

BEFORE THE GOVERNOR
OF THE STATE OF MISSOURI
THE HONORABLE BOB HOLDEN

In the matter of:)
)
JEFFREY TOKAR,) Execution scheduled for
) March 6, 2002
)
Petitioner.)

**APPLICATION FOR A REPRIEVE FROM,
OR COMMUTATION
OF A SENTENCE OF DEATH**

Introduction

Jeffrey Tokar is a 37 year old man who is incarcerated at the Potosi Correctional Center in Mineral Point, Missouri awaiting execution. He is scheduled to be executed at 12:01 a.m. on March 6, 2002. All legal appeals previously filed have been denied, or are pending uncertain review.

Jeffrey Tokar, by and through undersigned counsel, and with the earnest support of numerous individuals and for the meritorious reasons stated below, respectfully requests that Governor Holden, pursuant to the powers granted him by Article IV, §7 of the Missouri Constitution, grant him executive clemency and commute his sentence from death to life imprisonment without the possibility of parole. Alternatively, Jeffrey Tokar requests that Governor Holden grant a reprieve, staying his execution, and convene a board of inquiry pursuant to § 552.070 RSMo 2000, to gather information bearing upon whether his sentence of death should be commuted.

Summary and History of Proceedings

On August 27, 1993, Jeffrey Tokar was convicted of first degree murder of John Douglass, and sentenced to death. Mr. Tokar's conviction and sentence of death were affirmed on direct appeal by the Missouri Supreme Court. Jeff's motion for post-conviction relief was denied, and the denial was affirmed by the Missouri Supreme Court. Mr. Tokar's petition for certiorari to the United States Supreme Court seeking review of the decision of the Missouri Supreme Court was denied.

Mr. Tokar then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri. The district court denied the petition on March 19, 1998. The district court's decision was appealed to the United States Court of Appeals for the Eighth

Circuit. On December 8, 1999, the Eighth Circuit issued its Opinion denying Mr. Tokar habeas relief. The United States Supreme Court denied Mr. Tokar's petition for certiorari.

In addition to these court challenges, Mr. Tokar has filed three motions to recall the mandate of the Missouri Supreme Court, a motion to recall the mandate of the Eighth Circuit Court of Appeals, two petitions for certiorari to the United States Supreme Court seeking review of these decisions, and an original petition for habeas corpus in the Missouri Supreme Court. All of these requests for relief have been denied without opinion.

The circumstances surrounding the offense, summarized from court opinions, are as follows:

Around noon on March 11, 1992, Jeffrey Tokar picked up his girlfriend, Sandra Stickley. They shared some beer. Then they went driving in a rural area north of Centralia to find a place where nobody was home. Tokar and Stickley located the empty Douglass residence. After parking in the driveway, Tokar took his socks off, placed them on his hands to avoid leaving fingerprints, and went inside the garage. He later returned, motioning for Stickley to come in.

As the Douglass family was returning home, Tokar and Stickley were ransacking the Douglass home and stuffing items into empty pillowcases. Stickley warned Tokar that she heard someone pull into the driveway. Tokar went towards the garage; Johnny Douglass and his children entered the garage. Stickley, in another room, heard one shot and then a second shot. Tokar and Stickley left the scene in Tokar's car. Johnny Douglass's son Jarad summoned help, and the body of Mr. Douglass was found in the garage.

Tokar and Stickley were arrested on March 13, 1992 at the home of Tokar's grandmother. At first, Stickley denied knowing about the burglary and murder, but later confessed to being with Tokar during the incident and told police that Tokar had admitted to her that he shot Johnny Douglass. She also provided police with the location of the gun, which was recovered from a farm pond. A post-arrest lineup identification of Tokar was performed by Jarad Douglass, and Tokar was charged with first degree murder. Stickley entered a plea of guilty to second degree murder and was sentenced to twenty years in exchange for her cooperation in testifying against Tokar.

Subsequent legal claims have centered on ineffective assistance of trial counsel for failing to object to evidence obtained as a result of the arrest of Mr. Tokar and Ms. Stickley. Mr. Tokar was arrested on a warrant issued by an Audrain County judge based only on a complaint, signed by the prosecutor, which alleged that Mr. Tokar committed the murder. The complaint contained no facts constituting probable cause for that belief. And, at the time of Mr. Tokar's arrest, officers did not have probable cause to arrest him. Ms. Stickley's arrest and the finding of the weapon were the direct result of this unlawful arrest of Mr. Tokar; before the arrest, the officers had no idea of her identity and no description. Also at issue was trial counsel's failure to object to the prosecutor's final argument that the jurors should pray that their children would not have to experience the trauma the Douglass children experienced. The Missouri Supreme Court found that this argument was error, but not plain error. The Court then held that because trial counsel had not expressly denied a strategic reason for failing to make this objection, Mr. Tokar had not shown ineffective assistance of counsel.

