

## Prologue

Bruce Kilgore is an African-American whose death penalty case has fallen through the cracks. He will die by lethal injection on **June 16, 1999** at the Potosi Correctional Center in Mineral Point, Missouri if you, Governor Mel Carnahan, fail to intervene.

Bruce and his co-defendant, Willie Lockett, were convicted in separate trials of Marilyn Wilkins' murder. Only Bruce received the death penalty; despite a credible claim that it's the co-defendant, Lockett, who actually stabbed the victim.

During the opening statements of Bruce's trial, the prosecutor did not tell the jury it was Bruce who stabbed the victim. In fact, the guilt phase jury instructions identified Lockett as the person who stabbed the victim. During the penalty phase, the theory changed when Willie's girlfriend, Renee Dickinson, shocked everyone in the courtroom and declared for the first time that Bruce admitted stabbing the victim. Previously, Willie's girlfriend told the police and other authorities that Willie and Bruce had an alibi : they were with her. Only when she testified before Bruce's jury in the penalty phase did Renee state Bruce told her he had killed the victim. Just before she testified, Willie's girlfriend received probation for her role in the victim's death (hindering prosecution). Her testimony greatly benefited Willie by shifting responsibility to Bruce.

Bruce has steadfastly maintained that he did not stab the victim. Bruce cooperated with the police by showing them where the crime occurred and how Willie stabbed Ms. Wilkins.

In fact, only Willie had motive to kill the victim. Bruce did not know the victim.

However, the day before the murder, Willie's employers fired him because the victim reported that Willie was stealing food from the restaurant, Christo's Restaurant, they worked together.

Bruce has been denied the right to challenge the effectiveness of his trial counsel due to the technicality that he did not timely file a pro se verified motion and because his appointed counsel also failed to properly file a verified, timely amended post conviction motion. No Missouri state court has heard merits claims concerning his trial counsel's performance.

Bruce's execution would result in yet another "procedurally correct" but morally infirm execution of a man who asserts a credible claim of actual innocence of being the principal in a case in which the more culpable defendant received life imprisonment. In comparison to Willie's life sentence, Bruce's death sentence is unjustly disproportionate. This case cries out for clemency and a commutation of his sentence to life in prison without the possibility of probation or parole.

#### Introduction

Every state and the federal government has given its chief executive the supreme power of clemency. The United States Supreme Court has transformed a governor's clemency power from an elective act of mercy into a vital safeguard of justice. In Herrera v. Collins<sup>1</sup>, Chief Justice Rehnquist noted:

**Clemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing a miscarriage**

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<sup>1</sup> Herrera v. Collins, 113 S.Ct. 853 (1993).

**of justice where judicial process has been exhausted. In England, the clemency power was vested in the Crown and can be traced back to the 700's...<sup>2</sup>**

**Executive clemency has provided the "fail safe" in our criminal justice system...It is an unalterable fact that our justice system, like the human beings who administer it, is fallible.<sup>3</sup>**

The Missouri Supreme Court also noted that it is the proper role of the governor to act when the courts decline. Indeed in Wilson v. State<sup>4</sup>, the Missouri Supreme Court did not act to remedy a miscarriage of justice of the conviction of a mildly- retarded youth who was browbeaten into confessing to a murder he did not commit by the extremely aggressive interrogation tactics of deputy sheriffs. Another inmate in the Kansas penal system confessed to the murder Wilson had pleaded guilty to, offering convincing knowledge of the crime. You, Governor Carnahan, acted to correct this miscarriage of justice by granting executive clemency and commuting Wilson's sentence.

As you know, Governor Carnahan, you are not restricted in your supreme clemency powers. You will answer only to your conscience in making the final decision. Thus, you must consider factors that are certainly morally relevant, but for some reason or another may not have been considered legally relevant by a judicial body.

Bruce remains mindful that "Governor Carnahan will be hard put to spare another life so soon after saving...Darrell Mease at the pope's request. But he must not go through with an execution where there is a real possibility of innocence."<sup>5</sup> As the St. Louis Post-Dispatch noted when you, Governor Carnahan, courageously granted Darrell Mease clemency, "there may be political fallout for Carnahan from the decision."<sup>6</sup>

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<sup>2</sup> Herrera v. Collins, 113 S.Ct. 853, 866 (1993).

