Material provided by Michael Roberts' attorneys.

INFORMATION IN SUPPORT OF CLEMENCY FOR MICHAEL SHANE ROBERTS, CP-142

One of the principal reasons for withholding the sanction of death once a person has been convicted of a capital crime, or granting executive clemency if the person is sentenced to death, is institutional failure: that the tools society has established for identifying and treating an at-risk child or youth to help him or her adjust to the demands of social life, or to separate him or her from general society in order to protect the person or society or both, have not worked. If the person had received the help society holds itself out to provide, the crime would not have occurred.

Michael Roberts has been the victim of institutional failure from (I) his being sodomized by his father as a child and denied mental-health care and treatment lest it expose his father's rampant incest, through (II) the trial court's refusal to give instructions that even the Missouri legislature recognizes to be necessary to a fair trial, through (IV) the Missouri Supreme Court's blessing of his death sentence despite its recognition of these errors, through (V) the federal courts' refusal to afford him an appeal. The senseless atrociousness of the offense of which he was convicted should have satisfied a fair and rational judicial system that no one in his right mind would have committed it. The courts have buried their heads in the sand about the influence of drugs on this offense. No one, regardless of their views of the death penalty, can be confident that this young man is one of the worst of the worst that the Supreme Court of the United States has authorized the federal government and the states to kill in cold blood.

Michael was convicted for the 1994 death of a neighbor, Mary Taylor. As the prosecution at trial laid out the evidence, Michael and friends were smoking crack, ran out, and Michael left to get money for more. He went to his friend Mary's house, and they talked for a while. She told Michael it was time for him to leave, so she could go to bed. Michael said something "clicked" in his head. He hit Mary in the back of the head with a hammer, went to look for money. When he heard her moving, he struck her, tried to strangle her, knifed her, and put her face in a pot of water. He then took an answering machine and several items from her purse.

Michael's case presents several critical issues of law and morality.

I. Michael has never been competent to be held accountable to the extent of executing him, and his father denied him appropriate and available mental-health treatment in order to cover up the incestuous environment in which he raised the boy the State of Missouri now proposes to kill.

At trial the defense presented evidence showing that Michael had suffered from untreated severe mental and emotional problems from an early age. Psychological testing when he was seven years old found him unable to control his behavior and frightened and

overwhelmed by aggressive, totally uncontrollable impulses. A later psychiatric hospital stay resulted in a recommendation of medication to help control his behavior.

Michael did not receive this medication or other needed mental-health care until after the offense for which he was sentenced to death. He grew up in such a radically dysfunctional home that his father prevented mental-health professionals from intervening to protect and treat Michael. This father subjected him and his siblings to severe sexual and physical abuse. He sexually abused Michael and his daughter, Michael's older half-sister. He required Michael to stand guard at the door while he was performing incest and sodomy on Michael's half-sister. Later, he did the same to his granddaughter-the offspring of his incestuous abuse of his daughter. He forced Michael to perform fellatio on him. Not surprisingly, Michael later had sexual contact with his younger brother, his older half-sister, and his five-year-old half-sister. When their father discovered the latter poaching on his incestuous turf, he severely beat both Michael and his half-sister.

At various times during his childhood and in preparation trial Michael underwent neurological and psychological testing which showed brain damage resulting in abnormal electrical activity, inability to control impulses, mood swings, and loss of reason and judgment. This abnormal behavior was evident from an early age.

Michael's childhood was very unstable and dysfunctional. In part to cover up his sexual and physical abuse of his children, Michael's father completely controlled and dominated the family. Michael never received treatment. In common with thousands of underserved mentally-ill Americans who engage in self-medication, he turned to crack cocaine. That drug only increased his impulsive behavior. A psychiatrist testified to his extreme mental and emotional disturbance. Although his dependency on cocaine exacerbated his abnormal brain activity, the trial judge refused to allow the jury to consider this interaction as diminishing his responsibility for its horrific consequences.

II. This mental-health and child-abuse evidence should have been the cornerstone of a successful defense that would at least have led the jury to spare Michael's life, if not to convict him of second-degree rather than first-degree murder. But the prosecution and the trial court refused to allow the jury to hear the words the Missouri General Assembly required to allow it to put the awful facts about Michael's "upbringing" into the proper context.

