

IN THE MATTER OF: ANTHONY J. LARETTE JR.
Potosi Correctional Center
Mineral Point, Missouri 63660

TO: THE HONORABLE MEL CARNAHAN
Governor of the State of Missouri

**APPLICATION AND REQUEST FOR A HEARING AND A REPRIEVE FROM OR
COMMUTATION OF A SENTENCE OF DEATH**

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I. INTRODUCTION

This application is presented on behalf of Anthony J. LaRette, Jr., who is scheduled to die by lethal injection on November 29, 1995. Anthony is presently being held in the administrative segregation unit at the Potosi Correctional Center, under warrant of death issued by the Missouri Supreme Court on October 12, 1995. Pursuant to the Missouri Constitution and the Statutes of the state of Missouri (See Appendix at N), Anthony LaRette respectfully requests the Honorable Mel Carnahan, as Governor of the State of Missouri, to issue an indefinite stay of execution in order for Anthony to present facts and evidence in support of his application at a hearing. Counsel is in possession of evidence from several experts along with documents from numerous mental health facilities that show that Anthony had a twenty year history of organic brain damage and left temporal lobe syndrome, at the time of the offense.

Prior counsel failed to perform any investigation of Anthony's mental health history. As a result, neither the jury, which determined guilt and punishment, nor the Missouri Circuit Court which reviewed Anthony's case pursuant to previous Supreme Court Rule 27.26 was presented with this massive and compelling body of evidence. These failures of prior counsel precluded the jury and the Missouri state courts from fully and fairly considering his case and reviewing his claims. These failures also resulted in the procedural bar of the full presentation of his claims in the federal courts' review of his case. There are no such procedural limits on the Governor of Missouri whose clemency power exists to correct cases such as this.

It will become apparent once the facts are presented and reviewed that Anthony is

not a candidate for execution. Anthony is not requesting to be released from prison; he is requesting a commutation of his sentence to life in prison.

The Missouri Constitution and statutes grant the authority to the executive to stay executions and grant pardons, clemency and reprieves. The United States Supreme Court has also determined the Office of the Governor has the obligation to be the "fail safe" in our criminal justice system. Herrera v. Collins, 113 S.Ct. 853, 854 (1993).

Counsel requests a hearing and the opportunity to present evidence that will show Anthony LaRette is a victim of brain damage and mental illness and a legal system which has failed to correct itself. Anthony is not a person the public would find to be a reasonable candidate for execution.

II. LARETTE'S PSYCHIATRIC HISTORY

Anthony LaRette Jr. is the only child of Gertrude and Anthony LaRette Sr. As a youngster, LaRette had difficulty learning suffering from dyslexia and deficits in spelling and calculation. (Exhibit C). At the age of five or six he sustained an electrical injury when he grabbed a trailer-hitch which was not grounded. (Exhibit A at 3) Anthony was knocked unconscious and lost several teeth. After this accident, Anthony began having auditory hallucinations. Anthony heard, what he has described as, "Burmashave" being repeatedly chanted to him just before sleep. He also heard "Burmashave" in association with bed wetting. Anthony suffered from bed wetting until the age of 16. He also wet his clothes during this time. (Exhibit A at 3)

At the age of 8 or 9, Anthony was hit with a baseball bat on the left side of his head. This blow left Petitioner unconscious for 1 1/2 hours. Although there was external bruising

there was no fracture. (Exhibit A at 3). Within two weeks after this blow Anthony first exhibited aggressive behavior and attacked an adult female family friend, a St. Petersburg, Florida Police detective. Anthony exposed himself to her, grabbed her clothes, and then tore them apart. He learned from her description that he was sweating profusely and salivating from the corner of the mouth. He was taken to the police department and then transferred to Bay Front Medical Center in St. Petersburg, Florida. Dr. Koenig diagnosed him at that time as having Psychomotor Epilepsy and placed him on Phenobarbital and some vitamins. (Exhibit H at 9). Despite this treatment, six months later, Anthony attacked a woman near a skating rink, breaking her nose causing numerous bruises over her body, and ripping her clothes off. This rage behavior was totally unprovoked.

