its processing of this case. (App. 146-201.)

Far from *contributing* to the delay by doing anything improper, when the Attorney General's Office moved to transfer the case to the Eighth Circuit, Mr. Johns replied to one of that office's efforts to expedite the proceedings by *conceding* that "it is difficult to defend the delay highlighted by the State of Missouri in its pending motion." (App. 160.) Mr. Johns opposed the Attorney General's Office's motion *only* insofar as it had sought the wrong remedy—transfer from the district court to the Eighth Circuit rather than a writ of mandamus from the Eighth Circuit to the district court: he offered "*no resistance to the alternative relief sought by the State of Missouri* which requests that the district court be ordered to *expedite* a determination of the issues presented in the pending petition. (App. 163 (emphasis supplied).)

The Attorney General's Office gleefully acknowledged Mr. Johns's agreement on the pace of the proceedings in his reply to Mr. Johns's response on the jurisdictional issue. (App. 165.) The Eighth Circuit agreed with Mr. Johns's jurisdictional objection to litigating his petition before an appellate court, and gave directions to the district court concerning the delay in the proceedings. (App. 169.) The district judge sent a letter to the Eighth Circuit accounting for the delay (App. 170-71), and the next day it denied Mr. Johns an evidentiary hearing when the magistrate judge had held he was entitled to one (App. 220).

In respect to its timing, this grievance is like the one in *Stewart v. Martinez-Villareal*,[83] in which the Supreme Court held that a claim of incompetence to be executed is not successive within the meaning of 28 U.S.C. § 2244 as amended by AEDPA. In *Martinez-Villareal*, the prisoner had raised the claim in a previous federal habeas corpus petition, but the district court had dismissed the claim as premature: there was no execution date imminent, and it was impossible to determine whether he would be competent to be executed at some unknown time in the future. The court of appeals held that he did not need leave to file a new petition under 28 U.S.C. § 2244(b)(3), because the requirement of appellate-court approval did not apply to petitions challenging competence to be executed.[84] In an opinion by CHIEF JUSTICE REHNQUIST, the Supreme Court affirmed—reasoning that the prisoner should not be denied a federal forum because it was, in principle,

impossible to adjudicate his claim in his first petition.[85]

Just as a petitioner's mental condition at the time of his or her scheduled execution cannot usually be determined until the sovereign has set an execution date, the length of delay underlying a *Lackey* claim cannot be known until the district court proceedings are completed. Expecting a petitioner to plead delay in district-court proceedings before the proceedings have concluded—or even, as the Attorney General's Office appears to suggest, before they have begun—is absolutely unrealistic for the same reasons that the Supreme Court rejected the sovereign's position in *Martinez-Villareal*.

The delay in Mr. Johns's case occurred primarily on the federal district court's watch. The reasoning of the Eighth Circuit that Mr. Johns "defaulted" his present claim in the *state* courts is therefore unavailing: state courts do not have jurisdiction to correct errors and abuses of discretion on the part of federal district courts; the Supreme Court and the Eighth Circuit *do*. Mr. Johns's point on appeal was a request for appellate review, by the Eighth Circuit, of the acts and omissions of a district court within the supervisory jurisdiction of the Eighth Circuit, in his federal habeas corpus case.

By the logic the Eighth Circuit uses to hold this claim to be an "abuse of the writ," *any* appeal would be an abuse of the writ, because the petitioner could not know, when he or she filed the petition, that the district court was going to err, clearly err, or abuse its discretion in the disposition of the case. But an abuse of the writ can occur only in respect to section 2254 claims the petitioner could have asserted in his or her petition, relating to the underlying conviction and sentence from the *state* courts.

In addition to being outside the statutory jurisdiction of an action under section 2254, any requirement that a capital petitioner complain to the district judge that his case was taking too long is absolutely unreasonable. Demanding that the petitioner do so expects those who are asked to evaluate this claim to *forget* as public officials what they *know* as men and women.

