

IN THE MATTER OF: STANLEY D. LINGAR, CP-45
Potosi Correctional Center
Mineral Point, Missouri 63660

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

APPLICATION FOR COMMUTATION OF SENTENCE

Respectfully submitted,

KENT E. GIPSON, #34524
JEREMY S. WEIS, #51514
ATTORNEYS AT LAW
305 East 63rd Street
Kansas City, Missouri 64113
816/363-2795 Fax 816/363-2799

Attorneys for Applicant

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IN THE MATTER OF:)

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STANLEY D. LINGAR, CP-45) Execution Scheduled for

) February 7, 2001

Potosi Correctional Center) at 12:01 a.m.

Mineral Point, Missouri 63660)

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APPLICATION FOR COMMUTATION OF SENTENCE

TO: THE HONORABLE BOB HOLDEN,

Governor of the State of Missouri:

COMES NOW Stanley D. Lingar, by and through his counsel, and petitions the Governor for an order under Missouri Constitution Article IV, Section 7 and Section 217.800 RSMo. (1994), to grant Mr. Lingar executive clemency, and commute his death sentence to life without parole, or in the alternative stay the scheduled execution and convene a board of inquiry to further investigate the case. In support of this application, Mr. Lingar states the following grounds:

INTRODUCTION

A. FACTUAL BACKGROUND:

Petitioner, Stanley Dewaine Lingar, was tried before a jury in 1986 in the Circuit Court of St. Francois County, Missouri, on a charge of murder in the first degree involving the murder of Thomas Scott Allen. Following a three day bifurcated trial, the jury convicted petitioner as charged and recommended a sentence of death,

(L.f. 106), which was imposed by the trial court. (L.f. 129). The guilt phase of the trial lasted two days. The penalty phase lasted one day. At trial, Lingar was represented by Daniel Moore, of Poplar Bluff, Missouri, who served as lead counsel, (PCR Tr. 19), and his co-counsel, Dale Nunnery. Mr. Moore had no previous experience handling either a first degree murder trial or a capital murder trial. (PCR Tr. 33). Moore and Nunnery also represented petitioner during his original direct appeal.

In the guilt phase of the trial, the state put on sixteen witnesses and the defense put on one witness, Scott Starkey, whose testimony regarding petitioner's level of intoxication actually undermined the defense theory that petitioner could not deliberate on the shooting. (Tr. 355-361). It was the trial "strategy" of Mr. Moore to convince the jury that Lingar was guilty only of second degree murder because Lingar did not have the ability to coolly deliberate on the shooting due to his intoxication, which is the mens rea requirement necessary to convict someone of first degree murder under Missouri law. (PCR Tr. 190). In fact, during the closing arguments of the first phase of the trial, Mr. Moore conceded to the jury that Lingar committed second degree murder. (Tr. 383). Counsel made this concession without specific permission from Lingar to do so. (PCR Tr. 20).

In an attempt to establish Lingar did not "deliberate" as required for first degree murder, Mr. Moore relied heavily upon a defense of voluntary intoxication. Despite this strategy, Mr. Moore inexplicably did not present any evidence of petitioner's history of alcohol abuse or his treatment for blackouts. At the time of Mr. Lingar's trial, voluntary intoxication was no longer a viable defense in Missouri because it had been repealed as a defense to murder in 1983, two years prior to the date of the shooting. § 562.076 RSMo. Cum. Supp. (1983). As a result, the jury was not instructed that voluntary intoxication could be a defense to the crime. The prosecutor also informed the jury in closing argument that intoxication is not a defense and that there would be no instruction forthcoming which states that alcohol is a shield for Lingar's conduct. (Tr. 387).

The primary evidence presented by the prosecution at trial to establish guilt was the testimony of Mr. Lingar's co-defendant, David Smith, who testified for the state pursuant to a plea bargain agreement under which he received a ten year sentence for second degree murder after Lingar's trial was completed. (Tr. 350-51).⁽¹⁾

David Smith testified in long narratives without objection by either defense attorney. David Smith gave the following account:

In the late afternoon on Saturday, January 5, 1985, Lingar and Smith were drinking and driving around town in Doniphan, Missouri. They started drinking between 5:00 and 7:00 p.m. David Smith drank about three bottles of wine and six to eight cans of beer while Lingar drank two twelve packs of beer, along with another six pack of beer and about a half a bottle of wine. (Tr. 267, 271). Late that night or in the early morning hours of the following day as they were driving around, Lingar and Smith came upon about six juveniles who were hitchhiking. Smith rolled down the window of the blue mustang they were driving and asked the boys where they were headed. Lingar informed them that he was not going the way they were and drove off (Tr. 268). Lingar then put the car in reverse and backed up and picked up the hitchhikers. The five or six juveniles piled in the back seat. After driving approximately a mile down the road, they spotted a jeep with the hood up. Lingar pulled the Mustang up behind the jeep and everyone got out. Scott Allen told them that he had run out of gas. Lingar told Allen that he was headed into town and could drop Allen off at a gas station but would not be able to bring Allen back. Allen then got a white jug from his jeep and got in the Mustang with Lingar and Smith. The hitchhikers were left behind at the jeep. (Tr. 269-70). Lingar then drove the car through town and around several gas stations but they were all closed. He then started driving out of town saying he was going to check on two gas stations across the bridge located out of town. He then drove across the Current River bridge but the two gas stations were both closed, and instead of turning around to go back to town he kept driving out of town. As they were driving, Lingar told Scott Allen to take off his winter coat and Scott Allen refused. Lingar then told Allen to take it off or he wasn't going to take him back to town, so Scott Allen complied. Lingar then stopped the car by Lingo Lake and told Allen to remove his pants and masturbate. When Allen refused, Lingar again indicated he would not take Allen back if he did not comply. (Tr. 271-76) Lingar

