IN THE MATTER OF: LARRY GRIFFIN CP-10
Potosi Correctional Center
Mineral Point, Missouri 63660

TO: THE HONORABLE MEL CARNAHAN
Governor of the State of Missouri

APPLICATION FOR EXECUTIVE CLEMENCY AND/OR COMMUTATION OF A SENTENCE OF DEATH

KENT E. GIPSON #34524

MISSOURI CAPITAL PUNISHMENT
RESOURCE CENTER
5319 Rockhill Road
Kansas City, MO 64110
816/363-2795

Counsel for Applicant

IN THE MATTER OF: LARRY GRIFFIN, CP-10 Potosi Correctional Center Mineral Point, MO 63660	THIS IS A DEATH PENALTY CASE. EXECUTION IS IMMINENT.

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INTRODUCTION

Larry Griffin, by and through his attorney, respectfully submits this application, pursuant to Art. IV, Sec. 7 of the Missouri Constitution, and §§ 217.800 and 552.070 Mo. Rev. Stat., to the Honorable Mel Carnahan, requesting that he exercise his constitutional and statutory powers to commute his death sentence to the alternative sentence of life imprisonment without the possibility of parole for 50 years. In the alternative, Mr. Griffin requests that the Governor exercise his constitutional powers to grant executive clemency and order a new trial in this case because of substantial doubts that exist as to whether Mr. Griffin is guilty of the murder for which he is about to be executed.

Mr. Griffin's appeals are now almost entirely exhausted and he fully anticipates that his execution will be set by the Missouri Supreme Court within the next few weeks. Mr. Griffin respectfully requests an opportunity to present evidence and argument in support of this application to Governor Carnahan and the Board of Probation and Parole, or to a board of inquiry. Mr. Griffin also respectfully requests that Governor Carnahan stay his execution, as

contemplated by Rule 30.30, so this application will receive the full and fair review which it deserves.

The paramount argument that will be advanced in this application is the fact that Larry Griffin is actually innocent of the murder of Quintin Moss, which was committed in a drive-by shooting which occurred in the City of St. Louis, Missouri on June 26, 1980. In addition, this application will also address the fact that Mr. Griffin did not receive a fair trial, because he was not represented by experienced and competent counsel. As result, the system of justice has failed Mr. Griffin and he is about to be put to death for a crime he did not commit.

There is no dispute that the victim in this case, Quintin Moss, was a street-level drug dealer who was gunned down at the corner of Sarah and Olive in St. Louis, Missouri on June 26, 1980. Although this drive-by shooting was accomplished in front of numerous witnesses, only one eyewitness to the offense came forward and testified at trial, a man named Robert Fitzgerald. Fitzgerald, an Irishman from Boston, Massachusetts, is, to say the least, an interesting character.

Robert John Fitzgerald is a career criminal and convicted felon, with convictions dating back to the early 60's. He found himself in St. Louis on that fateful day in 1980 as result of the fact that he had been placed in the Federal Witness Protection Program because he had become a government witness in a case against several individuals in the Boston area in a case involving

racketeering charges and the murder of a policeman. (Hrg. tr. at 5).

After purportedly witnessing the drive-by shooting of Quintin Moss, Fitzgerald, although not wanting to get involved, told police that he saw three black males in the car perpetrate the drive-by killing of Mr. Moss. Mr. Fitzgerald was taken to the police station where he picked out a photo of Larry Griffin as one of the men he believed was involved in the shooting. Based upon this photo identification alone, Mr. Griffin was charged with capital murder.

Larry Griffin was arrested for this murder a few months later and the case proceeded to trial in June of 1981. Mr. Griffin's family retained a young attorney named Frederick Steiger to represent him at trial. Mr. Steiger, who was just a couple of years removed from law school, had never before tried a murder case, let alone a case involving the state's ultimate penalty. Mr. Steiger has made it known to present counsel that he never expected Mr. Griffin to be convicted, much less sentenced to death, because he viewed the prosecution's case as extremely weak and questionable.