<sup>3</sup> Herrera v. Collins, 113 S.Ct. 853, 868 (1993).

<sup>4</sup> Wilson v. State, 813 S.W.2d. 833, 834-835 (Mo. banc 1991).

<sup>5</sup> "Murderous Mistakes," editorial from the St. Louis Post-Dispatch dated February 23, 1999.

<sup>6</sup> "Carnahan Spares Murderer's Life" by Terry Ganey, January 29, 1999, St. Louis Post-Dispatch.

However, the Post-Dispatch reported that you stated you were prepared to deal with it :

**You do the acts that you need to do as governor as best you can. Some of them may have implications, some of them may not. Whatever it is, I will handle it.<sup>7</sup>**

Of course, this reflects former New Mexico Governor Toney Anaya views:

I am struck by the fact that it is easy for the general public to join the chorus of “kill the killers” and to press their political leaders to jump in front of the pack -- until those individuals themselves have to make these decisions of life or death.<sup>8</sup>

Governor Anaya notes,

In New Mexico, despite prosecutors having sought the death penalty hundreds of times, jury after jury of private citizens have brought back the death penalty in only six cases in twenty years.<sup>9</sup>

Governor Anaya reaches the conclusion:

The point being, that private citizens, once being given the awesome responsibility of passing judgment will invariably choose life over death.<sup>10</sup>

With this in mind, Bruce remains hopeful that you will continue to make your decision based on the facts highlighted in this final plea for mercy to you, Governor Carnahan, by Bruce Kilgore.

### **I. New Evidence to Support that Bruce did not stab the victim.**

Bruce has always maintained that he did not stab Marilyn Wilkins. Willie Lockett

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<sup>7</sup> Id.

<sup>8</sup> “Statement of Toney Anaya on Capital Punishment”; 27 University of Richmond Law Review 183 (1993).

<sup>9</sup> Id.

<sup>10</sup> Id.

acted as the principal when he stabbed Ms. Wilkins. Consistent with this, Willie has admitted to those he has come to contact with that he, not Bruce, stabbed Ms. Wilkins. Willie admitted his culpability to William K. Murray. Willie and Mr. Murray shared a cell for four months beginning December 1994. Willie discussed his case with Mr. Murray and stated that Bruce is on death row for a crime he did not commit. Willie admitted that he stabbed the woman, but was afraid to come forward because he feared the death penalty. Having become close to Willie during this time, Mr. Murray encouraged Willie to come forward. Yet, Willie has not come forward to reveal the truth. Mr. Murray's recollections are preserved in his attached affidavit.<sup>11</sup>

Willie also told Steve Davidson that Bruce did not stab or kill Ms. Wilkins. Mr. Davidson shared a cell with Willie at Potosi in October of 1994. Willie not only told him that Bruce did not do the killing, but the plan was for it be only a kidnapping and robbery, not a murder. According to what Willie told Mr. Davidson, it went too far because Lockett was high on alcohol. Mr. Davidson's recollections are preserved in his attached affidavit.<sup>12</sup>

According to Michael Miller, who is incarcerated at the Central Missouri Corrections Center, Willie told him that "he went and got Bruce to go rob the woman; and that things went wrong, and the woman ended up getting killed...Bruce had nothing to do with that."<sup>13</sup>

Even as far back as when Willie awaited trial in the St. Louis City Jail in 1987, Willie's fear of the death penalty prevented him from doing the right thing and

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<sup>11</sup> See the Affidavit of William K. Murray dated March 31, 1999.

<sup>12</sup> See the Affidavit of Steve Davidson dated April 7, 1999

<sup>13</sup> See the Affidavit of Michael Miller dated April 6, 1999.

clarifying Bruce's lack of involvement in the murder. During September of 1987, Kenneth McGee befriended Willie at St. Louis City Jail where they were assigned to the same tier. One day during that time, Mr. McGee noted that Willie looked troubled after a court appearance. He asked Willie what was wrong. Willie responded, " Man, I'm facing the Death Penalty... Man, my fall partner already went to trial and got the Death Sentence and I hate to see him die for something he didn't do, but, I got to do whatever it takes to save my own life."<sup>14</sup>

According to David Ware, who was also in St. Louis City Jail with Willie, "Lucky looked guilty of his case because he would sit in jail and think about whether he should testify against his Rappee.<sup>15</sup> Lucky really agonized over this 2 weeks before Bruce Kilgore's trial."<sup>16</sup>