then started the car and drove to his parent's house. Lingar got out of the car leaving Smith to watch over Allen and returned with a 22 automatic rifle, got back in the car and drove back to Lingo Lake. Lingar told Allen to continue masturbating. Allen then asked if he could get out and urinate. As Allen was urinating, Smith looked across the top of the car and saw Lingar standing there with the rifle laying over the top of the car pointing towards Allen. (Tr. 276-280). Lingar fired a shot and Allen fell to his knees. Allen then pulled himself up in the car and sat down on the passenger side seat. Allen then jumped over the console and sat behind the wheel, turned on the key to try to start the car, but failed to push in the clutch. Lingar then pointed the rifle at Allen's head and shot him again. Allen fell out of the car because the driver's door was open. Lingar then approached Allen and shot him a third time. (Tr. 305-6). Lingar then opened the trunk, grabbed a tire iron and hit Allen with it (Tr. 307). When Lingar realized Allen was not dead yet, he backed up the car and then proceeded in a forward direction to strike Allen with the car bumper. Then Lingar drove away. (Tr. 308). Lingar and Smith drove to Lingar's brother, Eddie's house. Eddie informed them that they needed to clean up the bloody snow, so they returned to the scene. They put Allen's body in the trunk, drove to the Eleven Point River bridge and threw the body off the bridge. They then drove back to Lingar's parents house and cleaned up the trunk. (Tr. 286-93). At some later point, Lingar and Smith decided to leave the state. After pawning the mustang to a salvage dealer, and upon advice by Lingar's father that it was best to leave the state, Lingar and Smith took Lingar's father's car to Bowling Green, Kentucky to stay with Lingar's sister. They disposed of the rifle on a back country road in Kentucky. (Tr. 300-303).

The medical examiner who performed the autopsy, Dr. Ramirez, testified that the cause of death was the first bullet to the chest. (Tr. 136, 148). At the post conviction hearing, the pathologist of Boone County, Missouri, Dr. Jay Dix, testified that after reviewing Dr. Ramirez' report, it was his professional opinion that David Smith's account that Lingar repeatedly struck the head of the victim with a tire iron

and ran over the victim with the car was inconsistent with the medical evidence because there were no bruises or abrasions on the victim's body, other than the gun shot wounds and one laceration four inches from the right ear. (PCR Tr. 5-10).

David Smith further testified that he reported to officers that Lingar was drunk that night and that Lingar did not know what he was doing. (Tr. 323-28). David Smith testified that "one minute he [Lingar] seemed like he knew what he was doing and the next he just seemed totally different." (Tr. 341). In addition, the state called two of the hitchhikers. Richard Book, one of the hitchhikers, had given a statement to officers that Lingar and Smith were drinking and were drunk (Tr. 163-64). The other hitchhiker called by the state, Jimmy Bessent, testified that Lingar had been drinking but was not swerving all over the road. (Tr. 171).

During the penalty phase of the trial, in his opening statement to the jury, the prosecutor informed the jury that the only additional evidence it would present at that stage was that Lingar had a consensual homosexual relationship with his co-defendant. (Tr. 395). Upon objection by defense counsel based upon surprise and relevance, the state replied that the evidence was relevant to the motive, was a circumstance of the crime, and revealed Lingar's character. (Tr. 396-97). When the state recalled David Smith to the stand at the penalty phase, he testified that he and Mr. Lingar were engaged in a homosexual relationship. (Tr. 403). The state did

nothing further to link this testimony with petitioner's purported motive for the murder or any aggravating circumstance submitted.

During his penalty phase argument, Mr. Moore told the jury that he was precluded from presenting, and the jury was precluded from considering, nonstatutory mitigating evidence and circumstances. (Tr. 437). Mr. Moore pointed out to the jury that they should consider the statutory mitigators of Lingar's lack of prior criminal history, Lingar's youth, and Lingar's intoxication which kept him from appreciating the criminality of his conduct in determining punishment. (Tr. 437-38). After approximately three hours of deliberation, the jury returned with a verdict sentencing Lingar to death based upon a finding of two statutory aggravating circumstances. See § 565.032 RSMo. (1986). The jury found the aggravating circumstance that "the murder of Thomas Scott Allen involved torture and depravity of mind." (L.f. 106). The jury also found that the murder was committed while Lingar was engaged in the perpetration of a kidnapping. (*Id.*).

B. PROCEDURAL HISTORY:

On April 18, 1986, Mr. Lingar's judgment of conviction for capital murder and sentence of death was imposed in the Circuit Court of St. Francois County, Missouri. Mr. Lingar filed a timely appeal of his conviction to the Supreme Court of Missouri, which affirmed the conviction and sentence. *State v. Lingar*, 726 S.W.2d 728 (Mo.

banc 1987), *cert denied*, 484 U.S. 872 (1987). Thereafter, Mr. Lingar filed a post conviction relief motion pursuant to Missouri Supreme Court Rule 27.26 (repealed 1988) in the Circuit Court of St. Francois County, Missouri. Mr. Lingar's 27.26 motion was denied by the Circuit Court after a hearing and this denial was affirmed by the Missouri Supreme Court. *Lingar v. State*, 766 S.W.2d 640 (Mo. banc 1989), *cert. denied*, 493 U.S. 900 (1989).

On October 18, 1989, Mr. Lingar petitioned the United States District Court for the Eastern District of Missouri *pro se* for habeas relief pursuant to 28 U.S.C. § 2254. On March 1, 1993, Mr. Lingar filed his First Amended Petition for Writ of Habeas Corpus by and through appointed counsel, Burton H. Shostak. Mr. Lingar's First Amended Petition for Writ of Habeas Corpus was denied without a hearing and his case was ordered dismissed by United States District Judge Jean Hamilton in a memorandum and order dated August 2, 1996.

The Eighth Circuit , by a 2-1 vote, affirmed the denial of habeas relief. *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1999). Judge Heaney vigorously dissented. Mr. Lingar filed a timely petition for a writ of certiorari in the United States Supreme Court on March 27, 2000, the Supreme Court denied Lingar's petition for certiorari. *Lingar v. Luebbers*, 120 S.Ct. 1536 (2000). Lingar then filed a motion to recall the mandate with the Missouri Supreme Court arguing, among other things, that his death

sentence should be reversed under *State v. Thompson*, 985 S.W.2d 779, 792 (Mo. banc 1999), because the prosecution did not disclose their intent to use evidence of homosexuality in aggravation of punishment.

