

In re capital execution of Reginald Powell

**APPLICATION FOR GRANT OF PARDON,
REPRIEVE OR COMMUTATION OF SENTENCE**

To: The Honorable Mel Carnahan, Governor

State of Missouri

The undersigned religious and civic leaders of the State of Missouri for their Application state:

I.

EXECUTION SET

1. The execution of Reginald Powell has been set for February 25, 1998.
2. Court appeals apparently have been exhausted.

II.

**PARDON POWER IS INHERENT TO THE PEOPLE;
CITIZENS HAVE STANDING TO APPLY**

3 The power to pardon, reprieve or commute is inherent in the sovereignty of the people of the State who have conferred the exercise of this power on the Governor by virtue of Article IV, Section 7 of the Constitution of Missouri. The power exists to serve the Common Good and not merely the individual under sentence.

4. The exercise of the pardon power is not dependent upon "one (the offender) who, on no sound principle, ought to have any voice in what the law should do for the welfare of the whole." *Biddle v. Perovich*, 274 US 479, 487 (Justice Holmes).

"A pardon in our days is not a private act of grace from an individual happening to possess the power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than the judgment fixed. The public

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welfare, not his (the prisoner's) consent, determines what shall be done." *Biddle*, supra, p. 486. 5. Precedent has been established for the right of these Applicants as citizens of the State to apply for reprieve or commutation in behalf of the common good and to have the Board of Probation and Parole review such application pursuant to Section 217.800, RSMo. On October 31, 1984 religious leaders and others, including many of the present applicants, filed an Application for Reprieve or Commutation relating to the capital execution of Gerald Smith with then Gov. Christopher S. Bond. Gov. Bond accepted the Application, referred it to the Board of Probation and Parole for review. Prior to the action of the Board on the Application, a federal stay order intervened and subsequently Gerald Smith resumed his legal appeals thus making the Application moot. The citizen-initiated clemency process has been used under subsequent governors. In fact "citizen" applications have been presented and acted upon since the earliest years of Missouri statehood. One of the earliest women prisoners was pardoned upon the application of her neighbors.

6. Reginald Powell has filed an application for executive clemency in his own behalf through counsel. This

application is made in support of his application.

III.

REVIEW UNDER SECTION 217.800, RSMO. REQUESTED

7. The undersigned invoke the requirements of Section 217.800, RSMo, which requires that "all applications for pardon, commutation of sentence or reprieve shall be referred to the

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Board (of Probation and Parole) for investigation." Further we request timely notice of the Board's proceedings and an opportunity to be heard prior to the completion of their investigation. The undersigned respectfully request an opportunity to be heard prior to the completion of their investigation. We request that the reasons for mercy and commutation outlined in this application be considered in granting commutation, not simply the prior conviction records and related parole materials of the offender. We request a written response to this Application.

IV.

A COMMUTATION SHOULD BE GRANTED

BECAUSE OF THE DEFENDANT'S MENTAL RETARDATION

8. Testing performed at the request of the St. Louis Schools diagnosed Mr. Powell as being borderline mentally retarded with an IQ of 65 and led to his placement in a Special Education Program. Testing also indicated that Mr. Powell is severely impaired by an Auditory Selective Attention Disorder; 97 individuals out of 100 filter information better than he.

9. There are just reasons why persons with mental retardation should not be executed:

A. The Supreme Court has repeatedly observed that "death is different." In a series of decisions over the last decade, the Supreme Court has made it clear that the sentence of death must be based on personal culpability and moral blameworthiness of the defendant. Because a person with mental retardation may not fully understand the implications of his actions, it is inhumane to hold him accountable to the highest punishment.

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B. Execution of a person with mental retardation cannot further the goals of deterrence or retribution. Society cannot feel "justified" to execute a person who has a reduced level of culpability resulting from his mental handicaps.

C. Defendants with mental retardation are vulnerable in the criminal justice system. For instance, persons with mental retardation have limited communication skills which could hinder their ability to assist police or their attorneys. Their deficits in attention or impulse control may hinder their ability to focus on the alleged crime or the gravity of their arrest.

D. There is an emerging national consensus not to execute persons with mental retardation. Currently states have laws banning the execution of persons with mental retardation. The Missouri General Assembly has also been addressing this issue. Currently there are two bills, House Bill 1288 and Senate Bill 702, pending before the General Assembly which would prevent the execution of persons with mental retardation.

10. A stay of execution should be granted pending the legislature acting on these bills. It would be tragic to execute Powell if afterwards the legislature removes the mentally retarded from the death penalty

V.

STAY SHOULD BE GRANTED

PENDING COMPLETION OF THE SENTENCING COMMISSION STUDY

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11. A Sentencing Commission has been established by Section 558-019, RSMo. Supp. 1992 and revised again in 1994. The Commission is charged with studying disparities in sentencing. The Commission has special duties to study sentencing in relation to the death penalty. The Commission is working on its assigned task.

12. The public policy of Missouri is to make the use of the death penalty contingent upon whether the penalty is proportionate. Section 565.035, RSMo., expresses this policy by requiring the Missouri Supreme Court to examine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Subsection 6 of Section 565.035 establishes a special legal assistant to the Supreme Court charged with collecting records in all cases in which the sentences of death or life imprisonment with probation or parole was imposed.

13. Over 200 offenders have received life without parole and 93 offenders are now on death row. There is sufficient experience to analyze proportionality between these sentences.

14. Therefore, we call upon the Governor to issue a stay of execution in this matter until the Sentencing Commission has had a reasonable opportunity to analyze the data on proportionality in connection with the use of the death penalty in Missouri. To proceed with executions now would be to disregard or make a fraud of the public policy set forth in Section 558.019 and 565.035.

VI.

