
**BEFORE THE GOVERNOR OF TEXAS AND
THE TEXAS BOARD OF PARDONS AND PAROLES**

In Re

MARIO MARQUEZ,

Petitioner.

**PETITION FOR CLEMENCY
AND REQUEST FOR REPRIEVE**

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SUMMARY OF CONTENTS OF PETITION

Mario Marquez is mentally retarded, severely brain damaged, and the victim of child abuse so severe that it amounted to child torture. As explained below, the jury never heard any of these tragic facts, and **the courts, which found these facts to be true, have determined that they are powerless to consider them in deciding whether he deserves the death penalty.** Clemency is thus the only available remedy. Mario's execution is set for January 17, 1995.

NO ONE IN THIS CASE DISPUTES THESE FACTS. Evidence about Mr. Marquez's mental retardation and other disabilities, his life history, and other related information was submitted during an evidentiary hearing in state court that was conducted well after the trial. At the close of that hearing, the state district attorney authored findings of fact which were agreed to, signed and entered by the state judge finding that Mr. Marquez was mentally retarded, severely brain damaged, and severely abused as a child. See Exhibit 24 (State Court Findings of Fact).¹

CLEMENCY IS THE APPROPRIATE REMEDY HERE BECAUSE NEITHER THE JURY NOR THE COURTS CONSIDERED THESE FACTS in determining whether Mr. Marquez should be executed. Mr. Marquez's trial attorneys presented **no evidence** to the jury at the sentencing phase of trial. In 1984 when Mr. Marquez was tried, the Texas death penalty statute prevented the jury from considering evidence of mental retardation and severe child abuse in favor a life sentence (the U.S. Supreme so held in Penry v. Lynaugh, 469 U.S. 309 (1989)), and so the attorneys had no choice but to exclude this information from the jury's consideration. On appeal, the courts have unanimously held that, **because these facts were not presented to the jury, they cannot be considered in any way in determining the appropriateness of Mr. Marquez's death sentence.**

The Governor and the Board are the only officials who have the power to act in these circumstances. Local and national sentiment clearly favor a vote for clemency in this case:

- (1) **THE CITIZENS OF TEXAS, AND NATIONWIDE, BELIEVE THAT MENTALLY RETARDED PERSONS SUCH AS MR. MARQUEZ SHOULD NOT BE PUT TO DEATH.** See Exhibit 1 (Independent Texas Poll showing that 73% of Texans oppose execution of persons with mental retardation); Exhibit 13 (Polls from other states demonstrating uniform, nationwide public opposition to execution of persons with mental retardation).
- (2) **MANY STATE LEGISLATURES HAVE NOW PASSED LAWS PROHIBITING THE EXECUTION OF THE MENTALLY RETARDED.** See

¹ The Exhibits to this Clemency Petition are in accompanying volumes.

Exhibits 3-12 (Statutes from States such as Georgia, Arkansas, Tennessee, Kentucky, Indiana and others banning execution of the mentally retarded).

- (3) **THE FEDERAL CONGRESS AGREES THAT IT IS WRONG TO EXECUTE MENTALLY RETARDED PERSONS, AND HAS PASSED LEGISLATION BARRING THE FEDERAL GOVERNMENT FROM EXECUTING SUCH PERSONS.** See Exhibit 2 (Federal law signed by President Bush prohibiting the execution of persons with mental retardation); Exhibit 21 (Report by the President's Committee on Mental Retardation entitled "Citizens with Mental Retardation and the Criminal Justice System," recommending law banning the execution of persons with mental retardation); Exhibit 22 (Congressional Testimony by Senator Arlen Specter in 1991, in favor of federal law banning execution of persons with mental retardation).
- (4) **ALL NATIONAL ASSOCIATIONS INVOLVED IN ADVOCACY FOR PERSONS WITH MENTAL RETARDATION UNANIMOUSLY OPPOSE EXECUTION OF SUCH PERSONS.** See Exhibits 14-19 (Position statements of numerous such organizations).

The facts of Mr. Marquez's tragic childhood cry out for mercy. All parties agree that Mario Marquez was brutalized by his father because of his mental retardation and his relative "slowness" in responding to parental direction. He was beaten with sticks, whips, and two-by-fours about the head and face. His father whipped him with a horse whip, and when he passed out his mother would revive him by rubbing an alcohol-soaked rag under his nose. See Exhibit 24 (State Court Finding of Fact No. 1). [The state court's findings were based on extensive evidence presented at the 1990 evidentiary hearing. See section B below for references to supporting Exhibits].

All parties also agree that when Mario was 12, both parents abandoned him and his younger siblings, leaving Mario as the oldest person in the home. One year later local authorities came to the household and took the younger children away. Mario was left behind, and from the age of 12 on, he was completely without parental supervision, despite the fact that he was mentally retarded. See Exhibit 24 (State Court Finding of Fact No. 1). [Here too the state court's findings were based on extensive evidence presented at the 1990 hearing. See Section D below for references to supporting Exhibits]. Left without any parental guidance or supervision, mentally incapable of coping, and defenseless against the pressures of a gang-ridden neighborhood, Mario began using street drugs, sniffing spray paint daily, and injecting heroin frequently at the age of twelve. See Exhibit 24 (State Court Finding of Fact No. 3). [These findings were also supported by substantial evidence at the 1990 hearing. See section E below for references to supporting Exhibits].

All of this information, which leads to but one conclusion -- that Mario Marquez should be granted clemency -- is set forth in detail below.