The Missouri Supreme Court summarily denied Lingar's motion to recall the mandate on October 3, 2000. Lingar then filed a petition for writ of certiorari with the United States Supreme Court on January 2, 2001, arguing that Mr. Lingar was denied his right of Equal Protection based on the Court's recent pronouncement in *Bush v. Gore*, ___ U.S. ___ (2000). *Lingar v. Missouri*, No.00-7717. Mr. Lingar is currently awaiting a ruling on that petition.

REASONS FOR GRANTING CLEMENCY

- **Clemency Should Be Granted Because There Are Significant Concerns Surrounding Mr. Lingar's Guilt and Degree of Responsibility for this Murder.**

Mr. Lingar's co-defendant, David Smith, entered into a plea agreement with the state and his trial testimony was the only direct evidence establishing that Lingar was the "triggerman" in this murder. Smith received a ten year sentence in exchange for his testimony and is now a free man.

This lenient plea bargain given to David Smith, by itself, raises a "red flag" regarding Smith's truthfulness and credibility. Criminal practitioners are well aware that it is common for a co-defendant, in exchange for a favorable plea agreement, to

falsely minimize his own degree of involvement and shift the blame to a less culpable co-defendant. There is a significant danger that this is precisely what occurred in this case. As noted earlier, Smith's testimony was the only evidence suggesting that Stanley Lingar, rather than Smith, was the mastermind of the kidnapping and the triggerman in the murder. Both objective and subjective factors that can be gleaned from the record in this case strongly support an alternative theory that it was Smith, not Lingar, who was the ringleader of this kidnapping plot and was the person who actually shot and killed Scott Allen.

The objective evidence that suggests that Smith was the triggerman comes to light based upon a comparison of the facts of Smith's story with the medical testimony regarding the condition of the victim's body. Smith testified that Lingar shot the victim, hit him several times in the head with a tire iron and then ran over him with a car, prior to throwing the victim's body into Eleven Point River. The medical testimony clearly establishes that Smith's account regarding the manner of the victim's death is false. The only trauma to the victim's body, apart from the gunshot wounds was one laceration to the head. Had the victim been struck repeatedly in the head with a tire iron and run over by the car, there obviously would have been additional trauma to the victim's body that would have come to light in the autopsy. If Smith lied about the cause and manner of the victim's death, it is certainly

not unlikely that he would lie about his own degree of involvement in the killing. It certainly would not take a great deal of intelligence or imagination for Smith to "flip-flop" his involvement with that of Lingar, portraying Lingar as the mastermind and triggerman when in fact, Smith himself was the actual killer.

There are two other subjective reasons, that can be gleaned from the facts, that suggest that Smith was the triggerman instead of Lingar. First, Smith is much more intelligent than Lingar. Second, as an intuitive matter, it is highly unlikely that Lingar, if he was the mastermind of this kidnapping and murder plot, would have been driving the car and holding the victim at gunpoint at the same time.

Although Lingar's precise IQ scores are not available, both the pre-trial mental evaluation, and, more recently Dr. A. E. Daniel have indicated that Mr. Lingar's intelligence is in the borderline mentally retarded range. (L.f. 23-28). David Smith, although slightly younger than Lingar, is much more intelligent.⁽²⁾ Due to confidentiality concerns, Lingar and his counsel have not had access to any of Smith's school or prison records which we believe would establish that his level of intellectual functioning was much higher than Stanley Lingar's. However, the Board

of Probation and Parole and the Governor's Office are not so constrained. In the course of the investigation of this application, Mr. Lingar would respectfully request that the Board of Probation and Parole examine the prison records of both Mr. Lingar and Mr. Smith to see for itself which of these two men is the most likely mastermind of these crimes. In light of this fact that Smith is the much more intelligent of the two, as an intuitive matter, it is therefore much more likely that he was the principle and the Lingar was the accomplice in this criminal episode.⁽³⁾

The second reason to doubt Smith's testimony that Lingar, rather than Smith, was the triggerman in the murder and mastermind of the kidnapping was his account that Lingar, after the abduction, drove the car and held the victim at gunpoint at the same time. As an intuitive matter, it is much more likely that the slow witted accomplice, rather than the more intelligent mastermind would be driving the car. In addition, it would be extraordinarily difficult for a person to concentrate on driving and hold the victim at gunpoint at the same time. It is much more likely that Lingar, being the accomplice, drove the car while Smith held the victim at gunpoint in the

passenger seat. Since Smith probably had possession of the weapon, it therefore, follows that he likely shot the victim instead of Lingar.

These questions surrounding the relative culpability of Lingar and Smith raises a disturbing question regarding whether the State of Missouri put the right man on death row. It is far from certain that Lingar, rather than Smith, masterminded this kidnapping and killed the victim. There is no dispute that both Lingar and Smith were involved in the abduction of the victim. However, there is enough doubt regarding their relative degree of involvement to justify sparing Stanley Lingar's life.

- **Clemency Should Be Granted Because the State Utilized Lingar's Homosexuality as a Basis For Imposing a Sentence of Death, Which Offends Basic Notions of Justice and Fairness.**

...where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976).

Evidence concerning Lingar's sexual preference, although purportedly offered by the state to establish motive for the murder, was not presented during the guilt phase of trial. Prior to the penalty phase, the state did not offer any evidence of Lingar's homosexual relationship with the co-defendant, David Smith. This is particularly curious because if this evidence was critical to the state's theory of motive

for the homicide, why didn't the prosecutor present this evidence during Smith's extensive testimony in the guilty phase?⁽⁴⁾ During sentencing proceedings, however, the state suddenly claimed that evidence pertaining to Lingar's sexual relationship with Smith should be allowed because it showed "one of the circumstances of the crime" and thus tended to prove Lingar's motive for killing Scott Allen. In the state's view, "[Lingar] realized that to let Scott Allen go would suddenly bring into evidence that he was a homosexual," adding that Lingar's relationship with the co-defendant was relevant...

... because if this was a young lady they had picked up and forced to disrobe, that would make perfect sense in our heterosexual society. But what's odd is the fact that they picked up a young boy. It doesn't make any sense without this evidence. Then what happens, it starts to fit more of a pattern. (Tr. 402).