Subsequently, Anthony continued to have aggressive outbursts which included self-exposure and sexually inappropriate behavior. Frequently, he would find himself about 20 - 25 miles away from home and "would wake up and realize that I was lost, frightened and scared." Dr. Alfred Koenig, M.D. of Psychiatric Associates of Koenig and Holtzman in St. Petersburg, Florida, treated Anthony during from 1959 through 1965, diagnosing Anthony with the support of electroencephagram, as having psychomotor seizures. His EEG dated January 23, 1965, was interpreted as "abnormal with possible left hemisphere localization." Dr. Koenig reported that sexual offenses such as indecent exposure, choking of older women, and rape attacks were possibly committed during black out spells. These seizures occurred with varying frequency of once to three times per week. A characteristic seizure occurred as follows: Anthony would experience the smell of rotten cabbage, followed by severe headache and severe perspiration. Occasionally he would hear voices. Then

Anthony would rip his clothes off and go into a rage as if he was "on wildfire." Thereafter he would not remember anything. When he woke up, "there would be people around me and I would be in total fear beyond what I can explain to you." (Exhibit A at 4). He would find himself wet with urine and his mouth would be frothing. In the late 60's he had clonic and tonic (Grand Mal Seizures). The smell of rotten cabbage preceded almost every seizure. The voices he heard were a repetition of "Burmashave" and occasionally statements such as "you are sick, do not let anybody touch you, they hurt you, hurt you, hurt, you. They are going to hurt me."

Anthony was admitted to Mount Park Hospital psychiatric ward in St. Petersburg, Florida, in 1963, and received treatment for six months. This was followed by a 1 to 1 1/2 year admission in Phoenix State Hospital, Phoenix Arizona. In 1965, Anthony was referred by Dr. Koenig to Johns Hopkins University in Baltimore, where he was seen by Dr. Dietrich Blumer, M.D., a noted neuropsychiatrist. (Exhibit H at 8). Dr. Blumer reported that Anthony "began exposing himself at age eight years and the episodes were preceded by brief auditory hallucinations and were not recalled by patient." According to Dr. Blumer's findings noted in a letter dated February 18, 1972, these episodes did not occur while he was on Mysoline. Dr. Blumer concluded that these "findings are highly characteristic of temporal lobe seizure disorder with post ictal sexual arousal and misdemeanor while in a confused amnesic phase." (Exhibit M at 259).

In 1965, while participating in competitive roller skating, Anthony had a seizure in which his pants became wet. A rink attendant apparently called him a "freak." Then, as related to Anthony by observers, he flew into a rage and attacked his female skating

partner, her brother, and a bystander. On that same evening, he went to the home of a neighbor girl whom he had known for a long time and masturbated in front of her. He was sweating. He then experienced a severe headache followed by a rage reaction. Later, he found out that the neighbor had attempted to console him and he had ripped her clothes off and broke her arm. These incidents led to his family leaving Florida and moving to Topeka, Kansas. (Exhibit A at 4).

In 1966, Anthony married his first wife Janis. In 1967, Anthony and his wife were involved in a car accident. His wife was killed and Anthony sustained a closed head injury. He was taken to the Stormont Vail Hospital, Topeka Kansas in a semi-stuporous condition on August 20, 1968, and was released after three days of hospitalization. (Exhibit L at 4-5).

In 1968, Mr. LaRette was evaluated at Menninger Foundation at which time his EEG was normal. Therefore, he joined the Marine Corps. During his training, he was hit in the head with a pugi stick by an instructor which precipitated a series of seizure attacks, leading to his honorable discharge from the Marines. The Marines stated that this discharge was due to psychomotor epilepsy, erroneous enlistment, and auditory hallucinations. (Exhibit F). Anthony returned to the Topeka area to be near his family.