I. AGREEMENT BY THE TRIAL COURT AND ALL PARTIES THAT MARIO MARQUEZ IS MENTALLY RETARDED AND SUFFERS FROM SEVERE BRAIN DAMAGE

As noted above, there is no dispute that Mario Marquez is mentally retarded. The state court found (based verbatim on proposed factfindings submitted by the Bexar County district attorney's office) that he is mentally retarded, see Exhibit 24, and all doctors, including State doctors, who have examined him have found that he is mentally retarded. See Exhibit 25 (Testimony of John R. Bateman, M.D., from state court post-trial evidentiary hearing) at 27; Exhibit 26 (Testimony of Robert Geffner, Ph.D., from state court post-trial evidentiary hearing) at 115-18; Exhibit 28 (Pretrial Mental Status Evaluation of Bexar County Jail Medical Director John Sparks, M.D.) at 14.

Mental retardation contains three elements, all of which are easily documented in Mario's case: (1) significantly sub-average general intellectual functioning (IQ of 70-75 or lower), (2) existing concurrently with impairments in adaptive behavior, and (3) manifested during the developmental period (before a person's 18th birthday). American Association on Mental Deficiency (now Retardation) (AAMR) Classification in Mental Retardation at 11 (H. Grossman ed., 1983). All experts and parties and courts agree here that Mario Marquez's condition satisfies each of these criteria.

With respect to elements (1) and (3), in 1967, when he was nine years old, Mario was found to have an IQ of 62, giving him a mental age of five years ten months. Thus he has an IQ score in the mentally retarded range that manifested itself well before his 18th birthday. See Exhibit 33 (School Records of Mario Marquez). Later testing confirmed these scores. Prior to his trial in 1983, state doctors tested him and found him to have an IQ of 66, which is not an appreciable difference in score. See Exhibit 28 (Pretrial Mental Status Examination).

Mario's school records confirm that he has been retarded since childhood. His scholastic achievement test results show that in 1970, at age twelve, Mario should have been, chronologically, in the seventh grade. See Exhibit 33 (School Records). His SRA test scores from 1970 placed him at the fourth grade (4.4) for overall arithmetic ability and the third grade (3.1) for overall language ability. See Exhibit 25 (Testimony of Dr. Geffner) at 112-14. Mario was retained in third grade for one year and "socially promoted" from the sixth to the seventh grade. During his schooling he was placed on the side of the room with those who could not read -- these children were given books to color and no attempt was made to teach them. Shortly after his parents abandoned him at age twelve, Mario stopped going to school, unable to read or write. See Exhibit (Social History Evaluation presented at post-trial state court evidentiary hearing) at 13-14.

With respect to element (2), to be classified as mentally retarded, a person's deficit in intellectual functioning must be accompanied by "impairments in adaptive behavior defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence and/or social responsibility that are expected for his or her age level and cultural group as determined by clinical assessment and, usually, standardized scales." AAMR at 11, quoted in Ellis & Luckasson at 422. Doctors agree that Mr. Marquez suffers from these problems as a result of his mental retardation. Dr. Bateman, who is the federal court's expert in litigation involving the entire state of Texas MHMR system, and who is currently the

medical director of the state forensic facility, Vernon State Hospital, explained in very great detail all of the ways in which Mr. Marquez exhibits deficits in adaptive behaviors. Dr. Bateman testified Mario has very limited ability to adapt, to think abstractly, to reason, to control impulses, to learn from prior behaviors or even understand the consequences of his behaviors. He has severe judgment and reasoning problems. These prevent him from learning from his mistakes and exercising good, rational choices, especially in emotional or stressful situations. Dr. Bateman also testified that it is difficult for Mario to assess a situation, begin acting and, subsequently, to monitor whether his predicted results occur and change course if necessary. This ability to appreciate and monitor one's actions is something that people of average intelligence take for granted, but that Mario cannot do. See Exhibit 25 (Testimony of Dr. John R. Bateman) at 41-54, 70-72.

The testimony and reports of state doctors confirm these adaptive behavior deficits. In 1983, Dr. Abbott, the Bexar County psychologist who tested Mr. Marquez prior to trial and participated in the determination that he was mentally retarded, concluded: "Mr. Marquez shows significant deficits in skills requiring more complex thinking and reasoning. Ability to use previous experiences to solve common problems is also seriously lacking. . . . [T]his man does exhibit serious defects in his ability to think and reason at higher, more abstract levels." See Exhibit (Pretrial Mental Status Exam) at 20. Dr. Sparks, Medical Director of the Bexar County Jail, found that Mario "calculated sums of money poorly and slowly. . . . He had a fairly good fund of general knowledge [but] had no concept of the population of San Antonio." "His answers giving information were very basic," and for the names of five big cities he gave "Montana," "New Orleans," "New York," "Oregon," and "Wisconsin." Id. Dr. Sparks noted that "the judgment questions I asked were answered like a child would probably answer them." Id. On the Wide Range Achievement Test, Mr. Marquez placed at the grade level of first grade three months in reading and first grade five months in math. Dr. Sparks concluded that Mr. Marquez was "basically illiterate." Id.

Under the AAMR classification, individuals with IQ scores between 50-55 and 70 have "mild" retardation; between 35-40 and 50-55, "moderate" retardation; between 20-25 to 35-40, "severe" retardation; and below 20-25, "profound" retardation. **Approximately 89% of retarded persons are, like Mr. Marquez, "mildly" retarded.** See Ellis and Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 423 (1985).