The reliance of the Eighth Circuit on the fact that "some of the delay was due to his motion to recall the mandate in the Missouri Supreme Court and his amendment of his federal habeas petition to

reflect the denial of the motion" fails to distinguish between a citizen's exercise of his federally-protected rights to seek relief for nonfrivolous grievances, on the one hand, and manipulative abuse of the judicial process, on the other. The Eighth Circuit cannot deny that the subject-matter of this additional litigation was nonfrivolous, because it found the issue on which this additional litigation occurred to be a ground for granting a certificate of appealability, and split two-to-one on it in its panel decision. It cannot offset the torture of eighteen years as if the two were coincidental minor penalties in a hockey game.

Although the presentation of a claim on direct appeal about the district court's handling of a case is not an abuse of the writ, Mr. Johns could show "cause" and "prejudice" in any event. At the time of the filing of the petition, Mr. Johns could not know, through the exercise of reasonable diligence, how long the district court would take to process the petition. In addition—despite the Attorney General's Office's continued attempt to have the Eighth Circuit ignore human nature—the temptation to squash Mr. Johns's other claims along with a *Lackey* claim is too great a risk to expect petitioners and their counsel to take. The denial of an evidentiary hearing shortly after Mr. Johns agreed with the Attorney General's Office that the case had taken too long is a chilling reminder of the potential for alienating the tribunal on the merits or on some other procedural question by complaining about the slowness with which it is processing one's case. Mr. Johns has suffered the prejudice of imprisonment at close confinement under threat of death—a penalty *in addition to* the one the jury, the sentencing judge, and the Missouri General Assembly contemplated, and one that fails to satisfy the historical, deterrent, and retributive criteria on the basis of which the Supreme Court allowed the states and the federal government to resume executions in 1976.

V. Mr. Johns deserves additional attention in executive clemency because the Eighth Circuit misapplied the Antiterrorism and Effective Death Penalty Act to limit the *points* Mr. Johns could litigate on appeal to the *issues* the certificate-granting court included in the certificate, as the Eighth Circuit did to Mr. Johns's prejudice.

In holding that the Antiterrorism and Effective Death Penalty Act's "certificate of appealability" requirement allows the court which grants the certificate to limit the points on appeal

to the issues it specifies in the certificate, the Eighth Circuit has gone beyond the text of the statute to limit a remedy specifically protected in the original Constitution. The Supreme Court's decisions construe narrowly statutory and judge-made rules that infringe on constitutionally protected rights. Under the law, petitioners and their counsel—not an agency of government that either has just denied relief or has no familiarity with the case—should be able to decide what points to include in their appeals, at least in the absence of clear congressional language purporting to allow such an invasion of the province of counsel. Because Mr. Johns was denied this opportunity for review in the federal courts, their denial of relief provides no assurance that his constitutional claims have been resolved by an independent judiciary.

A. The 1996 amendments to the statute on appeals from denials of federal habeas corpus did not authorize federal courts to limit the points on appeal to the issues included in the "certificate of appealability."

Paragraph (3) of subsection (c) of 28 U.S.C. § 2253 as AEDPA amended it requires that a certificate of appealability "indicate which specific issue or issues satisfy the showing required by paragraph (2)," *i.e.*, "a substantial showing of the denial of a constitutional right." AEDPA's amendments to section 2253 and Fed. R. App. 22(b) neither require nor authorize a certificate-granting court to *limit* the points a petitioner or a petitioner's counsel may raise on appeal once a certificate is granted.

In AEDPA Congress did a great deal to limit the rights of Americans to obtain consideration of constitutional claims in federal habeas corpus proceedings. The Supreme Court has traditionally given a narrow construction to statutes that trench on constitutional or other important federal rights.[86] AEDPA is a statute in derogation of the rights that *antedate* the Constitution, which the Constitution *expressly recognizes*.[87] If Congress had *meant* to limit the independent professional judgment of appellate counsel and the remedial authority of the United States courts of appeals to one or a few issues per appeal, it could have *said so*, and the courts should *require* it to have said so before applying such a rule.