Mr. Tokar's trial was also marred by the failure of the court fully to instruct the jury on mitigating

factors. The court instructed the jury that they could find that the death penalty was warranted because of specific non-statutory mitigating factors, but the instructions did not list the specific non-statutory mitigating factors which might apply.

Mr. Tokar's mental illness throughout the trial and post-conviction phases of his case causes the result to be unreliable. As a result of paranoid personality disorder, Mr. Tokar was unable to assist his counsel or to understand their theory of mitigation of punishment. And his counsel were unable, or unwilling, to discern that he was attempting to tell them about a meritorious Fourth Amendment Claim.

Basis for Commutation of Sentence

With due respect and deep sincerity, undersigned counsel submit the following justifications for the commutation of Jeff's sentence:

1. *Jeff's paranoid personality disorder rendered him incapable of accepting legal support.*

Jeffrey Tokar's paranoid personality disorder rendered him incapable of accepting the legal support that most defendants facing capital murder charges take for granted. On August 28, 1995, Jeff was diagnosed with paranoid personality disorder.^[1] Paranoid personality disorder results from a chemical imbalance in the brain; it is "a pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent."^[2] Paranoid individuals generally appear normal until faced with a stressful situation, when their intense suspicions trigger intense anger.^[3] They are especially sensitive to questions about their lives or behavior, which they perceive as attacks on their character or reputation.^[4] Unfortunately for Jeff and other individuals like him, the process of preparing for a trial and for a mitigation hearing requires that defense attorneys and investigators ask many questions. Since the prospect of facing trial is inherently stressful, and since the paranoia resulting from that stress is compounded by paranoia resulting from being questioned, paranoids are less likely than any other group of people to cooperate with their attorneys.^[5] In fact, while most defendants request help from their attorneys, many paranoids actively thwart attorneys' attempts to help them.^[6]

Jeff is no exception; he was unable to allow those individuals appointed to help him do their jobs. As early as 1993, Jeff's paranoia was apparent to those working with him. Dr. A. E. Daniel completed a psychiatric evaluation of Jeff Tokar on April 6, 1993. During the evaluation process, Jeff was "suspicious and guarded...[and] stated, 'I do not trust anybody.'"^[7] Dr. Daniel concluded, "A pervasive suspiciousness and paranoia was present throughout the interviews which seemed reflective of his relationship with the outside world. . . It appeared that he [Jeff] manifested severe paranoia bordering on to delusions."^[8]

Despite this report, Jeff's trial counsel did not attempt to have him declared incompetent to stand trial. The Missouri Supreme Court held that because there had been no such pretrial motion, the trial court was not required to conduct a competency hearing on its own motion.

In 1995, Jeff's appeal lawyer hired Dr. Genia Simmons, Ph.D. to evaluate Jeff, recognizing the

impact his paranoid personality disorder had had on his ability to adequately represent Jeff on appeal. Jeff did not agree to talk to Dr. Simmons, but she reviewed hundreds of pages of documents pertaining to his case, including "4 pages of secret questions given by Jeff to his mother to give to Loyce Hamilton (Jeff's post-conviction lawyer) to be asked by her at his post-conviction hearing, and the one-page letter from Jeff to Kathy Foster concerning the accuracy of the court reporter in recording these questions and their answers."^[9] Dr. Simmons also reviewed affidavits from five attorneys and support staff who worked with Jeff. They reported that Jeff was "highly suspicious of his attorneys, their legal assistants, the sheriff, the guards, even the judge and the court reporter because, in his mind, they all were conspiring against him, having secret meetings, hiding and distorting evidence in order to turn the jury against him, and even trying to humiliate and possibly kill him."^[10] Dr. Simmons made the diagnosis of paranoid personality disorder.

