

IN THE MATTER OF: **MARTSAY BOLDER**
Potosi Correctional Center
Mineral Point, Missouri 63660

MATK

1298500-7

1/14/93

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

TO: The Honorable Mel Carnahan
Governor of the State of Missouri

I. INTRODUCTION

Martsay Bolder, through his attorney, respectfully submits this application seeking a reprieve or commutation of his death sentence to the Honorable Governor Mel Carnahan. The application is submitted pursuant to Article IV, § 7 of the Missouri Constitution and R.S.Mo. §§ 217.800 and 552.070.

Mr. Bolder's execution currently is scheduled for January 27, 1993.

Mr. Bolder requests that the Governor issue a reprieve, or stay, of the execution date and time. A reprieve is necessary because Mr. Bolder has recently obtained evidence demonstrating that, as a matter of law, he is not guilty of capital murder and, therefore, is not eligible for the death penalty. This evidence will be submitted to the United States District Court for the Eastern District of Missouri through a petition for a writ of habeas corpus.¹ The Court has not yet had the opportunity to examine the evidence and a reprieve is necessary to ensure that Mr.

¹The petition has not yet been filed because Mr. Bolder has not had an opportunity to sign the petition. Although Mr. Bolder's attorney mailed the petition to Mr. Bolder on January 7, 1993, as of this time, it has not been delivered to Mr. Bolder for his signature. The petition cannot be filed without Mr. Bolder's signature.

Bolder is not executed while the evidence of his innocence awaits a court hearing.

Alternatively, Mr. Bolder requests that the Governor commute his sentence to life in prison without the possibility of parole for 50 years pursuant to R.S.Mo. § 565.008 (capital sentencing statute in force at the time of Mr. Bolder's trial; repealed 1983). Commutation is appropriate because the death sentence is disproportionate to any crime Mr. Bolder committed and because Mr. Bolder's death sentence is the direct result of constitutionally deficient effort by his state-appointed trial lawyer.

Mr. Bolder also suggests that a reprieve of the sentence should be issued while the Governor considers the request for commutation. A reprieve of at least 90 days is necessary in order to ensure that the Governor has adequate opportunity to consider the report and analysis of the Board of Probation and Parole and, if desired, the report and analysis of a Board of Inquiry, as well as adequate opportunity for personal consideration of this application.

Finally, Mr. Bolder respectfully requests an opportunity to present evidence and argument in support of this application to Governor Carnahan and the Board of Probation and Parole, or to a Board of Inquiry, as contemplated by Missouri Supreme Court Rule 30.30. Only through these processes can this application receive the full and fair review it deserves.

The inappropriateness of Mr. Bolder's sentence has been recognized and written about by judges in every judicial forum

where his case has been heard. In the Missouri Supreme Court Judge Seiler and Judge Bardget described Mr. Bolder's death sentence as "excessive and disproportionate". State v. Bolder, 635 S.W.2d 673, 691-92 (Mo. banc 1982), cert. denied, 459 U.S. 1137 (1983). (Seiler, J. dissenting in which Bardget, J. concurs). In the federal courts, the district judge who heard Mr. Bolder's previous habeas corpus petition and judges of the Eighth Circuit Court of Appeals have concluded that Mr. Bolder's death sentence is the direct result of inadequate lawyering and that a life sentence would have been issued if Mr. Bolder's trial lawyer had performed adequately. Bolder v. Armontrout, 713 F. Supp. 1558, 1567 (W.D. Mo. 1989) (Bolder I); Bolder v. Armontrout, 921 F.2d 1359, 1370 (8th Cir. 1990), cert. denied, 112 S. Ct. 154 (1991) (Bolder II) (Lay, C.J., dissenting); Bolder v. Armontrout, 928 F.2d 806 (8th Cir. 1991) (Bolder III) (Lay, C. J., specially dissenting from denial for petition of rehearing en banc with whom McMillian, J., concurs).

Despite the repeated judicial concern over Mr. Bolder's sentence, he has not been able to obtain relief in the courts. The federal district court, on habeas corpus review, determined that Mr. Bolder's sentence was unfair and granted habeas corpus relief. However, the district court's order was reversed by the Eighth Circuit Court of Appeals on a technical issue of procedural law. The Circuit Court did not disagree with the district court's conclusion that, on the merits, Mr. Bolder's sentence was unjust, but sent him back to death row.

In this paper, Mr. Bolder describes the facts relating to his conviction, and demonstrates that a reprieve should be issued, or alternatively, that his sentence should be commuted.

