APPLICATION FOR EXECUTIVE CLEMENCY

TO THE HONORABLE BOB HOLDEN, GOVERNOR OF MISSOURI:

COMES NOW the applicant, Mose Young, Jr., by and through his attorneys, Joseph Margulies, Sean D. O'Brien, and John William Simon, and petitions the Governor for his order staying the execution presently scheduled for April 25, 2001, and appointing a Board of Inquiry, pursuant to Mo. Rev. Stat. § 552.070; and for his Order commuting the sentence of the Circuit Court of the City of St. Louis from death to life without parole.

Mose Young was sentenced to death in a trial in which the prosecutor used every one of his peremptory challenges to exclude African-Americans from the jury. Mose's trial lawyer was an alcoholic who made no pretense of being prepared; in the next case he tried, he sat silent through the entire proceeding to protest the court's denial of his motion for a continuance. He was disbarred, but his other client's sentence was overturned.

Mose has been a good father to his two sons, one of whom is retarded. He has been a mediator between African-American and white prisoners, and has prevented more deaths than he was convicted of causing. He is worth more to the State of Missouri alive than dead.

Regardless of the broad philosophical issues involving the death penalty, this is one case in which a consistent death-penalty supporter can say that life without parole is enough punishment under the circumstances—that the norms underlying the continued practice of capital punishment do not support carrying out *this*

execution, and that the interests of society weigh in favor of letting *this* man continue to help raise his sons and to help his fellow-prisoners get along with each other and with the staff.

A National Perspective on This Application

The Nation is embroiled in a debate over the death penalty. Each new day brings fresh accounts of racial bias, incompetent counsel, and law enforcement untroubled by conscience. Roused by countless studies, and angered by appalling anecdotes, the public increasingly doubts whether the ultimate penalty can be administered fairly—free from the ugly taint of racism, free from the pathetic spectacle of counsel sleeping through his client=s trial, free from the horrifying risk of an innocent man executed. Support for the death penalty has fallen, and across the country, momentum gathers for a moratorium.

To date, over 1000 local, state, national, and international organizations have joined the call for a moratorium to study the persistent problems in the administration of the death penalty. Nearly two dozen municipalities have called for a halt on executions, including Atlanta, Baltimore, Buffalo, Detroit, Philadelphia, Pittsburgh, and the City and County of San Francisco. Many of the most prominent newspapers in the country have added their voice to this chorus, including the *St. Louis Post Dispatch*, *New York Times*, *Washington Post*, *Chicago Tribune*, *Los Angeles Times*, *San Francisco Examiner*, *The Oklahoman*, and the *Sarasota Herald Tribune*. Even the conservative *Washington Times* has endorsed a

moratorium. (Published information compiled by Equal Justice USA, available online at www.quixote.org/ej <http://www.quixote.org/ej>; *see also* www.Moratorium2000.org/news).

Nationally recognized religious leaders have called for a moratorium, including Cardinal Mahoney in California, Cardinal Keeler in Baltimore, Bishop Fiorenza, and Pat Robertson. Moratorium bills have been introduced in a dozen state legislatures, including Missouri, and passed in Nebraska and Illinois. In New Hampshire, the legislature repealed the death penalty, the first state in the modern era to do so, although the Governor vetoed the bill. (Published information compiled by Equal Justice USA, available online at www.quixote.org/ej/legis2000 <http://www.quixote.org/ej/legis2000>). Prominent national and international organizations have joined the campaign, including the American Bar Association and the United Nations Commission on Human Rights.

In 1997, the ABA published a 147-page report on the death penalty, and concluded that the "decisions about who will live and who will die turn not on the nature of the offense the defendant is charged with committing, *but rather on the nature of the legal representation the defendant receives.*" (Report of the American Bar Association on the Administration of the Death Penalty at 6 (1997)). The ABA called for an end to executions until the states implemented important reforms, notably in minimum standards for defense counsel and the elimination of racial disparity. On July 10, 2000, the incoming president of the American Bar Association renewed this call, and urged lawyers in their states to work for a

moratorium until persistent questions about racial profiling and incompetent counsel are resolved. *U.S. Lawyers Leader Seeks Death Penalty Moratorium,* New York, July 10 (Reuters).

On the national level, the Justice Department revealed last week that it is studying the influence of racial bias in the federal death penalty, and Senator Richard Durbin (D-Ill.) and Senate Judiciary Chairman Orrin Hatch (R-Utah) have called for Senate Hearings on the administration of the death penalty. Senator Patrick Leahy (D-Vt.) has introduced The Innocence Protection Act, designed to ensure, among other things, that people charged with a capital crime will have access to competent counsel. In the House, Representatives Jesse Jackson, Jr., (D-Ill.) and Jan Schakowsky, (D-Ill.) introduced legislation calling for a seven-year moratorium on all executions while studies proceed on the fundamental inequity in the death penalty. (Published information compiled by Moratorium 2000, available online at www.moratorium2000.org/news <http://www.moratorium2000.org/news>). And on July 7, 2000, the Clinton Administration announced that it would delay the first scheduled federal execution in nearly forty years to study the undeniable evidence of racial imbalance in the federal death penalty.

The events unfolding on the national stage provide a fitting backdrop to Mr. Young=s case. The recurring themes in the national debate are persistent concerns about racial disparity and incompetent counsel. Yet both themes figure prominently in Mr. Young=s case, and explain the result: Mose Young was prosecuted by a

racist, and defended by a drunk. But the leading men in this tragedy are themselves a product of a broken system—a system that tolerated institutional racism, just as it created a defense that collapsed under the weight of impossible burdens, until defense counsel became no better—and no different—than the sleeping lawyer. Mose Young=s trial was a mockery and a farce, and you should not allow his execution to go forward. The execution should be stayed and a Board of Inquiry appointed to study both the troubling evidence of racial profiling in the selection of jurors, and the appalling performance of Mr. Young=s attorney.