Missouri allows an accused citizen to interpose a mental-health defense to negate the existence of an essential element of the offense of first-degree murder, the required "mens rea" or mental state. In Mo. Rev. Stat. § 552.020 and § 552.030 (1994), the state legislature has recognized the need to insulate an accused citizen's ability from relying on such a defense from efforts by the prosecution to reduce its burden of proof. Both this statute and decisions of the Missouri Supreme Court made it mandatory that a trial court give certain pattern instructions (Missouri Approved Instructions-Criminal Third Edition, i.e., MAI-CR 3d, 300.20 and 306.04) in cases involving mental health defenses. Michael's trial counsel requested that the trial judge give the patterned instructions, just

as Missouri law required, after the testimony of each mental-health witness and again with the final charge to the jury.

Contrary to the applicable statutes, decisions, and Missouri Approved Instructions, the trial court refused to give the pattern instructions. The Missouri Supreme Court agreed that this decision was erroneous, but refused to order a new trial. State v. Roberts, 948 S.W.2d 577, 587 (Mo. 1977) (en banc).

The information and statements that the psychiatrists had reviewed and testified about included volumes of hospital records, school records, juvenile justice records, jail records and statements Michael made to them during the mental health examinations. These records included Michael's prior incestuous behavior with his siblings and his other prior aberrant behavior. They included statements that Michael had raped his five (5) year old sister, had intercourse with his other sister, deliberately set fires with the intention of causing serious damage, assaulted his mother, preformed fellatio on his younger brother, broke into a car dealership, assaulted someone with a trash can, threatened students with a knife, assaulted a therapist, assaulted an inmate while in jail, hit a second inmate in the face, threatened to assault a female security officer, attempted to get a gun with the intention of killing two people who stole a vehicle from him, committed a robbery, and choked a cat to death. Because the court failed to give the instructions required, it allowed the jury to consider these matters as evidence of guilt, and could also use them in rendering a punishment verdict.

The law recognizes that in order to raise a reasonable doubt in the mind of the jurors about an accused citizen's mental state, the defense may need to adduce mental-health evidence which reflects poorly on the accused citizen-which would frighten the jury and otherwise prejudice him if applied to its ultimate decisions. If Michael had wanted to try to keep the unseemly (but irrelevant) details of his past from coming before the jury, he could have declined to put on mental-health evidence at all. He would thereby have forfeited a large part of his right to present a defense and his right to individualized consideration in capital sentencing. He was entitled to present such information under well-established Supreme Court capital jurisprudence including Penry v. Lynaugh, 492 U.S. 302, 318 (1989). Yet in order to exercise these constitutional rights, he had to give up a portion of his right to be free from compelled self-incrimination and his rights under Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court dealt with the conflict between these procedural rights in Estelle v. Smith, 451 U.S. 454, 462 (1981).

To avoid forcing accused citizens to make an unfree choice that violates their constitutional rights wholesale, responsible sovereigns adopt protective rules to limit the prosecution's use of the fruits of mental examinations. The leading example of such rules is a federal death-penalty case, United States v. Beckford, 962 F.Supp. 748, 754-62 (E.D. Va. 1997). Any rule of law less protective of the accused citizen would force him or her to choose between the exercise of two sets of constitutional rights, in violation of the principle of Simmons v. United States, 390 U.S. 377, 389-94 (1968), that the sovereign may not put an accused citizen to such a choice when the rights involved are constitutional protections of the accused.

If a sovereign chilled a capital defendant's right to present mitigating information by conditioning it on a sacrifice of a federal constitutional protection of the accused, it would at least indirectly violate the rule of Green v. Georgia, 442 U.S. 95, 97 (1979), that a capital sentencing jurisdiction may neither apply nor misapply its law of evidence mechanically to prevent a capital defendant from presenting testimony that is "highly relevant to a critical issue in the punishment phase." In Israel v. McMorris, 455 U.S. 967 (1982), the Court made explicit the relationship between its holding in Green v. Georgia and the line of cases guaranteeing an accused citizen the right to present a complete defense: "a defendant's rights under the Sixth and Fourteenth Amendments may be implicated when a trial court mechanically applies state evidentiary rules to preclude a defendant from introducing exculpatory evidence necessary to his defense."