This observation is especially valid when Congress was not writing on a blank slate. The

dominant reading of the former statute did not permit the certificate-granting court to foreclose counsel or the appeal-deciding court from briefing, arguing, and deciding a given issue (with the possible exception of an appeal from denial of an abusive petition). Under pre-AEDPA law, once a district or circuit judge issued the certificate of probable cause, a petitioner's counsel was free to use his or her independent professional judgment in deciding which claims to advance on appeal. When construing section 2253 in *Barefoot v. Estelle*,[88] the Supreme Court speaks of "appeals" rather than "issues." Although at least one circuit had approved a contrary practice,[89] it reflected a minority position.[90]

B. The Eighth Circuit's limitation of Mr. Johns's appeal to the issues it included in its certificate of appealability prevented him from briefing and arguing a point on which the Supreme Court of the United States resolved a conflict among the circuits against the Eighth Circuit and in favor of the position Mr. Johns had taken in the district court and in his application for certificate of appealability.

In this case, one of the grievances on which the Eighth Circuit did not grant a COA is whether the district court erred as a matter of law in refusing to consider the *cumulative effect* of acts or omissions of trial counsel. Based on its own previous precedent about trial-*court* error,[91] the Eighth Circuit has held—in a decision the district court cited—that habeas corpus petitioners cannot establish ineffective assistance of counsel on the basis of the cumulative effect of acts or omissions by trial counsel—that respondents may "divide and conquer" by splitting counsel's performance and the resulting prejudice into separate claims no one of which the reviewing court finds to "stand on its own feet."[92]

In this respect, the Eighth Circuit was in conflict with several other circuits,[93] to say nothing of the Supreme Court's directions in *Strickland v. Washington.*[94] In establishing the authoritative test for ineffective assistance of counsel, the Supreme Court reasoned that to establish deficient performance a defendant must "show[] that counsel made *errors* so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[95] To establish prejudice, a defendant must "show[] that counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[96] The Court then noted:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent *the errors*, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[97]

The Supreme Court's holding in *Strickland* thus unambiguously contemplated the consideration of multiple errors in assessing the constitutional adequacy of counsel's assistance.

Refusing Mr. Johns leave to brief and argue the cumulative ineffective assistance of counsel point forced him to present this grievance *separately* from the rest of his underlying points on appeal. Forcing a petitioner to present points on appeal piecemeal harms both the judicial process and the petitioner. Not only does such a practice require at least two proceedings where giving effect to the plain words of section 2253 and the previous practice with certificate of probable cause would have required only one: a petitioner who is attempting to show cumulative effect of trial counsel's acts or omissions is not able to do so before the court that has the whole appeal in front of it. The errors of counsel and their effects on the decisionmaker appear artificially weaker because the petitioner must present them in isolation from the rest of the case. This doctrine distorts the results of the adjudication, and tips the scales in favor of death.

In *Williams v. Taylor*[98] the Supreme Court has made clear beyond cavil that—especially, as here, in a capital case where the petitioner asserts ineffectiveness for failure to develop and present evidence in the penalty phase—a court considering an ineffective assistance claim must consider the cumulative effect of the acts or omissions of counsel.[99] It emphasized with approval that the state trial judge, who had granted relief, relied on "his assessment of the totality of the omitted evidence."[100] It held that the Virginia Supreme Court had erred in reversing the trial judge's grant of relief, in part, by "fail[ing] to evaluate the totality of the available mitigation evidence."[101] It rested its own decision on "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally."[102]

Williams did not make "new law," but confirmed that the circuits which correctly followed *Strickland* were right, and the Eighth Circuit was wrong. Will the Eighth Circuit, and the Missouri

Supreme Court, decide to start applying *Strickland* in light of *Williams*, but deny *this* petitioner's motion to apply the Supreme Court's 1984 decision—as they did in respect to his motion to apply pre-existing law concerning the necessity of a nonduplicitous finding of deliberation?

C. Like the Missouri Supreme Court's failure to correct the error it made in Mr. Johns's case even after it recognized it, the Eighth Circuit's refusal to allow him to brief and argue a point that the United States Supreme Court found meritorious in another person's case shows that one cannot rely on the courts' denial of relief in deciding whether Mr. Johns should be executed.