Reasons for Exercising Clemency

I. The sentence of death against Mose Young is not the result of a fair and rational weighing of aggravating and mitigating factors but of raw prejudice in the selection of the twelve citizens who would make this decision—prejudice against African-Americans when they were not in a position to defend themselves at the ballot box.

At Mose's trial the prosecutor used all nine of his opportunities to strike a prospective juror without giving a reason to exclude African-Americans from the jury, when Mose is an African-American and the decedents in the pawnshop robbery of which he was convicted were white. It is impossible to present a more compelling inference of racial discrimination than to show that the prosecutor used 100% of these "peremptory challenges" against people of color. The St. Louis defense bar has long contended that behavior such as this is no fluke—that prosecutors in St. Louis deliberately discriminate against African-Americans in jury selection.

In the judicial courts—as distinguished from this proceeding—the fact that the prosecutor used his entire allotment of peremptory strikes to remove people of color would arguably *not* support an inference of intentional discrimination under the Fourteenth Amendment's guaranty of the equal protection of the laws, even when it is combined with the anecdotal understanding of the defense bar. In court—as distinguished from a clemency proceeding—such a claim requires direct proof of discriminatory purpose, as the Supreme Court of the United States held in *Swain v. Alabama*.[1] This factor is one of several in this case in which the courts have been limited by Congress—or have created limits for themselves—that allow life-and-death constitutional grievances to go unremedied without the intervention of the Executive. The courts expressly rely on clemency as a backstop when they announce such self-imposed limitations.[2]

Direct proof of racially discriminatory intent is notoriously difficult to secure.[3] In this case, the difficulty has been greater still because prosecutors have maintained a strict code of silence about their practice. Commissioner Jane Geiler's courageous decision to break that code of silence has enabled Mr. Young, for the first time, to establish that prosecutors in St. Louis—in his case and numerous others—routinely, repeatedly, and deliberately excluded African-Americans from juries in criminal cases.

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[1] 380 U.S. 202 (1965).

[2] *E.g.*, *Herrera v. Collins*, 506 U.S. 390 (1993).

[3] *Cf. United States v. Wilson*, 816 F.2d 421, 424 (8th Cir. 1987) (discussing "the tough evidentiary standard of *Swain*").

Previous litigation in this case focused on whether Mr. Young could receive the benefit of *Batson v. Kentucky*—the United States Supreme Court decision setting forth the constitutional rules to apply when a prosecutor's strikes appear to be racially motivated in a given case.[4] The Supreme Court decided *Batson* before Mose's appeal became final. That question was resolved against Mose because trial counsel, Jack Walsh, did not raise the objection necessary to preserve the issue for review, and because Walsh had no duty under the Supreme Court decision defining the constitutional guaranty of the "effective assistance of counsel" to anticipate the Supreme Court's *Batson* decision.[5] As a result, the prosecutor's discriminatory use of his peremptory challenges was governed by the earlier rule of *Swain v. Alabama*.[6] Because of the culture of silence which prevailed in the prosecuting attorney's office with respect to its deliberate practice to discriminate against African-Americans in the selection of jurors, that proof was beyond the reach of any competent defense lawyer at the time of Mr. Young's trial. Commissioner Geiler's recent appointment makes that proof available for the first time.

The relevant facts are few. In state post-conviction proceedings, trial counsel for Mr. Young, Jack Walsh, testified that the prosecutor in this case, Ed Rogers, used all nine peremptory challenges allotted to the prosecution to remove African-Americans from the jury. No one has never denied or refuted this testimony.

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[4] 476 U.S. 79 (1986).

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

[6] "[A] defendant cannot, under *Swain*, establish an equal protection violation 'solely on proof of the prosecutor's use of peremptory challenges to strike black jurors at the defendant's own trial.'" *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir. 1987), citing *Griffith v. Kentucky*, 479 U.S. 314 (1987).

On June 23, 2000, Joe Margulies—one of Mr. Young's present attorneys—spoke by telephone with Ms. Jane Geiler, and asked then Assistant Circuit Attorney Geiler about the discriminatory use of peremptory challenges by prosecutors within the Circuit Attorney's Office. Ms. Geiler told Mr. Margulies she has been a prosecutor with the Circuit Attorney for the City of St. Louis, the same office that prosecuted Mose in the name of the State of Missouri, since late 1984 or early 1985. She joined the office shortly after Mose's trial.

Ms. Geiler often choked back sobs as she talked.[7] She told Mr. Margulies that prosecutors in that office routinely and repeatedly used their peremptory challenges to remove blacks from criminal juries. "Speaking slowly and emphasizing her words, Ms. Geiler said that prior to the Supreme Court decision in *Batson v. Kentucky*, prosecutors in her office 'always, always' used their strikes against blacks. Blacks, she said, were not viewed as individuals but as a group–just as they viewed members of certain professions, or people with advanced degrees. People in these groups were considered presumptively hostile to the prosecution."[8] Ms. Geiler stated, "[y]ou didn't have to be a racist to use all your strikes against blacks, you just had to be a good prosecutor who wanted to win."[9] Ms. Geiler was not surprised that Ed Rogers had used all nine of his strikes against blacks, including some whom he removed without asking a single question.

[7] Affidavit of Joe Margulies, p. 1. (Submitted with this document.)

[8] *Id.* at 4.