However, the prosecutor did not produce any evidence to suggest that Lingar's sexual relationship with the co-defendant motivated the offense, and raised no such inference during his closing argument. Co-defendant David Smith testified that he and Lingar had been engaged in a homosexual relationship; which was the only additional aggravating evidence submitted by the state in the penalty phase, other than a letter written by Lingar that the state believed showed a lack of remorse. (Tr.

at 403-405). In light of these circumstances, the prosecutor's purported motivation was obviously a pretext to hide his true reason for presenting this evidence: to inflame a homophobic jury from a rural area with prejudicial evidence that Lingar was a practicing homosexual; a fact that the prosecution believed the jury would find morally offensive.

The federal district court recognized that admission of this evidence of homosexuality was both irrelevant and prejudicial as a matter of Missouri state evidentiary law. The Eighth Circuit also did not dispute Lingar's argument that the admission of this evidence violated the constitution. However, the court astonishingly refused to overturn Lingar's death sentence by finding that the admission of this incredibly prejudicial evidence was harmless error.

To allow a death sentence to be imposed based upon a defendant's sexual preference is both morally and legally indefensible. Although the state apparently recognized that this homosexuality evidence was inadmissible in the guilt phase, the prosecution perniciously injected this evidence for the jury to consider as relevant evidence in determining whether Lingar deserved to die. There can be no question that this information was introduced for the sole purpose of inflaming a rural Missouri jury into imposing a sentence of death. As a result, there is a real question

whether the jury, absent this inflammatory and irrelevant information, would have imposed a sentence of death.

The prosecution's presentation of this evidence was a transparent, but effective, tactic to inject an inflammatory and volatile social issue into the case to influence a rural jury to condemn appellant to die because he was, as believed by many fundamentalist Christians in the "bible belt," an immoral sexual deviant. Homosexuality, according to the views of many Americans, particularly fundamentalist Protestants, indicates a "depraved mind."⁽⁵⁾ The prejudice resulting from this evidence permeated the sentencing proceedings with unfairness. Elementary principles of justice and fairness demand that Stanley Lingar's death sentence be commuted.

- **Clemency Should Be Granted Because Mr. Lingar Was Denied His Right to Effective Assistance of Counsel.**

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Strickland v. Washington, 466 U.S. 668, 685 (1984).

When a human life is at stake, the Constitution demands extraordinary protections for capital defendants that can only be realized if the accused has competent counsel. *The Eighth Amendment and Ineffective Assistance of Counsel at Trial in Capital Cases*, 107 Harv.L.Rev. 1923, 1940 (1994). Counsel disregarded other viable guilt phase defenses to pursue a voluntary intoxication defense and further incorrectly informed the jury at the sentencing phase that it could only consider the three statutory mitigating circumstances submitted (i.e., age, lack of prior criminal history and impaired mental capacity) in determining punishment. The jury was also not presented with critically important, attainable evidence regarding appellant's family background, psychiatric history, and borderline mental retardation. Thus, it was virtually inevitable, in light of these inexcusable errors of counsel, that appellant would be convicted as charged and sentenced to die.

A. Clemency should be granted because Mr. Lingar was denied his right to effective assistance of counsel when his trial attorney admitted to the jury, without Mr. Lingar's consent, his guilt to second degree murder and based the defense to the deliberation

element of the greater first degree murder charge on the obsolete theory of voluntary intoxication.

Trial counsel's guilt phase theory of defense centered upon his mistaken belief that Lingar's voluntary intoxication negated his ability to "deliberate" and, in turn, negated the *mens rea* required to support a first degree murder conviction. In his closing argument, without his client's consent, counsel informed the jury that Lingar had committed second degree murder:

In this particular instance, Stanley Lingar has committed the acts contained in the instruction for second degree murder. I'll admit to that. Because I think that if I tried to argue to you that he's not guilty of second degree murder, I'm not going to have much credibility with you. Its very difficult for a defense attorney to admit any guilt on behalf of his client. I think in a case of this serious nature, where the State is talking about taking the life of Stan Lingar, that it is my duty to disclose that to you.

(Tr. 383-84).

This argument, which rested entirely on counsel's perceived validity of the voluntary intoxication defense, had grave consequences. Because the jury was not instructed that voluntary intoxication was a defense or a factor to consider in determining Lingar's guilt of the charged offense, counsel presented no viable defense at all to the capital offense of first degree murder. For all intents and purposes, counsel, in effect, conceded that Lingar was guilty of first degree murder.

With no viable defense to the greater charge, and counsel's concession of guilt to the homicide, conviction of the capital crime was a foregone conclusion.

Conceding Lingar's guilt and relying on legally invalid theory of defense presents a textbook example of ineffective assistance of trial counsel. Both Judge Heaney from the Eighth Circuit and District Judge Jean Hamilton recognized that counsel's performance was deficient. Counsel's incompetence is particularly egregious because, in light of the credibility problems of star witness David Smith as outlined above, a strong defense could have been presented that David Smith was the ringleader of the kidnapping and the triggerman in the murder. Had this defense been competently asserted, there is a reasonable likelihood that Mr. Lingar would have been convicted of the second degree felony murder and would have probably have been released on parole by now.

As with the homosexuality claim, it is astonishing that the courts did not grant relief on this claim. Governor Holden is not constrained by hyper-technical and arcane rules of law that, in recent years, have been manipulated and perverted by conservative courts to deny relief to prisoners on meritorious claims. If the right to effective assistance of counsel is to remain viable in this state, Stanley Lingar's death sentence should be overturned.

B. Clemency should be granted because Mr. Lingar was denied his right to effective assistance of counsel when his trial attorney incorrectly argued to the jury that they could not consider non-statutory mitigating factors when they considered imposing a sentence of death.

During his penalty phase closing argument, Lingar's attorney explained to the jury that the jury instructions "tell you what the law is." (Tr. 437) He explained to the jury that they must find an aggravating circumstance and then consider the mitigating circumstances. (Id.). In describing to the jury what mitigating circumstances they could consider, Lingar's counsel explained:

And by mitigating circumstances, we -- and when I speak of we, the defendant -- **is limited to what the statutory mitigating circumstances are. We may have other mitigating circumstances but they are not involved in the statute and we're not allowed to present them.** In Instruction No. 17 there is a list of the mitigating circumstances that we believe the evidence justifies.