The federal courts' failure to apply the law governing their own review of Mr. Johns's federal constitutional claims undermines any confidence an executive officer *should* be able to have in the result of a federal habeas corpus proceeding. Mr. Johns's federal constitutional claims are not technicalities, but are based on the very constitutional guaranties we rely on to prevent the conviction of the innocent and the execution of persons other than "the worst of the worst" convicts. Led by the Supreme Court in *Herrera v. Collins*, the federal courts are quite open about the fact that they will refuse to grant relief in some capital cases because the condemned citizen can always apply for clemency to the President or the Governor.

Although Mr. Johns did his best to present his claims to the courts, they refused to apply established law or, in the case of the Supreme Court of the United States at the beginning of this month, were otherwise occupied. Mr. Johns deserves relief—and mercy—from the only authority that can provide it: the Honorable Governor of the State of Missouri.

Conclusion

WHEREFORE, the applicant prays the Governor for his order as aforesaid, commuting his sentence from death to a term of years or to life imprisonment *with* eligibility for parole.

Respectfully submitted,

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[1] 857 S.W.2d 212 (Mo. banc 1993).

[2] *Johns v. Bowersox*, 203 F.3d 538, 549-50 (8th Cir. 2000).

[3] *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994).

[4] *Bush v. Gore*, 2000 U.S. LEXIS 8430 at *9-*15 (Dec. 12, 2000) (per curiam).

[5] 514 U.S. 1045 (1995) (concurring in denial of certiorari to give state and lower federal courts opportunity to develop issue).

[6] *Herrera v. Collins*, 506 U.S. 390, 412-16 (1993).

[7] *State v. Johns*, 679 S.W.2d 253, 257 (Mo. banc 1984).

[8] *Johns v. Missouri*, 470 U.S. 1034 (1985).

[9] *Johns v. State*, 741 S.W.2d 771 (Mo. Ct. App. 1987).

[10] *Johns v. Missouri*, 486 U.S. 1046 (1988).

[11] 28 U.S.C. § 2254.

[12] In support of his motion for an evidentiary hearing, Mr. Johns offered an affidavit from S.D. Parwatikar, M.D., the State-appointed psychiatrist who examined Mr. Johns in 1982 to determine his competency to stand trial. Dr. Parwatikar indicated that the examination had omitted any inquiry as to whether Mr. Johns suffered from diminished capacity at the time of the homicide. Mr. Johns offered this proof as relevant to the issue of deliberation. The State's original psychiatric report had even indicated that there was a question whether Mr. Johns had "the capacity to form an intent for capital murder."

In addition to the affidavit from the State psychiatrist, Mr. Johns offered the affidavit of David O. Danis, Esq., a former Assistant Circuit Attorney in the City of St. Louis—the same political subdivision that sought and obtained the death penalty against Mr. Johns. Mr. Danis had experience in capital murder prosecutions. He indicated that he had reviewed portions of the transcript and file, and noted that there was "strong evidence available to Mr. Johns's trial counsel at the time of his trial that would demonstrate two statutory mitigating circumstances during the penalty phase of the trial." Mr. Danis continued: "[i]t is my opinion that had the above-referenced evidence been presented in a reasonably effective manner during the penalty phase of Stephen Johns' trial, there is a likelihood that he would not have received a sentence of death." This former prosecutor also took issue with trial counsel's decision not to put on any evidence during the penalty phase despite the presence of Mr. Johns's mother and father at the trial, when they were ready and willing to take the stand in defense of their son.

[13] Pub. L. 104-132, 110 Stat. 1214 (effective April 24, 1996).

[14] 122 F.3d 518 (8th Cir. 1997).

[15] *See also Slack v. McDaniel*, 120 S.Ct. 1595, 1602-03 (2000) (after completion of litigation in Eighth Circuit in this petitioner's case, adopting, six to three, the position of the Eighth Circuit on the question whether AEDPA's amendments to 28

U.S.C. § 2253(c)(2) apply when the petition was filed before April 24, 1996).

[16] *Johns v. Bowersox*, No. 97-7777 (U.S.).

[17] U.S. S. Ct. R. 11.