The problems caused by Jeff's paranoid personality disorder were described in detail by many professionals who have worked on his behalf since he was arrested for the murder of Johnny Douglass. Jeff refused to allow Mary Hudson, a mitigation specialist who began working on his case in October of 1993, to "speak with his family because he stated that I was not working 'on the important issues.'"^[11] She called them anyhow, but, found that they were "unwilling to speak with me, indicating that he [Jeffrey Tokar] had absolutely forbidden this contact with me. . ."^[12] He "believed there was a great and terrible conspiracy to take his life by the prosecution and the judge."^[13] Kathy Anderson Foster, a paralegal with the Missouri Public Defender, had extensive contact with Jeff in 1993. He was adamant that "the testimony of a number of witnesses had been altered or omitted from the transcript,"^[14] and insisted that if sufficient and adequate investigation were undertaken, that could be proven. He was certain that there was a massive conspiracy against him.^[15] Loyce Hamilton, Jeff's post-conviction lawyer, also struggled with him. She met Jeff for the first time on January 13, 1994. She noted "Jeff's thought process was so irrational that it was impossible for me to effectively communicate with him."^[16] As he had with Kathy Anderson Foster, Jeff insisted to her that vital testimony had been left out of the transcript of his trial. "He found it suspicious that the only testimony that was omitted from the transcript was testimony that he had discussed with me and Kathy Anderson Foster...while we were in one of the small client/attorney visiting rooms."^[17] She asserts, "No matter how many times a particular concept was explained to Jeff, he held rigidly to his irrational beliefs that were created from his own imagination."^[18] Jeff simply did not trust those who were assigned to help him. Loyce Hamilton recalls going to Potosi Correctional Center to pick up his *pro se* post-conviction motion so that it could be filed with the court. He did not tell her that he had mailed a copy of the motion to his mother, and instructed her to file it on his behalf, as he did not trust her to file it for him.^[19]

Dr. Simmons concluded that Jeff's paranoid personality disorder had been in place since early adulthood, and that it affected "almost every aspect of [his] thinking, behavior and personality."^[20] As a young adult, Jeff often verbalized fears to his mother and aunt that "someone was trying to hurt him. . . Jeffrey [once] felt so scared that someone was coming to their home to hurt him that he placed knives in a circle on the floor around himself so that he would be prepared to defend himself from any direction."^[21]

Dr. Simmons explained that Jeff uses a "comprehensive set of delusions about life and other people...

[which are] closely organized to cover virtually every situation and person with whom he comes into contact.”^[22] His delusions “are that there is always someone out there who will come around to hurt him; that there are many people with these evil intentions toward him; and that they are in continual contact with each other in the form of an organized conspiracy, and that this conspiracy of people out to hurt him is constantly using every piece of information about him to bring him down...[therefore] he experiences the ever-present need to defend himself.”^[23]

According to the Harvard Mental Health Letter, “There is a saying that even paranoids have enemies, but it may be truer to say that it is especially paranoids who have enemies, because of the hostility they often provoke by their attitudes and behavior.”^[24] Such a presentation is actually an adaptive response to a feeling of being threatened, a response all healthy individuals would show were they being threatened as paranoids believe they are.^[25] The adaptive response of hostility to an admittedly unwarranted belief that juries are out to get them masks the reality that many paranoids feel remorse for their crimes.^[26] For this reason many paranoids have been found incompetent to stand trial.^[27] ^[28] Unfortunately, those paranoids who do stand trial cannot evoke any emotion other than hostility from juries; criminal psychologists Edward Scott and George Palermo researched the fate of paranoids facing capital murder charges without finding even one who had not received the death penalty. This result is especially sad because paranoids in prison usually respond to treatment very well.^[29]

Dr. Simmons concluded, “Jeffrey Tokar’s mental illness impacted his thinking and decisions during each step of his trial and the post-conviction proceedings related to the murder of Johnny Douglass. His mental illness barred full comprehension of the impact of the legal proceedings on his life...The observations of his attorneys. . . show a man so deluded and paranoid that he could not trust his own defense attorneys to help him.”^[30] As a result of his paranoid personality disorder, Jeff was unable to provide the assistance his attorneys needed to provide the courts with sufficient information to make a considered and informed decision about the imposition of the death penalty. Dr. Simmons concluded that Jeff was—years before his arrest for the murder of Johnny Douglass, at the time of his trial, and at all times subsequent—unable rationally to understand the true nature of any of the legal proceedings in his case. “I further conclude. . . that. . . Jeffrey Tokar will never be capable of understanding the true reasons for his punishment, including imposition of the penalty of death. . . In his mind, because of his mental illness, he will only perceive that he is receiving such punishment because the conspiracy against him succeeded in concealing from his jury the real facts of his case, which, if known, would ‘send him home.’”^[31]