In a neurology consultation dated July 16, 1972, Dr. Nagaswamy, of the Topeka V.A. Hospital described the occurrence of abnormal perception of food, "smelling rotten cabbage," uncal seizures, deja vu, automatisms, behaviors such as wearing clothes wrongly, and wearing shoes on the wrong foot with no memory. Dr. Nagaswamy also noted multiple attacks of sexual deviation with intense fear before the onset and sleep after the incident with a total loss of memory of what had happened. The diagnosis was again

Temporal Lobe Epilepsy with rape relation secondary to Uncal Seizures. Dr. Nagaswamy also noted "psychomotor double epilepsy starting on the left lobe and spreading to the other side." (Exhibit K at 188-189).

Anthony was seen from March through September 1973 by Arthur R. Dick, M.D. a neurologist at the Kansas University Medical Center, Kansas City, Kansas for the adjustment to anticonvulsants. (Exhibit I at 3). Anthony was voluntarily admitted to the Topeka State Hospital in October 1973 where he remained until January 1974. During this admission two EEG tracings were obtained which were abnormal, correlating with a diagnosis of Temporal Lobe Epilepsy and diffuse encephalopathy. Despite these findings, Anthony was labeled as "character disorder of hysterical/narcissistic with exhibitionism."

In March 1974, Anthony allegedly choked a Ms. Hecker and forced her to have sexual intercourse. Anthony was admitted to Larned State Hospital, Larned, Kansas on April 10, 1974, for a pretrial evaluation on a charge of rape and aggravated burglary. The evaluation was completed on June 5, 1974, finding him competent to stand trial. (Exhibit M at 276-281). The diagnosis was Passive Aggressive Personality Disorder with Antisocial and Sexual Deviant Features. On July 11, 1974, Anthony entered a plea to the charge of rape and was sentenced to the Kansas State Reformatory. While incarcerated, a psychiatric examination conducted by Karl K. Tarownick, M.D. dated September 4, 1974, described Anthony as having infantile personality with immature features, poor interpersonal relationship, difficulty in controlling impulses, especially sexual ones, poor frustration tolerance and poor judgment. (Exhibit M at 80). On September 18, 1974, Anthony was seen at Menninger Clinic, where his EEG was noted as mildly abnormal.

(Exhibit K at 7). He was referred to St. Francis Hospital in Topeka for further investigation, including a skull x-ray, ECHO encephalogram, and pneumoencephalogram, all of which were within normal limits at the time of the examination. However, the neurosurgeon at the hospital confirmed the diagnosis of Temporal Lobe Epilepsy. (Exhibit K at 272). Anthony was also found to have Familial Hypercholesterolemia, a condition which causes problems in stabilizing the blood dilantin level. As the result of this disorder, Anthony's seizures were difficult to control. In early 1975, while at the Kansas State Industrial Reformatory, Anthony suffered two well-documented seizures. On January 23, 1975, and April 19, 1975 these Grand Mal seizures lasted forty minutes each and were accompanied by lack of consciousness.

Anthony was granted parole to the Topeka V.A. Hospital in January 26, 1976 and remained there until July 26. During that time an EEG was "abnormal including cerebral dysrhythmia and left anterior temporal area of disturbance with a random slow wave of activity from this region." (Exhibit K at 270). Anthony was again diagnosed with Encephalopath, left temporal with an associated seizure disorder and Familial Hyperlipidemia interfering with adequate control of serum Dilantin level. (Exhibit K at 270).

For the next two years, Anthony stopped taking his medication. He married his second wife, Janet Suther in 1977. In January 1978, Anthony was admitted to the V.A. Hospital in Topeka emergency room following a seizure during which he was driving a car totally unaware of himself and arrested by the police. (Exhibit K at 255). At this time an EEG showed abundant spike and sharp wave discharge from the frontal and temporal regions bilaterally and slow wave activity over the left hemisphere and posterior region.

Anthony was again diagnosed with a seizure disorder with left hemisphere encephalopathy. This time however, he was only prescribed Dilantin.