[18] *Johns v. Bowersox*, 523 U.S. 1051 (1998).

[19] *Bush v. Palm Beach County Canvassing Board*, 121 S.Ct. 471 (2000).

[20] *E.g.*, *Zant v. Stephens*, 462 U.S. 862, 874, 876 (1983); *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979); *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

[21] 120 S.Ct. 2348 (2000).

[22] *Id.* at 2355-56, *quoting Winship*, 397 U.S. at 361-62, *quoting in turn Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

[23] 120 S.Ct. at 2356.

[24] *Id.* at 2359.

[25] *Id.* at 2364.

[26] 442 U.S. 510 (1979).

[27] 432 U.S. 197, 210 (1977).

[28] 421 U.S. 684 (1975)

[29] 438 U.S. 586, 604 (1978) (plurality opinion of BURGER, C.J.)

[30] 458 U.S. 782 (1982).

[31] 428 U.S. 153, 187 (1976).

[32] *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993).

[33] In *State v. O'Brien*, the state supreme court overruled by name *State v. Johns*, 679 S.W.2d 253, 257 (Mo. banc 1984), *cert. denied*, 470 U.S. 1034 (1985), and *State v. Hunter*, 782 S.W.2d 95 (Mo. Ct. App. 1989), noting that they had relied on *State v. White*, 622 S.W.2d 939 (Mo. 1981), *cert. denied*, 456 U.S. 963 (1982), for the proposition that a trial court may instruct a jury it may convict a defendant of capital or first-degree murder on an accomplice theory without finding that the *defendant* had deliberated on the homicide. In *O'Brien*, the state supreme court held that *Johns* and *Hunter* had "overlooked the key to *White*," which was that an accomplice liability instruction in a capital or first-degree murder case was constitutional only insofar as it predicated personal deliberation on the defendant on trial. 857 S.W.2d at 217-18. It overruled *White* to the extent that it had been "read" to require less, as it had been in *Johns* and *Hunter*. In a recent memorandum denying relief in the same Mr. White's federal habeas corpus action, the magistrate judge noted that the repudiated misreading of *State v. White* had been "made evident in *Johns* and *Hunter*." *Michael Anthony White v. Michael Bowersox*, No. 4:97-CV-00752-FRB, slip op. at 21 (E.D. Mo. Aug. 8, 2000).

[34] 120 S.Ct. 1073, 1075 (2000), *quoting*, *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923), *quoting in turn*, *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154 (1918)).

[35] *E.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1979).

[36] 119 S.Ct. 1827 (1999).

[37] *Roberts v. Delo*, 137 F.3d 1062 (8th Cir. 1998).

[38] *Compare* App. 127 *with State v. Roberts*, 709 S.W.2d 857, 863 n.7 (Mo. banc 1986), *cert. denied*, 479 U.S. 946 (1986) (emphasis supplied).

[39] *Roberts v. Delo*, 137 F.3d at 1068.

[40] *See Witherspoon v. Illinois*, 391 U.S. 510, 522-23 n. 20 (1968) (even before *Gregg v. Georgia*, the Supreme Court recognized that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death").

[41] 709 S.W.2d at 862.

[42] 137 F.3d at 1067.

[43] The Eighth Circuit also relies on *Thompson v. Missouri Board of Probation and Parole*, 39 F.3d 186, 190 (8th Cir. 1994). (App. 6.) *Thompson* was not a capital case: its affirmance of denial of relief on a duplicitous deliberation instruction *cannot* be authority for affirmance in a capital case. Although the context of the *Thompson* case was much different than this one, the jury instructions there—as the Eighth Circuit paraphrased them—required the jury to find that Thompson acted with the actual killer "knowingly and purposefully." Although the latter instruction would not support a death sentence, *this* petitioner's trial judge did not even require *that* level of mens rea. *Thompson* is no authority for anything in this case except

for the respondent's history of defiance of federal law. 39 F.3d at 189-90 (rejecting respondent's "escape rule" argument when "escape" had no connection to proceeding); *Thompson v. Armontrout*, 808 F.2d 28, 31-33 (8th Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) (upholding district court's finding of vindictive treatment of petitioner and district court's grant of relief).