Paranoid personality disorder is not a term used to describe people who do not care about others; it applies to people who do not get the chance to show others their true selves because they live their lives trapped by fear and suspicion.^[32] Since paranoid personality disorder is genetically rooted,^[33] Jeff was born less able to handle himself in the courtroom than other defendants. Indeed, when someone with Jeff’s impairment in a trial situation faces capital murder charges, he angers the jury in charge of his fate while misleading the attorneys trying to provide him with a fair defense. Because of this breakdown in the attorney-client relationship, the result in Jeff’s trial is unreliable.

2. This offense was related to Jeff’s severe substance abuse.

Jeff was introduced to alcohol at a young age. He had his first taste of alcohol at the age of nine, and became a heavy drinker while living with his alcoholic father when he was thirteen or fourteen years old.^[34] His heavy drinking continued for most of his life until he found himself in prison.

At trial, Jeff's first cousin Melody Harris testified that Jeff began drinking regularly when he was twelve or thirteen. When intoxicated, he would sometimes be injured and would come home with bruises. When he was not drinking, the teenaged Jeff was shy, quiet, not very outgoing, and rather withdrawn. When he had been drinking, he was more outgoing, talkative and aggressive.^[35]

Family members report that Jeff received a monetary settlement of \$30,000.00 after he was in a bus accident. He shared part of the money with his father, and "immediately after his father's death, the remainder was spent for drinking."^[36] On December 5, 1982, Jeff was treated by the Missouri Ambulance Service. He claimed to have been beaten up; they noted that he smelled of alcohol.^[37] Between 1983 and 1985, Jeff had a total of ten alcohol-related arrests in Wisconsin. His highest blood alcohol level was .33, more than three times the legal limit of .10. He was taken to a detoxification center after three of these arrests.^{[38] [39] [40]}

Jeff's substance use has proven problematic to him for years. On June 12, 1988, he was written up while at work at Columbia Regional Hospital, where he was employed in the dietary department. He complained of back pain, and admitted to using "morphine tablets regularly for [an] old back injury."^[41] More importantly, however, staff noted that Jeff was "unsteady on [his] feet and slow in movements, [and that his] eyes didn't focus."^[42] He stated that in his "'present condition' he could not perform his job and requested to go home...He was not belligerent, loud, or inappropriate....[and] readily agreed to go home and to be driven there by someone other than himself."^[43] He was also found to be under the influence at work on July 28 and November 19, 1988.^{[44] [45]}

On June 19, 1988, Jeff was admitted to the University of Missouri-Columbia Hospital and Clinics after vomiting bright red blood for several hours. He was given six transfusions^[46], his appears to be where he was exposed to the AIDS virus. He underwent an emergency esophagogastroduodenoscopy, which revealed a Mallory-Weiss Tear, caused by his heavy drinking.^[47] Notes taken upon admission quote his mother as stating that Jeff "works to drink."^[48]

Maxine Vandergriff, Jeff's maternal grandmother, reported that he "does not stop drinking until he is out of money or out of booze."^[49] She also reported that, when drinking, Jeff "imagines things and becomes very paranoid...he would lock the house thinking there was someone trying to get him."^[50] Many years later, Jeff himself described his drinking behavior as beginning as soon as he got up—he would take a beer with him in the shower. He then continued drinking all day. Even today, he has no idea what caused this behavior.

Jeff has been treated for alcoholism on two occasions. On August 8, 1988, he voluntarily admitted himself to the Missouri Department of Mental Health's "Mid-Mo" facility. He was diagnosed with Alcohol Dependence, Severe. He was referred there by Columbia Regional Hospital, his employer: "told me to come here or I was going to lose my job."^[51] At the time of his admission, he was

"mildly intoxicated."^[52] During a psychosocial evaluation, he reported that he drank an average of six to twelve beers a day, five to six times per week. He admitted to being an alcoholic, and reported that his longest "dry" period had been five and one-half months, while incarcerated. He was able to recognize medical, familial, social, legal, and financial implications from his drinking.^[53] He completed a four-week in-patient hospitalization and treatment program "successfully."^[54] but began drinking twelve beers a day immediately after his release on September 6, 1988.^[55]