[9] *Id.*

Later in the day on June 23, 2000, Mr. Margulies received a voice mail message from Ms. Geiler, who indicated that she had recently left a meeting with her boss (Circuit Attorney D. Joyce Hayes), and said she had been forbidden from cooperating on behalf of Mose Young. Ms. Geiler made it clear that if she did cooperate with Mose's attorneys, she would have to leave the office. At Ms. Geiler's request, Mr. Margulies called her at her home in the morning of June 24, 2000. Ms. Geiler reaffirmed that she had crossed the line when she offered to cooperate with Mr. Young: "There was no ambiguity. [Circuit Attorney D. Joyce Hayes] told me if I give you a statement, I will lose my job." Choking back tears, Ms. Geiler explained that she could not afford to lose her job for many reasons of a highly personal nature.[10] If subpoenaed to a hearing on this matter, Ms. Geiler will testify in accordance with her statements as set forth in Mr. Margulies' affidavit.

In related litigation, the United States Court of Appeals for the Eighth Circuit observed that it was uncontested that the State of Missouri—through Circuit Attorney Dee Joyce Hayes—"has deliberately interfered with the efforts of petitioner to present evidence . . . ."[11] The Eighth Circuit found it even worse than than a civil wrong: "[i]ndeed, there is reason to think that what the Circuit Attorney did here amounts to the crime of tampering with a witness, see Mo. Ann. Stat. § 575.270(1)." Based on these propositions of fact—later found to be true by the

[10] *Id.*, p. 5.

[11] *Young v. Hayes,* 218 F.3d 850, 853 (8th Cir. 2000).

district court after a trial—the Eighth Circuit ruled that Ms. Hayes's conduct had independent constitutional significance:

> The instant complaint alleges that the defendant Hayes, with the purpose of inducing Ms. Geiler to withhold evidence, threatened her with loss of her job. Cf. 18 U.S.C. § 1505 (a comparable federal statute). Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created. The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening the job of a witness. [*Id.* at 853.]

Counsel learned what Ms. Geiler had to say several months ago. Ms. Geiler did not immediately become available as a witness because of the chill which state actors placed on her testimony. Ms. Geiler's testimony became available only recently, when she left the Circuit Attorney's Office to accept an appointment as Commissioner for the Twenty-Second Judicial Circuit.[12]

Ms. Geiler's testimony provides the proof needed to support the *Swain* claim—proof that was previously beyond Mr. Young's reach. To get to first base by making a prima facie showing under *Swain*, an accused citizen must produce "[s]uch proof [that] might support a reasonable inference that African-Americans are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny African-Americans the same right and opportunity to participate in the

[12]The office of Commissioner is a quasi-judicial position created by Missouri statute. In that capacity, Commissioner Geiler presides over drug prosecutions by special order of the Presiding Judge of the 22nd Circuit.

administration of justice enjoyed by the white population."[13] An accused citizen "is not required to show that the prosecutor always struck every black venireman offered to him . . . but the facts must manifestly show an intent on the part of the prosecutor to disenfranchise blacks from traverse juries in criminal trials in his circuit."[14] In federal habeas corpus, a petitioner can make a prima facie "showing either by coming forward with statistical evidence or by using testimony from individuals who have witnessed the prosecutor's manner of exercising his peremptory strikes."[15]

Without Ms. Geiler's testimony, redress for Mose Young's *Swain* claim was beyond his reach. A senior member of the Eighth Circuit, the Hon. Myron Bright, observed that prosecutors have too often relied on the tough evidentiary standard of *Swain* to to get away with bare-faced racial discrimination:

> In case after case, this court has decried the frequency with which we have been called upon to examine prosecutors' use of peremptory challenges to strike black jurors from the trials of black defendants. . . . The number of appeals in which such challenges are made indicates that many federal prosecutors have been ignoring the Supreme Court's prohibition against the purposeful exclusion of black jurors from the juries of black defendants solely on account of their race. *Swain v. Alabama,* 380 U.S. 202 (1965); *Strauder v. West Virginia*, 100 U.S. (10 Otto) [303], 25 L. Ed. 664 (1880). Prosecutors seem to have been relying on the tough

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[13] *Swain*, 380 U.S. at 224; *Horton v. Zant*, 941 F.2d 1449, 1454 (11th Cir. 1991).

[14] *Willis v. Zant*, 720 F.2d 1212, 1220 (11th Cir. 1983)(emphasis in the original); *Horton v. Zant*, 941 at 1454.

[15] *Id.* at 1455; *Love v. Jones*, 923 F.2d 816 (11th Cir. 1991).

evidentiary standard of *Swain* to bar a defendant from successfully demonstrating error due to a prosecutor's conduct of peremptory striking of all or almost all potential black jurors. Prosecutors seem also to have been relying on *Swain*' s evidentiary standard to insulate themselves from being forced by the district court to provide the reasons for their use of peremptory strikes to eliminate black jurors.[16]

This observation applies with special force to Mose Young's case because the prosecution went to extraordinary lengths to enforce the code of silence that concealed their practice and policy to discriminate against African-Americans in the selection of trial juries. The history of this case speaks loudly and clearly that, in Judge Bright's words, "So far as prosecutors have relied upon the evidentiary standard in *Swain* to shield themselves from being forced to relate their reasons for peremptorily striking black prospective jurors, their reliance is neither justified nor in good faith."[17]

Using the standards the courts impose on themselves, the fact that Rogers used his peremptory challenges to exclude African-Americans from Mose's jury was not sufficient in and of itself to establish a constitutional violation. Commissioner Geiler's testimony provides direct evidence of the prosecutor's intentional racial discrimination. It changes the entire legal landscape of the racial discrimination issue in this case. If Mose could receive judicial consideration of this claim now that the Geiler evidence is available, under the Eighth-Circuit law, the burden would shift to the prosecution to show that it did not discriminate (which

[16] *United States v. Wilson*, 816 F.2d 421, 425 (8th Cir. 1987) (Bright, J., concurring).