Sadly, the San Antonio school system in place during Mario's childhood did nothing to assist him in coping with his mental disabilities in a way that would prepare him for adulthood. This is so despite the fact that his deficits, which are mostly products of his mental retardation, could have been effectively managed and changed had Mr. Marquez received even minimal intervention and training from mental health workers during his childhood. See Exhibit 30 (Testimony of Albert Michael Casillas, principal of Mario's elementary school, at state court evidentiary hearing Aug. 14, 1990); Exhibit 26 (Testimony of Dr. Bateman) at 55-60.

In addition to his mental retardation and emotional dysfunction, Mario Marquez suffers from severe neurologic brain impairment. Exhibit 25 (Testimony of Dr. Bateman) at 27; Exhibit 26 (Testimony of Dr. Geffner) at 87-88; Exhibit 27 (Neurological Evaluation). His brain damage includes significant dysfunction of the frontal lobes ("Frontal Lobe Syndrome"). Frontal Lobe Syndrome is defined as:

Organic mental disorder characterized by a marked change in personality, with development of certain relatively characteristic patterns of relating to the environment that have been associated with damage to the frontal lobes. Such patterns include emotional lability, impairment in impulse control and social judgment and marked apathy and indifference.

Kaplan, Freedman and Sadock, Comprehensive Textbook of Psychiatry III, 3328 (3rd. ed. 1980). Exhibit 26 (Testimony of Dr. Geffner) at 85-89. Damage to the frontal areas severely limits Mario's ability to think, reason, control impulses, and use good judgment. Id. at 94-100; Exhibit 27 (Neurological Evaluation) at 11.

Mr. Marquez's brain impairment most probably resulted from a number of factors. These included repeated blows to the head from sticks, whips, clubs, and other objects, which Mario suffered at the hands of his father, other head injuries he sustained during childhood, his loss of consciousness during the horsewhippings, and his daily abuse of spray paint beginning in childhood. Exhibit 24 (State Finding of Fact No. 6); Exhibit 26 (Testimony of Dr. Geffner) at 86; Exhibit 27 (Neurological Evaluation) at 11-12.

This impairment created severe deficits in Mario's ability to comprehend, understand, reason, think conceptually or abstractly, or exercise judgment. Because Mario's brain functioning is damaged, he has difficulty understanding cause and effect. He cannot communicate with others any understanding of the effect of his behaviors on himself or others. Mario is unable to learn from his experiences and has an extremely limited ability to make appropriate decisions. Exhibit 26 (Testimony of Dr. Geffner) at 98-99; Exhibit 25 (Testimony of Dr. Bateman) at 31.

II. GENERAL REASONS WHY MENTALLY RETARDED PERSONS SUCH AS MARIO MARQUEZ SHOULD NOT BE EXECUTED

Among the widely held compelling reasons why mentally retarded persons should not be subject to capital punishment are the following: 1) "[E]xecution of a person with mental retardation is invariably disproportionate the level of that individual's culpability" for their crime and, therefore, does not serve the otherwise legitimate penological purpose of retribution (See Exhibit 16 -- Amicus Brief by the AAMR, *inter alia*, at 17-18); 2) Mentally retarded persons suffer from cognitive impairments and deficits in adaptive behavior which frequently limit their ability to meaningfully interact with the criminal justice system and which, therefore, result in substantial deprivation of their rights and injustice (See Exhibits 14 and 15 -- Texas and National Association for Retarded Citizens position papers); and 3) The substantial injustice resulting from a defendant's mental retardation may be exacerbated by the "ignorance and stereotyped views of mental retardation held by many professionals in the criminal justice system." See id.

A key element in ascertaining moral culpability is the individual defendant's state of mind and level of intellectual and moral understanding of his actions. That is, the punishment should reflect the level of understanding and personal culpability possessed by the defendant. Under the accepted definition of mental retardation, **a person such as Mario Marquez who is mildly mentally retarded is at the bottom two or three percent of the population in measured**

intelligence. Thus his level of understanding and appreciation of his crime falls into the bottom two or three percent of the population in intelligence. Sentencing to death any person with mental retardation such as Mr. Marquez represents a tragic injustice.

It is sometimes suggested that no special consideration need be given to someone like Mr. Marquez, because other features of the criminal justice system accomplish the result sought here. Provisions that are mentioned in this regard include competency to stand trial, the insanity defense, mitigation consideration, and competency to be executed. Indeed, Mr. Marquez was examined for his mental competency prior to trial and found competent. But as the position papers of national and local advocacy organizations make clear, there is widespread lack of understanding about mental retardation and its impact on a person's awareness and appreciation of his circumstances as it relates to the criminal justice system. Indeed, the same pretrial competency exam **also found Mario Marquez mentally retarded, and yet no jury or court has ever considered this information in determining whether he should die for his crimes.** The very pitfalls identified by national professional organizations have produced the circumstances presented in Mr. Marquez's case.

Beyond the particular injustice in this case, it cannot be disputed that no theory of deterrence can justify executing a person with mental retardation such as Mr. Marquez. The notion that any person disabled by mental retardation would refrain from any course of conduct because the legislature in his state failed to enact a bill banning the execution of the mentally retarded is highly implausible. Executing a mentally retarded person such as Mario Marquez will deter no one.

Many centuries ago at common law it was considered reprehensible to execute a person as mentally disabled as Mario Marquez: "a miserable spectacle, both against Law, and of extreme inhumanity and cruelty and **can be no example to others.**" See Exhibit 16 (Amicus Brief) at 18 (Quoting Sir Edward Coke). That characterization applies no less forcefully in modern times to a person with mental retardation such as Mario Marquez.