(Id.) (emphasis added).

Both the District Court and Judge Heaney found that Lingar's attorney's performance was deficient within the meaning of Strickland:

Petitioner's attorney erred in stating to the jurors that they could consider only statutory mitigating factors. See Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (jury must be permitted to consider any mitigating factors); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (vacating death sentence where jury was instructed not to consider nonstatutory mitigating circumstances); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Ohio death penalty statute impermissible limited mitigating factors jury

could consider). The Court assumes that counsel's performance was deficient within the meaning of Strickland.

It is apparent that Lingar's attorney failed to research the law regarding nonstatutory mitigating circumstances, even though his client's life was at stake.

Because of counsel's mistaken understanding of the law, the jury was precluded from hearing and considering available nonstatutory mitigating evidence including, but not limited to, the following mitigating factors: (1) a background of being victimized by physical and sexual abuse, (2) a history of serious alcohol abuse, (3) a history of headaches and blackouts which could be related to his alcohol abuse, (4) that Lingar is normally a dependent, passive and non aggressive person, (5) Lingar's poor self-esteem and acute paranoia, (6) his potential to be rehabilitated through treatment, and (7) documented remorse for the crime.

The state has consistently argued that the jury was aware that they could consider nonstatutory mitigating factors when they handed down judgment. This argument ignores the fact that nonstatutory mitigating evidence was never presented to the jury. As Judge Heaney noted in dissent, "I cannot accept this rationale because the jury had no mitigating evidence to consider. Because of counsel's misunderstanding of the law, he failed to investigate and develop nonstatutory mitigating circumstances including a background of sexual abuse, serious alcohol

abuse, a history of blackouts, mental problems, and documented remorse for the crime. I repeat, the fact that the jury was instructed by the court that it could consider 'any circumstances' is beside the point, as defense counsel neither developed nor presented any such evidence." *Lingar*, 176 F.3d 453, 464 (8th Cir. 1999).

Had Mr. Lingar's jury been specifically instructed on the seven nonstatutory mitigating circumstances set out above, it is very likely the jury would have found that the mitigating circumstances outweighed the two submitted aggravating circumstances. Therefore, it is likely the balance of the evidence would have "tipped the scales" in favor of a life sentence had counsel performed in a competent fashion.

C. Clemency should be granted because the jury imposed a sentence of death without first considering seven substantial mitigating circumstances that likely would have resulted in the jury imposing a sentence of life imprisonment.

Lingar's jury convicted him and sentenced him to death without hearing or considering a number of mitigating circumstances. Lingar's trial counsel was constitutionally ineffective because he failed to conduct a reasonable investigation into Lingar's background, character, and medical and mental health. Lingar's defense attorney failed to investigate and present to the jury the following mitigating circumstances during the penalty phase of the trial: (1) Lingar's borderline intellectual

functioning, acute paranoid disorder, anxiety disorder, and dysthymic disorder;⁽⁶⁾ (2) Lingar's history of and treatment for blackouts, dizziness and severe headaches; (3) Lingar's history of alcohol abuse which coincides with his history of blackouts; and, (4) the extensive physical and sexual abuse Lingar endured as a child and throughout his teenage years. Lingar's trial attorney also failed to present to the jury that Lingar is a passive and dependent person, that he suffers from poor self-esteem and severe paranoia, and that he has a strong potential for rehabilitation and/or treatment. Finally, Lingar's trial attorney failed to rebut the prosecutor's argument that Lingar showed no remorse for the crime by presenting documented evidence which revealed that Lingar was in fact remorseful for his acts.

Instead of presenting these mitigating circumstances to the jury, Lingar's trial counsel put forth a brief plea for mercy through three of Lingar's family members. However, these three family members -- Lingar's mother, Gladys Lingar, his father, Roy Lingar, and his sister, Deborah Lowe -- had already lost credibility with the jury as it was revealed during the guilt phase of the trial that these three individuals had tried to help Lingar escape law enforcement. (Tr. 301-302). The extent of the penalty

phase mitigating evidence included testimony from these three family members that Lingar had never been in trouble with the law, that he was a good and helpful person, and that he received poor grades in high school. Counsel failed to call other, more credible witnesses to bolster the discredited testimony of these family members. The record reveals that there were other witnesses that counsel could have called on Lingar's behalf. (See Exh. 2).

Moreover, despite the fact that counsel relied on the mitigating instruction regarding Lingar's lack of capacity to appreciate the criminality of his conduct, supported solely with evidence of Lingar's intoxication the night of the shooting, counsel failed to ask any questions of these family members regarding Lingar's intoxication. Counsel failed to question these family members regarding Lingar's extensive history of alcohol abuse even though they were the people most familiar with it.

Lingar's jury convicted him and sentenced him to death without hearing that his intellectual functioning fell in the borderline retarded range. The jury also never heard that Lingar suffers from severe paranoid and anxiety disorders along with a depression disorder known as dysthymic disorder. Although Lingar's mother, father, and sister all testified during the penalty phase of his trial that Lingar "wasn't too high a scholar" (Tr. 413), received poor grades in school (Tr. 416, 423), and did not

graduate from high school (Tr. 416), the jury never learned why this was so. The pretrial mental examination found the following:

the results of both verbal and performance portions of the Wechsler Adult Intelligence Scale-Revised [WAIS-R] placed Mr. Lingar in the borderline range of intellectual functioning with a full-scale I.Q. also in the borderline range.

(L.f. 25). No WAIS-R score or IQ was reported, and, consequently, counsel never attempted to find out what Lingar's I.Q. score was. Whether due to neglect or oversight, this is a significant dereliction of duty on the part of Mr. Moore because the term "borderline" encompasses a range of intellectual functioning, the lower end of which is considered mentally retarded. Golden, Charles J, PH.D., Clinical Interpretation of Objective Psychological Tests (1979).⁽⁷⁾

The pretrial examination documents Lingar's significant adaptive problems including skipping school at age 14, abusing alcohol at age 16, dropping out of school at age 17, and inability to hold down a steady job. (L.f. 26). Counsel was also

aware that Lingar was not "self-sufficient" as he and David Smith had attempted to live in their own trailer, but ended up moving back in with Lingar's mother and father because they could not make it on their own. (Tr. 262-63). Lingar's adaptive problems were obvious. These problems combined with the "borderline intellectual functioning" should have alerted Mr. Moore of the necessity of more investigation and further psychological testing, especially for purposes of mitigation in the penalty phase.