[17] *Id.*

it cannot): when direct proof of the state's discriminatory intent is provided, the state is no longer entitled to the presumption that it exercised its peremptory challenges in a lawful manner.[18]

Mose Young cannot count on the courts to enforce the rules in his case, because these courts frequently apply the Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA) to cases that were filed before its effective date, as Mose's was. In his case, the retrospective application of the AEDPA to bar his due process and equal protection claim would do little more than reward the state for obstructing justice. But for the code of silence, he would have had the information he needed to succeed on a *Swain* claim years ago. Now he faces the denial of a judicial forum to present his federal constitutional grievances because of the application of a statute which was not even drafted, let alone enacted, at the time he filed his petition for federal habeas corpus.

We all know that racial discrimination is wrong for several reasons. First, it deprives a large segment of our population of the right to participate in self-government. Second, it distorts the fact-finding process by limiting the perspective of the jury to the perspective of one group in our society. Nowhere is this evil of racial discrimination more pronounced than in the sentencing portion of a capital

[18] *See Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987). In *Walton*, the Eighth Circuit held that a violation of *Swain v. Alabama* is established when the explanation for peremptory strikes reveals a discriminatory intent. 916 F.2d at 1359. Direct evidence of the prosecutor's racially discriminatory intent establishes the *Swain* violation and justifies habeas corpus relief.

trial. Stacking the deck by artificially increasing the number of jurors who will naturally empathize with the decedents as opposed to the accused citizens interferes with the rational consideration of aggravating and mitigating factors which is essential to the Supreme Court's decisions allowing the states and the federal government to resume capital punishment.

II. Mose Young's trial lawyer was admittedly and chronically unprepared to represent him.

Mose Young was represented by Mr. Jack Walsh, who has since given up his license and resigned from the practice of law. Mr. Margulies has attached an affidavit recounting his conversation with Ms. Geiler. Most notably, she recalls Mr. Walsh as Aa functional alcoholic,@ with a running tab at a local tavern. Every night after work—whether he was in trial or not—Mr. Walsh retreated to the familiar comfort of his bar stool at C.J. Muggs and Adrank his sorrow away.@ This practice is confirmed by the affidavit of James McKay, who worked at the time as a junior attorney in the same office, but who later became its Director. McKay was drinking with Mr. Walsh during the capital trial that followed immediately after Mr. Young=s—where Mr. Walsh sat mute during trial, and the case was reversed for ineffective assistance. (Affidavit of James McKay.)

Often choking back tears, Ms. Geiler described Mr. Walsh=s utter and abysmal failures throughout Mr. Young=s case, beginning with an unmitigated failure to prepare. Mr. Walsh inherited the case virtually at the last minute, and tried the case immediately after defending a major rape trial, which followed

immediately on the heels of another murder trial. Immediately after Mr. Young=s trial, Mr. Walsh was forced to try yet another capital case. By the time this last trial started, Mr. Walsh was coughing up blood.

Operating under these conditions, Ms. Geiler recalls that Mr. Walsh never visited the scene of the crime in Mr. Young=s case, and made no attempt to investigate or prepare prior to trial. Ms. Geiler remembers that Mr. Walsh had given no thought, let alone prepared for, the punishment phase. Ms. Geiler still recalls the night, during trial, when Mr. Walsh came to her home, well past midnight. In this meeting, Ms. Geiler developed the punishment phase instructions to the jury, and attempted to force-feed Mr. Walsh the arguments he could use to beg for his client=s life. In the trial for Mr. Young=s life, Mr. Walsh did virtually nothing.

But Ms. Geiler does not blame Mr. Walsh. Ms. Geiler describes Mr. Walsh as a tragic hero, who failed miserably and collapsed under the weight of an oppressive system. To understand Mr. Walsh=s abysmal failure, Ms. Geiler believed it was also necessary to comprehend the equally abject conditions under which her office operated. The Office of the Special Defender was overwhelmed. (*See also* Affidavit of James McKay.) Even in the most serious cases, attorneys litigated without the time, resources, and support essential to their clients= defense. In many cases, Ms. Geiler explained, the attorneys working in her office were veritable walking violations of the right to effective assistance of counsel. When counsel asked specifically whether this applied to Mr. Walsh=s defense of Mr.

Young, Ms. Geiler said without hesitation that it did. When asked specifically whether Mr. Young received a fair trial, Ms. Geiler said, again without hesitation, that he did not.[19] Her office was a classic example of institutional ineffectiveness, and Mr. Young=s defense was the shining illustration.

Sadly, the themes of racial disparity and incompetent counsel in this case are linked: because of counsel=s incompetence, the prosecutor=s racism has escaped review. As noted, Mr. Walsh did not object to the prosecution=s discriminatory use of its peremptory challenges because he believed, incorrectly, the issue would be preserved for federal review even without an objection.[20] He also acknowledged at the PCR hearing that: (1) he knew the local prosecutors used their peremptory challenges to excuse minorities from the venire; (2) he had objected to this practice in other cases; (3) he had intended to lodge the same objection in this case, even though he believed no objection was necessary in order to preserve the claim; and (4) he had no strategic or tactical reason not to make the objection, and in fact was surprised to discover that he had not done so.[21]

In the midst of Mose Young=s death penalty trial, Walsh experienced a sudden realization that would cost him his license to practice law in the State of Missouri. Exhausted from a crushing caseload, meager resources, aggressive prosecutors, and the unbending demands of the judiciary, Walsh nevertheless went

[19]Affidavit of Joseph Margulies at Para. 5.

[20]PCR Tr. at 139 (A[I]t was always my understanding of federal law that in terms of preservation of it you need not make a formal record at the trial stage.@)

[21]PCR Tr. at 139-40; 151-53.

through the motions of defending Young=s capital trial even though he knew he was ill-prepared. That was simply the path of least resistance. It was easier to proceed to trial on a capital charge than to stand up for his client=s right to be defended by an adequately prepared lawyer.