Mr. Ware provides valuable insight into this time:

Everyone else in the jail was telling Lucky to take his weight on this case. It seemed like Lucky was not going to take his weight for this charge and let his Rap Partner<sup>17</sup> go down on this. After talking to Lucky, it seemed like Bruce Kilgore did not know that the woman was going to get killed.<sup>18</sup>

These new revelations clearly show that Bruce did not stab Ms. Wilkins. Willie Lockett and those who have known Willie Lockett know that. Willie has not come forward because of his misplaced fear that he can now, and not Bruce, receive the death penalty. Given the circumstances of this case, it will be gallingly unfair for Missouri to kill Bruce when this case's main actor, Willie Lockett, serves life imprisonment

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<sup>14</sup> See the Affidavit of Kenneth McGee dated April 15, 1999.

<sup>15</sup> Rappee refers to Bruce Kilgore.

<sup>16</sup> See Affidavit of David Ware dated April 7, 1999.

<sup>17</sup> Rap Partner refers to Bruce Kilgore.

<sup>18</sup> See Affidavit of David Ware dated April 7, 1999.

without the possibility of probation or parole.

**II. Only Willie had motive to kill the victim. Bruce did not know the victim. On the day before the murder, Willie's employers fired him because the victim reported that Willie was stealing food from the restaurant at which they both worked together.**

Very early in their investigation, the theory the police developed involved Willie Luckett's anger toward Ms. Wilkins and Ms. Wilkin's fear of Willie Luckett after Ms. Wilkins informed their employers that Willie stole from them.

When questioned by the police about the relationship between Ms. Wilkins and Willie Luckett, Renee Dickinson, Willie Luckett's girlfriend, stated Willie didn't like Ms. Wilkins because he had been fired when she accused him of stealing meat; she<sup>19</sup> was off work that night and didn't know if he did or not...<sup>20</sup>

When the police interviewed Donette Morganfield, Ms. Wilkins' daughter, they asked whether her mother was having problems with anyone. Ms. Morganfield stated that she had told her about some coworkers, namely Willie L., Andre<sup>21</sup>, and Renee D., who were stealing food from work.<sup>22</sup> Ms. Morganfield elaborated,

Willie L. and Andre would hide meat in the trash, and when they would take the trash out they would put the meat in their car. About three weeks ago, Wilkins told their boss, causing Willie L. and Andre to be fired. At this time, Renee D. confronted her

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<sup>19</sup> meaning Ms. Wilkins

<sup>20</sup> St. Louis Metropolitan Police Department Report  
Complaint Number 86113064 dated September 26, 1986, p. 7.

<sup>21</sup> There is some confusion concerning whether this person's name is Andre or Andra. Both spellings appear in the police report. For purposes of clarification, we will print it as "Andre."

<sup>22</sup> St. Louis Metropolitan Police Department Report  
Complaint Number 86113064 dated September 26, 1986, P.8.

mother and accused her of being a snitch. Renee D. and her mother argued.<sup>23</sup>

When the police interviewed Pat Murphy, the night manager of Christo's Restaurant, the police asked Murphy if Ms. Wilkins had any problems with anyone at work. Murphy reported that she had fired two cooks from the restaurant about two or three weeks earlier for stealing meat after Ms. Wilkins had reported the incident to her. Murphy identified the cooks as Willie Lockett, and Andre Brooks.<sup>24</sup>

When the police asked Lynn Wilkins, Ms. Wilkins' son, concerning whether his mother was having any problems, Mr. Wilkins reported that his mother talked about the dishwasher, a cook, and a girl named Renee, who were stealing at work and his mother had turned them in.<sup>25</sup>

On September 3, 1986, Willie Lockett recorded a statement for the police. On tape, Willie Lockett describes how mad he was that he lost his job at Christo's because Marilyn Wilkins snitched on him.<sup>26</sup> Willie Lockett related that he felt like robbing Ms. Wilkins to get even with her, but was afraid she could identify him.<sup>27</sup>

No evidence exists that Bruce knew Marilyn Wilkins before she died, nor did he have a grudge against her like Willie Lockett. But for Willie Lockett, Bruce would never have known Ms. Wilkins.

