

To the Honorable MEL CARNAHAN
Governor, State of Missouri

In the Matter of

ROBERT ANTHONY MURRAY,
a condemned prisoner.

Execution scheduled for 12:01 a.m. July 26, 1995

**APPLICATION FOR STAY OF EXECUTION
AND
COMMUTATION OF DEATH SENTENCE**

Robert Anthony Murray, (whose family nickname is "Tony") is scheduled to die by lethal injection at 12:01 a.m. on July 26, 1995 -- just two weeks from now. That execution, however, would be manifestly unjust and violate the law of this state and the United States Constitution, most importantly because his older brother William K. Murray (known as "Bill" or "Keith"), actually committed the two murders for which Tony was convicted and sentenced to death. In separate trials months later, Bill Murray was sentenced to life in prison without parole, and Jesse Craig, a third co-defendant whose participation was similar to that of Tony Murray, was acquitted.

Tony Murray does not seek to be released from prison or to avoid punishment for those actions for which he is responsible. Rather, he asks Governor Carnahan to ultimately commute his sentence to life in prison without parole, but realizes that a full review of the true facts is essential before a final decision on commutation. Thus, Mr. Murray pleads for a stay of execution to permit that inquiry and also until the federal district court (Judge Howard Sachs) resolves the pending class action lawsuit which challenges the constitutionality of the

Missouri Supreme Court's practices in reviewing the proportionality of capital sentences, as required by Mo. Rev. Stat. § 565.035. Mr. Murray is a member of the plaintiff class seeking certification.¹

The governor has the power to stay Tony Murray's execution and commute his death sentence under the constitution and statutes of this state. Mo. Const. Article IV, § 7 and Mo. Rev. Stat. §§ 217.800 and 552.070.

I. THE COURTS HAVE NOT DECIDED THE FACTS

In December, 1986, after a jury trial in St. Louis City, Tony Murray was convicted and sentenced to death for the murders of Jeffrey Jackson and Craig Stewart. The jurors, however, never heard the true facts of this case. The story presented at trial was a fabrication, a combination of half-truths, exaggerations and outright fantasy by witnesses who were themselves frightened and confused drug addicts. The description of events as reported by the Missouri Supreme Court in State v. Murray, 744 S.W.2d 762 (Mo. banc 1988) affirming the convictions and death sentence is thus similarly fictitious.

Because of the extraordinary circumstances and relationships among those involved in this case, the truth was not disclosed until 1991, when Tony Murray filed an amended habeas corpus petition in the federal district court. Although the true facts and inequity of Mr. Murray's death sentence have been presented to each federal and state court since then, no tribunal has reached the merits of these pivotal claims. No court has conducted a hearing to listen to the witnesses and determine the facts.² Those facts are thus candidly presented

¹ Clemmons v. Delo, No. 90-0943-CV-W-6 pending in the Western District of Missouri before United States District Judge Howard F. Sachs. On June 21, 1995, this district court granted the petitioner's motion to amend the constitutional claim regarding Missouri's proportionality review. On June 30, 1995, the Motion for Certification of Class Action was filed, but remains pending. The stay of execution to permit Tony Murray's anticipated participation in this class depends on Governor Carnahan until the class is certified. The Amended Claim and Motion for Certification are attached as Exhibit 1.

² After the pro se federal habeas petition was filed in 1990 (before the truth was revealed) Judge William Hungate appointed Charles M. Shaw, a Clayton attorney, to represent Tony Murray. However, Mr. Shaw refused to communicate with Tony, did no investigation, and filed two "amended petitions" (identical to the pro se petition) without his knowledge or authorization. Tony Murray was thus astonished when, on April 8, 1991, Judge Hungate denied the habeas petition without an evidentiary hearing. Murray v. Delo, 767 F. Supp. 975 (E.D. Mo. 1991).

Before briefing on appeal, at Mr. Murray's request, the Eighth Circuit discharged Charles Shaw as counsel,

here to you, Governor Carnahan, and in videotaped accounts, with the plea that you will listen, seek the truth, and render justice and mercy.³

appointed present counsel, and remanded the case to the district court for an amended petition to be filed. Judge Hungate retired shortly thereafter, and the case was transferred to Judge Donald Stohr. After remand, the new evidence and true facts were presented to the district court, with three formal requests for an evidentiary hearing, and the submission of more than 20 affidavits. However, the district court denied the petition without an evidentiary hearing on the basis of a procedural bar, using a legal standard later overruled by the Supreme Court in Schlup v. Delo, 115 S.Ct. 851 (1995), without a factual determination. Murray v. Delo, No. 90-370C(8) slip op. (August 8, 1993). (These claims were also presented to the Missouri Supreme Court in a state habeas petition, but were summarily denied without opinion).

In light of prior counsel's abandonment of Mr. Murray, the Eighth Circuit held there was no abuse of the writ, but affirmed the district court's denial of the claims as procedural barred, again relying on the same legal authority overruled a few months later in Schlup, and without factual determination. Murray v. Delo, 34 F.3d 1367 (8th Cir. 1994). The United States Supreme Court denied certiorari on June 12, 1995.

³ Polygraph examinations of both Tony Murray and Bill Murray have been scheduled for July 13 or 14, 1995, at their request.

II. THE TRUE FACTS -- WHAT HAPPENED ON DECEMBER 6, 1985

On December 6, 1985, Jeffrey Jackson and Craig Stewart were shot to death by Bill Murray at a small "drug party" at Jeffrey Jackson's south St. Louis apartment. Tony Murray and Jesse Craig had accompanied Bill Murray to the apartment, but were not armed and did not participate in the murders. Also present were two women, Claudia Henning and Gladys Nutall, who testified at trial. The events and associations that caused these seven persons, all ravaged by drugs, to be together on that fatal night provide a framework to grasp what happened.