III. NATIONWIDE CONSENSUS THAT MENTALLY RETARDED PERSONS SHOULD NEVER BE PUT TO DEATH

A. Public Opinion in Texas, and throughout the country, favors clemency in this case

In 1988, an independent public opinion poll in Texas revealed that **73%** of persons polled said that capital punishment should not be used "in cases where the person is mentally retarded." Exhibit 1 (Dyer and Claassen, The Texas Poll, Nov. 15, 1988). Thus a large majority of Texans believe that Mr. Marquez should not be executed. However, as set forth above, only the Governor and Board have the power to carry out the moral will of the people of Texas in this case.

Public opinion in Texas is consistent with the belief nationwide that persons with mental retardation should **never** be put to death. Polls throughout the country are consistent in showing that from two-thirds to four-fifths of respondents oppose the imposition of the death penalty on anyone with mental retardation. Even more noteworthy is the fact that a majority of those who support the death penalty oppose it for people with mental retardation. Exhibit 13 (Polls from

other states demonstrating uniform, nationwide public opposition to execution of persons with mental retardation).

B. Public policy and the weight of precedent found in prohibition of the execution of mentally retarded persons by many states and the federal government favors clemency in this case

The above national consensus has begun in recent years to be reflected in legislation banning the execution of the mentally retarded. In 1989 the U.S. Supreme Court determined that the issue of whether a mentally retarded person should be executed is not subject to constitutional prohibition, but rather is one left to case by case consideration by lower courts and legislatures. See Penry v. Lynaugh, 469 U.S. 309 (1989). Since that decision, many states throughout the country have now passed laws banning the execution of the mentally retarded. Exhibits 3-12 (Collecting state statutes from Arkansas, Georgia, Indiana, Maryland, Tennessee, Kentucky, Colorado, Connecticut, Washington, & New Mexico prohibiting execution of mentally retarded). In addition, although the federal Congress has greatly expanded the federal death penalty since that time, it has also passed legislation prohibiting the execution of the mentally retarded. Exhibit 2 (Federal statute prohibiting execution of mentally retarded in federal capital cases).

With respect to other state statutes prohibiting executions of mentally retarded persons, many are in states that otherwise have readily relied upon the death penalty in recent years and have executed numerous individuals. See e.g., Exhibit 6 (**Georgia** statute banning execution of mentally retarded); Exhibit 3 (**Arkansas** statute banning execution of mentally retarded); Exhibit 7 (**Indiana** statute banning execution of mentally retarded); Exhibit 9 (**Maryland** statute banning execution of mentally retarded).

Congress has reached the same conclusions. During the debate on the Senate floor, conservative sentiment against execution of persons with mental retardation was pronounced. **Senator Arlen Specter**, among others, a former state district attorney, spoke in favor of banning executions of mentally retarded persons. Exhibit 22 (Congressional testimony by Senator Arlen Specter on June 20, 1991, noting support for ban on execution of persons with mental retardation); see also Exhibit 23 (Congressional testimony by Senator Joseph Biden on May 24, 1990, in favor of banning federal execution of persons with mental retardation and in opposition to an amendment that would have allowed federal execution of persons with mental retardation).

Former President Bush's Committee on Mental Retardation, which included members such as **Attorney General Dick Thornburgh**, recommended to him that the mentally retarded should not be subject to execution. Exhibit 21 (Report by the President's Committee on Mental Retardation entitled "Citizens with Mental Retardation and the Criminal Justice System," recommending legislation banning the execution of persons with mental retardation, delivered to President George Bush on Aug. 19, 1992).

C. Condemnation by all advocacy organizations nationwide concerned with the treatment of the mentally retarded of application of the death penalty to such persons favors clemency in this case.

All major advocacy organizations in this country and in Texas that deal with the special problems and concerns of the mentally retarded unanimously decry the execution of such persons. Perhaps the best formulation of this position can be found in the brief statement on this issue by the **American Association on Mental Retardation**, the nation's oldest and largest interdisciplinary organization of mental retardation professionals. Exhibit 17 (American Association on Mental Retardation Resolution on Mental Retardation and the Death Penalty, opposing the execution of persons with mental retardation). That statement outlines how persons with mental retardation, because of their handicaps, are "often treated unfairly by [the criminal justice] system" when they become involved in it. *Id.* It notes the shortcomings of the system in determining pretrial competence and similar issues, arising from "the failure of many criminal justice professionals to recognize and understand the nature of mental retardation." *Id.* For these reasons the AAMR's position, like that of many other similar organizations, is clear: "[N]o person who is mentally retarded should be sentenced to death or executed." *Id.*

The **Texas Association for Retarded Citizens (ARC)** similarly condemns the execution of the mentally retarded. In a position statement adopted in 1993, the Texas ARC noted the lack of understanding of mental retardation on the part officials in the criminal justice system. Exhibit 14 (The Association for Retarded Citizens of Texas Position Paper on Treatment under the Criminal Law of Persons with Mental Retardation, condemning the execution of persons with mental retardation). The Texas ARC noted that "people with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with the criminal justice system," creating problems that include an "inability to assist the defense lawyer or . . . to assist in the defense." The Texas ARC noted that these problems are "aggravated by ignorance and stereotyped views of mental retardation held by many professionals in the criminal justice system, as well as citizens called to serve on juries." *Id.*

More importantly here, the Texas ARC statement makes clear its view that if a mentally retarded defendant is found guilty of a crime, then "any sentencing . . . shall take into account the mental retardation." *Id.* No one would dispute the wisdom of **this** view, and yet, as noted above, the jury in this case that sentenced Mario Marquez to die was completely unaware of his mental retardation.