**III. During the opening statements of Bruce's trial, the prosecutor did not state it was Bruce who stabbed the victim. In fact, the guilt phase jury instructions identified Willie as the person who stabbed the**

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<sup>23</sup> Id.

<sup>24</sup> St. Louis Metropolitan Police Department Report  
Complaint Number 86113064 dated September 26, 1986, p. 6.

<sup>25</sup> St. Louis Metropolitan Police Department Report  
Complaint Number 86113064 dated September 26, 1986 pp. 8-9.

<sup>26</sup> St. Louis Metropolitan Police Department Report  
Complaint Number 86113064 dated September 26, 1986, p. 25

<sup>27</sup> Id.



**victim. During the penalty phase, the State's theory changed when Willie's girlfriend shocked everyone in the courtroom and declared for her first time that Bruce admitted stabbing the victim.**

**Previously, Willie's girlfriend had given statements to the police and other authorities, but it was only when she testified before Bruce's jury that she stated Bruce told the he had killed the victim. Just prior to her testimony, Willie's girlfriend received probation for her role in the victim's death (hindering prosecution), and her testimony greatly benefited Willie by shifting responsibility to Bruce.**

In opening statement, the prosecutor described the agreement Bruce and Willie

Luckett made:

when Mrs. Wilkins came out that she was observed by two men that lay in wait for her, two men that agreed earlier that they were going to kidnap this lady, two men that had agreed that they were going to rob this lady.<sup>28</sup>

It is significant the prosecutor stopped there. He did not tell the jury that they agreed to murder this lady. He stopped there because Bruce never agreed to kill this lady, and the State knew that.

Also, in opening statement, the State outlined the rationale behind why Willie

Luckett's the more culpable person:

The State's evidence will be as Mrs. Wilkins was kept in the back seat, held down by Mr. Luckett and as Bruce Kilgore drove, that Mrs. Wilkins recognized Luckett and she said, "Willie, is that you?"

**And at that point Willie Luckett took off his mask and told her that he was going to kill her.**<sup>29</sup>

Further, the prosecutor recounted

When Mr. Luckett told Marilyn as he held her down in that vehicle as the car sped west on Highway 70

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<sup>28</sup> Trial Transcript p. 568

<sup>29</sup> Trial Transcript pp. 568-569.

that he was going to kill her, Mrs. Wilkins said,  
**“Why are you doing this to me, Willie?”**<sup>30</sup>

Clearly, as demonstrated by its opening statement, the State intended to impress upon the jury that Willie, not Bruce, had motive to kill Ms. Wilkins.

As the State described the ultimate murderous act, the State told the jury that the State’s evidence will be that Willie Lockett held the blade. He stuck it in her throat. He came down and he came across.<sup>31</sup>

During opening statement, the State clearly articulated that Willie Lockett was the more culpable person.

After presenting the guilt phase evidence it outlined during the opening statements, the State tendered its proposed jury instructions to Judge Daniel Tillman. In the jury instruction submitted by the State for guilt phase deliberations, Instruction No. 5, the instruction for murder in the first degree, reads in its most pertinent parts

**First, that on August 27, 1986, Willie Lockett caused the death of Marilyn Wilkins by cutting her...**

**Third, that Willie Lockett knew or was aware that his conduct was causing the death of Marilyn Wilkins...**

**Fourth, that Willie Lockett did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief...**<sup>32</sup>

The prosecutor’s closing argument faithfully tracked the submitted instructions. He argued “that with the purpose of promoting or furthering the death of Marilyn Wilkins the defendant<sup>33</sup> aided or encouraged Willie Lockett.<sup>34</sup> In his closing argument, the State never asserted that Bruce stabbed Ms. Wilkins.

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<sup>30</sup> Trial Transcript p. 570.

<sup>31</sup> Trial Transcript p. 570-571.

<sup>32</sup> Jury Instruction No. 5 filed August 24, 1987.

<sup>33</sup> meaning Bruce Kilgore

<sup>34</sup> Trial Transcript, p. 65.