On a Saturday morning in May 1984, a St. Louis jury returned a verdict fixing Mose Young=s punishment at death. Walsh spent the rest of the weekend intoxicated. The following Monday, still vomiting from his binge, Walsh appeared for jury selection in the capital case of *State of Missouri v. Walter Harvey*. He urged the court and the prosecutor to continue the case. He was physically exhausted. Since being appointed to represent Harvey, he had been tied up in numerous other trials—including one case in which he met his client for the first time on the morning of trial. Walsh told the court that he had done no preparation whatsoever for Harvey=s trial; he was not ready to give the case the defense it deserved. His plea for for an opportunity to give his client a fair trial fell on deaf ears; the court denied his request and proceeded with jury selection.

Fearful that any effort that he might put forth on Harvey=s behalf would simply sanitize an injustice, Walsh determined that Harvey would be better off if he simply refused to participate in the trial. He did not make any challenges or strikes from the venire panel. He gave no opening statement. He conducted no cross-examination. He presented no witnesses. He made no argument. His sole effort consisted of repeatedly reminding the court that he was not prepared to give his client a fair trial.

Walsh took this action knowing that he was putting his legal career at substantial risk. He excused his young apprentice, assistant public defender James McKay, so that McKay would not suffer any repercussions from Walsh=s conduct. Walsh felt there was no real alternative for Harvey=s defense under the circumstances. He had nagging doubts about Harvey=s guilt. There were promising avenues of investigation he had not explored. There were aspects of the prosecution=s case that did not ring true. And he believed that Harvey did not deserve the death penalty.

Walsh=s desperate decision had the anticipated consequences. Harvey=s conviction was reversed on appeal in a begrudging opinion by the Missouri Supreme Court. At his retrial, a jury spared Harvey=s life. Angry judges and prosecutors pursued disciplinary action against Walsh in the Missouri Supreme Court; recognizing that his career as a trial lawyer had gone down the tubes, Walsh surrendered his license and returned to his boyhood home, Chicago Illinois. When asked if he had any regrets, Walsh replied that he wishes his epiphany had come ten days earlier—when he had the life of Mose Young in his hands.

The same factors which prompted Walsh=s kamikaze move in Harvey=s trial applied with equal justification in the Mose Young trial. Even though Young consistently asserted his innocence, Walsh had conducted no investigation. He had not viewed the crime scene. He had not interviewed Patricia Wilson, an eye-witness who was inside the pawn shop when the shooting started, even though Ms. Wilson had made statements suggesting that Young was not the shooter. Walsh did

not investigate Ronnell Bennett, the only witness produced at trial who claimed to have seen Young open fire in the pawn shop. The jury did not know that Bennett and Young had a history; several years earlier, Bennett=s brother had shot Mose Young in the back. Young still has the bullet lodged near his spine.

Aside from the issue of guilt or innocence, there were many facets of Young=s hard life growing up in the projects which could have moved a jury to spare his life. Many witnesses willing to vouch for his character and his amenability to rehabilitation. Circumstances strongly suggesting that Mose was suffering from severe mental and emotion difficulties, which may have been induced or exacerbated by use of toxic street drugs. He had been seen by witnesses shortly before the shooting, acting irrationally. Young appeared to be engaged in a heated argument with someone, even though he was alone.

The cases of Mose Young and Walter Harvey share many similarities. Both involved high-publicity crimes which were being prosecuted by skilled and aggressive prosecutors. In both cases, Walsh was haunted by doubts about guilt, which he had not had the opportunity or resources to investigate. Both clients persistently asserted their innocence. Neither deserved to die. The only difference between Mose Young and Walter Harvey is the fortuitous timing of their trials. Walsh concedes that if Harvey had gone to trial first, Harvey would now be on death row, and he would have thrown his career away to save Mose Young. In Walsh=s own words, to even attempt to mount a defense in either case, in light of the dearth of resources, his burdensome caseload, and his absolute failure to

prepare, would have been Aa fraud on the system.@ Mose Young=s execution would perpetuate that fraud.

III. Mose Young is a valued part of a family in which he has fulfilled his role as a parent even from prison.

Mose is of value to others even within the walls of a maximum security prison. He has remained a positive factor in his sons' lives. Although his own parents have passed away, he remains an active, valued member of his extended family.

A. Mose Young grew up in public housing projects as a generous, likeable child, whom his relatives remember with affection.

Mose grew up in public housing projects in St. Louis; his family did not have the resources most families had; his father worked at intermittent, poorly paying jobs. (App. 5.) Mose sometimes helped his father on the job. (App. 1 & 8.) Mose and his siblings sometimes had to use rolled-up socks instead of baseballs in order to play games. (App. 5.)

In spite of the negative factors in this environment, Mose grew up as a well-behaved, likeable child. He was generous to other children, sharing what little he had. His relatives now recall him as he was then, and regard him fondly. (App. 2, 5 & 9.)

The jury that returned a death verdict did not know about Mose's strong family ties, because counsel did not contact them. One after another of the relatives who have provided affidavits in support of clemency say that clemency counsel was the first attorney for Mose to contact them, and that if they had been contacted in

preparation for Mose's trial, they could have provided more information. Mose's cousin, Geraldine Wynne, adds that some of the relatives to whom she would have referred previous counsel if they had contacted her have died since Mose's trial.

B. Mose Young has positively participated in the upbringing of his sons, one of whom has cerebral palsy.

Mose had a long-lasting, monogamous relationship with Linda Brownlee, and she bore him two sons, Mose Brownlee and Morio Brownlee. (App. 2.) Mose Brownlee has cerebral palsy and is mentally retarded. (App. 2 & 11.)

Morio is nineteen, and graduated from Roosevelt High School in 1999. (App. 11.) He recounts that his father kept him and his brother out of trouble; his father encouraged him to stay in school, and he graduated. (App. 11.) Morio plans to continue to keep his father involved in his family as he has children of his own, if the State of Missouri does not kill him first. (App. 11.)