These concerns form the basis of the **Texas ARC position against executing the mentally retarded**: "**The presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and an inadequate defense that the imposition of the death penalty creates an unacceptable risk of a miscarriage of justice. People with mental retardation shall be exempt from the death penalty, but not from other appropriate punishment on a case-by-case basis.**"

The positions of the AAMR, the national ARC, and the Texas ARC are supported by at least ten other disability organizations throughout the country. They include: the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the American Orthopsychiatric Association, the National Association of Private Residential Resources, the New York Association for Retarded Children, the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, the Mental Health Law Project, and the National

Association of Protection and Advocacy Systems. See Exhibit 16 (Amicus brief in Support of Petitioner in Penry v. Lynaugh, 492 U.S. 302 (1989), opposing the execution of persons with mental retardation joined by all named organizations). These professional and voluntary organizations represent the broadest possible spectrum of viewpoints within the field of mental retardation.

The position against executing the mentally retarded has also been adopted by the American Bar Association. Exhibit 20 (American Bar Association Resolution and Report, finding that execution of persons with mental retardation violates contemporary standards of decency, adopted by the A.B.A. House of Delegates on February 7, 1989).

IV. EXACERBATION OF MARIO MARQUEZ'S DISABILITIES DUE TO MENTAL RETARDATION BY HIS BACKGROUND OF POVERTY, SEVERE CHILD ABUSE, ABANDONMENT AS A CHILD, AND RESULTING USE OF INHALANTS AND DRUGS

- A. The torture and abuse Mario Marquez suffered at the hands of his father was inflicted because of his mental retardation.

As noted briefly above, Mario's father, Nicolas Marquez, subjected him to some of the most violent and cruel punishment imaginable during his childhood. The impetus for Mario's father's cruelty was Mario's mental retardation. Mario was tortured, physically beaten, and routinely abused by his father throughout his early life because he was slower than the other children. See Exhibit 24 (State Court Finding of Fact No. 1).

Of all the children, Mario was singled out and subjected to the worst torture and punishment by the father. Exhibit 31 (Testimony of Virginia Marquez, mother of Applicant, at post-trial state court evidentiary hearing) at 91-93. This was apparently because Mario was mentally retarded and was unable to respond to his father as quickly as his father wanted him to. For example, Mario's father would beat him because he was slow tying his shoes, or he was not able to read or do his school lessons well, or because he could not respond to his calls as quickly as the other children. Id. at 82-83; Exhibit 32 (Testimony of neighbor Gonzales) at 38.

Among the worst physical violence inflicted on Mario was when his father would, with some frequency, **tie Mario's hands and feet, hang him from a tree or from the clothesline behind the house, and whip him with a leather horse whip until he passed out.** Mario's siblings or his mother had to cut him down and revive him by putting alcohol on his cuts and bruises. Mario often bled from cuts about his face, head and back. Family members poured alcohol on his wounds and used rags as bandages. See Exhibit 31 (Testimony of Mrs. Marquez) at 85; Exhibit 32 (Testimony of neighbor Irene Gonzales at post-trial state court evidentiary hearing) at 38-43.

In addition to this abuse, Mario's father subjected him to daily beatings and whippings with other objects, including sticks, belts, two-by-fours, ropes, the wooden end of a hammer, and his fists. He beat Mario all over his head, back, and his arms and legs. Exhibit 31 (Testimony of Mrs. Marquez) at 84-85. Mario was not taken to the hospital for any of these injuries because the

family did not have money for medical treatment and because his mother was afraid the authorities would take him away from the family. Id. at 91; Exhibit 29 (Social History) at 11-12.

The abuse Mario's father inflicted on him was torture. It was torture as we understand the term as it relates to, for example, the kinds of horrors suffered by prisoners of war. It was similar to that kind of abuse, but worse. For a war prisoner, there is a sense that as a captured soldier one is expected to endure possible suffering as an inevitable consequence of war. Here Mario, a child, was subjected to torture by an adult, and not just by any adult, but by his own parent, whom he should have been able to expect would love him, protect him, and care for him. Instead, Mario's primary caretaker beat him savagely and repeatedly for no ostensible purpose other than to be punitive and cruel. Exhibit 26 (Testimony of Dr. Geffner) at 107-08.

B. The poverty in which Mario Marquez was raised prevented him from even attempting to overcome the personal and social debilitations caused by mental retardation.

The tenth of sixteen children, Mr. Marquez was raised in a household marked by acute poverty and neglect. Exhibit 24 (State Court Finding of Fact No. 1); Exhibit 29 (Social History) at 9-11. He was born on August 22, 1958, in Taylor, Texas. At that time and throughout his early childhood, the family worked as migrant laborers for half of every year. They picked cotton and other crops on farms across the state of Texas and throughout the Southwest. All of the children were required to work from a very early age, including Mario. He was roughly two and one half to three feet tall (his mother did not remember how old he was) when he first began picking cotton in the fields. The children regularly missed several months out of every school year because they were away picking cotton. The family used the money they made to support themselves when they returned to San Antonio each winter. Exhibit 24 (State Court Finding of Fact No. 2); Exhibit 31 (Testimony of Mrs. Marquez) at 72-80; Exhibit 29 (Social History) at 9-10.

The house Mario grew up in as a child in San Antonio was a shack. It had few interior walls which were covered only with cardboard. Instead of doors in the house, Mrs. Marquez used sheets. The roof leaked throughout the house. The house was infested with rats. The only inside plumbing was one toilet; the faucets were on the outside of the house. Exhibit 30 (Testimony of School Principal Casillas) at 16; Exhibit 32 (Testimony of neighbor Gonzales) at 34-35.