II. BACKGROUND FACTS

Martsay Bolder entered the Missouri State Penitentiary at age seventeen. Despite his young age, Mr. Bolder had been certified as an adult and convicted on a second degree murder charge. The Missouri State Penitentiary is a difficult place for any inmate but it presented special dangers for young Mr. Bolder. The principal source of this danger was inmate Theron King.

A. The Stabbing And Subsequent Death Of King

Early in 1979, Theron King was assigned as Mr. Bolder's cell-mate. King was twenty years older than Mr. Bolder and he used his age and experience to taunt and harass Mr. Bolder. For example, King told Mr. Bolder that he knew, but refused to disclose, the circumstances of the murder of Mr. Bolder's older brother. King also spread gossip that Mr. Bolder was engaged in homosexuality. King's harassment continued after he was removed from Mr. Bolder's cell. Eventually, the harassment became too much for Mr. Bolder. In April, 1979, King saw Bolder in the jail yard and started to call him names, including "pussy assed nigger". Mr. Bolder confronted King and, when King refused to retract his epithets, Mr. Bolder stabbed King.

King incurred a wound to the abdomen that was not attended to promptly. No surgeon was available for 45 minutes and, by that time, King had lost a great deal of blood. An emergency surgery was performed without the benefit of sterile conditions. King died six weeks later. The autopsy report identified the cause of King's death as "generalized infection resulting from a stab wound".

If, indeed, the stab wound caused the infection that befell King, Mr. Bolder would be legally responsible for King's death. The autopsy conclusion, however, seems suspect due to the passage of time before the infection had its ultimate effect. Evidence recently obtained indicates that the autopsy conclusion was only half correct. King did die of an infection but the infection was not caused by the stab wound. Rather, the infection was caused by hospital staff when, weeks after the stabbing, they removed fluid from King's chest by passing a hypodermic needle through the location of King's abdominal wound. Mr. Bolder believes that using the wound area for this procedure was malpractice. The hospital's use of the wound area also may explain why King's infection-related death occurred six weeks after the stabbing.

The new evidence has not been fully investigated. Its source, however, appears reliable. The significance of the evidence cannot be overstated. If King really died of malpractice, rather than a stab wound, Mr. Bolder could have been convicted of no more than aggravated assault and he would not have been eligible for the death penalty.

B. Mr. Bolder's Trial

The newly discovered evidence regarding King's death was not available at the time of Mr. Bolder's trial. The evidence regarding the provocation leading to the stabbing and evidence regarding Mr. Bolder's background, however, was available. Unfortunately for Mr. Bolder, the evidence was ignored by his lawyer.

Mr. Bolder's trial was assigned to a young Jefferson City lawyer who practiced criminal law part-time and who had no experience in capital murders. The lawyer's preparation consisted of speaking with his father, a doctor, regarding the medical cause of King's death and meeting with Mr. Bolder on five (5) occasions. Mr. Bolder's trial lasted only one day and virtually all of that time was devoted to the prosecution's case. Mr. Bolder's lawyer introduced no evidence and limited his closing remarks to a few minute speech regarding the difficult burden the jury would face in its sentencing decision.

Missouri capital punishment trials occur in two phases. In the first phase, the jury determines the defendant's guilt or innocence. If the jury finds the defendant guilty of capital murder, the second phase commences. In this penalty phase, the jury may be presented with evidence demonstrating why the death penalty should not be invoked. Mr. Bolder's lawyer failed to produce important evidence in both phases.

In the guilt phase, Mr. Bolder's lawyer failed to present any of the evidence regarding the despicable conduct of King and the

anger it caused to well up in Mr. Bolder. Although such evidence certainly would not have excused Mr. Bolder's decision to stab King, it would have supported a jury verdict of either first or second degree murder for which the death penalty, as a matter of law, could not be imposed. See State v. Bolder, supra, 635 S.W.2d at 691-92. Moreover, if this evidence has been argued in the penalty phase, the jury would likely have issued a life sentence.

Perhaps more importantly, Mr. Bolder's lawyer failed to make any investigation for witnesses who could testify at the penalty phase of Mr. Bolder's trial. Missouri's capital punishment statute allowed penalty phase evidence on any topic that could influence the jury's decision on life or death. Mr. Bolder's lawyer, however, did not read the capital murder statute carefully. Consequently, the lawyer was not aware that he could present mitigation evidence at the penalty phase and he conducted no investigation for mitigation witnesses. Bolder I, supra, 713 F. Supp. at 1567.