In the summer of 1985, Claudia Henning had introduced Bill Murray to Jeffrey Jackson and Craig Stewart. All four were involved in buying and selling drugs in the St. Louis area. The conflict between Bill Murray and the victims began when he met with Jackson and Stewart a few months later to sell them some drugs. While riding around with them in their car, negotiating the deal, Bill Murray was beeped on his pager and left the car to make a telephone call. When he returned, Jackson suddenly drove the car into an alley and demanded Bill's drugs, money and watch at gunpoint. After Bill turned them over, worth more than \$750, Jackson and Stewart ordered him out of the car. Bill expected to be shot in the back at that point and was surprised when they drove off. He was stunned, yet furious, that they had even tried to rip him off because he considered himself very tough, had a serious reputation and was usually well-armed to protect himself. Jackson and Stewart were known as lightweights on the drug scene. Bill Murray vowed to seek the return of his property, and teach them a lesson, but Jackson and Stewart were elusive and he had trouble finding them.

Claudia Henning, who had known Bill Murray and Tony Murray for many years, was addicted to drugs and occasionally "dated" and obtained drugs from Jeffrey Jackson. She agreed to find out where Jackson would be at a certain time and to let Bill know. She arranged to be at Jackson's apartment on Park Street on the night of December 5, 1985, and informed Bill that afternoon.

Bill Murray enlisted Jesse Craig and Tony Murray to accompany him as a "show of force". Tony initially declined to go because he had to work at the Steak and Shake in Creve Couer at midnight and did not want to be late. Bill pressured him into going, insisting that he wanted the appearance of strength in numbers,

that it would only take a short time and that he would give Tony a ride to work. Bill did not reveal to Tony his true intent to "beat the shit" out of Jackson. Jesse Craig borrowed a car from his girlfriend Yolanda Brefford ("Tammy"), who was also Bill's and Tony's niece.

When they arrived at the Jeffrey Jackson's Park Street apartment, Bill Murray first went in alone, while Tony Murray and Jesse Craig waited in the car. The two men and the two women inside the apartment (Jackson, Stewart, Henning and Nutall) were intoxicated and partially clothed, sitting around a coffee table smoking marijuana, PCP and cocaine with a pipe. Bill demanded the return of his drugs, his money and his watch. At first the men agreed, but then they became belligerent. Mocking and laughing at Bill, they told him to leave.

When Bill Murray left, he pushed the button on the lock so that he could re-enter when he wanted to do so. He went back to the car and got Jesse and Tony, and the three men entered the apartment. None of them wore masks or disguises of any kind. Only Bill was armed. He thought that the four persons in the apartment others were so intoxicated that they posed no threat to him. Tony did not question Bill's assessment that the situation was safe for all of them.

Bill Murray ordered both men and women to lay on the floor and directed Jesse Craig and Tony Murray to search the apartment for money. When the search produced little, Bill abruptly commanded Jesse Craig to help him put Jeffrey Jackson and Craig Stewart in the kitchen and tie them up with torn clothing to intimidate them and prevent their access to any hidden weapons. Bill had set his gun down by him while they did that.

Bill Murray ordered Tony to stay with the two women in the living room, who were left untied. Tony sat on a couch in the living room, watching the girls, and "faked" having a gun in his pocket. When Claudia said she needed to go to the bathroom, Tony let her do so, but stood outside the closed bathroom door. But he got suspicious after a few minutes, opened the door, and found Claudia trying to climb out the bathroom window. Tony stopped her and brought her back into the living room, where she jumped through the front glass window a few minutes later.

Bill Murray, who was in the kitchen area with Jackson and Stewart, heard the crash of the glass when Claudia Henning jumped out the window and he suddenly shot one of the two men, killing him. Bill then panicked, but remembers stopping and thinking "this was a bad mistake". After that reflection, he shot and killed the other man.

Tony Murray, still in the living room area, had run to the window to look after Claudia Henning leaped out. He heard the first gunshot from there. Gladys Nutall instantly jumped up and ran down the stairs, and Tony followed to the top of the steps. As Gladys stumbled on the stairs, she looked up at Tony Murray. Disturbed at what had happened, Tony motioned for her to go on and get out of there. Bill, Jesse and Tony then fled the apartment and drove off. Bill Murray, still armed, saw Claudia Henning about thirty feet away as they were leaving. He considered shooting her, but decided not to because she had helped set the deal up and he thought she would be quiet. See Affidavit of William K. Murray, dated August 18, 1992 (Exhibit 2); Affidavit of Robert A. Murray, dated August 19, 1992 (Exhibit 3); Affidavit of Richard Wetzel, Ph.D., dated September 7, 1993 (Exhibit 4)

Shortly after this, both Gladys Nutall and Claudia Henning met with police. Hysterical and "wasted" on drugs, the women were undoubtedly reluctant to relate all the facts to the police. Consequently, the tale that evolved about what happened that night bore little resemblance to the truth. Those stories, including a summary of their trial testimony, are described infra at 21-26 in Section VI).

III. BILL MURRAY'S ADMISSION OF HIS OWN GUILT

Bill Murray, aware of Tony's absolute loyalty to him, selfishly hid the truth even though his younger brother had been condemned to death for his crime. Smugly thinking that "it would eventually work out OK" for Tony, Bill did not publicly admit his fault until after other executions at Potosi shook him to realize in September, 1991 that his brother could also be executed, despite his innocence. Finally, he spoke the truth. But there has been no evidentiary hearing in any court to test the sincerity of Bill Murray's confession, which was submitted to the courts in sworn affidavit form as follows:

I first went to Jeffrey Jackson's apartment on Jefferson Street alone late on December 5, 1985. Claudia Henning, Gladys Nutall, Jeffrey Jackson, and

Craig Stewart were sitting around a coffee table smoking what appeared to be PCP, or cocaine and marijuana. I spoke to Jeffrey Jackson privately and asked for him to pay the money that he owed me. When he refused, I left and went back to the car to get Jesse Craig and my brother Tony to return with me to the apartment. I felt that Jackson would pay me the money if I had others with me and exhibited a show of strength.