[44]119 S.Ct. 1827 (1999).

[45]120 S.Ct. at 2361-62, *distinguishing Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

[46]508 U.S. 275 (1993).

[47]117 S.Ct. 337 (1999) (per curiam)

[48]386 U.S. 18, 24 (1967).

[49]The testimony about the ammunition purchase is far from a slam-dunk for the prosecution, as well. The trial exhibit reflecting Mr. Johns's purchase of the bullets said they were all Smith & Wesson. (T.Tr. (Respondent's Exhibit A) 435-36.) Yet the bullets the police recovered in the handgun were Remington & Peters and Winchester Western. *Id.* at 356. Only three S&W bullets were recovered with the handgun (along with eight WW and two R&P), yet the prosecution's evidence was that only three shots were fired in the robbery-murder. The record does not establish that Mr. Johns bought these bullets with the purpose of using them in a robbery. There is no proof they left the place they were put after the purchase—no proof that the three S&W bullets found with the gun were among the fifteen Mr. Johns purchased. This record is consistent with Mr. Johns's testimony that he had purchased the bullets for Wishon, as he had from time to time purchased bullets for Keener as well, because this source of "overwhelming evidence" did not have the required identification. (T.Tr. 435-36.) This testimony is part of Mr. Johns's contesting, at trial, the case against him generally, which distinguishes the operative facts here from those in *Neder* and means that the Eighth Circuit should never have gone down the road of "harmless error."

[50]R. Bolt, A MAN FOR ALL SEASONS, act I, p. 147 (THREE PLAYS, Heinemann ed. 1967) (Anglo-American legal tradition would give even the Devil the benefit of the law, for the protection of honest citizens).

[51]*State v. Ervin*, 835 S.W.2d 905, 935 (Mo. banc 1992), *cert. denied*, 507 U.S. 954 (1993).

[52]527 U.S. 373, 119 S.Ct. 2090, 2109-10 (1999).

[53]*State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994), *quoting State v. Ervin*, 848 S.W.2d 476, 484 (Mo. banc), *cert. denied*, 510 U.S. 826 (1993). *State v. Ferguson* also recognizes that the basis of *State v. Ervin*, 835 S.W.2d 905, 923 (Mo. banc 1992), *cert. denied*, 507 U.S. 954 (1993), and *State v. O'Brien*, 857 S.W.2d 857, 923 (Mo. banc 1993), was constitutional, in that relieving the prosecution of the burden of proof on the element of the accused citizen's own deliberation in a capital murder or first-degree murder case violates due process. 848 S.W.2d at 587, citing *State v. Ervin*, 848 S.W.2d 476, 484 (Mo. banc), *cert. denied*, 510 U.S. 826 (1993).

[54]373 U.S. 83 (1963)

[55]*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 1948 (1999) (*quoting United States v. Bagley*, 473 U.S. 667, 682 (1985)).

[56]*United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998).

[57]*E.g.*, *Williams v. Taylor*, 120 S.Ct. 1495 (2000).

[58]*See United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated*, 165 F.3d 1297, 1299-1302 (10th Cir.) (en banc) (Porfilio, J.), *cert. denied*, 119 S.Ct. 2371 (1999).

[59]120 S.Ct. 1495, 1519 (2000).

[60]466 U.S. 668 (1984).

[61]*Id.* at 694, *citing United States v. Agurs*, 427 U.S. 95, 104, 112-13 (1976)

[62]*E.g.*, H. Kaplan & B. Sadock (eds.), COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1816; D. Besharov, RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED 102 (1990).

[63]*E.g.*, Kaplan & Sadock 144-45 & 163.

[64]*E.g.*, Kaplan & Sadock 279, 1069, 1722, 1816; M.R. Brassard, R. Germain, & S.N. Hart, PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH (1987).

[65]*E.g.*, Kaplan & Sadock 1277.

[66]*Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-11 (1992) (evidence); *Wainwright v. Sykes*, 433 U.S. 72, 86-91 (1977) (grounds for relief).