In this case, the State of Missouri has at a legislative level adopted a protective rule to allow accused citizens effectively to present such evidence, and the Missouri Supreme Court has held that the trial judge erred it in failing to follow it in Michael's trial. In Missouri, that rule is the requirement of instructing the jury it may not use statements like the ones at issue here for the purpose of determining whether the defendant committed the offense with which he or she is charged. The "offense" includes all the essential elements of the offense. In order to analyze this grievance, one must distinguish between admitting evidence as bearing on mental condition, and admitting evidence as bearing on mental state, when the latter is an essential element of an offense. Mental state is part of "the act charged" to which Mo. Rev. Stat. § 552.030.5 refers, and is squarely within the prohibition of this statute. Refusal to give the required instructions was particularly prejudicial in light of the fact that in a capital case, Missouri law requires an instruction that the jury may consider evidence from the guilt-or-innocence phase in the penalty phase (MAI-Cr3d 313.41A), and the trial court gave this instruction at Michael's trial.

The mandatory instructions and the statute protect against the use of any statements made by a defendant and against the use of any "information" gained during the course of the inquiry into the defendant's mental condition to allow the prosecution to avoid meeting its burden of proof. Mo. Rev. Stat. §§ 552.020 & 552.030. The required instructions and the statute are procedural protections of the accused citizen. In the Heath Wilkins case, Senior Judge Scott O. Wright explained that when, as here, a state creates a procedural protection for one accused of crime, it may not arbitrarily withdraw that protection consistently with the United States Constitution.

In this case, refusal to give these instructions denied the Michael his right to due process of law under the United States Constitution. In addition, it denied him the right to be free from compelled self-incrimination, the right to trial by an impartial jury, and the right to be free from cruel and unusual punishments.

Rather than analyzing this claim as Michael's present attorneys presented it-a denial of a state-created, federally-protected procedural right of the accused-the federal district court presented it as a simple claim of instructional error.

Through trial counsel, Michael sought the protection of a clearly established, mandatory rule of state law enacted to protect his federal and state constitutional rights. The State of Missouri denied it. When he sought relief from the Missouri Supreme Court, it admitted the error but refused to correct it although (if not because) his life depended on it. This treatment was arbitrary and capricious, and cannot be tolerated in light of the strict conditions the Supreme Court of the United States has laid down for the administration of capital sentencing since 1976.

Michael received no appellate relief from the Missouri Supreme Court in spite of its own admission of trial-court error. The federal district court denied relief, then summarily denied a certificate of appealability without even allowing Michael's counsel to file a motion for one. The Eighth Circuit could have granted Michael the appellate relief he should have received in the state courts, and had to receive in the state courts if the State of Missouri had any valid claim to execute him in light of Gregg v. Georgia, 428 U.S. 153 (1976), and its progeny. It refused to do so, without even attempting to give a reason.

III. Michael's previous attorneys failed to include meritorious grounds for relief in his state post-conviction relief motion and appeal concerning errors of trial counsel, with the effect that the federal courts refused to review these claims, including the claim that trial counsel did not prepare an actual defense but expected Michael to plead guilty to an offense of which he believed he was innocent in order to avoid the death penalty.

Trial counsel brought a parade of relatives, clergymen, and other lawyers before Michael to attempt to induce him to take a plea offer to life imprisonment without eligibility for parole (LWOP). Michael rejected these efforts because he believed-and still believes-that, at worst, the highest degree of homicide of which he could lawfully be found guilty was second-degree murder.

The principal investigatory feat that trial counsel accomplished before the prosecution's plea offer expired was to find Michael's estranged sister, whom they brought to him to persuade him to plead guilty to avoid the death penalty. In their discovery response of February 7, 1995, trial counsel gave no indication that they would call any penalty-phase expert. Only two weeks before trial did trial counsel endorse their penalty phase expert.

Michael's present counsel raised this grievance in his federal habeas corpus action. The state contended that this ground for relief, among others, was procedurally defaulted because it raised claims of ineffective assistance of counsel that previous counsel had not included in Michael's motion for state post-conviction relief. Michael's present counsel replied that because he was at all relevant times indigent, he had a state-created right to counsel in his state post-conviction relief action; that this action was the first opportunity to present his federal constitutional claims of ineffective assistance of counsel; and that therefore he had a federally-protected right to the effective assistance of counsel in these proceedings. The federal courts refused to reconsider their decisions that because he was not entitled to constitutionally effective counsel in Missouri post-conviction relief proceedings, omissions by these attorneys cannot provide "cause" for reviewing claims they failed to raise.