When I returned, I led the entry into the apartment armed with a gun. I was followed by Jesse Craig and Tony Murray, neither of whom were armed with any kind of weapon. I directed all four to lie face down on the floor while we briefly searched through the apartment for money or drugs to take for payment, but when I didn't find much, I believed there was more hidden away.

In an effort to scare them into cooperating with me, I directed Jesse Craig to help me tie up and gag Jeffrey Jackson and Craig Stewart. He did and we walked them to the kitchen...

Claudia Henning jumped up at one point and ran to the window at the front of the apartment, but Tony stopped her. Then shortly after that, Claudia again leaped up and ran and jumped out the front window. Tony ran out to the front room window, and the sound of breaking glass and Tony's footsteps must have caused me to panic -- I suddenly shot and killed both men.

Affidavit of Bill Murray, dated August 18, 1992, Exhibit 2.

Although Bill Murray did not admit his guilt publicly until 1991, he had conceded privately to certain friends and family members, since shortly after the crime, that he alone had shot and killed both men. These included Thomas Jefferson, Stacy Jefferson, Robert Staten, Clarence Jackson, Arlene Watson, Robert Loggins and Ronald Jordan. Jesse Craig also talked about Bill's shooting. Boasting to Yolanda Brefford and Belinda Murray, he exaggerated his own involvement and mocked Tony for being so upset.

Bill Murray's first admission was later in the morning after the shooting, on December 6, 1985, when he confided in Thomas Jefferson and Stacy Jefferson, while he and Tony were at the Jeffersons' mother's home in St. Louis. Both Thomas and Stacy Jefferson described Bill's disclosure as follows:

The morning after the shooting incident, William Murray and Robert Murray visited my residence at 5380 Emerson, St. Louis, Missouri 63120. William Murray asked that the 12:00 noon television news program be turned on. The news reported the shooting incident. Following the news report, William Murray demonstrated how he had shot the two men. William Murray stated that he had shot the two men and indicated that his brother, Robert Murray, was not involved in the shooting incident.

Affidavits of Thomas Jefferson and Stacy Jefferson, Exhibits 5 & 6.

Thomas Jefferson noted that Bill Murray was still armed at that time:

I observed William Murray carrying a gun, which he placed on my table. I had seen William in possession of the gun on prior occasions. Robert Murray did not touch the gun. When William left, he took the gun with him.

Affidavit of Thomas Jefferson, dated August 19, 1992, Exhibit 5.

Stacy Jefferson added that Tony Murray had been distraught and had asked their mother to pray for them:

On this occasion, I observed Robert to be shaken, scared, and crying. Robert repeatedly stated he wanted to see his mother. Robert stated that he loved his brother William and feared something would happen to William. Robert asked my mother to pray for them.

Affidavit of Stacy Jefferson, dated August 19, 1992, Exhibit 6.

After midnight that night, Bill also confessed to friend Robert Staten over the phone, as Mr. Staten describes:

Approximately 1:00 a.m. the night following the shooting incident, Robert Murray telephoned me at my residence in an apartment on Village North in St. Louis, Missouri. Robert asked me to allow him to stay with me. I asked him why he needed a place to stay. Robert then replied that he "didn't do it." I asked him what he meant. Robert then stated he "didn't kill anyone." At that time, William "Keith" Murray picked up the telephone and told me that he ("Keith") "did it".

Affidavit of Robert Staten, dated August 19, 1992, Exhibit 7.

Within the next couple days, Bill Murray divulged his guilt to his friend, Clarence Jackson. Mr. Jackson states:

On about December 6 or 7, 1985, Bill Murray visited me at the music store I had in St. Louis at the time, C.J.,s Records. On that day, Bill told me that on the previous night or so he had taken his brother, Tony Murray and Jesse Craig, Jr., with him as a show of strength to the apartment of a man whose name I do not remember, and became involved in a robbery. Bill Murray told me that while they were at the apartment, Claudia Henning jumped out the second story window and then he panicked and shot the two men there. He told me that Tony Murray and Jesse Craig had not been armed, and the he alone shot both men. I have not talked with William K. Murray or Robert Murray since they have been locked up.

Affidavit of Clarence Jackson, dated February 11, 1993, Exhibit 8.

Although Bill Murray went into hiding with friends in St. Louis for six months before he was captured, Tony returned to his mothers home on December 7, 1985, where he was promptly arrested about 10 P.M., without resistance. Jesse Craig was also present and opened the door at Mrs. Murray's home when police arrived, but was not questioned or arrested then. Belinda Murray, a sister of Tony and Bill who also lived with her mother, relates that the next morning Jesse talked to her about the shooting:

The following morning , on December 8, 1985, I returned from my job as a nurse's aide on the night shift at the South County Rehabilitation Center at about 7:15 a.m. Jesse Craig, Jr. ("Junior") was laying on the floor of the entry room, or dining room of the home.

I asked Junior what he was doing, and asked him about Tony's arrest the night before. He told me that Tony had been with him and my brother Bill the night of December 5, 1985, and that they had gone together to the apartment of Jeffrey Jackson. He told me that Tony had not killed anybody, but that Bill had shot one of the men, and that he himself, (Jesse, Jr.) had shot the other one.