However, inexplicably, the State shifted its theory of the case. Magically, during the penalty phase, Bruce elevated from merely being an aider and abettor to being the person who held the weapon and stabbed Ms. Wilkins because of Willie's girlfriend's new and improved story about her "recollections" of the night Ms. Wilkins died. Unluckily for Bruce, Renee Dickinson, Willie Lockett's girlfriend, allowed the prosecution to further demonize Bruce as the actual stabber, not Willie Lockett any longer. At penalty phase, Willie Lockett's girlfriend told the jury that

**Willie woke me up and he said that the lady was dead, and I told him he was lying, and he said yes, that Bruce had cut his neck -- cut her neck. And I looked up to Bruce to answer me and he said, "Yeah."**<sup>35</sup>

With only those scant words, Renee Dickinson strove to send Bruce to death row, and deflect attention from her boyfriend. Soon after this statement from her, the jury learned Renee Dickinson pled guilty to hindering the prosecution of this case by lying to the police about her boyfriend's whereabouts.<sup>36</sup>

When Bruce's trial began, Willie's girlfriend continued to be charged with offenses relating to Ms. Wilkins's death and the prosecutor continued to indicate to the defense that she would not be called as a witness. During the guilt phase of Bruce's trial, Willie's girlfriend suddenly pleaded guilty to hindering the prosecution of the murder of Ms. Wilkins. As Bruce's penalty phase commenced, the prosecutor notified defense counsel that Willie's girlfriend would be called as a witness against Bruce.

Her damning testimony came as a surprise because on at least three prior

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<sup>35</sup> Trial Transcript, p. 111.

<sup>36</sup> It is interesting to note that Renee Dickinson's first contact with the authorities concerning this case involved her lying to the police.

occasions on which Willie's girlfriend spoke to the authorities she had not stated that Bruce made this admission.<sup>37</sup> In fact, Detective Jerry Leyshock testified that she had not told him in previous interviews that Bruce had admitted killing Ms. Wilkins.<sup>38</sup> Renee lied to the police that Willie and Bruce had an alibi.<sup>39</sup> If Bruce had actually made that admission to Willie's girlfriend, why was it not documented and turned over to the defense counsel before she appeared before Bruce's jury? The police and authorities had extensively interviewed her. Yet, nowhere in their transcriptions can you find her telling the authorities Bruce admitted stabbing Ms. Wilkins.

Missouri should not send Bruce to the death chamber based on the word of Renee Dickinson, Willie Lockett's girlfriend.

**IV. Bruce has been denied the right to challenge the effectiveness of his trial counsel due to the technicality that he did not timely file a pro se verified motion. No Missouri court has heard merits claims concerning his trial counsel's performance.**

By a set of circumstances, the most prominent being the appointment of an ineffectual and disinterested attorney at the initial state post-conviction proceeding who failed to file proper pleadings to vest the trial court with jurisdiction, Bruce was not afforded the opportunity to litigate crucial constitutional claims surrounding his death penalty, most prominently ineffective assistance of trial counsel issues.<sup>40</sup> Having missed his opportunity for post-conviction review because of appointed counsel's failure to properly file an amended post-conviction motion, petitioner received another opportunity to litigate these critical structural constitutional claims when the Missouri

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<sup>37</sup> Trial Transcript, p. 119-120.

<sup>38</sup> Trial Transcript, pp. 127-130.

<sup>39</sup> Bruce's dilemma is compounded by the fact that trial counsel failed to point out Renee's lies to Bruce's jury.

<sup>40</sup> See Affidavits of David Ferman dated July 28, 1992 and June 1, 1999.

General Assembly enacted a statutory procedure to evaluate these structural constitutional claims. Yet, even though Bruce never received substantive review of his constitutional claims of inadequate assistance of trial counsel under the review procedures provided by Missouri Supreme Court Rule 29.15, the Missouri Supreme Court deprived Bruce of the right to finally litigate the adequacy of counsel's assistance, in a decision rendered December 22, 1998<sup>41</sup>, depriving Bruce of his due process rights to review his Sixth and Fourteenth Amendment constitutional claims.

Bruce Kilgore has not had his day in state court in the Sixth and Fourteenth Amendment constitutional claims to adequacy of counsel. It is also not his fault, but rather that of appointed counsel in his 29.15 case filed in 1988, that he has not received his day in state court on these important structural constitutional claims. Bruce filed a post-conviction motion, later determined by the Missouri Supreme Court to have been timely because of ambiguity in the amended 29.15 rule,<sup>42</sup> but since appointed counsel did not properly file any amendments to the pro se motion which was not verified, thereby leaving no verified motion before the court, the circuit court lacked jurisdiction to entertain and consider, on the merits, any of the claims raised in petitioner's motion regarding ineffective assistance of counsel.<sup>43</sup> Shortly after Bruce's case in Kilgore,<sup>44</sup> the Missouri Supreme Court decided in Wilson v. State,<sup>45</sup> where a movant files an unverified pro se petition under Rule 29.15 or 24.035, but counsel timely files a properly verified amended motion subsequent to the filing of the unverified pro se

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<sup>41</sup> Scleeper v. State, 982 S.W.2d. 252 (Mo banc. 1998).