In 1980, on his wedding anniversary, Anthony found his wife in bed with another man. He began to experience increasing anger. Between July 3, and July 17, 1980 Anthony attempted to kill his wife twice. He then left for St. Charles Missouri to stay with a friend. His anger continued to grow. On July 21, 1980, Mary Fleming was killed. Anthony left St. Charles and drove home to Topeka. During that next week, Anthony traveled between his home and the home of his parents looking for his wife. On August 5, 1980, Anthony hallucinated that he killed his wife. He took an unknown amount of barbiturates and alcohol. After writing a suicide note, he went to the bathroom in his sister's home and he attempted to kill himself by stabbing himself three times in the chest and slashing his neck three times. He lost consciousness and was taken to St. Francis Hospital in Topeka.

Anthony was released to the custody of the Shawnee County jail. St. Charles, Missouri detectives arrived at the jail around 3:00 a.m. The detectives interrogated Anthony at that time about the death of Ms. Fleming. Anthony requested that he be allowed to go to his cell to sleep. The next morning the St. Charles detectives took Anthony into custody and made the trip back to St. Charles jail. At 7:40 p.m. the officers questioned Anthony again.

Trial counsel was aware that this extensive mental health history existed from LaRette and his parents and from an initial competency examination at Fulton State Hospital but failed to perform any investigation to obtain these records and potential

witnesses. LaRette's hearing counsel in his state post conviction proceedings failed to locate and obtain the records and witnesses. This condition explained and mitigated the events of July 25, 1980. Competent counsel would have presented such evidence to the jury. Without such knowledge the jury was forced to see the events of that evening as an unmotivated attack and thus sentenced Anthony to death. With this information the jury would have understood that those events were the result of Anthony's mental illness and that that condition was the result of injuries he suffered as a child. Such an understanding would have convinced the jury that the death penalty was not warranted in this case. The circuit court, therefore made its findings without these crucial information, skewing its review as well as that of the state and federal courts that reviewed its findings.

REASONS TO GRANT EXECUTIVE CLEMENCY

IV. INEFFECTIVE COUNSEL PRIOR TO TRIAL AND TRIAL ERROR

Anthony LaRette Jr. was arrested and charged with the murder of Mary Fleming. Donald Tiemeyer, an attorney who had recently begun practicing in St. Charles, Missouri was appointed to represent Anthony on the charge of capital murder. At the time of his appointment, **Mr. Tiemeyer had never tried a criminal case.**

Tiemeyer failed to investigate Anthony's background and 20 year history of mental illness and brain damage. This resulted in the failure to properly prepare an adequate defense for the guilt and penalty phases of the trial.

On August 11, 1980, Anthony was arraigned on the charge of Capital murder, at that time Donald Tiemeyer entered his appearance. From his statement before the Circuit

Court of Warren County, Mr. Tiemeyer had no prior criminal trial experience at the time of his appointment to Anthony's case. On August 12, 1980, Mr. Tiemeyer requested a psychiatric examination based upon Anthony's prior attempts at suicide. In September 1980, Anthony was examined at Fulton State Hospital by, Henry Bratkowski, D.O.. Bratkowski was aware of Mr. LaRette's prior mental illness hospitalizations but did not obtain or review any of those records as part of the examination. His report noted that Anthony had organic brain syndrome and epilepsy based on his history but found that Anthony had no mental disorder. After receiving this report, Mr. Tiemeyer never requested a second psychiatric exam and never sought to obtain any of Anthony's medical records.

On August 11, 1981, Anthony's trial began with Judge Hodge presiding. A change of venue motion had been granted, so the trial was conducted in adjoining Warren County. Mr. Tiemeyer presented no witnesses at the trial. The jury never learned about Anthony's long history of mental illness and seizures. The jury retired to at 3:05 p.m. to consider the guilt portion of the trial on August 14, 1981. The jury returned a guilty verdict at 4:27 p.m. and at 4:43 p.m. the penalty phase of the trial began. Mr. Tiemeyer stipulated to Anthony's prior convictions which were then read by the state to the jury. The only evidence Mr. Tiemeyer presented to the jury in mitigation was a stipulation of the testimony of Gertrude LaRette, LaRette's mother. This stipulation included the fact that Anthony had found his wife with another man, that he was very upset, that he went to St. Louis and when Anthony returned to Kansas he was as upset as when he left. No other evidence was presented by on behalf of Anthony to the jury. During the penalty phase of the trial, Anthony sat with this head between his legs. After closing arguments, the jury retired to deliberate on

punishment at 5:17 p.m. and returned with their verdict at 6:20 p.m.

