

IN THE MATTER OF: ELROY PRESTON
Potosi Correctional Center
Mineral Point, Missouri 63660

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

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

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I. INTRODUCTION

This application is presented on behalf of Elroy Preston, who is scheduled to die by lethal injection on January 28, 1998. Elroy is presently being held in the administrative segregation unit at the Potosi Correctional Center, under warrant of death issued by the Missouri Supreme Court on November 6, 1997. Pursuant to the Missouri Constitution and the Statutes of the state of Missouri (See Appendix at 21), Elroy Preston respectfully requests the Honorable Mel Carnahan, as Governor of the State of Missouri, issue an indefinite stay of execution in order for Elroy to present facts and evidence in support of his application at a hearing.

Death penalty proponents note the safeguards and protections that are provided by our system as the reason why the death penalty is an appropriate and just punishment which comports with our ideas of liberty and justice. Each and every one of those safeguards and protections has failed in this case. Elroy Preston is on death row because the very system that seeks to execute him failed to adhere to its own rules and provide him with these basic protections. These failures in the system are particularly egregious as Mr. Preston is mentally ill and has been unable to assist his counsel in preparation and litigation of his case.

It will become apparent once the facts are presented and reviewed that Elroy is not a candidate for execution. We are not asking that Elroy be released from prison but a commutation of his sentence to life in prison without possibility of parole for at least 50 years.

The Missouri Constitution and statutes grant the authority to the executive to stay

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

Counsel requests a hearing and the opportunity to present evidence that will show Elroy Preston is a victim of mental illness and a legal system which has failed to correct itself. Elroy Preston is not a person the public, if it had all of the facts, would find to be a reasonable candidate for execution.

II. REASONS TO GRANT EXECUTIVE CLEMENCY

ELROY PRESTON'S MENTAL PROBLEMS

Counsel has submitted a petition for a competency hearing to the Director of the Department of Corrections¹. (Appendix at 1). This request is based on several factors. Although I have represented Elroy for the past 5 years, I have only seen Elroy on two occasions. At each meeting, he appeared withdrawn, confused, and did not appear to understand who I was or what I was trying to do for him. In addition, Elroy has refused to see many of his other attorneys and was uncooperative at the original trial and during trial preparation. Mr. David Freeman and Cheryl Raffert have related their observations of Elroy on the few occasions that he has met with counsel. Even Elroy's family has been unable to communicate with him.

¹Counsel has submitted a request to Dora Schriro, Director of the Department of Corrections to stay the execution so that a hearing as to Mr. Preston's competence to be executed can be held. In light of the impending execution date, Counsel submits this request for clemency prior to a decision by Ms. Schriro regarding the request for a competency hearing.

More importantly, counsel has requested and received Elroy's institutional records and found that he has been treated in the prison for hallucination, bizarre behavior and other problems. (Appendix at 5). Betty Weber, the prison psychologist has determined that Elroy is moderately impaired. In addition to the prison records, counsel has spoken with the family and found that Elroy suffered from a head injury as a child which changed his entire personality. (Appendix at 2). Prior to the beatings he was a very docile and fearful child. After the injury Elroy complained of head aches and would suddenly fly into a rage. Elroy was referred to a neurologist however his parents never took him for treatment.

Dr. Daniel Cuneo has reviewed the available institutional records and spoken with individuals who have seen Elroy. He has concluded that Elroy Preston is psychotic and suffers from an explosive behavior disorder as the result of a head injury as a child. Dr. Cuneo states that Elroy is not fit for execution as he does not appear to understand the clemency process or the issues of mitigation. (Appendix at 1).

Furthermore, Mr. Preston's mental health problems existed long before his trial. Trial counsel, however, never conducted a social history or interviewed family members who would have related this information. Therefore, the experts who examined Elroy never knew about the brain injury and thus never investigated or considered it when determining Elroy's mental state at the time of the crime.