Junior bragged that he was "smart" because he had "covered" himself, and so he couldn't get caught over this like Tony had. He said that Tony had "froze up like a punk" and just "freaked out" and "let those girls go". Junior complained that Tony had just "stood there and cried" after the men were shot.

Affidavit of Belinda Murray, dated August 18, 1992, Exhibit 9.

Yolanda Brefford, who unwittingly had loaned her car to Jesse the night of the killing, reports that Jesse Craig told her the same story a few days later:

A few days later, after Tony was arrested, Junior told me that Tony was "in there locked up for nothing", and told me that Tony had not shot anyone. He told me this many times over the following several months, both before and after he himself was arrested. I recall Junior also saying this to me on the phone when he was being held at the St. Louis City Jail, and after Tony's trial.

Junior also bragged to me on a few occasions that he himself had shot one of the men at Jeffrey Jackson's apartment. Junior mocked Tony for "freezing up" and "crying" and for "letting those girls just get away".

Affidavit of Yolanda Brefford, dated August 19, 1992, Exhibit 10.

Ms. Brefford later shared that information with Detective Beffa of the St. Louis Police Department:

Before Jesse, Jr. was arrested, I related to Detective Beffa of the St. Louis Police Department the information about me loaning my car to Junior on December 5, 1985, and about me seeing blood on his clothes the following morning, and that I had been told that Tony did not do the shooting. Detective Beffa came to my mother's house and we rode around the Berkeley area in his car while I told him this. Shortly after that, Jesse Craig, Jr. was arrested.

Affidavit of Yolanda Brefford, Exhibit 11.

Detective Beffa evidently believed Ms. Brefford's story, because a short time later, on July 1, 1986, Prosecutor Joseph Warzycki charged Jesse Craig with first degree murder. Sometime around then (before Tony's trial) Mr. Warzycki told Tony Murray's trial attorney, Cathy Gilbert Kelly, that he did not think Tony was the shooter, and that he "knew" Jesse Craig shot at least one of the men.⁴ Ms. Kelly was thus stunned at trial when the prosecutor announced in opening statement that Tony Murray was the shooter:

The state's witnesses in [Tony Murray's] case had implicated three persons involved. . . . The identity of the third person was not known for some time. At a date which I cannot specifically recall, I had a conversation with Assistant Circuit Attorney, Joseph Warzycki, concerning which of the three persons implicated as having been at the scene the night of the shootings had been the actual shooter. I believe the conversation arose in the context of discussing the extent of Robert Murray's role in the incident and the State's decision to seek the death penalty in his case.

In that conversation, I was pointing out that William Murray was the ringleader throughout the incident and that, according to the statements of the state's witnesses, the unidentified third person was the actual shooter. Mr. Warzycki responded that they knew who the shooter was and an arrest was going to be made soon. I asked who it was and he replied that it was Jesse Craig.

To my recollection we had no further discussions concerning which of the three was the actual shooter prior to the trial of this case. I was surprised during the trial by Mr. Warzycki's theory that Robert Murray had been the shooter. I recall asking Mr. Warzycki "where that had come from" and referencing our earlier discussion and his previous statement to me that Jesse Craig had been the shooter. As I recall, Mr. Warzycki smiled but made no other response.

⁴ Bill Murray shot both men, Jesse Craig's early bragging notwithstanding. Yet the prosecutor's disclosure to defense counsel about his belief about the identity of the shooter indicates that he should have questioned the veracity of Gladys Nutall's account that Tony was the shooter.

Affidavit of Cathy Kelly, dated April 3, 1992 (Exhibit 11).

Although Bill Murray and Jesse Craig had both spoken of Bill's blame at least privately, Tony Murray kept his brother's crime secret. When Tony's mother and eldest sister, Mrs. Pearl Murray and Arlene Watson, visited him at the St. Louis City Jail a few days after he was arrested, Tony would say only that he had to "protect" his brother. Affidavit of Pearl Murray, dated June 23, 1992, Exhibit 12. Arlene Watson soon discovered where Bill Murray was hiding at the time, went there and asked Bill directly whether he or Tony had shot either of the men. She relates that Bill Murray admitted to her that he had killed them both:

Sometime within the first few months after my brother Robert ("Tony") Murray was arrested between mid-December 1985 and April 1986, I went to visit my brother Bill Murray ("Keith") at the apartment of Madeline Woods in Kinloch, where he was hiding out. My sister Rosemary accompanied me on this visit.

I had already visited "Tony" at the St. Louis City Jail, and he had sworn to me that he himself did not shoot Jeffrey Jackson or Craig Stewart. Out of my own curiosity, I asked my brother Keith on this visit if he (Keith) had shot them. He told me that he had. "Keith" told me that he himself had shot both Jeffrey Jackson and Craig Stewart.

Sometime a few weeks later, "Keith" called me on the phone and asked me if he should turn himself in so that the truth would come out that Tony had not shot anyone. I told Keith he would have to make that decision. At that time, I related this incident to a man that I was then dating named Sylvester Ingram, who was a police officer.

Affidavit of Arlene Watson, dated June 23, 1992. Exhibit 13.

Arlene Watson also discussed this in confidence with a friend and co-worker, Gloria Odem, who remembers the conversation. See Affidavit of Gloria Odem, dated August 19, 1992, Exhibit 14.

After Bill Murray was finally arrested in May, 1986 after hiding for more than six months, he too was held at the St. Louis City Jail. During that time, Bill also admitted to two inmates at the jail, Ronald Jordan and Robert Loggins⁵, that he was the killer. Ronald Jordan remembers that Bill Murray confided in him during August and October, 1986, before Tony Murray's trial:

⁵ Both men are now serving life without parole at Potosi Correctional Center.