On February 12, 1989, Jeff sought treatment at the University of Missouri-Columbia Hospitals ER Center for alcohol use. He admitted to having had a fifth of Schnapps and three to six beers in the last twenty-four hours. He threatened to kill himself.^[56] He was again voluntarily admitted to the Missouri Department of Mental Health's "Mid-Mo" facility. He stated that his mother "wanted me to quit [drinking] or else I will die."^[57] His mother quoted him as saying that "if he couldn't quit there was no reason to live."^[58] He listed "drinking" as a talent.^[59] He was diagnosed with Alcohol Dependence, and a history of Polysubstance Abuse.^[60]

Dr. Robert Smith, a noted expert in the area of substance abuse, conducted an extensive review of Jeff's life history. In an affidavit, he noted, "In reviewing Jeff's criminal record, his legal offenses were committed while under the influence of alcohol and/or another drug. His violent episodes also occurred after he had ingested alcohol as documented by police and hospital records."^[61] Further, he found that Jeff's Paranoid Personality Disorder was "exacerbated by his use of alcohol at the time of the offense" and that, at the time of the offense, his "paranoid symptoms were enhanced by the alcohol to the point of being delusional, resulting in aggressive behavior."^[62]

Though alcohol abuse is a choice, some people enter the world more disposed to become alcoholics than others; psychologists have found that genetic attributes explain about sixty percent of the variance of risk for an alcohol use disorder.^[63] ^[64] Psychologists call the genetically influenced characteristic common to alcoholics "neuronal and behavioral inhibition."^[65] Since neuronal and behavioral inhibition is commonly found in the personality profiles of people with personality disorders,^[66] it should not be surprising that sufferers of personality disorders are over-represented in the alcoholic population and vice versa.^[67] In fact, sufferers of paranoid personality disorder are at an especially high risk for becoming alcoholics.^[68] ^[69] Their high risk is not just a result of genetic overlap but also because drinking alcohol to excess can cause paranoia.^[70] Since paranoids often drink to escape their fear and suspiciousness, they can become caught in a destructive cycle.^[71] They drink to escape paranoia in the short term, not realizing that in the long term alcohol makes them even more fearful and suspicious, rendering them even more likely to drink in the future.

While Jeff was not invariably violent when drinking, there is a clear connection between his alcoholism, his paranoia, and his legal offenses. The current offense was committed when he was under the influence of alcohol.^[72] When Jeff is able to control his use of alcohol, he is generally observed to be a pleasant and productive person despite his paranoia.

Jeff's prison record reveals a few alcohol-related offenses; alcohol is certainly available in prison. He

has had no alcohol or substance abuse offenses since his trial in this case, probably the longest sober period of his adult life. And his prison alcohol violations do not involve violence. The prison system has enabled Jeff to control both his alcoholism and the aggression that sometimes occurred in connection with alcohol when he was in the community.

3. *Jeff did not receive a fair trial.*

A combination of the inexperience of the attorneys and Jeff's mental illness prevented Jeff from receiving a fair trial. Jeff's trial attorneys lacked the capital trial experience necessary to understand the significance of mental health issues. Jeff's mental illness, paranoid personality disorder, prevented him from cooperating with his attorneys during all stages of representation. The communication problems caused by Jeff's mental illness were compounded by the fact that Jeff's trial attorneys had little trial experience in capital cases, his post-conviction attorney had no trial experience and little post-conviction experience, and his direct appeal attorney had little appellate experience, although he was an experienced trial lawyer.

From the outset, Jeff told his lawyers that his arrest violated the Fourth Amendment. However, the two attorneys who represented Jeff at trial ignored his suggestion that they move to suppress evidence gained as a result of his arrest. Their refusal to proceed as he desired caused untold difficulties in his interactions with them. Because Jeff's attorneys refused to address the arrest issue, they were unable to secure his cooperation in preparing and presenting mitigating evidence for the penalty phase. Jeff's difficulty in interacting with his trial attorneys, and later with his post-conviction and appeal attorneys, is the result of mental illness. For that reason, much of the mitigating evidence presented in this petition was not available to the jury. Dr. Smith's affidavit and supporting documents were tendered to the Missouri Supreme Court during his first consolidated appeal, but, that court refused to consider the evidence.