On April 30, 1986, shortly after Lingar was sentenced and arrived at the Missouri Department of Corrections, a personality inventory, the Million Clinical Multi Axial Inventory (MCMI) was administered to Lingar. (Add. at 98-101). From the results of the MCMI, the following parallel DSM-III diagnoses were listed:

Axis I: Clinical Syndrome: . . . 298.30 Acute Paranoid Disorder.
300.02 Generalized Anxiety Disorder. 300.40 Dysthymic Disorder

Axis II: Personality Disorder: . . . Avoidant Personality;
prominent dependent traits. Course: The major personality features described previously reflect **long term or chronic traits that are likely to have persisted for several years prior to the present assessment**.

* * *

Severity of Disturbance: On the basis of the test data, the assumption may be made that **this inmate is experiencing a severe mental disorder**. Further professional observation and care are appropriate.

(Exh. 1) (emphasis added).

The information contained in the pretrial psychiatric examination was not hidden or kept from Mr. Moore. Mr. Moore was fully aware of the findings and lack of conclusiveness on the most important mitigating issues. The results of the MCMPI performed after Lingar entered the Department of Corrections reveal that Lingar's attorney failed to discover considerable additional mitigating psychiatric evidence, which, as the report states, "are likely to have persisted for several years prior to the present assessment." (Id.).

Lingar asserts that even though his attorney was operating under the deficient belief that he was limited to statutory mitigating circumstances, counsel should have discovered and introduced this mitigating psychiatric evidence because it provided a basis to support one of the statutory mitigating factors submitted, i.e., whether Lingar had the capacity to appreciate the criminality of his conduct. In addition, this evidence provided a basis to request an additional statutory mitigating circumstance regarding whether "the murder. . . was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 565.032.3 (2) RSMo. (1985).

The pretrial examination further documented Lingar's history of blackouts and its connection with his history of alcohol abuse. Once again, this history was never

presented to the jury either during the guilt phase or in mitigation of punishment. The pretrial report documents the following:

[Mr. Lingar]. . . has been drinking heavily since age 16. He stated he used to drink two six-packs or more of beer a day. . . he stated he had "**blackout spells" from age 8**. He denied a complete loss of consciousness during these spells. He said he would feel weak after a spell and the spells lasted one or two minutes, but there were occasions when the spell would last a longer period of time. He was investigated at Poplar Bluff and states he was on medication, but it was not clear what medication he was treated with.

* * *

Mr. Lingar. . . related an extensive substance abuse history primarily involving the use of alcohol. He indicated **he began drinking alcoholic beverages at approximately age 8** and his excessive drinking has continued to the time of his current arrest. Mr. Lingar also related a history of "black-outs" in which he more or less passes out and briefly loses consciousness. His description of these episodes, however, appear to be more like fainting spells than seizures. **It is possible that there is a relationship between these episodes and Mr. Lingar's early and heavy use of alcohol, but direct connection is difficult to ascertain.**

(L.f. 23-26) (emphasis added).

Lingar's trial counsel relied heavily on the extent of Lingar's intoxication the night of the shooting both in the guilt phase and the penalty phase. Mr. Moore admitted Lingar's guilt to all elements of murder in the first degree except deliberation in the guilt phase, mistakenly relying on a "voluntary intoxication defense" to the deliberation element. In the penalty phase, counsel based the statutory

mitigating instruction regarding whether Lingar had the capacity to appreciate the criminality of his conduct solely on Lingar's intoxication that night. Despite this "strategy," counsel completely failed to present to the jury the fact that Lingar has a history of alcohol abuse. As demonstrated above, this history was well documented in the pretrial mental examination.

Lingar's history of alcohol abuse was also documented in both presentence investigation reports submitted before sentencing. In the report dated April 2, 1986 submitted by Officer James Kellogg, he reports that:

Lingar stated that he began abusing alcohol when he was 16 years old. During the past few years, he would consume 2 [two] or more six-packs of beer daily. He stated that he would periodically abstain from alcohol for periods of time, but was never able to avoid resuming it. He related that he remained sober for 4 [four] months until January 1, 1985, when he resumed drinking every day, including the time of the present offense. The defendant stated that he has used marijuana on an occasional basis and would at times abuse "downers," for which he had a legitimate prescription. Lingar has never received treatment for substance abuse.

(L.f. 117). Officer Kellogg's presentence report concluded with the following:

Alcohol abuse has been a problem for the defendant for a number of years. He did not seek professional treatment, but tried unsuccessfully to abstain from alcohol on his own. Alcohol abuse is viewed by this officer as the major discernible causative factor in the present offense.

(L.f. 116).⁽⁸⁾

The fact that the probation officer felt Lingar's history of alcohol abuse, not just the fact that Lingar was intoxicated on the night of the shooting, was relevant and important for sentencing purposes reveals the extent of Moore's deficient performance in failing to present it as mitigating evidence before the jury.

In addition, the report documents that Lingar had been treated for these blackout spells, which included a prescribed medication. In fact, on March 20, 1985, Mr. Moore requested Lingar's medical records from Doctor's Regional Medical Center. The only record from Doctor's Regional in Poplar Bluff, Missouri, is that of a CT scan conducted on Lingar on December 8, 1980. This record noted in the history section "fainting." There were also records from Ripley County Memorial Hospital in Doniphan, Missouri which indicated that Lingar had been admitted to Ripley County Hospital on December 2, 1980 and discharged on December 9, 1980. These records show that Lingar was treated by a Dr. C. Forrest Sparger for blackouts and fainting spells. (L.f. at 113). The Ripley County Records state as follows:

Chief Complaint: 1. History of fainting, intermittently for two years; 2. History of Dizziness; 3. History of blurred vision. States he as been treated by local physician for ulcers and nerves. . . He has never had a EEG or brain scan. States that all the time he wants to sleep, even during school. . . Because of the above noted symptoms he came to the clinic on 11/25/80. X-ray of the skull done at that time showed essentially normal skull. Because of the recurrence of the fainting, ever since the first examination by this examiner on 11/25/80, he comes in at this time for further evaluation and treatment.