Mr. Tiemeyer represented Anthony on appeal. The Missouri Supreme Court affirmed the conviction on March 29, 1983.

V. POST-CONVICTION REPRESENTATION

On December 21, 1983, Anthony filed a pro se petition for relief under Missouri Supreme Court Rule 27.26. Ms. Cathy Gilbert (now Cathy Kelly) was assigned to represent Anthony. Ms. Kelly received her license two months before in October 1983. She had been employed as a St. Louis Circuit Attorney until December 1983. She received this case when she joined the office of the St. Louis Public Defender. Ms. Kelly had no previous jury trial experience. She had no experience drafting or investigating post-conviction motions. She had never investigated or participated in the preparation or trial of a murder case. Ms. Kelly had no experience investigating or preparing a mental defense. Ms. Kelly requested supervision. The Missouri Public Defender System had not received full funding from the Missouri legislature and therefore, there were no resources to hire experts or to investigate Anthony's case. Instead, Ms. Mary Louise Moran was assigned to help as co-counsel. Ms. Moran carried a heavy caseload of murder cases. Ms. Moran never read Anthony's trial transcript. Ms. Moran did look over the amended motion filed by Ms. Kelly but made no decisions regarding its content. This amended motion was filed on April 30, 1984.

During the pendency of Anthony's post-conviction motion, the Missouri Supreme Court set execution dates every 30 days. The Missouri Supreme Court required that each thirty days, Ms. Kelly file a motion for the execution to be stayed. This motion had to

include an affidavit from the post-conviction trial judge that the motion was still pending. These documents were then sent to the Supreme Court for review. The stay extension was for only another 30 days and then the process would begin again.

On May 21, 1984, Ms. Kelly filed a motion to withdraw citing a conflict of interest as Henry Robertson another attorney in her office had handled an aspect of Anthony's direct appeal. This motion was denied by the trial court on June 1, 1984, the date of the evidentiary hearing. At that hearing, Mr. Tiemeyer stated that he was aware that Anthony had a history of hospitalization and head injuries. He stated that he did not investigate or obtain any of Anthony's medical records. Tiemeyer admitted that he never spoke to Mr. & Mrs. LaRette about Anthony's illness. His explanation for his inaction was Anthony's desire not to go to a mental hospital. Ms. Kelly requested additional time to obtain Anthony's medical records. Ms. Kelly stated that she had only recently learned that the medical records were not in the possession of Mr. Sindel, a private attorney. This request was denied by the court after the state objected to such a continuance. Judge Hodge filed his Findings of Fact and Conclusions of Law on June 12, 1984, denying Anthony's 27.26 motion.

Beth Ferguson, of the Special Public Defender's Office, was assigned to appeal the 27.26 motion. Ms. Ferguson joined the Special Public Defender's Office in October 1984 after admission to the Missouri bar. Ms. Ferguson had no previous appellate or trial experience. Ms. Ferguson had never investigated or participated in the investigation of a case involving either a mental defense or murder. Ms. Ferguson also had no experience investigating or appealing 27.26 motions. Ms. Ferguson wrote and researched the appeal

of Anthony's motion without the aid any other attorneys in her office. That appeal was denied on November 26, 1985. LaRette v. State, 703 S.W.2d 37 (Mo. App. 1985).

VI. FEDERAL APPEALS

Anthony filed a federal petition for writ of habeas corpus on April 11, 1986. The Federal Public Defender was appointed on May 2, 1986. It was during that time that Anthony's medical records were recovered and presented to a court for the first time. Counsel attempted to present them to the state courts but access to those courts was denied. See LaRette v. State, 757 S.W.2d 650 (Mo. App. 1988); LaRette v. State, No. 48923 (Mo. App. June 12, 1991); LaRette v. State, No. 54202 (Mo. App. June 12, 1991); State v. LaRette, No. 63569 (Mo. June 11, 1991).