<sup>42</sup> Kilgore v. State, 791 S.W.2d at 395,

<sup>43</sup> Id.

<sup>44</sup> supra, and *citing to petitioner's case*,

<sup>45</sup> 813 S.W.2d 833, 834 (Mo. banc 1991)

motion, the purpose of the verification requirement is satisfied and the motion court has jurisdiction to consider the claims. Had appointed counsel acted as he professionally should have, Bruce would have had substantive review of his Sixth and Fourteenth Amendment claims regarding the adequacy of counsel in his death penalty case, but he was precluded from this review by counsel's failure to act properly. He never had his day in state court with regard to these issues.

Subsequently, on October 28, 1997, the General Assembly of Missouri made effective a law to provide post-conviction review under statute, by the enactment of Section 547.360, RSMo Cum. Supp. 1997. Unlike previous amendments to Missouri post-conviction rules as set forth in Supreme Court Rules (as opposed to the statute), there was no schedule with regard to limitations on applying to those, like Bruce, whose judgment and sentence, or whose appellate mandate, was issued long before the enactment of the statute. Therefore, a reasonable period of time should be afforded to those wishing to review this judgment and sentence under the procedures enacted by statute, which is the general principle not only in Missouri,<sup>46</sup> but as interpreted by statutory amendments to habeas corpus rules, such as the Anti-terrorism and Effective Death Penalty Act of 1996, amending provisions of 28 U.S.C. Section 2254.<sup>47</sup> Bruce's filing of his motion seeking post-conviction review under the newly enacted Section 547.360 well within a six month period, in fact 128 days (Bruce filed on December 31, 1988) from the effective date of the statute. It was filed within a reasonable

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<sup>46</sup> Swartz v. Swartz, 887 S.W.2d 644 (Mo. App., W.D. 1994),

<sup>47</sup> See Peterson v. Penskie, 107 F.3d 92, 93 (2nd Cir. 1997), (noting that since Congress failed to create a schedule for person convicted more than one year before the effective date of amendments creating a one year time period for federal habeas corpus petitions, such person were entitled to file within a reasonable time).

period of time so that he should have been able to avail himself of the review procedures, and finally receive review of, his constitutional issues in state court.

Therefore, unlike all others who have litigated the constitutional claims under 29.15, and then would seek to have a "second bite" of the apple by use of 547.360,<sup>48</sup> which principles of collateral estoppel and res judicata would clearly bar, Bruce has not yet had his first bite of the apple because of the jurisdictional bar to his 29.15 action created when counsel failed to verify and timely file an amended post-conviction motion which, as noted in Wilson v. State, supra, would have corrected the technical deficiency of the pro se motion not being verified. Section 547.360<sup>49</sup> would have given Bruce his first opportunity for substantive review in state court of these

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<sup>48</sup> Petitioner's case was joined by the Missouri Supreme Court with that of Neil Schleeper and Roy Roberts. Roy Roberts received full merits review of his post-conviction claims, Roberts v. State, 775 S.W.2d 92 (Mo. banc 1989), and Mr. Schleeper had the opportunity for review but by his own contumacious failure to appear, subjected himself to dismissal under the escape rule. State v. Schleeper, 806 S.W.2d 459 (Mo. App., E.D. 1991). Petitioner, on the other hand, was denied review due to appointed counsel's failure to properly act in filing a verified amended motion.