Killing Mose would needlessly deprive his sons of a father who continues to be a positive influence in their lives.

Because it has arisen since his incarceration, the jury could not have had the full sense of this fact about the value of Mose's life even if his previous lawyers had bothered to interview his sons, which they didn't. Like the information about his upbringing that the jury never heard, this is a mitigating factor that you are the first—and last—decisionmaker to consider.

IV. Mose Young has played a valuable role for staff and other prisoners.

One of the principal determinants of a decision between life without parole and the death penalty is whether the accused citizen will be a threat to others if sentenced to prison or whether he will make a contribution to society while confined. By his conduct in the Department of Corrections, Mose Young has proved that the interests of the State of Missouri would be better served by keeping him alive than by killing him. The jury and the sentencing court could not have know this: you do.

A. Mose Young has healthy respect among both black and white prisoners on account of his unique combination of seriousness and good humor.

Virtually anyone who takes the trouble to meet Mose Young, Jr., will agree that he is an impressive person. He is friendly, and at the same time serious. This combination of personal strengths was developing, or perhaps already developed, before he went to the Department of Corrections. (App. 1 & 9.)

This combination of good personal attributes has not been lost on his fellow prisoners. (App. 16 & 17.)

B. Mose Young uses the respect he has earned to prevent violence and other violations of good order.

Lamentable as its effects has been outside the walls of our prisons, our country's sad history of racial conflict has had fatal consequences among men who are confined at close quarters and are not selected from among the most restrained and lawabiding among us. Grievances that could lead to removal from one's

holiday card list in the outside world could lead to assault or even homicide in a prison, and routinely do.

Mose Young has repeatedly used the credibility he has established among other prisoners to prevent potentially fatal situations from getting out of hand. (App. 13-18.) In presenting this information, counsel do not rely on the word of their client's black fellow prisoners, but on a Native American (who regards himself as a neutral observer of conflicts between white and blacks, App. 15) and two whites (one of whom the State of Missouri has characterized as a white supremacist, App. 13). In light of the evidence from men who might be expected to be hostile toward Mose, one can safely assume there would be numerous testimonials from staff if they were not gagged by those in the Department of Corrections who put killing a few of their prisoners ahead of protecting the mass of them.

In acting as a mediator, Mose has exposed himself to hostility from other prisoners who may regard him as a traitor to his fellow blacks or as uppity toward whites, as the case may be. (App. 14.) In doing so, he has undoubtedly saved lives of staff and prisoners alike.

Mose Young is a real-life analog to John Coffey in *The Green Mile*. Of course he has not performed miracles; but *The Green Mile* is a work of fiction. Mose Young has stopped race riots, and has saved more lives than he has been convicted of taking. Sparing his life would be readily understandable to anyone who can add and subtract, especially if they have seen this movie.

WHEREFORE, the applicant prays the Governor for his order staying the execution and appointing a Board of Inquiry, and thereafter commuting the death sentence of Mose Young or granting other and further appropriate relief.

Respectfully submitted,

JOSEPH MARGULIES

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Attorneys for Aplicant

AFFIDAVIT OF SAMUEL FINLEY

COMES NOW the affiant, Samuel Finley, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Samuel Finley.

2. I reside in the City of St. Louis.

3. I was born March 7, 1915.

4. My late wife Alberta and were the parents of thirteen children, two of whom died as infants. These surviving eleven children included Leberta Mills, the mother of Mose Young, Jr.

5. Leberta married Mose Young, Sr.

6. Mose, Jr., was an only child.

7. I went to school with Mose Young, Sr., and associated with him a great deal.

8. After Mose Young, Sr., finished school, we worked together sometimes. I worked out of Northside Landfill. I owned a dump truck and a pickup truck that we used for hauling and other similar jobs.

9. Mose, Jr., stayed at our home some of the time when his parents were working.

10. Mose, Jr., worked with his father when we worked out of Northside Landfill.

17. Until his present clemency representation, no attorney for Mose, Jr., has ever approached me for information about his family background or personal character. If I had been approached earlier, I would have cooperated, and would have provided at least as much information as I have included in this document. If I had been approached earlier, I would have had a stronger recollection about the events of Mose's youth.

Further, the affiant saith naught.

Samuel Finley
SAMUEL FINLEY

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS CITY)

Subscribed and sworn to before me, a Notary Public, this 8th day of July, 2000.

"NOTARY SEAL"
Joseph S. Hupert, Notary Public
St. Louis City, State of Missouri
My Commission Expires 1/13/2001

James S. Hupert
JOSEPH S. HUPERT

My commission expires 1/13/2001.

3

AFFIDAVIT OF GERALDINE WYNNE

COMES NOW Geraldine Wynne, being duly deposed and sworn, and states on her oath or affirmation all as follows:

1. My name is Geraldine Wynne.

2. I live in Berkeley, Missouri.

3. I am a cousin of Mose Young, Jr.

4. My mother, Alberta Finley, was the eldest of ~~eleven~~ nine siblings born to my maternal grandparents.

5. Mose's mother, Leberta, was the second-eldest of these siblings. She was born around 1920.

6. Mose's mother and father had tried to have a child for years before Mose was born. They regarded him as a special gift.

7. When we were growing up, my immediate family lived about one mile from Mose's immediate family.

8. Both of our mothers worked full-time outside the home, and as the eldest daughter in my own family, I was a mother-figure much of the time.

9. As a child, Mose spent much of his time at our home. He grew up as one of my brothers.

10. Mose's father, like mine, was a combat veteran of the Korean War. During Mose's childhood, his father was a drinker. Nonetheless, Mose was

devoted to both of his parents, and would have sacrificed for them and done their bidding even to his own detriment.