At trial, the bulk of the prosecution's case against Mr. Griffin was the testimony of Mr. Fitzgerald, in which he testified regarding his positive photo identification. Mr. Fitzgerald then positively identified Mr. Griffin in court as one of the men he observed participating in the drive-by shooting of Mr. Moss. Mr. Fitzgerald was never cross-examined about the reason he was in the

witness protection program or any other factors beyond the fact that he had many prior criminal convictions. It is also interesting to note that at the time of trial Mr. Fitzgerald was being held in jail by St. Louis County authorities on numerous felony credit card fraud charges. After Fitzgerald testified, the St. Louis County prosecutor's office marched him into court, sentenced him to time served, and he was released from jail the very day Larry Griffin was convicted for capital murder on June 26, 1981. (See Exh. 6).

Mr. Griffin's inexperienced trial counsel made numerous mistakes during the trial, which will be outlined in greater detail below. However, undersigned counsel believes that trial counsel's greatest blunder was his decision to rely upon an alibi defense without first fully investigating the particulars of that defense. As result, the alibi defense completely blew-up in the defense's face, and in undersigned counsel's opinion, led the jury to convict Mr. Griffin on shaky evidence.

Over the next several years, Mr. Griffin's appeals progressed in a tedious and uneventful manner. Undersigned counsel first became involved in the case in 1991. Present counsel, after reviewing some of the record in the case, was immediately appalled by the poor quality of representation that Mr. Griffin had received not only at trial, but during his post-conviction state and federal appeals. Mr. Griffin's previous post-conviction counsel was permitted to withdraw, and undersigned counsel was appointed to represent him in 1991. For the first time, a thorough

investigation was conducted. In the Spring of 1993, two significant events occurred which has led counsel to believe that Mr. Griffin is actually innocent of the murder of Quintin Moss.

First, undersigned counsel received a phone call in April of 1993 from a man who identified himself as Kerry Caldwell. Mr. Caldwell informed counsel that he was a federally protected witness in an ongoing federal criminal trial which was taking place in St. Louis, Missouri at that time. The federal trial in which Mr. Caldwell was a witness was United States v. Jerry Lewis-Bey, a racketeering trial that lasted for several months during 1992 and 1993 in the St. Louis Federal Court before the Honorable George Gunn. Mr. Caldwell informed counsel that he had knowledge of the murder of Quintin Moss and knew that Larry Griffin was innocent of that offense.

Undersigned counsel was initially skeptical of Mr. Caldwell's story. However, counsel then proceeded to conduct an independent investigation into Mr. Caldwell's story and the circumstances of how he became a federally protected witness and why he came forward in this case. The following facts were revealed to counsel.

The federal racketeering trial in the Lewis-Bey case, commonly referred to in the media as the Moorish Temple trial, involved allegations that an inner-city St. Louis drug gang controlled by black Muslims were involved in a major drug dealing operation from the late 70's to the late 80's, in which they committed numerous murders. Each of these murders were obviously drug related. The star witness for the prosecution in the Moorish Temple case was a

man named Ronnie Thomas-Bey. Undersigned counsel learned through the record at Mr. Griffin's trial that the automobile used in the 1980 drive-by shooting of Quintin Moss was owned by the same Ronnie Thomas-Bey. (Exh. 3).

Mr. Griffin's counsel and other representatives thereafter interviewed Mr. Caldwell at greater length, and the following story of the Quintin Moss murder emerged. Quintin Moss was a small time drug dealer who was affiliated with Dennis Griffin, who was Larry Griffin's brother, in the drug trade. Dennis Griffin was murdered on January 1, 1980 behind the home of Quintin Moss. Mr. Caldwell and Dennis Griffin's other drug associates believed that Quintin Moss had murdered Dennis Griffin. As result, Mr. Caldwell and his associates decided to kill Mr. Moss to retaliate for the murder of Dennis Griffin.

On the afternoon of June 26, 1980, Kerry Caldwell observed Quintin Moss on the corner of Sarah and Olive Streets in St. Louis, Missouri. He immediately paged three of his associates, Daryl Smith, Humphrey Scott and Ronnie Parker. Shortly thereafter, those three individuals drove by that scene and killed Mr. Moss by shooting him numerous times. Most importantly, Caldwell has stated under oath that Larry Griffin took no part in the murder of Quintin Moss on that afternoon. (See Exh. 1).