If Mr. Bolder's lawyer had read the statute and looked for mitigation witnesses, he would have been armed with valuable penalty phase testimony. Mr. Bolder's current lawyers, upon their appointment to represent Mr. Bolder in his federal habeas corpus action, promptly located neighbors, acquaintances and a counselor to Mr. Bolder who recounted facts of Mr. Bolder's childhood and adolescence. In sum, these witnesses explained that Mr. Bolder grew up in a destructive climate of poverty, violence and mental disease. Mr. Bolder's father was present in the home only to vent

his wrath during drunken binges and little maternal care was provided. Notwithstanding these remarkable burdens, Mr. Bolder was thoughtful and considerate to his neighbors and friends and responded admirably when able to escape the ghetto with his counselor. Id. at 1567 (recounting evidence).

Without the benefit of any evidence demonstrating the provocation which caused the stabbing or Mr. Bolder's very difficult background, it is little wonder that the jury returned a death verdict. If the jury had heard the available evidence, however, their verdict most probably would have been a life sentence. The federal habeas corpus judge, who heard the evidence believed it "inescapable" that the jury would have returned with a life in prison verdict had Mr. Bolder's lawyer presented the full facts.

III. REASONS WHY A REPRIEVE OR COMMUTATION SHOULD BE GRANTED

Mr. Bolder should be granted a reprieve until his pending habeas corpus petition is decided on the merits. Alternatively, Mr. Bolder's sentence should be commuted. Commutation is appropriate because Mr. Bolder's sentence is disproportionate to his crime and because his sentence is the result of attorney negligence.

The reasons on which Mr. Bolder seeks relief are valid. They should not be discounted simply because all but the medical malpractice issue previously have been presented to the courts. The number of Mr. Bolder's prior court proceedings does not equate to a reasonable opportunity to present the important facts of his

case. Indeed, all but one of Mr. Bolder's court appearances have been notable for their avoidance of the facts, either due to attorney error or due to procedural technicalities relied on by the courts to ignore the merits. The exception was the federal habeas corpus case in which the judge found Mr. Bolder's death sentence to be illegal. Thus, a reprieve or a commutation by the Governor would not "overrule" any valid fact finding of a court or jury. Rather, an order granting a reprieve would acknowledge that important issues regarding Mr. Bolder's guilt remain unresolved and an order granting a commutation would be entirely consistent with the outcome of Mr. Bolder's only untainted court proceeding. Below, Mr. Bolder explains the three basic reasons that a reprieve or commutation should be ordered.

A. Mr. Bolder Should Be Granted A Reprieve Of His Death Sentence While The Federal Court Considers His Newly Discovered Evidence.

The evidence regarding the medical malpractice cause of King's death was discovered by Mr. Bolder only a few weeks ago. As soon as an affidavit was obtained supporting the evidence, Mr. Bolder's lawyers filed a federal habeas corpus petition. If the medical malpractice issue is determined in Mr. Bolder's favor, his death penalty will be void as a matter of law. A ruling that King died of medical malpractice would mean that Mr. Bolder's crime was no more serious than felonious assault.

A reprieve of Mr. Bolder's sentence is necessary until the habeas corpus petition can be ruled on the merits. If a reprieve

is not granted, Mr. Bolder may be executed while the issue of his guilt of capital murder remains unresolved. In order to avoid the possibility of executing an innocent man, a reprieve should be issued.

B. Alternatively, Mr. Bolder's Death Sentence Should Be Commuted Because It Is Disproportionate To His Crime

In Missouri, capital punishment may be imposed only for a murder committed with statutorily specified circumstances. R.S.Mo. § 565.012.2 (capital murder statute in place at the time of Mr. Bolder's trial; repealed 1983; superseded by R.S.Mo. § 565.032) All but one of the statutory circumstances focus on the motive for, or manner of, the murder. Thus, murder for hire and murder involving torture are crimes for which the death penalty may be imposed. These circumstances comport with the legislature's view that some murders are so vile that society may be vindicated only by taking the life of the guilty party.

Mr. Bolder is subject to the death penalty due to the lone statutory circumstance which does not focus on motive or manner. Mr. Bolder was sentenced to death only because his crime occurred while he was incarcerated. R.S.Mo. § 565.012.2(9) (1978) (repealed 1983). Under the "while incarcerated" circumstance, the death penalty may be ordered for a murder that, if it occurred outside the prison walls, would result in a conviction of a lesser crime. Moreover, the "while incarcerated" circumstance requires no depravity as a prerequisite to the imposition of capital

punishment. The circumstance, therefore, promotes disproportionate sentences and uneven application of the death penalty.