* * *

Final Diagnosis: Sphenoid, maxillary and frontal sinusitis. . . Abnormal EKG with anterior lateral ST elevation. Chronic obstructive pulmonary disease. . . Fainting, cause not determined.

(Id.)⁽⁹⁾

Despite the medical documentation of Lingar's history of and treatment for black out spells, fainting, dizziness and headaches, and the fact that the cause of these

fainting episodes had not previously been determined, Mr. Moore did nothing to further determine the cause of Lingar's medical condition. Neither did he try to further determine whether or not Lingar's medical condition was related to his history of alcohol abuse, and/or was a factor in Lingar's behavior the night of the shooting. In fact, Lingar's attorney presented absolutely no evidence of Lingar's medical condition to the jury, despite its clear relevance to the intoxication defense during the innocence/guilt phase, and its relevance to the mitigating circumstance submitted to the jury regarding Lingar's capacity to appreciate the criminality of his conduct.

Furthermore, the pretrial psychiatric report reveals that Lingar's blackout spells began when he was eight years old, the same year he began drinking alcoholic beverages. (L.f. 24-26). The report also notes that it is possible that there is a link between Lingar's heavy use of alcohol and the blackouts he experiences. (L.f. 24). During these black outs Lingar does not completely lose consciousness, which is consistent with the fact that he appeared conscious on the night of the murder, but did not remember the incident clearly. This is also documented in the report: "Mr. Lingar said beyond this point he cannot remember anything until after the alleged crime. . . ." (L.f. 25). Mr. Moore testified that when he first interviewed Lingar, Lingar could not remember parts of the incident, but that closer to trial, Lingar no longer claimed memory loss, although Lingar could not tell him how many times he

shot the victim. (PCR Tr. 21-22). Lingar, however, testified that what he told his attorney about the shooting came not from his own memory, but solely from what David Smith told him. (PCR Tr. 54-56).⁽¹⁰⁾ Regardless, Lingar told the examining psychiatrist and his attorney that he could not remember parts of the incident.

At the very least, Lingar's jury should have heard that there was a possibility that Lingar's intoxication was accompanied by "blackout" spells. In light of the pretrial report and the fact that counsel's only defense was that Lingar could not deliberate because he was voluntarily intoxicated, Mr. Moore should have presented to the jury the obvious connection between these blackout spells and Lingar's intoxication and loss of memory on the night of the murder.

Lingar's jury sentenced him to death without hearing important mitigating evidence concerning his background and character. Although the jury heard from

Lingar's family members that he was a good kid, helped others, and had never been in trouble before, the jury did not hear relevant and key mitigating evidence of the difficult childhood and teenage years Lingar experienced due to physical abuse inflicted upon him by his father, and sexual abuse inflicted upon him by his older male cousin. Affidavits submitted by Lingar and his mother, Gladys Lingar, reveal that Lingar's father had a serious drinking problem and would beat Lingar and his siblings while in a drunken rage, using whatever he could get his hands on. (Exh. 2).

In addition, despite the sexual nature of the offense, Lingar's attorney failed to discover the extensive sexual abuse Lingar suffered throughout his childhood.⁽¹¹⁾ Affidavits submitted by Lingar and his nephews, Steve and Curtis Thornsberry, reveal that Lingar was abused sexually by his much older cousin, Darrell Grissom, from the age of five and lasting throughout his teens. During this sexual abuse, Darrell Grissom fondled Lingar, attempted to penetrate him anally, and engaged Lingar in both masturbation and oral sex. (*Id.*).

Had this evidence of physical and sexual abuse been presented to the jury, it would have provided powerful evidence in the mitigation of punishment. This evidence would have also provided an explanation for the sexual overtones surrounding the crime. It is beyond dispute, based upon scientific data, that victims of child sexual abuse tend to become victimizers when they become adults. *See Mendel, The Male Survivor: The Impact of Sexual Abuse (1995) pp. 121-123.*

Mr. Moore also failed to further investigate and present to the jury evidence regarding Lingar's character and emotional functioning, i.e., that Lingar suffers from poor self esteem and is generally a submissive, dependent, passive and non-aggressive person. The pretrial psychiatric examination of Lingar's responses on the MMPI "reflected poor self-esteem" although it reported that "there was no evidence suggestive of an ongoing thought or mood disorder." However, the MCMI personality inventory which was administered to Lingar shortly after he arrived in the Missouri Department of Corrections reported the following concerning Lingar's personality patterns:

Most characteristic of this prisoner is his apprehensive and fearful mistrust of others, his marked depreciation of self-worth, a general social passivity and awkwardness, and a fearful hesitation in most social settings. . .

this rather sad man also experiences recurrent anxieties and a pervasive disharmony of mood. . . . and his over concern with social rebuff and

exploitation is often intensified by his tendency to anticipate and, thereby, elicit rejection and victimization. . .

he evinces a conciliatory submission to others and a dependent search for supportive persons as a consequence. . . he typically assumes a passive role in which he willingly submits to the demands of others to fulfill his dependency needs. . .

he is not likely to be aggressive or a troublemaker. . .

This man is frequently self-absorbed, being lost in daydreams that may occasionally blur fantasy with reality. . .

preoccupations with personal inadequacy and feelings of worthlessness or guilt are also notable, and they deserve careful review. . .

(Exh. 1). Lingar's dependent and submissive character, coupled with his "acute paranoia" was clearly relevant in mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 107-108 (1982).

Although a trial attorney should not be faulted for failing to investigate mitigating evidence when the strategy not to do so is based on sound assumptions, *Pickens*, 714 F.2d at 1467, Mr. Moore's decision not to further investigate here was based on everything but sound assumptions. It was based on counsel's lack of knowledge of the law, and was the result of neglect, lack of thoroughness, and lack of preparation. Lingar's attorney read the pretrial mental examination which contained much of the mitigating evidence, but he nevertheless completely failed to follow up on the inconclusive findings contained in report. As the MCMI reveals,

had counsel followed up and requested an additional mental evaluation, he would have obtained additional information and documentation of Lingar's psychological and emotional problems.