Also during the spring of 1993, undersigned counsel was able to locate Robert John Fitzgerald, who not surprisingly was, and still is, incarcerated in the State of Florida on a shoplifting offense. Mr. Fitzgerald was located, after an exhaustive search by

an investigator retained by Mr. Griffin from the Boston, Massachusetts area, Terrence McDonough. Mr. McDonough interviewed Mr. Fitzgerald at length and discovered that Mr. Fitzgerald perjured himself when he positively identified Mr. Griffin in court as being one of the perpetrator's of the Quintin Moss shooting. In addition, although Fitzgerald still insists his photo identification of Mr. Griffin was truthful and accurate, Fitzgerald did state that the police suggested to him that he pick out Mr. Griffin's photo before he did so. (See Exh. 2). This suggestive police identification procedure obviously taints the reliability and credibility of the out-of-court photo identification of Mr. Griffin by Mr. Fitzgerald.

Mr. Griffin, through undersigned counsel, presented this newly discovered evidence regarding Caldwell and Fitzgerald in his federal habeas corpus action in the federal courts. Mr. Griffin alleged that it would be unconstitutional to permit him to be executed because of the substantial evidence that he is actually innocent of the crime for which he was sentenced to death. Unfortunately for Larry Griffin, the legal landscape supporting such a claim took a turn for the worse in 1993 when the United States Supreme Court decided Herrera v. Collins, 113 S. Ct. 853 (1993). Although the true meaning of Herrera remains unresolved, Herrera makes it clear, that at the very least to be entitled to relief on a free-standing claim of actual innocence, the claim must be truly extraordinary and persuasive. In finding that Mr. Griffin was not entitled to a new trial under Herrera, the federal district

court astonishingly found that neither Mr. Caldwell nor Mr. Fitzgerald's recent statements and testimony were sufficiently credible to justify a new trial.

A primary factor motivating the Supreme Court to erect an extraordinarily high standard for actual innocence to justify court intervention, was its view that executive clemency is an adequate safety valve for the truly innocent. Executive clemency powers, unlike those of the federal courts, are not restricted by unduly harsh and uncompassionate rules, which in counsel's view and in the view of Justice Blackmun, have been erected by the Supreme Court with the expressed purpose of denying relief to death row inmates. Herrera, 113 S. Ct. at 881 (Blackmun, J., dissenting).

Larry Griffin and his undersigned counsel steadfastly believe that a thorough examination of all the facts in this case will reveal that Larry Griffin is actually innocent of the murder for which he has been condemned to die. The courts have turned a deaf ear to these claims. Therefore, Larry Griffin's fate lies with the powers of Governor Carnahan under the executive clemency authority vested in him by Missouri statutes and the Missouri Constitution. Larry Griffin, therefore, respectfully requests that the Honorable Governor Carnahan, after a full and thorough review of all the facts surrounding his case, commute his death sentence to a sentence of life imprisonment without the possibility of parole for 50 years; or in the alternative, grant him clemency by overturning his capital murder conviction subject to the discretion of the authorities to seek a second trial in the case.

PROCEDURAL HISTORY

In 1981, Larry Griffin was convicted and sentenced to death for the June 26, 1980 drive-by shooting of Quintin Moss. His conviction and death sentence were affirmed by the Missouri Supreme Court in State v. Griffin, 662 S.W. 2d 854 (Mo. banc 1983), cert. denied, 469 U.S. 873 (1984). Thereafter, the Missouri Court of Appeals affirmed the circuit court's denial of petitioner's post-conviction motion pursuant to Missouri Supreme Court Rule 27.26 in Griffin v. State, 748 S.W. 2d 756 (Mo. App. 1988).