11. Mose, my siblings, and I grew up in public housing projects. Our fathers had laborious jobs that were not reliable sources of income. We did not have many of the resources that the bulk of Americans take for granted. For example, although several of us loved sports, there were times when we had to roll up socks to use to play ball.

12. Both as a child and at all times of which I have personal experience, Mose has been a pleasant and generous person. He was certainly a happy, giggly, ever-smiling child. He always shared with other children, even when he only wound up with a small amount of whatever he was sharing. He was not easily provoked. It was fun to be around him. Having searched my recollections in the course of preparing to give this sworn evidence, I cannot recall having a bad memory of Mose.

13. Although all of us who grew up together have gone our separate ways to a certain extent, I have remained in touch with Mose and the others with whom I grew up.

14. As an adult, Mose had a long, monogamous relationship with Linda Brownlee. Ms. Brownlee bore him two sons, Mose Brownlee and Mario Brownlee. The former son is retarded.

5

15. Mose has maintained a close relationship with his sons. Even during his incarceration, he has exercised a positive paternal influence on them, successfully warning them to avoid trouble and to do the best they can to be good citizens.

16. Mose means a great deal to me and to all of my close relatives.

17. Until his present clemency representation, no attorney for Mose ever contacted me at all, let alone asked me about his early life or his character or his contribution to our family. If I had been asked at any previous point, I would have provided at least as much information as I have provided in this affidavit. I say, "at least as much," because if trial counsel or any previous counsel had interviewed me closer in time to the events of our youth, I would have remembered more, and in more detail, and would have been able to refer counsel to family members and neighbors who are now deceased.

Further, the affiant saith naught.

I swear or affirm that the foregoing is true and correct according to my knowledge and belief.

Geraldine Wynne
GERALDINE WYNNE

STATE OF MISSOURI)
) SS.
City
~~COUNTY~~ OF St. Louis)

Subscribed and sworn to before me, a Notary Public, this 7th day of July, 2000.

Mary E. Peters
NOTARY PUBLIC

My commission expires on Aug. 16, 2002.

MARY E PETERS
NOTARY PUBLIC STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXP. AUG. 16,2002

7

AFFIDAVIT OF JOHN W. FINLEY, SR.

COMES NOW the affiant, John W. Finley, Sr., being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is John W. Finley, Sr.

2. I reside in Florissant, Missouri.

3. I am the youngest of the eleven brothers and sisters of Alberta Finley, the aunt of Mose Young.

4. Mose's mother, Leberta Young, was my mother's sister.

5. My father, Samuel Finley, and Mose's father, Mose Young, Sr., both served in the Army in the Korean War.

6. I have known Mose all of my life.

7. Mose was a only child.

8. Both of our fathers worked together. Both of them were laid off substantial times. Both of them taught us responsibility and good work habits.

9. My father owned a dump truck and a pickup truck. Mose's father owned another substantial moving vehicle. Our fathers would do moving, hauling, and odd jobs, and Mose and I helped them.

10. Mose's mother and mine worked at the same hotel on Kingshighway, in St. Louis, Missouri.

11. When we were children, Mose spent a lot of time with me because we lived about four miles from each other, we were close to each other in age, and our mothers worked full-time outside the home.

12. Mose's immediate family and mine attended different churches, but I remember Mose visiting our church because I was an usher.

13. Growing up, Mose was very giving and happy-go-lucky. He was very friendly; he treated everyone as a friend. He would never turn anyone away.

14. Mose shared his money with his many young relatives, whether they lived in St. Louis or were visiting from out-of-town.

15. In our teens, we grew apart. I was three years older than Mose, and when I started high school, I did not see him as much as I had in the past.

16. Mose and I were raised in an environment where situations occurred in which fights could easily have broken out, or bad situations could have deteriorated. I saw situations in which through Mose's influence on one or the other of the persons involved, violence was avoided, even though he may have been younger than the persons involved.

17. Given my familiarity with Mose's good character, I was surprised to learn that he had become involved with drugs.

18. At no point until his present clemency representation has any attorney interviewed or attempted to interview me about Mose's family history, upbringing, or character. If any previous attorney had contacted me, I would have cooperated in setting forth facts such as the ones in this affidavit.

Further, the affiant saith naught.

John W. Finley Sr.
JOHN W. FINLEY, SR.

STATE OF MISSOURI)
) SS.
COUNTY OF St. Louis)

Subscribed and sworn to before me, a Notary Public, this 7 day of July, 2000.

Laura M Keown
NOTARY PUBLIC

My commission expires _____.

LAURA M. KEOWN
Notary Public – Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: July 13, 2002

AFFIDAVIT OF MORIO D. BROWNLEE

COMES NOW the affiant, Morio D. Brownlee, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Morio D. Brownlee.

2. I reside in the City of St. Louis.

3. I am the second son of Mose Young, Jr. I was born on May 1, 1981.

4. My elder brother, Mose Brownlee, was born on August 12, 1976. He has cerebral palsy.

5. Both of us live with our mother, Linda Brownlee.

6. Before he was sent to the Department of Corrections, my mother and father were devoted to each other; he treated her with respect and met the needs of our family; he was generous to others including people who were not members of our family.

7. Our father has maintained contact with us during his incarceration, and has functioned as a father as best he could within the limits imposed by the State of Missouri.

8. In telephone calls and by other means, my father encouraged me to stay in school, and I graduated from Roosevelt High School in 1999.

9. My father encouraged me to stay out of trouble, and I have never been charged with a criminal offense.

10. By his good paternal influence, my father has made me a better man than I would have been if he had not been alive.

11. If my father's life were spared, I would do everything within reason to keep him involved in the life of my family.

12. Until his present clemency representation, no attorney of my father's approached me or, to the best of my knowledge, my mother or brother, about my father's character or his role in our family. If any previous attorney had approached me, I would have given the same information I have included in this affidavit.

Further, the affiant saith naught.