The Eighth Amendment demands that the capital sentencer have full and individualized information in deciding whether to take a life. The Sixth Amendment imposes on counsel the duty to "individualize" his or her client before the jury can make a reliable decision. Mr. Moore dismally failed in this duty and Lingar now faces the ultimate prejudice of sacrificing his life. But for the constitutionally deficient performance by Lingar's attorney, as found by Judge Heaney, there is a reasonable probability the result of the penalty phase would have been different. Stan Lingar's death sentence should be commuted.

CONCLUSION

Stanley Lingar's life deserves to be spared. As outlined in this application, there are serious doubts regarding Stanley Lingar's guilt and the appropriateness of the death sentence handed down by Mr. Lingar's jury. This case also presents an opportunity for the Governor to demonstrate to the people of Missouri that a citizen's private sexual practices should not be considered as a reason for imposing a sentence

of death. This case further provides the Governor with the chance to reaffirm a unifying principle upon which both proponents and opponents of capital punishment would agree: that in a case like this one where the evidence of guilt is uncertain, a death sentence should not be carried out.

Respectfully Submitted,

Kent E. Gipson, #34524

Jeremy S. Weis, #51514

Public Interest Litigation Clinic

305 East 63rd Street

Kansas City, Missouri 64113

(816) 363-2795 Fax (816) 363-2799

1. Mr. Lingar has continually maintained that he cannot remember the shooting. This is documented in the pretrial psychiatric examination. (L.f. 25). Also, Mr. Moore testified that petitioner originally told him that he was so drunk he could not remember the entire incident. (PCR Tr. 21). Mr. Lingar also testified to this during the post conviction hearing. (PCR Tr. 54). Mr. Lingar testified that what he told Mr. Moore regarding most of the details of the incident actually came from what David Smith told him. (PCR Tr. 53-54).

2. Perhaps the strongest evidence of Smith's greater intelligence is demonstrated at Smith's sentencing hearing, where Smith read a statement he had prepared. Smith's statement is cogent and well-written, demonstrating a level of intelligence far greater than his borderline mentally retarded co-defendant. (See Exh. 3).

3. The theory that Smith was the leader, and Lingar was the follower in this criminal episode is strongly bolstered by Lingar's prison MCMI evaluation, which diagnoses Lingar's personality as "passive" and "avoidant." A characteristic of this diagnosis is passivity, submission, and a lack of initiative; hardly the personality profile of the mastermind of a plot to abduct and murder Scott Allen. (See Exh. 1).

4. In his guilt phase closing argument, the prosecutor stated that motive was irrelevant and he did not know why and did not have to prove why the victim was killed. (Tr. at 369).

5. One of the aggravating circumstances presented in the instructions was whether the murder involved torture or "depravity of mind." This instruction gave the jury a vehicle under which they could be influenced to impose death because of Lingar's status as a sexual deviant.

6. Counsel's failure to present this mental health evidence in support of a guilt phase diminished capacity defense was also ineffective because, had this evidence been effectively presented, there is a reasonable probability that Lingar would not have been convicted of the capital crime. Strickland, 466 U.S. at 694.

7. Due to Lingar's indigent status, Lingar's original habeas attorneys requested from the District Court "sufficient funds to secure expert testimony necessary to prove the facts alleged in the petition" in the First Amended Petition. (First Amended Petition, 54). However, this request was denied. Present counsel is unable to obtain the raw data from Lingar's pretrial examination. Undersigned counsel contacted Dr. A.E. Daniel who reviewed his pretrial evaluation and informed counsel that Lingar's IQ falls in the lower range of borderline. However, Dr. Daniel felt he needed to conduct another neuropsychological evaluation of Lingar. Unfortunately, Lingar lacks the requisite funds to have the necessary evaluation performed.

8. The MCMI personality test conducted shortly after Lingar entered the Department of Corrections:

"This man reports recurring episodes of alcoholism. Although he may have made efforts to resolve this difficulty, he anticipates continued problems in this area, and may experience distress over the consequences of alcoholism on his work possibilities and family relationships." (Exh. 1).

9. The medical records from Ripley County were presented to the trial judge before sentencing. They were submitted with the "partial pre-sentence" report done by the state of Missouri Board of Probation and Parole which was filed with the court on April 3, 1986. (L.F. 113). Probation and Parole officer, Dan Gregg, noted in his pre-sentence report that

[Mr. Lingar's] mother indicated that Stanley had been treated for blackouts by Dr. Sparger in approximately 1980. This doctor is no longer living, however, the medical records were obtained from the Ripley County Memorial Hospital. Lingar was in the hospital in 1980 and one of the final diagnosis was fainting, cause not determined. Most of the records were difficult to read, however, they are enclosed with this report.

(Id.). It is also important to note that this pre-sentence report was submitted to the Missouri Supreme Court as an attachment to the "Report of the Trial Judge."

10. The Probation and Parole presentence investigative report submitted to the court by Officer James M. Kellogg also documents the following:

"Lingar stated that he recalls picking up the hitchhikers, and later the victim, but he does not remember anything that happened relative to the death of the victim. On the evening of January 6, David Smith told Lingar that Lingar had shot and killed someone. After Smith explained what happened, he and Lingar thought about giving themselves up, but were afraid of the consequences. . . Lingar stated that Smith's testimony at the trial was at variance with his earlier statements. [Lingar] stated that he believes he is innocent of murder in that he does not remember having committed the offense, and only has Smith's account that he committed the crime."

(L.f. 119).

11. Lingar's trial attorneys also failed to discover that Lingar and his co-defendant, David Smith, had a homosexual relationship. When the evidence of this relationship was introduced in the penalty phase, Lingar's trial attorney, Mr. Nunnery, objected on the following grounds:

" . . . this relationship is also not only a secret between them, but a secret to the defense. We have never been notified that there was any evidence of homosexuality and I think it is unfair to interject it at this point in the proceedings." (Tr. 398-99).

Lingar's attorney's were completely unprepared for this evidence.