Mr. Griffin next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri. That court originally denied relief without a hearing on July 16, 1990. On October 11, 1991, the Eighth Circuit initially affirmed the district court's denial of habeas relief in Griffin v. Delo, 946 F.2d 1356 (8th Cir. 1991); then later vacated that opinion on rehearing and remanded the case back to the district court for further proceedings because of the incompetence of previous federal habeas counsel in failing to recognize and raise several constitutional claims. Griffin v. Delo, 961 F.2d 793 (8th Cir. 1992). After remand, present counsel was appointed, and second,[1] third, and fourth amended petitions for writ of habeas corpus were filed. The Federal District Court, the Honorable Edward L. Filippine presiding, conducted a limited evidentiary hearing on October 6, 1993. On October 25, 1993 the

[1]Judge Filippine denied applicant's second amended petition without a hearing in a memorandum and order dated July 2, 1993.

district court entered a judgment and order dismissing Mr. Griffin's habeas corpus petitions; the third amended petition without prejudice, but the fourth amended petition with prejudice.

On February 24, 1994, the Eighth Circuit remanded the case in order for the district court to address the merits of petitioner's third amended petition. Thereafter, the district court entered a memorandum and judgement dismissing petitioner's third amended petition with prejudice on April 25, 1994.

On August 23, 1994, without permitting Mr. Griffin or his counsel to brief any of the issues, the Eighth Circuit summarily affirmed the district court's denial of all relief. Rehearing and rehearing *en banc* were denied by the Eighth Circuit, over the dissents of Chief Judge Arnold, Judge McMillian and Judge Wollman, in an order dated November 21, 1994. See Griffin v. Delo, 33 F.3d 895 (8th Cir. 1994). The United States Supreme Court thereafter denied petitioner's timely petition for a writ of certiorari on May 15, 1995. Griffin v. Delo, __ U.S. __ (1995).

Mr. Griffin does intend to seek further judicial review of his conviction and death sentence. However, because of the strict procedural rules governing such a review, it is unlikely that any court will agree to hear the merits of any future appeal. Mr. Griffin, through his attorney, will keep the Governor apprised of any legal developments in the courts in this case.

REASONS JUSTIFYING EXECUTIVE CLEMENCY

I. NEWLY DISCOVERED EVIDENCE RAISES SUBSTANTIAL DOUBT AS TO WHETHER LARRY GRIFFIN IS GUILTY OF THE MURDER FOR WHICH HE IS ABOUT TO DIE.

The impending execution of Larry Griffin does not present the typical issues that are usually presented in clemency applications in death penalty cases. In most death penalty cases, the evidence of the prisoner's guilt is strong, and the primary issue presented for judicial and executive review is the legal and moral propriety of the sentence of death in a particular case. Although many condemned prisoner's often go to their deaths professing their innocence, there is an extraordinary amount of evidence in Larry Griffin's case to indicate that the State of Missouri may put to death an innocent man for a murder he did not commit. In the paragraphs below, Mr. Griffin will set forth in great detail the facts surrounding his case, including the facts presented at his trial and the newly discovered evidence which casts significant doubt as to whether Mr. Griffin is guilty of the murder of Quintin Moss. Mr. Griffin strongly believes that even the most critical and skeptical observer of all of this evidence would entertain serious doubts regarding whether he is guilty of the murder of Quintin Moss.

A. The facts surrounding the shooting of Quintin Moss and Mr. Griffin's 1981 trial.

Quintin Moss died of numerous gunshot wounds which he received at approximately 3:30 p.m. on June 26, 1980. Mr. Moss was gunned down on the corner of Sarah and Olive in St. Louis, Missouri on that date in front of numerous witnesses.

Once the police arrived at the scene of the shooting, as is not uncommon in inner-city criminal investigations, the police had difficulty finding anyone who would admit seeing anything. Since the details of the crime were sketchy and because of the lack of cooperative witnesses, the police immediately focused on Larry Griffin and other members of his family as suspects, because of the fact that they knew that Quintin Moss had been a suspect in the murder of Dennis Griffin, Larry Griffin's brother, which had occurred on or about January 1, 1980.

After arriving at the scene, the police encountered a white male who was later identified as Robert John Fitzgerald. At that time, Mr. Fitzgerald was living under an alias provided to him because he was a federally protected witness. Mr. Fitzgerald was taken to the police station and shown a group of five photos of various suspects. Mr. Fitzgerald, at that time, purportedly positively identified a photograph of Larry Griffin as being one of the three perpetrators of the drive-by shooting.