The discovery of these problems and their origin also puts a different perspective on Elroy's actions during his state proceedings. Prior to trial, Elroy reluctantly cooperated

with mental health experts as evidenced by Dr. Parwatikar's report (Appendix at 8) but refused to give any personal information as depicted in Dr. Shuman's report. (Appendix at 9). Later at the post-conviction motion hearing, the Court repeatedly and unsuccessfully voir dired Elroy to determine the source of his problems as he appeared to be acting inappropriately.

Without information about Mr. Preston's prior mental problems and head injury, Mr. Preston's uncooperative stance could most likely have been viewed as the action of a difficult defendant. Given the proper information, however, quite a different picture emerges. Preston was and remains a very disturbed and mentally-ill individual. His actions on the night of September 22, 1980, prior to trial and at his state court hearings were manifestations of that mental illness. His condition prevented his full participation and understanding of the process and exacerbated the other injustices which occurred in the litigation of his case.

PROSECUTORIAL MISCONDUCT

The state obtained Elroy Preston's death sentence through its use of deception. Counsel is in possession of documents which demonstrate the extent of the deception and provide evidence of facts which if considered would have resulted in a lesser sentence in this case.

Mr. Preston's death sentence and his conviction for Capital Murder are predicated on materially misleading facts. The state led the jury to believe that the principle witness against Elroy Preston, his brother Ervin, was an unbiased, capable observer. This

impression was the result of the experienced² prosecutor's concerted and successful effort to conceal the fact that Ervin Preston had a mental illness which resulted from his continual and excessive alcoholism. As a result of this concealment, the state was able effectively to combat the defense³ that the deaths of Betty Klein and Willie Richardson were the result of an argument after hours of drinking and induction of other drugs.

In this case, the prosecution prevented defense counsel's discovery of exculpatory evidence. The evidence, which the state successfully prevented the defense from discovering, was that Ervin Preston suffered from alcohol related hallucinations, memory loss, and vision problems. In those records, trial counsel would have found that Ervin Preston was hospitalized for alcoholism. (App. at Exhibit 18). At his admission in 1974, Ervin Preston was drinking **2 to 3 quarts of alcohol per day** and substituted home brew for purchased liquor. (App. Exhibit 18 at 60). At that time, Ervin had experienced problems with his vision, balance, memory and was often confused⁴. (App. Exhibit 18 at 60). In addition to those problems Ervin Preston had experienced auditory and visual hallucinations. (App. Exhibit 18 at 14, 42). These records also document that Ervin Preston had had three other psychiatric hospitalizations. (App. Exhibit 18 at 60). Ervin

²Mr. Nels Moss was the prosecutor in this case. He was assigned to the case in October of 1980. He has been a prosecutor since 1968.

³Trial counsel revealed to Mr. Moss the defense strategy prior to trial.

⁴At the time of admission, November 18, 1974, Ervin Preston believed that it was June. (App. Exhibit 18 at 62).

Preston had an alcohol severity score of 91⁵. (App. Exhibit 18 at 60). Dr. John Taylor in his discharge notes states

Because of the patient's severely limited insight into the nature and severity of his disorder, both psychiatric and medical, the prognosis for this patient is grave. It is not unlikely that this patient will suffer from recurrent attacks of diabetes mellitus and/or ketoacidoses because of his unwillingness to take medications as prescribed. In terms of his alcoholism the patient's motivation is very limited and the possibility that he will stop drinking is very, very small.

(App. Exhibit 18 at 44).

Ervin Preston was an important state's witness. He was an eye witness to the events and his testimony against his brother was crucial to the state's case. Ervin Preston's testimony was used to establish not only the sequence of events of that evening but also Elroy Preston's state of mind at the time of the killings.