When the Marquez family had enough money, they ate rice, beans, and tortillas. Frequently there was not enough food, and some of the children tried to get food at neighbors' houses. Exhibit 32 (Testimony of neighbor Gonzales) at 33-34. They received food staples from government charity, and clothing for the children from the school. The children were forced to share clothing. Exhibit 31 (Testimony of Mrs. Marquez) at 70-71; Exhibit 29 (Social History) at 10.

As a child, Mario was afraid of "everything." Mario would often go behind the house and cry. Other children at school would tease him and he would just stand and cry. He was especially afraid of the police -- when he heard sirens or saw police he would cry. He was also afraid of the

hogs that his family raised and the other farm animals. When they would go out to the farm, Nicholas Marquez would tell Mario he had to feed the hogs and Mario would run screaming and crying. Exhibit 29 (Social History).

Oftentimes Mario and his siblings did not have shoes to wear to school. Sometimes Mario stayed home from school because he was embarrassed to go in bare feet. In addition, because of the unsanitary living conditions in the house where they lived in San Antonio, all of the children, including Mario, had head lice. The school would not allow them to attend when they were infested with head lice. Exhibit 32 (Testimony of neighbor Gonzales) at 35-37; Exhibit 29 (Social History).

Mario attended school from age six to somewhere between ages twelve and fourteen, and stopped attending after the sixth grade. Exhibit 24 (State Court Finding of Fact No. 2). He received no encouragement from his parents to attend school and received no assistance in doing his homework. Education was not valued in the Marquez household: neither of Mario's parents, nor any of the sixteen children completed high school.

The school that Mario primarily attended, Kindred Elementary, was seriously deficient in being able to recognize and meet the needs of its special students. The student to teacher ratio was very high and the school did not have any counselors. The school's principal admitted these severe problems with the school. Exhibit 30 (Testimony of School Principal Casillas) at 9-13; State Court Finding of Fact No. 2. There was no program to identify and assist mentally retarded students. Id.

Mario's attendance at school was sporadic. He was absent at least one-quarter of the time and for two years he attended only the second semester. Exhibit 33 (School Records). He was retained in third grade for one year and "socially promoted" from the sixth to the seventh grade. He was embarrassed in class because of his learning problems. Unable to read or write, and left alone at the age of twelve, Mario dropped out of school within a year of being abandoned by his parents in 1970.

- C. The abandonment of Mario Marquez by his parents, after longstanding physical abuse, and the neglect of authorities to rescue him, precipitated his fall into a solitary life, preventing amelioration of his mental retardation and resulting in further diminution of his mental capacity.

When Mario was twelve years old, both parents left him and his five younger siblings in their house on Cree Street, making Mario the oldest person in the home. The children were left to fend for themselves. Exhibit 24 (State Court Finding of Fact No. 1); Exhibit 31 (Testimony of

Mrs. Marquez) at 102; Exhibit 32 (Testimony of neighbor Gonzales) at 44-46; Exhibit 29 (Social History) at 14-15.

For an entire year Mario and his siblings -- Rosa, Jimmy, Ricky, Yolanda, and Pete -- lived by themselves at the family home at 146 Cree Street, without any parents, older siblings, or other adults to take care of them, supervise or guide them, or feed them. Mario was responsible for getting his younger brothers and sisters ready for school and making sure they had food. Sometimes he had to steal in order to make sure his brothers and sisters had food to eat. Again, at this time **he was only twelve years old. He was also mentally retarded!** Exhibit 32 (Testimony of neighbor Gonzales) at 44-46; Exhibit 29 (Social History) at 14-15.

During the year that the children lived by themselves they had virtually no adult supervision or guidance. They went to school if and when they wanted. According to Mario's school records, in 1970-71 (the year his parents left him) he missed 64 of 105 days and in 1971-72, 53 of 106 days. Exhibit 33 (School Records). Rather than go to school, the children stayed home and sniffed spray paint, gas, or glue. Neighbors called the police about the children being at home, but the only thing the police did was sometimes take the children to the school. There was, apparently, no further investigation.

Finally, after approximately one year, the police came and took the children, except for Mario, to a shelter. The children remained at the shelter until their father came for them. These children -- Yolanda, Ricky, Rosa, Jimmy, and Pete -- were then sent to live with older sisters in Brownsville and Colorado City. Exhibit 29 (Social History).

After the other children were taken away by the authorities, Mario remained at the family home by himself. He was thirteen years old. Mario's first suicide attempt was during this time -- he took an overdose of asthma pills. Mario lived by himself in the Cree Street home until 1974, when he was 16. Exhibit 29 (Social History) at 16-17.

Being raised in an abusive, neglectful and impoverished home, and being abandoned at the age of twelve, had a profound and disastrous effect on Mario. At every critical developmental stage of his childhood he was left to fend for himself. His parents completely failed to provide any support, guidance, discipline or attention. This left him completely incapable of developing and maturing in a normal manner. As a result of the parental neglect, Mario never developed, among other things, his own internal sense of behavioral limits: he learned neither self control nor the ability to act according to social expectations and demands. This total lack of nurturing and parenting also deprived him of socialization skills and perceptions, such as appropriate behavior for adult living, appropriate family roles, perception of one's self as a part of a community, and awareness of and expectation for the future. Exhibit 29 (Social History).

To this day Mr. Marquez has no idea how inappropriate it was for his parents to desert him. He has no sense of "entitlement": that he was entitled to have his parents raise him until he was an adult; that he was entitled to be a growing child for several more years; that he was entitled to be cared for, supported, and guided by parents or other guardian adults.