Later that same day, the St. Louis Police Department located the vehicle used in the drive-by shooting of Quintin Moss, a late model Chevrolet. The police learned that the car was owned by an individual named Ronnie Thomas. (See Exh. 3). Inside the trunk of the vehicle the murder weapons were found, as well as a red baseball cap and other items of physical evidence. The car and the various items were dusted for fingerprints, none of which were identified as belonging to Larry Griffin or any other suspect in the case. (Trial tr. at 283). Also located inside the vehicle was

a receipt from a court proceeding with the name of Reginald Griffin, who was Larry Griffin's nephew.

The police investigation also uncovered another witness, a St. Louis police officer named Andre Jones. Mr. Jones stated that on the afternoon of the murder, he saw three individuals coming out of a house in the City of St. Louis not too far from where the murder occurred, one of whom was carrying what appeared to be shotguns. (Trial tr. 193-201). One of the men was wearing a red baseball cap. Officer Jones later testified that one of the men was known to him to be Larry Griffin. However, Mr. Jones described the man he identified as Larry Griffin as having facial hair, whereas eyewitness Robert Fitzgerald testified that the man he identified as Larry Griffin was clean shaven. (Trial tr. 205-206, 116).

The police were also aware of the fact that a similar drive-by shooting had occurred at the same location, in which Quintin Moss was present, about six weeks prior to June 26, 1980. A couple of hours after this earlier shooting, the police chased and apprehended Larry Griffin and his nephew Reginald Griffin in a car which they believed matched the general description of the one used in the earlier drive-by shooting. However, no weapons were found on either of the Griffins and no charges were ever filed in connection with this incident. However, evidence of this previous incident was presented at trial. (Trial tr. 243-265).

Based upon Fitzgerald's photo identification and other circumstantial evidence, Larry Griffin was charged with offense of capital murder for the shooting of Quintin Moss. He was arrested

and jailed a few weeks later. Mr. Griffin's family retained a young attorney named Frederick Steiger to represent him at trial.

Mr. Steiger had been out of law school approximately two years at the time he was retained and during that time engaged in a general criminal law practice. Mr. Steiger has indicated to undersigned counsel that Mr. Griffin's case was the first murder trial he had defended in his career. Prior to that time, he had tried a few criminal cases involving less serious offenses. Mr. Steiger had never before been involved in the litigation of a death penalty trial.

In preparing for trial, Mr. Steiger took the deposition of Robert Fitzgerald. During that deposition Mr. Steiger did learn of Mr. Fitzgerald's numerous criminal convictions, the fact that he had pending felony credit card fraud charges against him, and the fact that he was a federally protected witness. (See Exh. 15). However, Mr. Steiger inexplicably failed to conduct further inquiries or investigations into the reasons Fitzgerald was placed in the Federal Witness Protection Program. In addition, Mr. Fitzgerald steadfastly denied that he had been offered any promises of leniency or other favorable plea bargains on his pending charges in exchange for his testimony against Mr. Griffin. (Trial tr. at 143-145).

Upon speaking to members of Mr. Griffin's family, Mr. Steiger developed the strategy to present an alibi defense at trial, in addition to attacking the reliability and credibility of the state's evidence and only eyewitness. The substance of the alibi

was testimony from the boyfriend of Mr. Griffin's sister regarding his belief that on the afternoon of the murder, Larry Griffin was with him at his sister's house selling a boat, which the boyfriend, a man named Gilbert Greenlee, had advertised for sale in TRADING TIMES magazine. Mr. Steiger has admitted to Mr. Griffin's present counsel that he was extremely confident that he would win an acquittal for his client in the guilt stage of trial, and therefore did no investigation or preparation for the death penalty phase.

Mr. Griffin's trial commenced in June of 1981 in the City of St. Louis. The prosecutor on the case was Gordon Ankney, an experienced and skilled prosecutor with a great deal of death penalty trial experience.

In the prosecution's case-in-chief, the prosecution presented evidence from the victim's mother regarding the fact that the victim had received anonymous telephone threats from an unidentified black male just prior to the murder. (Trial tr. at 45-61). The prosecution also presented the testimony of Police Officer Jones regarding the fact, that in his belief, he saw the defendant along with a couple of other black males, coming out of a house and one of the men was carrying a shotgun on the afternoon of the murder. The prosecution also introduced evidence surrounding the murder of Dennis Griffin, and the fact that the police believed that Quintin Moss was a suspect in the Dennis Griffin homicide.