4. *Unlike many individuals facing long sentences or the death penalty, Jeff has maintained positive, meaningful relationships with his family.*

Jeff is a significant source of support and guidance to his mother, Doreen Smith. This is particularly significant because his mother's decisions during his early life made his childhood very difficult. She married and divorced several times. Jeff's father, Louis Tokar, was an abusive alcoholic; Ms. Smith divorced him when Jeff was a baby. She was then briefly married to Don Kerschner, another alcoholic. She then married Sam Cooper and had another child with him. Mr. Cooper treated Jeff and his older brother, Louis Tokar, as second-class members of the family. Ms. Smith ultimately divorced him, too. Since that divorce, she been married three more times. The instability in Jeff's early life is reflected in his school records. He enrolled late for Kindergarten, in the Waynesville school district, on September 26, 1969, and only attended fifty-one days of school. There are no records available for his first and second grade years. When he began attending school in Waynesville again, as a third grade student, he again enrolled late, and only attended one-hundred and twenty-four days of school that year.^[73] Jeff attended at least three different high schools.^[74] During his youth, Jeff lived for a time with his maternal grandparents, his aunt, and his father as well as his mother. Louis Tokar, Sr. died of cancer while Jeff was in high school. Shortly before his father's death, Jeff's older brother, Louis, Jr. was involved in an automobile accident while drinking.

He suffered a severe and disabling head injury. Jeff helped his mother take care of Louis, and, in fact, was often left alone to do so. Dr. Daniel, a psychiatrist who evaluated Jeff concluded, "he has experienced multiple moves resulting in poor anchoring to any given town or school system."^[75]

Given this history, one might expect that Jeff would resent his mother. However, he is very supportive of her. He believes that she has had a hard life, much harder than his, and is grateful for her acceptance and support. Jeff expressed his feelings for his mother as early as 1993, when a psychologist noted, "He does share a marked regard for his mother in spite of clinical information he gave in regard to her many problems in life. . . themes of his adoration of her abound through this testing."^[76] Jeff told Dr. Daniel that his inability to trust anyone has "not helped him to develop a lasting relationship with anyone except his mother. . . [and] emphasize[d] that the only valid relationship in his life is with his mother."^[77]

Doreen Smith values her relationship with her son. She visits him regularly, and sends him money when she can. It is not much, but, she hopes he will be able to buy the things he needs from commissary with it. However, Jeff saves his money, and sends it back to her, with instructions about how she is to use the money. Recently, for example, he sent her money so that she could buy the watch she now wears.^[78] Doreen anticipates her birthday each year; Jeff sends her money so that she can go out to eat. He either makes a restaurant suggestion for her or encourages her to try something new. She especially appreciates the money he sends her, as she knows he earns only a tiny amount each month. He must save diligently in order to have money to send to her.^[79] Even in prison, Doreen says, "I want him alive."

A long-time friend of the family, Carrie Hadden, describes Jeff as a "very considerate person" who calls his mother and gives her gifts periodically.^[80] Carrie Hadden worries about how Doreen will be effected if Jeff is executed: "She's a kind-hearted person. it would take her forever to get over it, if Jeff were executed...it would be a profound tragedy."^[81]

5. Jeff has compassion and concern for others.

In a reference interview conducted by the Madison Convalescent Center with Block Cleaners, it was reported that Jeff "Goes out of way to help people," that he is "nice," and that he was like "'one of the family.'"^[82]

Jeff worked at the Madison Convalescent Center for more than a year, from April, 1985 through May 5, 1985, in the Dietary Department. In response to a question on an orientation form, Jeff replied that the *Dignity* film shown during orientation was "good to see because it reminds you old people have feelings just like every body else."^[83] Jeff received a compliment card which read, "It takes a 'special' kind of person to put the *needs* of others before their own...To always have a 'positive' outlook rather than dwell on the negative...To go that 'extra mile' when someone needs a helping hand...Thank-you for being that kind of person...Madison Convalescent Center and I would like to compliment you for your help answering the telephones on Friday. Your enthusiasm and positive attitude are appreciated! You did a good job."^[84]

In a letter of recommendation, Barbara Clavette, the Administrator, wrote: "Jeff has proven to be a

very valuable employee. He has had very low absenteeism, gets along well with Residents [sic] and staff and has always been very conscientious about his work duties...I would highly recommend Jeff for employment and feel confident that you will find him to be an asset to your facility. We are sorry that he is moving out of state and will miss him.”^[85]

Jeff’s older brother, Louis Tokar, who suffers from a serious head injury, recalls how supportive his brother was after his accident. “Jeff encouraged me—he made me want to keep living...to go on.”^[86] While Louis was recovering from his accident, Jeff would go for walks with him, and take him fishing.