I first met William Murray in the summer of 1985 and got to know him better in the St. Louis City Jail from around June 1986 until November 1986, when he was also "locked up" there. While we were both inmates on Tier 4-4 of the jail, William Murray talked to me two or three times about the homicide of two men, cab drivers named Jeffrey Jackson and Craig Stewart, in December 1985. In August 1986 and once or twice in October, 1986, William Murray told me that he had shot the two men at an apartment. William Murray told me that his brother Robert Murray was at the apartment when the men were shot, but that Robert Murray had nothing to do with the shootings. He told me that Robert had already left the room where the men were tied up because a woman at the apartment had jumped out the window. William Murray told me that he had panicked when the woman jumped out the window, and he then shot the two men.

Affidavit of Ronald Jordan, dated October 25, 1991, Exhibit 15.

After Tony Murray and convicted and sentenced to death for the murders, but before Bill Murray's trial, inmate Robert Loggins also had a conversation with Bill Murray about who killed Jackson and Stewart:

From August 1986 until approximately September, 1987, I [Robert Loggins] was an inmate at the St. Louis City Jail. I met William K. Murray at the St. Louis City Jail during this time when he was also an inmate in the jail. Sometime around late December, 1986, or early January, 1987, sometime around the Christmas holidays of that year, William Murray told me that his brother, Robert "Tony" Murray, had been convicted of murder for crimes which he had not done.

William Murray told me that he himself had actually shot and killed Jeffrey Jackson and Craig Stewart, and that Robert Murray had nothing to do with those homicides. William Murray related this to me on the fourth floor of the St. Louis City Jail, on Tier 4-4.

Affidavit of Robert Loggins, dated October 25, 1991, Exhibit 16.

Despite these admissions to others, Bill Murray did not come forward and admit his actions at Tony's trial or his own. In fact, just as he had dominated Tony since childhood, Bill also exerted his control over Debra Williams, a girlfriend and mother of his child, and convinced her to lie for him at his trial. Debra agreed, and testified falsely that Bill Murray was at her home on the night of December 5-6, 1985, staying with her children while she was out "partying" with some girlfriends. Bill Murray knew that he could make Debra do just about anything for him, and he took advantage of that power -- for his own benefit. Tr. of Wm. Murray's trial at 1547-1616.

IV. BILL MURRAY'S DOMINATION AND TONY'S VENERATION OF BILL

Psychiatric and psychological experts, and all those who knew them, agree that Bill Murray dominated Tony, that Tony was profoundly devoted to Bill, and that Tony had always been nonviolent. The jury was not presented with any of this expert evidence, though it would have directly supported two of the three other mitigating circumstances submitted: "extreme duress or substantial domination by another person" and "no significant history of criminal activity", and the federal courts have not even commented on the psychological evidence because of the procedural bar ruling.

Even before trial, Dr. S. Parwatikar, M.D., a psychiatrist appointed by the court, noted the probability of Bill Murray's domination over Tony:

Mr. Murray is the younger of two individuals implicated in the crime and since he did have considerable identity problems during childhood, having been pressured by peers and he looked up to his older brother for leadership, it is likely that he may have been influenced by his older brother. . . . The mitigating factors in this case are the influence of his older brother and his cocaine abuse at the time of the alleged crime.

Report of S. Parwatikar, M.D., dated July 2, 1986 (Exhibit 20).⁶

Dr. Parwatikar has since expanded on his initial impressions:

[Tony Murray] looked up to his brother for leadership. . . if [he] was involved in this crime, it is likely that he was influenced by his older brother, William. . . [and] there clearly was evidence that Robert Murray did have mitigating mental disorders, including that he was strongly influenced by his older brother and by cocaine abuse, which definitely would have supported finding that he acted under extreme duress and under the substantial domination of another person.

Affidavit of S. Parwatikar, M.D. dated September 20, 1991 (Exhibit 18).

Dr. Richard Wetzel, Ph.D., a psychologist at the Washington University School of Medicine who extensively evaluated Tony Murray and interviewed Bill Murray and several other family members, presented

⁶ Trial counsel never talked with Dr. Parwatikar after his examination and did not request further testing or information. Dr. Parwatikar did not testify at trial. (29.15 Tr. at 43, 291-293, 295.)

his findings, concludes that Bill's substantial domination over Tony explains why he even went with Bill Murray and Jesse Craig to Jackson's apartment. This is described in the following excerpts from Dr. Wetzel's report:

At the time of the offense. . . , (Tony) Murray was under the substantial domination of his brother (Bill) and was under the influence of a mind-altering drug....

[Tony] was particularly susceptible to domination by Bill Murray because of several factors in the family background, including [Tony's] status as the youngest child in a very dysfunctional family [in which] Bill Murray became his surrogate father....

Mrs. Murray brought many juvenile delinquents into her home who were recently released from the Booneville State Training Center. This began when Tony was only two years old, and William Murray was eleven....

At unexpected times and in an unpredictable manner, Mrs. Murray would punish Tony in a way that was devastating. On one occasion, she beat his head against the floor and the wall....

Tony's father, William Murray, Sr. was a psychologically shattered man during most of Tony's life. He was 50 when Tony was born, and became disabled shortly after that. He played almost no role in managing the household and was not available to care for or protect Tony.

Bill Murray is nine years older than Tony, and has an IQ 20 points higher, according to school records. Bill and Tony have a close relationship which began when Tony was very young. Bill offered Tony support that the parents could not give, and as his only brother, he was a strong father figure. . . . Bill learned how to cope with the delinquents brought into the home, and protected Tony from them. On one occasion, Tony was rescued from a delinquent attempting anal rape. Bill taught Tony boxing and karate when Tony was eight years old and Bill was seventeen.

Bill has always had tremendous influence on Tony. The delinquents taught Bill how to fight, to drive, to jump start cars, and Bill passed it on to Tony. Bill started selling marijuana when he was 21 (Tony was 12) and he used part of the money from that venture to support Tony and buy him clothes while Tony was in high school. . . .