The prosecution also introduced evidence regarding a similar drive-by shooting which took place May 13, 1980, which included

police hearsay testimony regarding one witness' account regarding the description of the auto used. (Trial tr. 243-246). Evidence was also presented that Quintin Moss was present on that corner when this previous drive-by shooting took place. The prosecution also offered evidence through the testimony of certain police officers that Larry Griffin and his cousin Reginald Griffin were arrested after a brief police chase in a car that matched the general description of the auto used in this previous shooting on that same afternoon. (Trial tr. 247-266). Reginald Griffin was arrested on other charges at that time, but because no weapons were found, and no credible evidence linked them to the May 13th drive-by shooting, they were never charged with that offense.

The prosecution's only direct evidence of Mr. Griffin's guilt was presented through the eyewitness testimony of Robert Fitzgerald. Fitzgerald told the jury that he had given a friend and his daughter a lift to the area of the shooting on the afternoon in question. His car had broken down on the corner of Sarah and Olive and he was attempting to fix it when the shooting occurred. (Trial tr. 71-79).

Mr. Fitzgerald testified that he observed three black males in a late model car drive-by and shoot Quintin Moss numerous times. He stated he got a good look at the person in the passenger side of the front seat and later identified him from the aforementioned photo array as Larry Griffin. (Id. at 93). Fitzgerald then identified Mr. Griffin in court as the person he observed shooting Quintin Moss from the front passenger seat. He could not testify

about any specific characteristics about the individual he identified as Mr. Griffin other than he was clean shaven, medium complected, and shot at the victim through the window of the car with his right hand. (Id. at 113-118).

After the prosecution rested, the defense put on some medical testimony regarding the fact that the defendant had seriously injured his left arm by breaking a plate-glass window a few weeks before the shooting. (Trial tr. 268-277). However, the significance of this evidence was never explained to the jury because trial counsel neglected to put on available evidence that the defendant is lefthanded. In addition, this evidence was of little or no value in light of the testimony of Fitzgerald that the person he identified as Larry Griffin shot the victim righthanded.

Defense counsel at trial then presented the aforementioned alibi testimony, primarily through the testimony of Gilbert Greenlee. Mr. Greenlee testified that on June 26, 1980 at approximately 4:00 p.m. he and Larry Griffin sold a boat to a white male at Mr. Griffin's sister's residence. (Trial tr. at 329-360). Since it was a cash transaction, he did not know the man's name, but did testify that he had placed an ad in the TRADING TIMES magazine regarding the boat and then cancelled the ad the day after he sold it to the unknown white male. (Id. at 354). Mr. Griffin's trial counsel, Frederick Steiger, did not make any attempt to verify this alibi through records or other testimony from representatives of TRADING TIMES magazine.

The prosecution, however, exercised greater diligence. In rebuttal testimony, the prosecution called an employee of TRADING TIMES magazine who testified that the ad in question was in fact cancelled during business hours on June 26, 1980, the date of the murder; thus indicating that the sale of the boat actually took place the day before the murder occurred. (Trial tr. at 374). This rebuttal testimony, which was the last evidence heard by the jury before beginning guilt-phase deliberations was devastating to Mr. Griffin's defense. This rebuttal evidence clearly suggested that Mr. Griffin's defense had fabricated this alibi and, in undersigned counsel's view, led them to convict the defendant on the basis of prosecution evidence which would not have ordinarily sustained the state's burden of proving guilt beyond a reasonable doubt.

Not surprisingly, the jury returned with a guilty verdict for the offense of capital murder. Mr. Griffin's trial attorney, Frederick Steiger, has since indicated he was devastated and totally caught off guard by the jury's guilt phase verdict. As result, he presented absolutely no evidence and very little argument during the penalty phase. (Trial tr. at 478-480). Thereafter, the jury returned a death verdict after penalty phase deliberation.