In prison, Jeff spent the last two years as a book cart worker. While all that was required of him was that he make the books available to the prisoners on his wing and keep track of them, he saw the job as a way to help others. He made it a point to know what types of books his “customers” enjoyed, and to point them out when they were available. Before this, he spent some time as an “ISOP” (suicide prevention) worker. While Jeff is not overly social and values his privacy, his interactions with inmates and staff are generally positive.

Carrie Hadden, a long-time friend of the family, values Jeff because of his positive input into her life. She is a senior citizen, and takes a variety of expensive medications. Jeff recently identified a discount, mail-order pharmaceutical company. Knowing that her prescription expenses are high, and that it is difficult for her to get out of the house, Jeff cut the contact information for the company out of a magazine and sent it to her.^[87]

Jeff is sustained by his faith in Christ. He regularly prays and reads the Bible, which he knows quite well. He enjoys singing Christian songs and hymns to pass the time. Recently, he was baptized in prison. Jeff seeks to know God’s will for him and to carry it out. In an article Jeff wrote several years ago, he talked about his faith: “Although I am in prison on death-row, with my. . . health in question. . . I am still happy because I have something NOBODY can take. I have the Holy Spirit in my soul, springing up in me like a fountain and making me whole. . . I am now in good hands. I have a feeling of peace. For my Lord is watching over me and protecting me from all evil.”^[88]

6. *Jeff is not a dangerous person.*

Jeff had no prior history of violent felonies. His only prior convictions were for driving while intoxicated and receiving stolen property. This offense occurred when Jeff was intoxicated. Mr. Douglass arrived during a burglary, and was killed with a weapon Jeff found at the scene. There is no indication that Jeff’s plans that day included violence. While the shooting of Mr. Douglass was horrible and unjustified, it was also not characteristic of Jeff’s usual behavior, particularly when sober. (His record does reflect that he sometimes became agitated when drunk, but he never injured anyone.) His prison record, both before and after this offense, has been good and does not include any assaultive offenses. The prison system classifies Jeff as a non-aggressive personality. If Jeff stays in prison, he will not be a threat to the prison population, the prison personnel, or the public at large.

At Jeff’s sentencing hearing, Michael Cahalin, an employee in the Missouri Department of Corrections testified that he had classified Jeff as a “Level One” inmate, which was the “least

restrictive custody level.^[89] Thomas Fischer, another Department of Corrections employee testified that Jeff had been classified as a “high SIGMA” personality, meaning that he had the “personality traits of someone who is very naive, tends to be gullible, [and] tends to be victimized by other inmates who are stronger than they are.”^[90] Jeff presents a minimal risk to the prison system.

7. The death penalty is unfair, and wrong.

The execution of Jeffrey Tokar is an affront to the American tradition of fairness and to the moral imperative to refrain from killing. The pageant of death which has been unrolling every four weeks this year in Missouri should end now.

In recent years, including this year, legislation has been introduced in the Missouri legislature both abolishing the death penalty and calling for a moratorium on executions until the criminal justice system can be evaluated and made more fair. While a moratorium could be imposed by the legislature, it is also within the power of the governor.

The death penalty is imposed in Missouri and elsewhere in an arbitrary and capricious manner. Procedural problems abound, and new ones keep emerging. Most recently, in *Ring v. Arizona*, No. 01-488, the United States Supreme Court has agreed to review the issue of whether a judge can make the factual findings necessary to impose death. Missouri law permits this option when the jury is unable to reach a verdict. And approximately eight other states permit the death penalty to be imposed by a judge alone. Simply because of where they happened, numerous death sentences may be vacated by a single decision of the United States Supreme Court.

A recent study of the operation of the death penalty in 34 states, including Missouri, from 1977-1995 reveals that there are striking geographic differences in the way the death penalty is used in Missouri. For example, in Cole County, the death penalty is imposed at the rate of 267 per 1000 homicides. In the City of St. Louis, the rate for the same period is 3 per 1000 homicides.^[91]

There are also significant disparities in the imposition of death sentences based on the ethnic origin of the victim. Persons who are convicted of murdering victims of African origin are far less likely to be sentenced to death than persons who, like Jeff, are convicted of murdering persons of European origin. A recent report of the Death Penalty Information Center on race and the death penalty puts it thus: “Race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease.”^[92] Missouri follows the national trend in the relationship between the race of the victim and the likelihood of a death sentence.^[93]