Bill told Tony what to do and when to do it. Tony depended on Bill to tell him how to react. . . . Bill pressured [Tony] into going [to the scene of the crime], insisting that it would only take a little time and that he would get him to work on time. . . . Tony gave in and did what his brother told him to do against his wishes, as he had done so many times in the past. . . . Tony trusted Bill without questioning his motives.

Tony returned to his mother's home, where he was arrested the following day. Bill remained on the run for the next six months. During that time, Tony did

not have anyone he trusted to tell him what to do. He held his silence about his and his brother's roles and did not make any disclosures which would have led to lesser penalties. Bill domination was more important than his future. It is typical of Tony's relationship with Bill that he continued to hold his silence that his brother had shot and killed two men and yet Tony was convicted and received the death penalty for that. Despite anger and resentment at his brother later for not coming forward in his defense, he stayed silent until Bill Murray told him that he should come forward with the truth.

The psychological testing shows that Tony has psychological problems that make it easy for Bill, but no one else, to manipulate him.

Affidavit of Richard D. Wetzel, Ph.D., dated September 7, 1993 (Exhibit 4).

Tony's domination by his brother Bill was even apparent to prison authorities when he was first incarcerated -- before Bill permitted him to speak the truth. The following is excerpted from a Diagnostic Center Report from the Department of Corrections, dated April 9, 1987, when Tony first arrived at Missouri State Penitentiary:

He does seem to have been influenced by an older brother, William Murray Jr., who is a co-defendant in his instant offense. Unless it is this influence, one is at a loss to account for the criminal act in his current and only offense. There is an apparent lack of "Street Smart" and a presence of naivete in his make-up. He is pleasant and cooperative and open with staff. He communicates pleasantly, intelligently, and with a noted absence of foul language.

Report of Floyd George, CCW, 3C, Missouri Department of Corrections (Exhibit 19).

Indeed the state's own witness Claudia Henning cited Bill's intense influence over Tony when she testified at trial that on the night of the incident she remarked:

"Tony, you wouldn't be in this if it weren't for Bill."

(Tr. at 1029.)

Even after he was sentenced to death, quietly discouraged and frustrated that his brother had provoked this horrible mess and then failed to redeem him, Tony Murray's outrageous allegiance to his brother persisted. Persuaded by Bill Murray and other family members that Debra Williams' false alibi testimony at Bill's trial had spared him of the death penalty, Tony followed Bill's lead and made the disastrous and regrettable decision to testify untruthfully at his own 29.15 hearing. The decision spared Tony the seditious task of "snitching out" his

own brother; Bill Murray still had not accepted his own responsibility then. Tony Murray concedes that his false testimony was wrong. But isn't execution a lopsided penalty for perjury when a man is innocent of murder?

V. THE JURY WOULD NOT HAVE GIVEN TONY MURRAY THE DEATH PENALTY

Had the proof that Bill Murray was the killer been before the jury, Tony Murray would not have been sentenced to death. The third mitigating circumstances submitted for the jury's decision on punishment was whether Tony was an accomplice with relatively minor participation. Instructions No. 11 and 16, Legal file at 54 and 60. At least three jurors who reviewed the affidavits described above, including the foreman, insist that they would not have imposed the death penalty if this evidence was presented at trial.

Foreman James Rudd and Jurors Carl E. Johnson and Michael Falbo each have stated:

In reaching our decision to assess the death penalty as punishment, the jury relied on the testimony of Gladys Nutall that Robert Murray was the person who actually shot the victims.

I have reviewed the statement of William Keith Murray, dated August 18, 1992, which states that he alone shot both Jeffrey Jackson and Craig Stewart, and that Robert Murray was present at the scene but did not shoot anyone. This evidence was not available to the jury at the time of trial.

If this evidence would have been presented at trial, the jury's verdict on punishment would not have been the death penalty.

Instead, the jury may have agreed to sentence Robert Murray to life in prison. At least, there could not have been a unanimous verdict for the death penalty because I would not have agreed to that in light of the statement by William K. Murray that Robert Murray was not the triggerman.

Affidavit of James Rudd, dated February 12, 1993, Exhibit 20; Affidavit of Carl E. Johnson, dated September 7, 1993, Exhibit 21; Affidavit of Michael Falbo, dated February 12, 1993, Exhibit 22.

Michael Falbo and Carl Johnson also added that there could not have been a unanimous guilty verdict for first degree murder because they would not have joined in that decision if Bill Murray had admitted that he was the shooter:

In reaching the verdict of guilty of first degree murder rather than second degree felony murder, the jury relied on the testimony of Gladys Nutall that

Robert Murray was the person who actually shot Craig Stewart and Jeffrey Jackson. . . In fact, the jury could not have even reached a unanimous verdict of guilt for first degree murder because I would not have agreed to that in light of the evidence that William Murray was the triggerman.

Affidavits of Carl Johnson and Michael Falbo. (Exhibits 21 and 22).⁷

VI. THE EVIDENCE AT TRIAL AGAINST TONY MURRAY

Who was the Shooter?