Thus the federal courts have denied him independent judicial review of several claims of ineffective assistance of counsel, including one of virtual abandonment by trial counsel.

Although it is hard to imagine a more fatal form of ineffective assistance of counsel than relying on one's client to plead guilty rather than preparing a defense, that was by no means the only claim of ineffective assistance which Michael and his attorneys presented to the court in this case.

Trial counsel failed to object to slanted arguments the prosecutor made during jury selection, poisoning the pool of prospective jurors by making them think a penalty phase was inevitable.

Trial counsel failed to object and move for a mistrial or other appropriate relief when the prosecutor misstated the law on second-degree murder. They failed to object when the prosecutor mischaracterized the jurors as an extension of law enforcement. They failed to object when he appealed to the personal fears of the jurors. They failed to object when he inaccurately denigrated a defense mental-health professional's credentials and competence. They failed to object to his misstating the evidence regarding the disposition of property Michael was said to have taken from ft Taylor.

They failed to object and move for a mistrial when the prosecutor argued evidence of "other crimes," i.e., uncharged conduct, as indicating that Michael must be guilty of the crime for which he was on trial. They failed to seek relief when the prosecutor argued that Michael had told a prosecution psychiatrist he had put gloves on to keep blood off his hands. They failed to seek relief when the prosecutor argued that Michael could not be cured-there having been no evidence on this question. They refused to seek relief when the prosecutor said the judge would probably let the jurors see a videotape the prosecutor had neither offered nor published to the jury.f

Trial counsel failed to seek relief when the prosecutor began testifying about his own home life. They failed to seek relief when he misstated evidence about what was in Michael's mind, and asked the jury to speculate on the matter.

Trial counsel argued that "[t]he only medical health professional you heard from that had a full and complete picture reaching his diagnosis was Dr. Rabun." Because Dr. Rabun had testified he did not believe Michael suffered from a general medical condition, this highlighted his adverse testimony.

IV. The courts have denied Michael an essential check on the constitutionality of carrying out a death sentence by denying him meaningful appellate review of his conviction and sentence in the state court system.

As demonstrated in the discussion of the instructional error relating to mental-health testimony, the Missouri Supreme Court recognized that the trial court had erred, but denied relief anyway. From Gregg v. Georgia, 428 U.S. at 187 & 198, forward, the Supreme Court has "meaningful appellate review" to ensure that the death penalty is not

imposed in an arbitrary or irrational manner. In Godfrey v. Georgia, 446 U.S. 420 (1979), the Court discussed three independent criteria as indispensable to a finding that a particular capital sentencing scheme effectively and constitutionally channeled the sentencing authority's discretion. Among these bedrock requirements was the availability of rational appellate review of the "process for imposing a sentence of death." 446 U.S. at 428. In Zant v. Stephens, 462 U.S. 862, 874, 876 (1983), the Court explained that its original approval of Georgia's capital sentencing procedure in Gregg had rested "primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the State Supreme Court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate." In Clemons v. Mississippi, 494 U.S. 738, 749 (1990), it said "this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency." In Parker v. Dugger, 498 U.S. 308, 321 (1991), the Court once again emphasized the importance of meaningful appellate review in determining the constitutionality of a death penalty scheme: "We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."

V. After Michael received no appellate relief from the Missouri Supreme Court in spite of its own admission of trial-court error, the federal district court denied relief, then denied a certificate of appealability (under the Antiterrorism & Effective Death Penalty Act of 1996, "AEDPA") on its own motion, without his even applying for one. The federal appeals court refused to allow Michael's appointed counsel to file a motion of greater than twenty pages to seek review of a federal district court order of 109 pages.

The federal courts could have granted Michael the appellate relief he should have received in the state courts, and had to receive in the state courts if the State of Missouri has any claim to execute him in light of Gregg v. Georgia and its progeny.