Mario D. Brownlee
Mario D. Brownlee
MARIO D. BROWNLEE

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS CITY)

Subscribed and sworn to before me, a Notary Public, this 8th day of July, 2000.

Joseph S. Hupert
NOTARY PUBLIC

My commission expires 1/13/2001.

"NOTARY SEAL"
Joseph S. Hupert, Notary Public
St. Louis City, State of Missouri
My Commission Expires 1/13/2001

AFFIDAVIT OF ROBERT DRISCOLL

COMES NOW the affiant, Robert Driscoll, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Robert Driscoll.

2. I reside at the Potosi Correctional Center, in Mineral Point, Missouri. Before that I resided at what is now the Jefferson City Correctional Center, in Jefferson City, Missouri.

3. I am imprisoned by the State of Missouri on account of a conviction of murder and sentence of death.

4. I am a white man, and in its case against me the State of Missouri asserted that I was a member of the Aryan Brotherhoods, which many regard as a white supremacist organization.

5. Since 1985 I have known Mose Young, CP-75, who is black.

6. At the time the men under sentence of death in the State of Missouri were confined at the then Missouri State Penitentiary—a Robert Baker, who was black, was killed in an incident involving Frank Guinan and Gerald Smith, who were white. This killing caused tensions between black and white prisoners to rise, creating a threat to the safety of staff and prisoners alike. Mr. Young persuaded the black prisoners that the death of Mr. Baker was personal rather than racial, with the effect that there was no riot or race war over the killing.

7. In addition, after the male Missouri capital detainees were moved to the Potosi Correctional Center, a situation arose in which young prisoners were, or were thought to be, pressuring each other to give them their canteen items, and there appeared to be a racial element to the problem. Mr. Young intervened with the young black prisoners to avoid such a controversy.

8. In additional circumstances, Mr. Young has been a mediator between black and white prisoners, and has effectively promoted the safety of prisoners and staff alike by stopping numerous potential racial conflicts, even though this has involved placing himself in some danger.

Further, the affiant saith naught.

Robert Driscoll 99933
ROBERT DRISCOLL

STATE OF MISSOURI)
) SS.
COUNTY OF _____)

Subscribed and sworn to before me, a Notary Public, this 30th day of _____, 2000.

Patricia Hausmann
NOTARY PUBLIC

My commission expires 3-3-02.

AFFIDAVIT OF MARK JUAN HAMILTON

COMES NOW the affiant, Mark Juan Hamilton, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Mark Juan Hamilton.

2. I reside at the Potosi Correctional Center, in Mineral Point, Missouri.

3. For the past twenty-three years I have been a prisoner of the State of Missouri, on the basis of the sentence and judgment of the Circuit Court of Jefferson County, in which I was convicted of second-degree murder and assault.

4. I am a Native American, and regard myself as an objective observer of relations between European-American and African-American prisoners.

5. In August 1992 there was a disturbance at the Potosi Correctional Center, resulting in a lockdown.

6. Mose Young played the leading role among the prisoners in avoiding a continued or worsened racial conflict once the prisoners were released from lockdown after the 1992 incident.

7. In 1993 Mr. Young successfully promoted having black and white prisoners playing on teams with each other in the institutional

football season. This was the first time, to my knowledge, there had in fact been integrated teams.

8. For at least the past seven years, Mr. Young has served as an umpire and referee in athletic events, and has stopped many arguments and otherwise prevented situations from getting out of hand.

9. As I have come to know him, Mr. Young is a temperate, fair-minded person who has credibility with both black and white prisoners, and who uses his ability to deal with other prisoners to promote peace and mutual respect within the institution.

Further, the affiant saith naught.

Mark Juan Hamilton
MARK JUAN HAMILTON

STATE OF MISSOURI)
) SS.
COUNTY OF _____)

Subscribed and sworn to before me, a Notary Public, this 30th day of June, 2000.

Patricia Hausman
NOTARY PUBLIC

My commission expires 3-3-02.

16

AFFIDAVIT OF ROBERT W. ALLEN

COMES NOW the affiant, Robert W. Allen, being duly deposed and sworn, and states on his oath or affirmation all as follows:

1. My name is Robert W. Allen.

2. I reside at the Potosi Correctional Center, in Mineral Point, Missouri.

3. I am imprisoned by the State of Missouri on account of the judgment and sentence of the Circuit Court of Jackson County in which I was convicted of capital murder, first-degree (felony) murder, and armed criminal action, and was committed to the Department of Corrections for life without eligibility for probation or parole for fifty years and for two other life sentences.

4. I am a white man, and have known Mose Young, who is black, since I was transferred to the Potosi Correctional Center.

5. Whenever someone white and someone black gets into a argument, he would usually get things straightened out.

6. For example, at a time about a year and a half ago when racial tensions were high, there was a dispute about who would use the microwave oven next. This trivial dispute was leading toward a racial incident involving many prisoners. Mr. Young talked to the black prisoner

involved in the dispute and persuaded him to put the question in perspective. The dispute was resolved.

7. The foregoing example is one of which I have personal knowledge. I have also heard about numerous similar contributions by Mr. Young to the safety of prisoners and staff alike.

8. Mr. Young is able to help black and white prisoners to get along because he is fair and reasonable, and keeps his word. He uses his influence to stop racial disputes and to encourage all of us to get along.

Further, the affiant saith naught.

Robert W. Allen
ROBERT W. ALLEN

STATE OF MISSOURI)
) SS.
COUNTY OF _____)

Subscribed and sworn to before me, a Notary Public, this 30th day of June, 2000.

Patricia Hausmann
NOTARY PUBLIC

My commission expires 3-3-02.

PATRICIA HAUSMANN
NOTARY PUBLIC, STATE OF MISSOURI
WASHINGTON COUNTY
MY COMMISSION EXPIRES 3/02

18