[67]*Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc [t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler v. Sullivan*, 446 U.S. 335, 344 . . . (1980). Ineffective assistance of counsel, then, is cause for a procedural default.").

[68]*E.g., Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992).

[69]*Smith v. State*, 887 S.W.2d 601, 602 (Mo. banc 1994), *cert. denied*, 514 U.S. 1119 (1995).

[70]*See Strickland v. Washington*, 466 U.S. 668 (1984).

[71]*Parkus v. Delo*, 33 F.3d 933, 938-39 & n.6 (8th Cir. 1994).

[72]*Kenley v. Armontrout*, 937 F.2d 1298, 1307-08 (8th Cir. 1991).

[73]American Bar Association, House of Delegates, Recommendation No. 107 (Feb. 3, 1997).

[74]*Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

[75]*Id.* at 187 (emphasis supplied), *citing Powell v. Alabama*, 287 U.S. 45, 71 (1932).

[76]28 U.S.C. § 2254(b).

[77]*Johns v. Missouri*, 486 U.S. 1046 (1988).

[78]28 U.S.C. § 2253(c)(2) (as amended effective Apr. 24, 1996).

[79]*Pratt v. Attorney-General*, [1994] 2 A.C. 1, [1993] 4 All E.R. 769, 773-74, 775, 783 (P.C. 1993) (appeal taken to U.K. Privy Council from Jamaica).

[80][1993] 4 All E.R. at 786.

[81]*Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J.) (memorandum concerning denial of certiorari).

[82]*See Ford v. Wainwright*, 477 U.S. 399, 406-10 (1986).

[83]118 S.Ct. 1618 (1998).

[84]*Martinez-Villareal v. Stewart*, 119 F.3d 628, 630 (9th Cir. 1997).

[85]118 S.Ct. at 1621-22.

[86]*E.g., Kent v. Dulles*, 357 U.S. 116, 129 (1958).

[87]U.S. Const. art. I, § 9 (Suspension Clause).

[88]463 U.S. 880, 892-93 (1983).

[89]*Barber v. Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984); *Vicaretti v. Henderson*, 645 F.2d 100, 101-02 (2d Cir.), *cert. denied*, 454 U.S. 868 (1981).

[90]*See Chacon v. Wood*, 36 F.3d 1459, 1466-67 (9th Cir. 1994); *United States ex rel. Wandick v. Chrans*, 869 F.2d 1084, 1085 (7th Cir. 1989); *Smith v. Chrans*, 836 F.2d 1076 (7th Cir. 1988); *Von Pilon v. Reed*, 799 F.2d 1332 (9th Cir. 1986); *Houston v. Mintzes*, 722 F.2d 290 (6th Cir. 1983); *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978).

[91]*See Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990), *cert. denied*, 499 U.S. 978 (1991).

[92]*See Griffin v. Delo*, 33 F.3d 895, 903 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995).

[93]*E.g., Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991); *United States ex rel. Kleba v. McGinnis*, 796 F.2d 947, 958 (7th Cir. 1986); *Crisp v. Duckworth,* 743 F.2d 580, 583 (7th Cir. 1984); *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir.), *cert. denied*, 440 U.S. 974 (1979); *Lankford v. Foster*, 546 F.Supp. 241, 252-53 (W.D. Va.), *aff'd*, 716 F.2d 896 (4th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984).

[94]466 U.S. 668, 695 (1984).

[95]*Id.* at 687 (emphasis added).

[96]*Id.* (emphasis added).

[97]466 U.S. at 695 (emphasis added).

[98]120 S.Ct. 1495, 1516 (2000).

[99]In an opinion by a former Chief Justice of Missouri and nationally renowned author on jury instructions, the Missouri Court of Appeals, Eastern District, has already recognized the necessity of cumulative ineffective assistance of counsel analysis in light of *Williams v. Taylor* by citing that decision and granting relief on such a claim in *State v. Blankenship*, 23 S.W.3d 848, 850-51 (Mo. Ct. App. 2000) (Blackmar, Sr.J.).

[100]120 S.Ct. at 1515.

[101]*Id.*

[102]*Id.* at 1516.