<sup>49</sup>The Missouri Supreme Court's decision denying petitioner's right to pursue his postconviction claim under Section 547.360 also denies petitioner the only meaningful and adequate postconviction remedy available to pursue his claims, particularly his claims of ineffective assistance of counsel on his direct appeal. Section 547.360 provides a means for challenging the effective assistance of counsel provided at both the underlying trial and on direct appeal, Section 547.360.1. This review was not available under Rule 29.15 at the time petitioner was required to file it. Rather, prior to the adoption of the statute, petitioner was limited to the inadequate remedy of a motion to recall the mandate, motions authorized only by case law, motions which neither provide for the appointment of counsel nor an evidentiary hearing. Such motions are inadequate to resolve claims of ineffective assistance of appellate counsel because the movant never receives an evidentiary hearing to show that the admissions of appellate counsel reflected ignorance and/or incompetence rather than conscious and reasonable strategy. In petitioner's case, his trial counsel also represented him on appeal from his conviction. There was not an independent review of the trial record by a different attorney on appeal as to any particular deficiencies or other plain error matters that may have been raised. Thus, Section 547.360 provided the only effective procedure available to petitioner to review Sixth and Fourteenth Amendment issues of effective assistance of appellate counsel, under Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821 (1985), yet the Missouri Supreme Court's ruling summarily denied petitioner that right as established in Section 547.360.

important constitutional claim.

Now, the Missouri Supreme Court has set Bruce's execution date with the belief that Bruce has exhausted his legal remedies. However, Bruce's execution would result in yet another "procedurally correct" but morally infirm execution of a man who asserts a credible claim of actual innocence of being the principal in a case where the more culpable defendant received life imprisonment. If you, Governor Carnahan, allow Bruce's execution at this point, you will allow Bruce to die without ever receiving a hearing in open court concerning the effectiveness of Bruce's trial counsel. Someone must stand up and declare that the substance of justice is more important than slavishly following technical legal procedures.

**V. Bruce and his co-defendant Willie Lockett were convicted in separate trials of the murder. Only Bruce received the death penalty. Although Willie actually stabbed the victim, only Bruce received the death sentence. In comparison to Willie's life sentence, Bruce's condemnation is unjustly disproportionate.**

We seemed to have come to a place in our history where clemency has become rare. Historically, executive clemency was not an uncommon occurrence. During the early-and-mid 1940s, 20-25% of all death penalties were commuted.<sup>50</sup> Clemency often served as the remedy to correct disproportionate sentences. As Governor Pat Brown stated, "I often used the issue of disparity of sentence to keep someone from the gas chamber. If two men committed the same crime but for reasons of age or attitude or even sheer chance were given different sentences, the unfairness alone seemed to me to be reason enough to commute."<sup>51</sup> Yet, since the Furman case, governors have commuted

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<sup>50</sup> Hugh Bedeau, "The Decline of Executive Clemency in Capital Cases"; 18 N.Y.U. L&Soc Change Review 255, 262 (1990-1991).

<sup>51</sup> Edmund (Pat) Brown, Public Justice, Private Mercy, p. 114, Weidenfeld and Nicolson, (1989).



only five death sentences due to sentencing disparity.<sup>52</sup>

However, our legal jurisprudence continues to expect governors to exercise executive clemency, especially if the totality of the circumstances renders the result inherently unfair. Yet, even though our jurisprudence does not expect clemency to be uncommon, recently it has become too uncommon. When justices of the Supreme Court have uttered such phrases as “heightened scrutiny” and “death is different”, they acknowledge the awesome nature of the death penalty.<sup>53</sup> With the decline in the use of the commutation power, we have lost an important means of insuring executions occur only when the process and its outcome are fair.<sup>54</sup>

Governor Carnahan, Bruce remains hopeful that you continue to understand that the clemency power in the chief executive will function as “an instrument of equity in the criminal law designed to promote the general welfare by preventing injustice.”<sup>55</sup> This exercise of equitable power by a chief executive has long been considered necessary and

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<sup>52</sup> *Beatrice Lampkin, Ohio*. Lampkin was convicted and sentenced to death for hiring a man to kill her abusive husband. Her sentence was commuted to life because the guman received a life sentence...*Harold Glen Williams, Georgia*. Williams was convicted and sentenced to death for the burglary and murder of his grandfather in 1980. An accomplice, Williams' half-brother, Dennis, was found guilty of voluntary manslaughter and sentenced to ten years. In commuting the sentence, the Georgia Board of Pardons and Parole cited the disproportionate sentence received.*Richard Gibson, Florida*. Gibson's death sentence was commuted because one of his accomplices was sentenced to life and two others were never prosecuted.*Freddie Davis, Georgia*. The codefendant of Freddie Davis, although equally culpable was sentenced to life.*Charles Hill, Georgia*. A codefendant of Charles Hill was sentenced to life despite the fact that his codefendant was the triggerman.Cited in Radelet, Michael L. and Zsembik, Barbara A.: “Executive Clemency in post-Furman Cases”, 27 *University of Richmond Law Review* 289 (1993).