The state was aware that defense counsel wanted Ervin Preston's medical records as trial counsel requested a release at Ervin Preston's deposition. (App. Exhibit 20 at 7). Indeed, the prosecutor suggested at the deposition he would attempt to get those records. (App. Exhibit 20 at 7). However, the state later opposed the release of those records. At trial the prosecutor argued:

The state previously on the record, I think, but if not, at least orally in chambers, has objected to the production of any medical or mental records of the witness, Ervin Preston, for the reason that -- they are confidential and he has refused to give his consent to their disclosure....**I think there is no basis to subpoena and -- and -- or produce these records in Court and I object to their production or use in Court.**

(App. Exhibit 22 at 303)[Emphasis Added]. The Court denied defense counsel's request,

⁵This score means that Ervin Preston's drinking patterns are more severe than 91 percent of the patients admitted to alcohol treatment programs in Missouri.

without reviewing the records for himself, stating:

The situation in St. Louis City Hospital has to do with the medical condition which has already been testified to. If the defendant, if the witness has an alcohol problem and he's admitted it, then I see no reason why that cannot be asked, but certainly not with reference to Malcolm Bliss or State Hospital or anything like that and -- I'll -- I will not permit defense counsel to ask him, whether he's been in Malcolm Bliss or Missouri State Hospital or in City Hospital or any psychiatric problems.

(App. Exhibit 22 at 304-305). In addition to opposing disclosure of the records, during Ervin Preston's testimony the state concealed the true nature of Ervin's disabilities. When Ervin Preston mentioned a spirit, the prosecutor quickly interrupted him and redirected the conversation away from that topic. (App. Exhibit 22 at 311).

While concealing evidence, the state sought to maximize its advantage by attacking the defense offered. The defense attempted in this case was that Elroy Preston lacked the requisite mental state to commit the crime of Capital Murder due to his large consumption of alcohol. Ervin Preston testified that he was "dead sober" at the time of the killings despite having consumed a large amount of alcohol several hours earlier. (App. Exhibit 22 at 326). The prosecutor asked Ervin Preston to characterize Elroy Preston's condition that evening. (App. Exhibit 22 at 326). Ervin Preston stated that Elroy Preston was also sober that evening. (App. Exhibit 22 at 326). These observations formed the basis of the state's attack upon Elroy Preston's defense. These observations however, were made by a person suffering from alcoholism so severe that he suffered from auditory and visual hallucinations.

The jury never learned of Ervin Preston's true condition as the experienced

prosecutor⁶ prevented the discovery⁷ of that evidence. Once Preston's discovery of the true nature of the witnesses' condition was prevented, the state embarked on a plan to maximize the devastating nature of his unimpeachable testimony. The state used Ervin Preston as the fulcrum in its quest for a death sentence. The state argued

Ervin told it like it was, like he could remember it, as best he could.

* * *

Ervin got on the stand and he told you, subject to cross-examination, what happened.....Did you think --- did you hear he was a alcoholic? One, you didn't hear that. Did you --- did you hear he's **suffered from alcoholism? You didn't hear, that, did you? Did you hear more -- further on that he suffered from alcoholism with psychosis? You know, that means, out --- such, that it puts you out of touch with reality.** Didn't hear that except, from her, she's no expert, no. We talked about how rotten, Ervin was and he was getting his story together. **There's another thing, that incenses me about this particular situation. We give discovery, the State, since it has the burden of proof, must disclose everything we've got. Every thread of evidence, every statement of every witness, every police report, we have, we give it to them because that's the way the law is designed, that's the way it should be.**

* * *

You know, the brother said, you know, he'd been drinking, but he knew what he -knew what he was doing. He knew --- he knew right from wrong....There's no real evidence, that he is so intoxicated, that he drank, drank, drank for --- drink with everybody else, that he did not stop drinking.

(App. Exhibit 22 at 473, 475-480)[Emphasis Added].

⁶The state was represented by Nels Moss an assistant circuit attorney for the City of St. Louis. Mr. Moss has been a circuit attorney for almost 30 years. Mr. Moss has been cited for prosecutorial misconduct before. Indeed, the Missouri Court of Appeals recently reversed a murder conviction for improper actions by Mr. Moss. State v. Nelson, 1997 WL 556000 (Mo. Ct. App. 1997). In another case the court noted about Mr. Moss' misconduct "**the error is but one example of a consistent pattern of improper tactics reflected by other transcripts in cases tried by the same experienced prosecutor.**" State v. Goodson, 690 S.W.2d at 161 (Gaertner, J. concurring) (Emphasis Added).