A STAY SHOULD BE GRANTED AS PART OF A MORATORIUM ON EXECUTIONS UNTIL THOROUGH EXAMINATION OF DEATH SENTENCING POLICIES

15. At its annual meeting in April, 1997, the Missouri Association of Criminal Defense Lawyers adopted the resolution of the American Bar Association calling for a moratorium on executions until policies are implemented which insure that the death penalty is administered fairly and impartially and that innocent persons are not executed.

16. The four areas discussed in the ABA resolution are:

a. Standards which insure competent counsel at all stages of death penalty litigation. Until July of 1997, no standard existed in Missouri requiring two counsel to represent a defendant in Missouri post-conviction litigation, a significant part of the death penalty review process. Although the newly adopted Supreme Court Rule 29.16 requires this as of July 1 of 1997, none of the persons now on death row in Missouri were subject to this rule at the time of their post-conviction litigation, and the Missouri Public Defender System has not been appropriated additional funds to enable it to comply with the new rule.

b. Permitting courts to exercise independent judgment on the merits of constitutional claims in state and federal post-conviction proceedings: The restrictive time periods and pleading requirements for seeking post-conviction relief in Missouri throw into question the validity of its post-conviction proceedings. Because of these restrictions as well as the restrictions on relief in federal court contained in the AntiTerrorism and Effective Death Penalty Act now in effect, many legitimate constitutional

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claims cannot even be considered by either state or federal courts.

c. Racial Discrimination in the imposition of the death penalty. Statistical and anecdotal evidence in Missouri indicates that racial disparities exist in all phases of the death penalty process, beginning with the decision whether to seek the death penalty in a particular case and proceeding through plea bargaining and sentencing.

d. Preventing execution of mentally retarded persons and those who were under 18 at the time of their offenses. Missouri executes persons who were 17 years of age at the time of their offenses as well as mentally retarded persons.

17. Because of these serious concerns about the fairness of the process by which the death penalty is imposed, executions should be suspended in Missouri.

VII.

A STAY SHOULD BE GRANTED PENDING LEGISLATION

REGARDING THE JUDGE'S ABILITY TO IMPOSE THE DEATH SENTENCE

18. In 1984 Section 565.030, RSMo was changed to allow the trial judge to impose the death sentence if a jury could not decide on the sentence in a capital case. Mr. Powell was directly impacted by this change as it was the sentencing judge who imposed his death sentence when the jury could not agree.

19. Senate Bill 703, which would change Section 565.030 to restrict the judge to imposing a life without parole sentence if the jury could not decide, is currently pending before

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the Missouri General Assembly. This bill would place Missouri in line with over 15 other states and the federal government which impose death only when the jury unanimously agrees to do so

20. A stay should be granted pending the legislative action on Senate Bill 703

VIII.

COMMUTATION SHOULD BE GRANTED BECAUSE THE DEATH PENALTY IS NOT A DETERRENT IN FACT ITS USE MAY THREATEN THE COMMON GOOD

21. Capital punishment takes the life of a human being. Do we take another human life without clear and convincing evidence that such an act is in the best interest of society? Ought we to take another human life merely for revenge or retribution? We answer, no.

22. What clear and convincing evidence exists to justify the state's taking of a human life? Scholarly studies fail to show that capital punishment has a deterrent effect on homicide.

23. One study concluded the following:

"During the 1950's there is no evidence that executions had even the slightest deterrent effect on murder. In addition, based upon our analysis of this decade, we find no support for the argument that a return to past execution practices will provide an effective solution to the murder problem. Rather, if executions are to again receive a prominent role in the criminal justice system, their use will have to be justified on grounds other than deterrence." This study compared murder and executions in death penalty states in the 1950's. (William C. Bailey, "The Deterrent Effect of Capital Punishment During the 1950's," *Suicide and Life Threatening Behavior*, Vol. 13, #2, Summer, 1983, pp. 95-109.)

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24. There is an alarming correlation between the date of the last period of executions in Missouri and a significant increase in the number of homicides. Prior to the 1989 renewed use of execution, the last execution in Missouri occurred on February 26, 1965. In 1964, the year prior to the execution, there were 240 homicides in Missouri. The executions occurred early in 1965. In 1965 there were 300 homicides in Missouri, an increase of 60 over the preceding year. In 1966, the year following, no executions occurred yet there were 246 homicides in Missouri, a decrease of 54 from 1965. That is, there were significantly more homicides during the year of the last executions in Missouri than either the year before or after. This

correlation must be given serious consideration in light of the opinions of psychiatrists that killing by the state is an incentive to those with a murder-suicide syndrome and a trigger to increasing intentional homicide.

25. The renewal of executions in Missouri in January, 1989 shows no correlation between the use of the death penalty and deterrence for crime.

Year	Number of Executions	Murder Rate Per 100T
1988	0	8.00%
1989	1	8.00%
1990	4	8.80%
1991	1	10.20%
1992	1	10.50%
1993	4	11.20%
1994	0	10.60%
1995	4	8.90%
1996	6	8.00%

26. Reliance on capital punishment wastes resources which could be better used by society, including the development of better ways to reduce crime. The cost of capital punishment litigation exceeds the cost of life imprisonment. Estimates are that it is about six times as expensive.

27. The Common Good of the people of Missouri would be better served by commutation of the death sentence.

28. Execution destroys human life, a gift of our Creator, Redeemer God. It debases humanity, encourages revenge, precludes repentance and sanctions violence as a solution. Society abhors violence. Violence begets more violence. It is in the interest of the Common Good of the people of our state that the cycle of violence be broken.

FOR THE FOREGOING REASONS, the death sentence should be commuted, or in the alternative a stay of execution should be granted.

Respectfully Submitted,

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Benedictine Sisters

Our Lady of Peace Community, Columbia, Missouri

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Dated February 20, 1998

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