<sup>53</sup> Palacios, Victoria J. : “Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice In Death Penalty Cases” ; 49 *Vanderbilt Law Review* 311 (1993).

<sup>54</sup> *Id.*

<sup>55</sup> Ammons, Linda L. : “Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women, 3 *J/L.&POL*”Y (1994), at 2.

desirable in the constitutional scheme of government and law.<sup>56</sup> Bruce's case, demonstrates an inherently unfair result. Two men convicted of the same crime; and although the strong evidence supports that Willie Luckett stabbed Marilyn Wilkins, Bruce faces the execution chamber while Willie serves a life without parole sentence.

This case cries out for clemency. For fairness to reign over this case, you must commute Bruce's sentence to the same life without parole sentence that his codefendant serves.

### **VI. Bruce's life has extraordinary value and merits clemency from you as Governor to spare his life.**

At the Potosi Correctional Center, Bruce serves in the Youth Enlightenment Program (YEP); YEP is basically what is commonly known as a "Scared Straight" program for troubled juveniles. Bruce is one of only twelve members of this organization. The group meets with juveniles who have been in trouble with the law, and are brought into Potosi for the YEP program. At the start of the session, YEP members introduce themselves and relate their life stories and explain the circumstances that led to their

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<sup>56</sup> Ammons, note 237 at 30-1.

Ammons further notes: "In the eighteenth century, William Blackstone commented on the need for clemency to mitigate the harshness of English law. The founding members of this republic also recognized how the strict rule of law could sometimes work a hardship. Alexander Hamilton gave this rationale for the clemency power, 'The criminal code of every country partakes so much of necessary severity that without an easy access to exception in favor of unfortunate guilt justice would mean a continuance too sanguinary and cruel.' Chief Justice William Howard Taft succinctly articulated the necessity of the clemency power: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy it has always been thought essential in popular governments...to vest in some authority other than the courts power to ameliorate or avoid particular criminal judgments."

[Footnotes omitted.]

incarceration. The introduction serves to demonstrate for the juveniles how their lives parallel the juveniles' lives. During the interactions, the juveniles learn what it's like to do hard time and are encouraged by men like Bruce to start making better choices in order to improve their prospects in life. Prospective members must apply for membership into YEP. The members maintain a rigorous selection criteria in order to ensure YEP's productivity.<sup>57</sup> No one forces the YEP members to be part of the group. Membership is an earned privilege. Bruce encourages troubled youths to lead a better life and make smarter choices. He has made the difference in at least one young man's life who will now not end up in the Missouri Department of Corrections because that young man met and interacted with Bruce Kilgore. It would be a tremendous waste for you as governor to allow Bruce Kilgore's voice to be silenced and not allowed to touch any more troubled youths. If you allow Bruce to live, Bruce will continue this ministry of helping to save our youth.

### Conclusion

Unjust death verdicts are not a freak act of nature, but grow out of weakness in the court system. There are common characteristics in wrongful murder cases: public pressure for conviction, little physical evidence, and unreliable confessions given under police pressure.<sup>58</sup> As the Illinois Supreme Court's Chief Justice stated, "Our faith in our criminal justice system...should not be viewed as an endorsement of the status quo."<sup>59</sup>

Someday this case will repose in the Missouri State Archives for those who

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<sup>57</sup> See the enclosed YEP application and interview questions attached in the appendix.

<sup>58</sup> "Executing the Innocent", editorial in the St. Louis Post-Dispatch, dated April 7, 1999.

<sup>59</sup> Id.

follow us to study. Future generations will have this to ponder. If the State proceeded to Bruce's trial believing Willie Lockett stabbed Marilyn Wilkins and Bruce Kilgore did not, how was it fair that Bruce Kilgore was sentenced to death and executed and Willie Lockett received life in prison and was not subjected to execution by the State?

Governor Carnahan, this clemency petition will also rest in the file maintained by the State Archives. Future generations will know that the basic question of whether it was fair for Bruce Kilgore to receive death while Willie Lockett received life was posed squarely to you. How will those who follow us judge your decision?

RESPECTFULLY SUBMITTED,

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