⁷Indeed, it was not until after Ervin Preston's death that undersigned counsel was able to obtain the Malcolm Bliss medical records.

In the penalty phase Mr. Moss argued

Now ladies and gentlemen, **it was never established how much he dranked (sic).** It was never established by any evidence that he continued drinking up until the time that he killed these people at three o'clock in the morning.....I submit to you this man, **while maybe not cold sober, certainly as his brother, has said, knew what he was doing.** Yeah, he knew what he was doing, he said and **this is a man that is observed him many more years than his girlfriend who has an interest in the case.**

(App. Exhibit 22 at 541)[emphasis added].

Elroy Preston's conviction and death sentence are predicated, therefore, on the actions of a prosecutor who, while extolling the virtues of our system of discovery and fair play, in reality stacked the deck and prevented disclosure of damaging and important evidence which if presented may have prevented a death sentence. The state's misconduct remains unpunished because the discovery of the deception occurred years after the conviction and under the new laws limiting habeas corpus review, the error could not be corrected. There are no such procedural limits on the Governor of Missouri, whose clemency power exists to correct cases such as this.

INEFFECTIVE ASSISTANCE OF COUNSEL

This injustice was compounded by the ineffective assistance of counsel Elroy received at every stage of his case. Prior counsel failed to perform any investigation of Elroy's life and mental health history. As a result, neither the jury, which determined guilt and punishment, nor the Missouri Circuit Court which reviewed Elroy's case pursuant to then Supreme Court Rule 27.26, was presented with this massive and compelling body of evidence. These failures of prior counsel precluded the jury and the Missouri state courts from fully and fairly considering his case and reviewing his claims. These failures also

resulted in the procedural bar of the full presentation of his claims in the federal courts' review of his case.

Trial counsel failed to interview and investigate Mr. Preston's social and mental history. By failing to conduct such an inquiry she never learned that Elroy was born with an excessively large head. As a result of this deformity, he was taunted and abused by other children in this neighborhood. At the age of 8 or 9, he was beaten about the head by the members of a neighborhood gang. (App. Exhibit 2). He was taken to the hospital but his parents never sought the after care and neurological care that the doctors recommended. After that injury, Elroy's personality changed dramatically. Prior to that head injury, Elroy was a timid and passive person. After the injury, Elroy complained about headaches and would fly into a rage with no provocation. These rages would begin without warning and caused Elroy to destroy furniture and attack others around him.

In addition to this head injury, Elroy was victimized by his older brother Ervin Preston, the state's key eyewitness. Ervin Preston sodomized Elroy when he was about 6 years old. (App. Exhibit 2). As the result of this attack, Elroy became very fearful of all men except his father. Elroy's parents never sought counseling or medical assistance for Elroy. Instead, they required that Ervin never be alone with the younger children in fear of more attacks. This evidence of Ervin Preston's bias was also never developed so that it could be presented to the jury at either the guilt or penalty phase.

Trial counsel never interviewed the family members to get a social history or a medical history. In part, this inaction may be explained by the fact that the state waited until trial counsel was on maternity leave, less than 2 months before trial, to file the notice

required that the death penalty would be sought. Nevertheless, this information was essential to Elroy's defense, as it explained his mental condition and actions on the night of September 22, 1980.

The importance of this information cannot be underestimated as demonstrated by the report submitted by Dr. Cuneo and the affidavit of Gwendolyn Berry. (App. Exhibit 1 and 23). Dr. Cuneo states that the head injury and subsequent personality changes are important bases for his opinion that not only does Mr. Preston suffer from a mental disease or defect, but also is unfit to be executed. (App. Exhibit 23).

Undersigned counsel also located Ms. Gwendolyn Berry, a juror in the original trial, who stated that information regarding Mr. Preston's head injury could have impacted her decision about whether a death sentence was appropriate. (App. Exhibit 23). As only one juror is needed to impose a life sentence, Ms. Berry's statement indicates not only the significance of the information but the level of ineffective assistance of trial counsel who failed to investigate and prepare any evidence in mitigation.