Mr. Bolder's case demonstrates the disproportionate impact of the "while incarcerated" circumstance. Assuming that Mr. Bolder, rather than medical malpractice, is responsible for the death of King, his crime warrants a conviction of nothing greater than second degree murder. Mr. Bolder's crime occurred due to King's provocation and was not vile or shocking. Consequently, the crime could not support a death sentence, if it had not occurred at the penitentiary.

On the direct appeal from his conviction, two Missouri Supreme Court judges argued exactly this point. State v. Bolder, supra, 635 S.W.2d at 691-92. The judges found that the "while incarcerated" circumstance produced uneven and unfair results.

Mr. Bolder's death sentence is disproportionate even if the "while incarcerated" statutory circumstance is accepted as appropriate. In other cases where the circumstance has been invoked and a death sentence returned, the murders were vile and horrible. Assuming that Mr. Bolder murdered King, the murder is not comparable to the other cases. For example, in State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), a death sentence was returned against an inmate who tortured a mentally slow inmate on numerous occasions, burned and sodomized the victim and finally slowly strangled the victim to death until a vertebra in his neck was broken. Similarly, in State v. Parkus, 753 S.W.2d 881 (Mo. banc 1988), an inmate was sentenced to death for the brutal

strangulation of another inmate. In that case, the defendant sneaked into the victim's cell at night, hit him in the face with a blunt instrument, further incapacitated him by binding his arms and then strangled the victim until the vessels in his eyes burst and he died. In State v. O'Neal, 718 S.W.2d 498 (Mo. banc 1986), and State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987), death sentences were issued against members of a white supremacist group, the Aryan Nation Church, who threw boiling liquid into the face and eyes of their black victim, incapacitated his arms and then repeatedly stabbed him to death. Mr. Bolder's crime does not compare in viciousness with these or any other inmate murder.

The disproportionate nature of Mr. Bolder's sentence is even better demonstrated by those cases in which the jury determined death to be an inappropriate sentence for an inmate's crime. In State v. Hurt, 668 S.W.2d 206 (Mo. App. 1984), the defendant was sentenced to life despite inflicting twenty-six separate stab wounds during the murder of his victim. In State v. Zeitvogel, 655 S.W.2d 678 (Mo. banc 1983), two inmates stabbed their victim sixteen separate times, attempted to stab two other inmates, and attempted to stab a prison guard but were given a life sentence.

Uneven application of the death penalty is an evil which responsible government must seek to avoid. When people are sentenced based upon a classification, rather than on the facts of their crime, or when similar facts cause widely divergent sentences, the public's distrust of the system only can increase. Given the nature of the classification that made Mr. Bolder

eligible for the death penalty, and the disproportionate sentence that was imposed, it should be concluded that Mr. Bolder's sentence is a product of uneven application of the death sentence. As a result, his sentence should be commuted.

C. Alternatively, Mr. Bolder's Death Sentence Should Be Commuted Because It Is Due To The Neglect Of His Attorney.

In Part II(B), above, Mr. Bolder described the failures of his state-appointed trial lawyer and explained that the lawyer's inattention and lack of inquiry led directly to the imposition of Mr. Bolder's death sentence. Here, Mr. Bolder explains the legal significance of his lawyer's failings. In addition, Mr. Bolder explains why his lawyer's conduct has not resulted in a court order rescinding his death sentence.

Under the Sixth and Fourteenth Amendments to the United States Constitution, all states are required to provide a lawyer to their indigent criminal defendants. The lawyer is required to perform in a reasonably competent, or "effective" manner. If an appointed lawyer performs incompetently or "ineffectively", the defendant is denied a constitutional right and a sentence tainted by the lawyer's ineffectiveness cannot stand.

The constitutional right to an effective lawyer provides critical protection to fairness in criminal sentencing. Jurors, no doubt, attempt an honest assessment of the case but they can be guided only by what is presented to them by the case lawyers. If the lawyer appointed by the state to defend the case does a shoddy

job, the jury may be deprived of the most important facts upon which its life or death decision should be made. In that circumstance, the jury may order death although it would have ordered a life sentence if the critical facts had been presented. Thus, consistent enforcement of the right to effective counsel can avoid death sentences that reflect the defense lawyer's lack of effort and attention, rather than the nature of the crime.