At Tony's trial in December, 1986 (one year after the crime) Gladys Nutall falsely testified that she saw Tony shoot Craig Stewart in the back (Tr. at 1081, 1095-96). Tony was sentenced to death on the basis of that perjured statement. Exhibits 20, 21 and 22. No other testimony, no physical evidence, no circumstantial evidence even tended to suggest that Tony Murray was the person who killed Jeffrey Jackson and Craig Stewart. Tony's defense at trial was basically the truth -- that he was only an accomplice, not the shooter. But Bill Murray -- the killer -- was not willing to step forward with the proof to support Tony Murray then.⁸

Gladys' testimony that Tony was the shooter directly contradicted all previous statements she had made about what she had seen. For example, compare the following:

Story #1: Immediately after the incident, Gladys Nutall told Detective Joseph Beffa that she only saw two black men enter Jeffrey Jackson's apartment. She said then that the first man, who wore the rust-colored leather jacket and a baseball cap was the only one with a gun. At that time, she said the second man wore a green jacket and did not have a weapon. Gladys also said that she thought a third man entered, but she could not describe him because he entered after she was lying face down on the floor. She stated that she did not know any of the three men, but that Claudia Henning had called one "Bill." (Police Incident Reports, Exhibit 23).

Story #2: On the following day, Gladys identified Tony in a lineup only as "one of the participants." After the lineup, Gladys told Detective Beffa that she had only heard one shot while she was lying on the floor, did not see who did it, and that she then immediately dashed out the door. She said then that as she ran down the steps, she looked up and saw "Robert

⁷ Even the prosecutor, Joseph Warzycki, stated that he believed the jury imposed the death penalty because of testimony that Tony Murray was the shooter. 29.15 Hrg. Tr. at 97.

⁸ When Gladys Nutall testified again at Bill Murray's trial three months later, he was convicted and sentenced to life in prison without parole on both charges of first degree murder. Jesse Craig's trial followed in May, 1987, and he was acquitted.

Murray at the top of the stairs, "looked him right in the face," and that she did not see a weapon. Then she said, she heard another shot from inside the apartment.

Story #3: At a deposition several month later, on July 18, 1986, Gladys Nutall repeated that "William Murray" was the one who entered the apartment first, wearing black pants and the rust colored leather jacket, and that he had the gun. She said that she did not "get a chance" to look at the other's faces, but "Robert Murray" wore a "green jacket", was the one who stopped Claudia Henning from jumping out the window on her first attempt, and did not have a gun. (Depo. Tr. at 31.) (Interestingly, Gladys used petitioner's nickname "Tony" when she said, "That's when Tony . . . told her [Claudia Henning] to get down." (Depo. Tr. at 31.)

She then described the third man as wearing a long tan coat and tan cap. Gladys also testified at this deposition that Bill "did all the talking," and was the one who tied up Jackson and Stewart. This time, however, she said that right after Claudia Henning jumped out the window, "I looked up and saw the guy with the tan cap on with the tan coat on grab Craig and shoot him." (Depo. Tr. at 42-43.) She added that she immediately ran down the steps, and as she fell, saw the "guy with the green jacket" come to the top of the stairs, and that he "did not have anything in his hands." (Depo. Tr. at 41-46.)

Story #4 - The Perjury at Trial: At Tony's trial, Gladys again said that Bill was "doing all the talking" and told everyone what to do. Once again she testified that it was the person in the "green jacket" who stopped Claudia from her first attempted jump out the window. She again said that she "saw a man with a long coat do the shooting." (Tr. at 1099-1100.) She repeated that the man in the "green jacket" was the person she saw at the top of the stairs as she ran down. Now, however, for the jury, she announced that she "knew for sure" that Tony was the person she saw shoot Craig Stewart. (Trial Tr. at 1081, 1095-96.) Now she testified that she saw "all their faces." (Id.)

The accuracy of Gladys Nutall's observations in Jeffrey Jackson's apartment suffered in other respects, as well. For example, Gladys testified at trial that she had not used or "seen" any drugs at the apartment. Tr. at 1058. But police discovered all sorts of drug paraphernalia there in plain view. (See Police Incident Report, dated December 18, 1985, Exhibit 23). The coroner discovered cocaine and PCP in the bodies of both victims, and Claudia Henning even admitted at trial that they had all consumed marijuana and cocaine. (Tr. at 976-79, 996.)

Claudia Henning, who had known both Bill and Tony for several years, stated on December 6, 1985 that Bill was the man in the dark leather jacket, and that Tony wore the green jacket. She stated the third person wore a blue striped shirt, black trench coat, and dark ski mask. When Claudia Henning was again interviewed 5 days later on December 11, 1985, she said Bill was in charge, continually telling Tony and the third person what to do. At a deposition on July 18, 1986, Claudia testified that Bill wore the maroon leather jacket and Tony

wore the green jacket at Jeffrey Jackson's apartment on December 6, 1985. She stated the third person wore a long coat, but never removed his ski mask. (Depo Tr. at 29.) This description was repeated by Claudia at trial. (Trial Tr. at 1021.)

Claudia's descriptions of Bill and Tony and their clothing were consistent each time, and were consistent with the descriptions of Gladys Nutall until Ms. Nutall abruptly changed her story at trial. Police Incident Reports, Exhibit 23.

There was no sexual assault by Tony Murray

There were other aspects of Claudia Henning's testimony, however, that were not true. Claudia told the police that Tony Murray had sexually "fondled" her, but stopped when he saw that she was on her period, or when she had a B.M., as the story evolved. In fact, Tony Murray did not touch her in any sexual way. Claudia's testimony that Tony Murray had a knife and stabbed the two men was also false.⁹ Claudia also must have imagined the tale she spun when she said she had "lost a kidney" when she jumped from the window. (Tr. at 1024.)¹⁰

Contradictory Theories and Arguments by Prosecutor Warzycki

Prosecutor Joseph Warzycki, perhaps fearing that the jury may not believe either Gladys Nutall or Claudia Henning and seeking a conviction for first degree murder rather than felony-murder, repeatedly argued in the guilt phase closing of Tony Murray's trial that "it doesn't matter which one fired the shot, although we know in this case that he did it, because under the law, people who act together are equally responsible." (Tr.