In fact, while trial counsel did attempt to present a mental defense no expert testimony was presented in either stage of the trial. Indeed, no evidence was presented in mitigation. Trial counsel, Christine Adler recognized her limitations and admitted at the post-conviction motion that she believed that she provided ineffective assistance of counsel. (Exhibit 19).

Ms. Adler was assisted by Peter Stragand. Mr. Stragand entered his appearance less than a month before trial and spent his entire time trying to acquaint himself with the facts regarding guilt. He stated that he met with Mr. Preston on only one occasion. Mr.

Stragand was put in charge of the penalty phase. He was given this responsibility despite the fact that he had never prepared or tried a murder case, let alone a capital case. Mr. Stragand admitted that he did not inform Mr. Preston that he had the right to testify in the penalty phase. Instead, Mr. Stragand had a "hunch" that the jury would not give death and decided not to present any evidence in mitigation. This hunch was based not on any experience or information but on a feeling. This decision is particularly foolhardy in light of the limited, if not non-existent, investigation and preparation that counsel conducted prior to trial on the penalty phase. The jury never learned because trial counsel never discovered the effect of head injury coupled with alcohol use or about the abuse that Elroy suffered as a child from the state's star witness. Instead the jury when faced with an unexplained double killing, was given no reason to spare Elroy Preston's life.

Both Ms. Adler and Mr. Stragand admitted at the post-conviction motion that they were ineffective. The 27.26 judge, Judge Kitchin, however, determined that as to these statements neither attorney was credible. Judge Kitchin, a long advocate of the death penalty, instead ruled that their overall experience was sufficient. It should be noted that post-conviction counsel did not investigate Mr. Preston's social and mental history either. Therefore, Judge Kitchin lacked the information regarding the possible evidence which was available when he denied Mr. Preston's claims.

FEDERAL REVIEW

The state court's decisions and counsel's failure to adequately investigate and present evidence to the state courts has prevented Mr. Preston from successfully requesting and get relief in the federal courts. The district court and then the Eighth Circuit

determined that these earlier hearings and the failure to develop evidence below prevented relief in federal court.

Elroy filed a federal petition for writ of habeas corpus in the Western District of Missouri in early 1988. The Federal Public Defender was appointed on June 6, 1988. It was during our representation of Elroy that Ervin Preston's mental health records were recovered and presented to a court for the first time. Counsel attempted to present them to the state courts but access to those courts was denied. See State ex. Rel. Elroy Preston v. Paul Delo, No. No 75519 (Mo. 1993).

The district court on June 28, 1995 denied the petition without an evidentiary hearing refusing to reconsider the state courts' findings of fact despite the existence of new and important information. The Eighth Circuit Court of Appeals affirmed the denial of the petition. Preston v. Delo, 100 F.3d 596 (8th Cir. 1996). On October 20, 1997, the United States Supreme Court denied the petition for certiorari. Preston v. Bowersox, 118 S.Ct. 357 (1997).

IX. THE POWER AND RESPONSIBILITY OF THE GOVERNOR

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

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

The Constitution of this state vests in the Governor the power of checks and balances in most criminal matters and does so in the matter of sentences of death. One quality of our system of justice is the idea that one accused of a crime is guaranteed due

process and a fair trial. If this does not take place or the system has failed for some reason, it can only be corrected by act of the Governor.

This is a situation that calls for intervention by the executive branch due to the failure of the criminal justice system to correct itself.

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

This position is even more significant in Elroy's case due to procedural impediments

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

X. CONCLUSION

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

Petitioner requests that the Governor appoint a board of inquiry so that counsel can present the evidence of Mr. Preston's mental illness and of other issues in mitigation of his sentence. In the alternative, Petitioner requests an opportunity for a hearing before the Missouri Board of Probation or Parole.

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

Respectfully submitted,

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