In his federal habeas corpus hearing, Mr. Bolder demonstrated that his state-appointed trial lawyer had provided ineffective assistance and, as a result, that his death sentence was tainted. At the habeas corpus hearing, Mr. Bolder's current counsel presented the mitigation witnesses who were ignored by the trial lawyer. The judge concluded that the trial lawyer's ineffective assistance, including his failure to understand the law and to contact mitigation witnesses, was inexcusable. The habeas corpus judge ruled "counsel's conduct so undermined the proper functioning of the adversarial process that the sentencing hearing cannot be relied on as having produced a just result." Bolder I, supra, 713 F.2d at 1569. Due to his finding, the judge ruled that the state must offer a new penalty phase hearing to Mr. Bolder.

The state appealed the habeas corpus judge's hearing to a panel of the Eighth Circuit Court of Appeals and obtained a reversal. Bolder II, supra, 921 F.2d at 1359. It is important to note that the appellate panel did not disagree with the habeas corpus judge's finding that trial counsel's failures were the root cause of Mr. Bolder's death sentence. Rather, the appellate panel

found that a technical rule allowed them to reinstate the death sentence.

The appellate panel's technical ruling itself presents a situation of bitter irony. The panel concluded that the habeas corpus judge should not have considered the issue of the trial lawyer's ineffectiveness on the merits because the issue had not first been presented to the state courts. However, the issue was not presented to the state courts because the lawyer appointed by the state to represent Mr. Bolder in his state post-conviction hearing, duplicated the error of Mr. Bolder's trial lawyer. The state post-conviction lawyer has admitted that he did not locate and present testimony from the mitigation witnesses because "it didn't occur to me". Thus, Mr. Bolder has twice been the victim of poor lawyering and procedural rules prohibit any other court from issuing an appropriate ruling on the merits of his claim.

The appellate panel's decision to reverse the habeas corpus judge, while avoiding the merits of Mr. Bolder's ineffective assistance claim, has been controversial. One member of the three-judge appellate panel wrote a dissenting opinion that harshly criticized the action of his two brethren. The dissenting judge argued that the merits of Mr. Bolder's claim ought to be considered and that, on the merits, Mr. Bolder would prevail. Bolder II, supra, 921 F.2d at 1370. Later, the panel majority's decision was submitted to all active judges in the Eighth Circuit for their consideration of whether the full court should review Mr. Bolder's tainted sentence. Consideration by the full court may occur only

upon the vote of a majority of the judges. In Mr. Bolder's case, the judges split five to five and, consequently, the full court did not consider the panel's decision. Given that consideration by the full court occurs rarely, the split indicates significant concern by the judges. Moreover, in connection with the full court's action, two judges wrote a special opinion in which they stated that executing Mr. Bolder would be a "miscarriage of justice". Bolder III, 928 F.2d at 806.

Mr. Bolder was denied his constitutional right to competent legal representation at his trial. The judge who fully considered the issue found that Mr. Bolder's trial lawyer overlooked mitigating evidence so powerful that, had the jury heard the evidence, it almost certainly would have returned a life sentence. To allow Mr. Bolder's execution would, therefore, disregard the constitution's mandate that all criminal defendants be given a fair opportunity to present relevant facts regarding their case to the jury and it would end the life of a man who deserves to live.

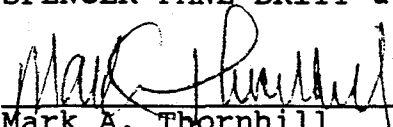
CONCLUSION

Mr. Bolder faces execution for what is at most a second degree murder and may be only felonious assault. His sentence is, therefore, disproportionate to the crime. A reprieve is necessary to allow Mr. Bolder adequate time to prove his innocence of capital murder in his pending habeas corpus motion. Alternatively, Mr. Bolder's death sentence should be commuted to life in prison without the possibility of parole for fifty years. A commutation

is appropriate because Mr. Bolder's death sentence is disproportionate to any crime he committed and is due to the constitutionally deficient assistance from his appointed trial lawyer. If the lawyer had presented the available evidence to the jury, a life sentence would have been returned.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE



Mark A. Thornhill
Gardiner B. Davis
1400 Commerce Bank Building
1000 Walnut Street
Kansas City, Missouri 64106
(816) 474-8100
Facsimile: (816) 474-3216

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was mailed, United States first class postage, this 14th day of January, 1993, to:

Stephen David Hawke
Attorney General's Office
221 W. High Street
P.O. Box 899
Jefferson City, Missouri 65102



ATTORNEY FOR APPELLANT