The district court on May 10, 1993 denied the petition without an evidentiary hearing refusing to reconsider the Circuit Court's findings of fact which were made without the benefit of either LaRette's mental health records or testimony from his treating physicians. On January 11, 1995, the Eighth Circuit Court of Appeals affirmed the denial of the petition. LaRette v. Delo, 44 F.3d 681 (8th Cir. 1995). On October 2, 1995, the United States Supreme Court denied the petition for certiorari. LaRette v. Bowersox, 116 S.Ct. 246 (1995).

VIII. THE POWER AND RESPONSIBILITY OF THE GOVERNOR

Article IV, section 7 of the Constitution of Missouri (1945) states as follows:

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

The Constitution of this state vests in the Governor the power of checks and balances in most criminal matters and does so in the matter of sentences of death. One quality of our system of justice is the idea that one accused of a crime is guaranteed due process and a fair trial. If this does not take place or the system has failed for some reason, it can only be corrected by act of the Governor.

This is a situation that calls for intervention by the executive branch due to the failure of the criminal justice system to correct itself. Although the courts have determined that a sentencer should not be precluded from considering as mitigating factors any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), there are cases where this does not happen. Anthony did not have any evidence of his brain damage and mental illness presented to the jury. Trial counsel never obtained this evidence.

The jury was never told of Anthony's 20 year struggle with mental illness and brain damage. They could not make a competent and rational decision as to the question of life and death without this information. Due to ineffective assistance of counsel from the beginning of his journey through the legal system Anthony has not had his case adequately presented. This should be the time for a reasoned response to a system that has failed, if not for any other reason than for the protection of the United States Constitution and the rights of all of the citizens of this state.

It is the responsibility of the Governor to intervene and grant pardon when there has been a miscarriage of justice or violations of the constitution which our legal system has

not adequately addressed. In Herrera v. Collins, 113 S.Ct. 853 (1993), the Court noted "clemency is deeply rooted in our Anglo-American tradition of law and is the historic remedy for preventing miscarriages of justice where judicial processes have been exhausted. Clemency provided the principle avenue of relief for individuals convicted of criminal offenses, most of which were capital because there was no right of appeal." Herrera, 113 S.Ct. at 867. Justice O'Connor concurred with the majority and added "throughout history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency." Herrera at 871. (O'Connor, J., concurring). In light of Herrera there can be no doubt as to your proper role in the criminal appeals procedure. The executive action of clemency would not be in conflict with the judicial system. The highest authority of the judicial branch has deemed clemency as an intrinsic part of the judicial system. Indeed, the Herrera majority relied upon their perception that "executive clemency has provided the 'fail-safe' in our criminal justice system." Herrera at 868.

This position is even more significant in Anthony's case due to procedural impediments which were beyond Anthony's control. Ineffective assistance of counsel was the cause of many significant claims not being raised during the post-conviction proceedings. Anthony's counsel, prior to trial and through his post-conviction proceedings, simply did not do their jobs. These failings limited Anthony's ability to challenge his conviction and sentence in federal court. Due to this breakdown in the criminal judicial system, it is necessary that intervention be made and that checks and balances prevail.

X. CONCLUSION

As Governor of the state of Missouri, the power has been vested in you by the Missouri Constitution, the statutes of the State of Missouri and the United States Supreme Court to exercise your executive power to prevent miscarriages of justice and to act as the "fail-safe" in our criminal justice system. The facts in Anthony LaRette's case are clear and indicate Anthony is not a proper candidate for death by lethal injection. The judicial system has failed Anthony LaRette, a brain damaged, mentally ill individual who has received ineffective assistance of counsel during his entire criminal proceedings. This miscarriage of justice has culminated in his sentence of death and the affirmance of that sentence by the highest courts of the state and federal government.

Petitioner requests that the Governor appoint a board of inquiry so that counsel can present the evidence of Mr. LaRette's 30 year mental illness. In the alternative, Petitioner requests an opportunity for a hearing before the Missouri Board of Probation or Parole.

For the above stated reasons, commutation of Anthony LaRette's sentence to life without probation and parole is appropriate.

Respectfully submitted,

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