⁹ Claudia Henning had initially told police that the victims were beaten and stabbed. Yet when the coroner, Dr. Phillip Burch, reported that there were no stab marks, bruises, or any evidence of this whatsoever, Claudia retreated and suggested they may have stabbed the linoleum floor. Tr. at 980-81 and 1013-14.

¹⁰ Medical records revealed that Ms. Henning had a pre-existing bladder infection at the time she jumped from the window, a condition entirely unrelated to any injury she sustained. The condition was treated with antibiotics -- not surgery. She had no serious injury and did not "lose a kidney".

at 1193-1196). His tune changed, however, in the punishment phase of trial where Joe Warzycki suddenly insisted that Tony Murray was positively the shooter:

Was Tony an accomplice or, in the words of this, his participation relatively minor? Tony is the one who is the shooter. He's the one in the kitchen with the gun, the gun that fired the bullets into Jeff, the gun that fired the bullets into Craig. Tony is the person who took the knives into the kitchen.

(Tr. at 1330-31). Though contrary to all evidence, the prosecutor cast ethics aside in his quest for a death verdict and argued that Tony Murray was not only the shooter, but was also "running the show." (Tr. at 1331.)

Within the next three months, however, by the time of Bill Murray's trial, the prosecutor apparently learned otherwise: that Bill Murray, not Tony, had really been the person in charge. Although it was too late for Prosecutor Warzycki to change what he had already argued to the jury at Tony's trial in seeking death, he could at least try to set the record straight for the jurors who sat before him now -- at the trial of Bill Murray. Now, Mr. Warzycki raved:

Bill came there first, cased the place, went into the kitchen, looked around, looked in the bathroom. He made sure who was there and left....[Bill Murray] is not an unintelligent man....Bill started the ball rolling....We know that Bill ran the actual robbery. Bill was the person in charge. Claudia told you that. Bill was the one that directed Tony what to do. . . We are trying the person who was giving the orders, Bill Murray. . . .

We know that Bill Murray was the first one to tie up the men It was Bill Murray who pushed the two men into the kitchen. Bill Murray started the ball rolling here. In the kitchen, it was Bill Murray who was observed -- not Tony, but Bill Murray who was observed with the butcher knife. And you saw the knife, how it was broken. And you saw the cuts on the floor. Not Tony, but Bill Murray. Do we have minimal participation here? No...there is only one person who decided [what was done that night], and that was Bill Murray.

Argument of Prosecutor Joe Warzycki, Trial Tr. of William Murray at 1784-1787, 1804 (emphasis added)(Attached as Exhibit 24)

VI. EXECUTIVE CLEMENCY IS NECESSARY HERE, AS IN OTHER CASES, FOR EQUITY IN PUNISHMENT AMONG CO-DEFENDANTS

Since Furman v. Georgia, 408 U.S. 411 (1972) governors in other states have commuted death sentences at least five times because a co-defendant who was equally or more culpable received a sentence less than death. The Missouri Supreme Court, which overturned a death sentence only once on proportionality review, also relied on the inequity of punishment between co-actors in doing so. State v. McIlvoy, 629 S.W.2d

333 (Mo. 1982). Each of these actions were taken for the sake of "fairness" -- based on the enduring principle that punishment should be proportionate to blameworthiness.¹¹ Tony Murray asks you, Governor Carnahan,

¹¹ Commutations were granted to Charles Hill (1977), Freddie Davis (1988) and Harold Williams (1991) of Georgia; Darrell Edwin Hoy (1980) and Richard Henry Gibson (1980) of Florida. Each of these cases involves a sentencing disparity startlingly similar to that between Tony Murray, Bill Murray and Jesse Craig.

Charles Hill: The Georgia State Board of Pardons and Paroles granted clemency to Charles Harris Hill in September, 1977, because codefendant Gary Watts, who was the triggerman, plead guilty in exchange for a life sentence. See David Morrison, "Hill Death Sentence Commuted to 99 Years," ATLANTA CONST., Sept. 30, 1977, at 8A.

Freddie Davis: In December 1988, the Board took the same action to commute Davis's death sentence, just two days before his scheduled execution, solely because his codefendant, who eventually took full responsibility for the crime, was sentenced to life. The Board determined the death penalty was disproportionate to the codefendant's life sentence. A member of the Board explained, "the scales of justice were just out of balance on this one." Tracy Thompson, "Panel Commutes Davis Execution to Life Sentence," ATLANTA CONST., Dec. 17, 1988, at 1.

Harold Williams: Though Williams had been sentenced to death, his "ringleader" accomplice brother was only convicted of voluntary manslaughter, but later took full responsibility for the crime. After finding "ample evidence the co-defendant. . . was the ringleader in the murder," the State Board of Probation and Paroles found that Harold's sentence was disproportionate to his brother's. Jingle Davis, "Ex-Marine's Death Sentence for Murder is Commuted," ATLANTA CONST., Mar. 23, 1991, at B5.

Darrell Edwin Hoy: In 1980, Governor Bob Graham commuted Hoy's death sentence because codefendant Hesse Hall, the triggerman, received a life sentence on retrial. "Of Convictions and Clemency" (editorial), CLEARWATER SUN, Jan. 2, 1980, at 8A; and David Pero, "Hoy's life spared," CLEARWATER SUN, June 13, 1980, at 1A.

Richard Henry Gibson: Again in 1980 for the same reason, Governor Graham commuted the death sentence of Gibson, whose lawyer had not presented evidence in the sentencing phase. Two codefendants had been sentenced to life, and two other persons involved in the crime were never imprisoned. "Graham Commutes

to follow this strong precedent, grant a stay of execution and commute his sentence to life in prison without parole to render justice here.

Gibson Sentence, FLA. TIMES-UNION (Jacksonville), May 7, 1980, at B4.

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