The federal district court denied a certificate of appealability on its own motion, without allowing appointed counsel to make an argument why-even though it had denied relief-the district court should allow an appellate court to review one or more of its findings or holdings. When counsel asked the court to reconsider its denial, or to grant a certificate notwithstanding its previous denial, it denied the motion summarily. The Eighth Circuit denied a certificate summarily. Unless the Governor intervenes, Michael will go to his death without any appellate court having told him why he did not even deserve an appeal of the district court's denial of relief.

The Eighth Circuit was not content with denying Michael an appeal: it limited appointed counsel to twenty pages to seek the one and only appeal of the district court's 109-page order denying relief. This process of review is part of the guaranty of reliability that the Supreme Court and the society whose conscience it so frequently articulates require before a person is put to death in America in the Twenty-First Century.

Although the language of AEDPA does not require it, and previous practice under the "certificate of probable cause" requirement did not include it, the Eighth Circuit holds

that "appellate review is limited to the issues specified in the certificate of appealability." E.g., Carter v. Hopkins, 151 F.3d 872, 874 (8th Cir. 1998). Thus, unless one thought that the Eighth Circuit would grant a COA on an issue on its own motion, omission of an issue from the application for COA would be a waiver of the issue as a point on appeal.

Appointed counsel attempted to file two applications for COA that were greater than twenty pages. The first was in the style of a brief, using the same large typeface required of federal appellate briefs and having the organizational features of a federal appellate brief that would have allowed a reader to locate rapidly whatever part of the application he or she considered important without requiring counsel to forfeit potential points on appeal by omitting them from the application.

The panel of the Eighth Circuit directed the clerk to strike this application because it was greater than twenty pages. It did so based on the conclusion that a certificate of appealability, even in a capital case, was a "motion" within the meaning of Fed. R. App. P. 27(d)(2), and thus could not be greater than twenty pages unless the Eighth Circuit granted leave.

Appointed counsel considered the length issue when preparing the initial application, consulting capital habeas corpus litigators with nationwide experience or other sources of information on this area of practice. They were unable find any other circuit that limited capital applications for COA to twenty pages. Their consultations bore out their understanding that this rule was intended to cover motions for extension of time and other internal matters, rather than dispositive, outcome-determinative documents such as an application for COA. Nothing has come to their attention in the interim to suggest that what the Eighth Circuit did in this case is anything but an arbitrary abuse which places persons under sentence of death in one federal judicial circuit at greater risk of execution in violation of the Constitution than persons anywhere else.

When the panel ordered the initial application stricken, appointed counsel filed a motion for leave to file a second application of thirty-nine pages, and tendered the second application with their motion. Again, the panel denied the motion on its own initiative and ordered appointed counsel to file an application limited to twenty pages.

In light of the position the Eighth Circuit takes on the consequences of omitting an issue from the COA, counsel felt obliged not to cut issues. Only by removing facts, authority, and reasoning necessary to make their points effectively were counsel able to cut the thirty-nine pages down to twenty. The panel denied relief a week after counsel filed the twenty-page application-the same day the Attorney General's Office filed a responsive pleading (which took the full twenty pages the Eighth Circuit would allow), but without (it said) taking action on the respondent's pleading.

Capital litigation is one of the most demanding and fact-intensive forms of legal work, reflecting the special rules the Supreme Court has authoritatively imposed to keep the death penalty within constitutional bounds; nowhere are the stakes so high, and caselaw is replete with examples of men and women who are killed because their lawyers left

some claim or issue out of a pleading. Habeas corpus litigation is one of the most complex forms of legal work, requiring an understanding and application of changing concepts that appear like a foreign language to most attorneys other than those concentrating in the area. This application for COA required counsel to combine these two unusually grave and complex enterprises in one document.

Requiring appointed counsel to cover ten issues in twenty pages or to abandon some of the issues-which would have worked a forfeiture under the construction of the habeas corpus appeal statute that the Eighth Circuit enforces-forced them to make a cruel, unnecessary choice. It was a misapplication of the rules and statutes governing federal habeas corpus appeals, an abuse of discretion, and a violation of Michael's constitutional rights to due process of law in the federal courts and of their obligations under the Suspension Clause of the Constitution. It also violated the Eighth Amendment, in that the panel's treatment of this application undermines the appearance of rationality and regularity that the Supreme Court has required of appellate proceedings in capital cases. E.g., Parker v. Dugger, 498 U.S. 308, 321 (1991); Gregg v. Georgia, 428 U.S. at 187 & 198 (1976).