In jurisdictions where judges are subject to political pressure because they are elected, like the judge who presided at Jeff’s trial, the error rate in death penalty cases is higher than in jurisdictions where judges are selected in such a way as to insulate them from political pressure.^[94]

The same study noted that jurisdictions with a high rate of death penalty cases have a higher rate of reversals of death verdicts than jurisdictions with lower death penalty rates. The authors note, “Our main finding indicates that if we are going to have the death penalty, it should be reserved for the worst of the worst: **Heavy and indiscriminate use of the death penalty creates a high risk that**

mistakes will occur.”^[95]

Reliability is not a hallmark of the Missouri death penalty system. Over all, during the study period, 33% of death penalty sentences were reversed by the courts on some level.^[96] While some may argue that this means that all mistakes are caught, so that a conviction which has been fully reviewed must pass muster, the error rate is disturbingly high and suggests that some errors probably slip through the net. An example is Jeff’s claim that his trial counsel should have filed a motion to suppress; the Eighth Circuit declined to review his defective warrant claim because of an erroneous finding that Jeff had not presented it to the Missouri courts.

Not only is the death penalty wrong because of the way in which it is applied, it is also wrong because it re-victimizes those who have already been harmed, and creates new victims in the process. Executing Jeff Tokar would be traumatic to his family—especially his mother and brother—and to other members of his support group. Those members of the prison staff at Potosi Correctional Center who must carry out the execution will also be traumatized by the loss of human life. In fact, at least one individual who works for the Missouri Department of Corrections, who has witnessed nearly thirty executions with victims’ families, has been so traumatized by her previous experiences that she has made arrangements to ensure that she will no longer have to witness executions. While she once believed that executions could be healing, after having worked with almost thirty victims’ families before, during, and after executions, she no longer holds that belief, and, in fact, has come to believe that the death penalty is wrong.

Executing Jeffrey Tokar would be traumatic for the family of the victim, John Douglass. In fact, simply preparing for the execution of Jeffrey Tokar is difficult for the victim’s family. Kay Crockett, the Victim Service Coordinator for the Missouri Department of Corrections wrote in a letter dated February 22, 2002: “This is a difficult, painful time for the Douglas [sic] family.”^[97] She also indicated that the family needs to “deal with all of the feelings that have re-surfaced.”^[98] Executions re-victimize the survivors while also prohibiting future healing. If Jeffrey Tokar is not executed, it is possible that, some day, he might be able to express remorse and offer an apology to John Douglass’ family. Under the present circumstances, however, he is far too frightened and desperate to take this step. The possibility of future healing is eliminated once Jeffrey Tokar has been executed. While “prosecutors often stoke a family’s rage by telling them that the only the death penalty can assuage their sorrow,” a Florida therapist who works with the families of victims says that families do not realize that taking a life will not fill the void of a loved one until after the execution is over.^[99] Executing Jeffrey Tokar will only widen the circle of victims.

Standard of Review

Article IV, § 7 of the Missouri Constitution grants the Governor the “power to grant reprieves, commutations and pardons, after conviction . . . upon such conditions and with such limitations as he may deem proper.” He is not restricted by strict rules of evidence, and is free to consider a wide range of legal and equitable factors in the exercise of his clemency powers.^[100] He may consider any aspect of the case, including claims which the courts have declined to review for procedural reasons.^[101] Governor Holden is also free to expand the relevant case law and apply his own interpretation to grant relief if he so desires.

Conclusion

Counsel, family and friends of Jeffrey Tokar respectfully request that his sentence of death be commuted to a sentence of life without the possibility of parole, or alternatively, that a reprieve be granted staying Jeff's execution, and that a board of inquiry to convened to determine the factual issues raised in this application.

Respectfully submitted,

ELIZABETH UNGER CARLYLE
Attorney at Law
200 S.E. Douglas, Ste. 200
Lee's Summit, Missouri 64063
(816) 525-6540
(816) 525-1917
E-mail: elizcar@swbell.net

MICHAEL J. GORLA, #26399
Attorney at Law
720 Olive Street, Suite 2301
St. Louis, Missouri 63101
(314) 621-1617
(314) 621-7449 - FAX
E-mail: mjgorla@msn.com

CARYN PLATT TATELLI, LCSW
Forensic Social Worker
P.O. Box 237
Highwood, Illinois 60040
(847) 926-8644
(847) 926-8645 - FAX
E-mail: ctatelli@yahoo.com

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