Instead, suddenly, at the age of twelve he had to become a parent, though he was, in every way, still a child, and a very disabled child to be sure. Rather than being enabled to learn and attend to normal twelve-year-old tasks and responsibilities, he was forced to be responsible for raising his younger brothers and sisters. Suddenly, his main concern was "How do I get food?", rather than "How do I learn to read?" or "How do I develop and maintain friendships?" And he

had to do this without having learned any of the adult skills necessary to raise and care for a family, much less those necessary to care for himself.

Mario's turbulent home life, and then sudden desertion by his parents at age twelve, precipitated a serious substance abuse problem at that early age. Mario's daily use of drugs from the time he was left alone at 12 years of age allowed him a departure from a hellish reality over which he had virtually no control, and in which he was alone, scared, unprotected, and helpless. Exhibit 26 (Testimony of Dr. Geffner) at 109. The daily use and abuse of drugs for sixteen years was also a contributing factor to Mario's severe brain impairment.

Mario Marquez began to sniff spray paint every day shortly after his parents abandoned him. Older boys and heroin addicts in the neighborhood began coming by the house on Cree Street to use and sell drugs. Exhibit 31 (Testimony of neighbor Gonzales) at 46-48. Mario also started drinking beer and using heroin during this time. He got all of these substances from the older boys who began hanging out at the Cree Street house. Exhibit 29 (Social History) at 19-21.

Mario quickly became addicted to spray paint sniffing and other drug use. He constantly sniffed paint, doing this virtually every day of his life until he was incarcerated for this capital offense in 1984. Exhibit 24 (State Court Finding of Fact No. 3); Exhibit 29 (Social History) at 19. Every night Mario would partially fill a coke can with spray paint, and would sniff it, pass out, wake up and start sniffing again throughout the night. Exhibit (Social History). Because there were no adults at the home, and hence, there was no adult supervision, the Cree Street house became known as a place for delinquent children to hang out and sniff paint and do other drugs. Exhibit 32 (Testimony of neighbor Gonzales) at 46. In 1974, when he was 16, Mario was charged with sniffing paint and referred to the Bexar County Probation Department. He was also arrested in 1976 and twice in 1981 for paint sniffing.

Inhaling spray paint made Mario physically violent. Sober, he was a passive, kind man. But when intoxicated on spray paint, he often became angry and violent towards his friends and his relatives. Exhibit 32 (Testimony of neighbor Gonzales) at 46-47, 53-54; Exhibit 29 (Social History) at 20.

Mario inhaled spray paint daily for sixteen years. He usually inhaled Krylon Bright Silver spray paint, which contains the toxic solvents toluene and methylene chloride (and for that reason produced the greatest "high"). When inhaled, toluene and methylene chloride immediately travel to the brain and destroy nerve cells throughout the nervous system. Exhibit 26 (Testimony of Dr. Geffner). The nerve cells are what allow the brain to transmit and process information, comparable to telephone wires. *Id.* Toluene and methylene chloride also attack and destroy the cortex of the brain which is the part of the brain that controls one's emotions and enables reasoning and judgment processes. The long-term effect of permanently destroying nerve cells is that a person is unable to process information, control his emotions or make appropriate judgments and decisions. *Id.*

V. THE LASTING INJURIOUS EFFECTS OF MARIO MARQUEZ'S DISABILITIES

When a mentally retarded person such as Mario Marquez is additionally burdened with other factors -- brain damage, severe physical abuse and torture, childhood abandonment, brain

damage, and long term inhalant abuse -- the effects are profound and devastating on development and adult behavior. The combined effects have left Mario Marquez with few resources to function with any sense of normality in the modern world.

Mario's mental retardation impaired him substantially in his ability to conduct himself appropriately in the world. It severely limited his judgment and reasoning skills and made him unable to infer from his own experience what the consequences of his actions would be. Exhibit 25 (Testimony of Dr. Bateman) at 30-45.

The torture and abuse destroyed Mario's sense of self-worth or esteem, rendered him incapable of having casual or intimate relationships of any kind, and created deep-seated anger impulses in him. Exhibit 26 (Testimony of Dr. Geffner) at 104-109. Being raised in an abusive, neglectful and impoverished home, and abandoned by his parents at age twelve, had a disastrous effect on Mario. At every critical developmental stage of his childhood he was left to fend for himself. His parents completely failed to provide any support, guidance, discipline, or attention. Exhibit 29 (Social History) at 27-32. This deprived him of any opportunity to develop and mature normally. As a result, Mario lacked his own internal sense of behavioral limits, had no inner resources upon which to rely when crises arose, was unable to plan for the future, and was ill-equipped to handle responsibility. Exhibit 24 (State Court Finding of Fact No. 5).

Abandoning Mario at such an early age was perhaps the most devastating thing his parents could have done. It left him completely on his own, making decisions and choices for himself and his younger siblings that he was already hampered from making adequately due to his existing retardation and developmental handicaps. Any potential for judgment and control that Mario might have been able to exercise was obliterated when his parents left him. Furthermore, once alone and on his own, Mario began making the very bad and immature choices that could be expected, including dropping out of school and beginning to use spray paint and other drugs.

The brain damage that resulted from a combination of childhood abuse and the extensive spray paint use affected Mr. Marquez substantially. It severely limited his ability to comprehend the consequences of his actions. Exhibit 26 (Testimony of Dr. Geffner) at 86-98; Exhibit 27 (Neurological Evaluation) at 11. It also made him act without thinking, judge situations inappropriately, and be incapable of planning ahead or controlling his impulses. *Id.* All of this meant that his judgment and reasoning abilities were severely impaired. Exhibit 24 (State Court Finding of Fact No. 7). This was particularly true when Mr. Marquez was in stressful situations. Exhibit 26 (Testimony of Dr. Geffner) at 94.

The combined effect of being mentally retarded, brain impaired, tortured and abandoned as a child was devastating for Mr. Marquez. His capacity to adapt or control his behavior was impaired, as were his cognitive and judgment abilities. Exhibit 24 (State Court Findings of Fact No. 6); Exhibit 25 (Testimony of Dr. Bateman) at 30-45; Exhibit 26 (Testimony of Dr. Geffner) at 87-123. Mario was a grown man who functioned as a damaged child. He had no healthy way to cope with or respond to every day life situations. All of his problems increased exponentially his inability to act, respond, and think appropriately, clearly, or rationally.

Mario's multiple crippling dysfunctions created a cycle of pain and fear, and an inability to cope:

[T]he post traumatic stress disorder caused sufficient emotional pain that his main goal was to block that out anyway he could. And you set up unfortunately a negative self-destructive, self-fulfilling prophesy. In other words, you have a circle

going where you have the frontal lobe syndrome, learning disabilities, brain trauma, post traumatic stress disorder all working together to produce more and more stress, more and more pain, less ability to cope, and then you have polysubstance abuse that . . . [was] his way of escaping. In his own words, that was how he escaped, because that's the only time he could block it out and feel good and then unfortunately as we already indicated, that inhalant abuse then creates more brain damage and it becomes a very negative circumstance.

All those conditions appear to . . . hinder his ability to even cope at most levels. . . . In other words, not able to make appropriate decisions, getting in to situations that cause additional problems. So you have a cycling effect where the conditions are working against each other to cause more and more trauma, more and more stress, more and more pain, emotionally which lead to more and more inhalant abuse, more and more striving to ease or wipe those out which unfortunately leads to more brain impairment and that cycle just kept going through his adult years until finally incarcerated and that cycle stopped at that point.

Exhibit 26 (Testimony of Dr. Geffner) at 109, 122.

It is with this awareness of who Mario Marquez was, and how crippled he was in managing basic life situations, let alone stressful circumstances, that the crime for which he has been sentenced to die must be understood. Miserable children often become violent adults. With the mental retardation placed in the context of the abuse, the poverty, the illiteracy, the abandonment, and the resulting drug use, Mario's ultimate violence in a stressful situation cannot be surprising. When seen in light of the severely stunted coping skills Mario possessed, the crime is no more excusable, but Mario's moral blameworthiness for it is surely diminished.

VI. WHY NEITHER THE TRIAL JURY NOR THE COURTS HAVE EVER CONSIDERED MARIO MARQUEZ'S MENTAL RETARDATION IN DETERMINING WHETHER HE DESERVES TO DIE

Clemency, or at the very least a short reprieve to give this information further consideration and provide for a full hearing, is the appropriate response in this case because, as noted, no court or jury has ever had the opportunity to consider the above undisputed information in determining whether Mr. Marquez deserves to die for his crime. The fact that Mario Marquez is mentally retarded and severely brain damaged, was tortured repeatedly at the hands of his father, and was abandoned to raise himself at the age of twelve, are universally recognized as critical mitigating factors favoring a life sentence. This evidence could have provided a powerful mitigating explanation for why the crime in this case -- the killing of Mr. Marquez's wife during a jealous rage, and his niece, who was unfortunately caught in the middle -- could have occurred. All told, Mr. Marquez's serious disabilities and tragic life experiences severely limited his ability to process information and react rationally with a full understanding of his choices and the consequences thereof.

However, the jury that sentenced Mr. Marquez to death did not have any of this information, nor could the jury have given mitigating effect to this information had it been presented. This is why the trial attorneys did not present it to the jury at trial.

Judge Sharon MacRae and Mark Stevens, trial counsel for Mr. Marquez, testified that they did not investigate and present this substantial mitigating evidence because of a legal flaw in the Texas death penalty statute later recognized by the United States Supreme Court: namely, that this type of evidence could only be considered by the jury under the Texas death penalty statute in favor of a death sentence and not a life sentence in the case. To avoid affirmatively harming Mr. Marquez by introducing evidence that could only increase the chance that he would be sentenced to death, Mr. Marquez's lawyers forewent the presentation of such evidence despite its obvious mitigating potential.

In the appeals process, the courts were repeatedly asked to consider the information about Mr. Marquez's mental retardation and other disabilities that the jury was never given the chance to hear. They unanimously rejected having any ability legally even to consider this evidence: "We are powerless to act. Because the jury did not hear this information, we cannot legally consider it either."

Thus clemency is the only available avenue through which someone with the authority and power to act can both consider the above-noted information about Mr. Marquez's mental retardation, brain damage, and childhood torture, and act on it in a way that is most appropriate: the granting of a life sentence.

Should the Governor or the Board determine that more time or information is necessary prior to making the clemency decision, then given the overwhelming facts favoring clemency here, a short reprieve is in order to allow full consideration of the information, and, if necessary to allow time for a hearing at which this information can be fully presented to the Board.

VII. CONCLUSION: MARIO MARQUEZ SHOULD BE GRANTED CLEMENCY

There is no valid penological purpose to be served by the extermination of a human being who is as mentally disabled and psychologically incapacitated as Mario Marquez. It would be a pathetic gesture of the most extreme cruelty to put to death such an obviously disabled individual. The morally right course here is to vote for mercy and grant clemency to Mr. Marquez. If there be any doubt, then at the very least the Governor and the Board should decide to grant a short reprieve to allow all Board members to carefully review and consider the wealth of information contained herein and in the supporting exhibits which points to but one morally defensible outcome: a vote for mercy.

Respectfully submitted,

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