B. <u>The newly discovered evidence of innocence</u>.

1. <u>The recantation of the identification testimony of Robert Fitzgerald</u>.

After a nearly six month search, Boston investigator Terrence McDonough, located Robert John Fitzgerald in a Florida prison. It

appears that Mr. Fitzgerald has not changed his ways since Mr. Griffin's 1981 trial. While incarcerated in Florida, Fitzgerald told Mr. McDonough that he had committed perjury when he positively identified Larry Griffin in court as the person he saw shoot Quintin Moss. (Exh. 2). Fitzgerald further testified that, although he still stands by his photo identification, the police told him that Larry Griffin was involved before showing him the photo that he picked out at the police station. Mr. Fitzgerald later testified regarding these facts under oath in the evidentiary hearing before Judge Filippine on October 6, 1993. (Hearing tr. at 20, 36).

In regard to the photo identification procedures, Fitzgerald testified that he was taken down to the police station shortly after the murder occurred. One of the police officers then threw a photograph which later turned out to be that of Larry Griffin in front of Fitzgerald and told him "we know that this man is involved." (Hrg. tr. at 19-23). Thereafter, the same police officer showed him a photo array with five photographs, one of which was the previously mentioned photo of Larry Griffin. Not surprisingly, Mr. Fitzgerald picked out Larry Griffin's photo and at that time made a positive photo identification of Larry Griffin as being one of the men he observed shooting Quintin Moss. (Id. at 19).

Had the jury heard the circumstances surrounding this photo identification procedure, Mr. Griffin believes that the credibility of Fitzgerald's identification would have been severely undermined

and could have very well led to his acquittal. The suggestive circumstances surrounding this photo ID could have given trial counsel additional ammunition in which to attack Fitzgerald's credibility and the reliability of his out-of-court identification of Larry Griffin.

More importantly, Fitzgerald completely recanted his positive in-court identification of petitioner during the trial. Fitzgerald has testified under oath that he could not identify Larry Griffin in-court as one of the persons he saw shoot Quintin Moss. Nevertheless, he identified him anyway. This testimony by Fitzgerald at Mr. Griffin's trial can only be described as plain and simple perjury.

Fitzgerald's recent revelations would have totally destroyed his credibility in the eyes of the jury. In fact, if he had told the truth before and during Mr. Griffin's trial, Mr. Griffin would have very likely been entitled to a directed verdict of acquittal or would not have charged at all due to insufficient evidence. In any event, Mr. Griffin believes that no jury would have convicted him if Fitzgerald would have testified truthfully regarding his out-of-court and in-court identifications in this case.

2. Kerry Caldwell.

One of the actual perpetrators, who acted as the look-out man during the drive-by shooting of Quintin Moss, came forward in 1993 and testified under oath that Larry Griffin was not involved in the shooting of Quintin Moss. (See Exh. 1). Ironically, Caldwell, like Fitzgerald in 1980, was a federally protected witness. As

previously noted, Mr. Caldwell initially contacted undersigned counsel in April of 1993 and provided information about his knowledge of the murder of Quintin Moss which completely exonerated Mr. Griffin of any involvement. Caldwell later provided sworn affidavits and sworn testimony before the federal district court in support of Mr. Griffin's petition for writ of habeas corpus. (Hrg. tr. at 66-129).

Kerry Grant Caldwell was 16 years old at the time Quintin Moss was killed. By that young age Caldwell was already heavily involved in the inner-city drug trade. (Id. at 66-68). Caldwell was associated with a group of drug dealers led by Dennis Griffin, who was Larry Griffin's brother. Larry Griffin was not involved in his brother Dennis' drug activities. (Id. at 78).

On or about January 1, 1980, Dennis Griffin was shot to death outside the residence of Quintin Moss. Quintin Moss was detained for questioning by the police for Dennis Griffin's murder, but was never charged and was soon thereafter released. However, Caldwell testified that he and other members of Dennis Griffin's drug gang believed that Quintin Moss had murdered Dennis Griffin. (Id. at 73). As result, Mr. Caldwell and his associates made a pact that they would kill Quintin Moss to retaliate for Dennis Griffin's at their first available opportunity. (Id. at 73-75).

This first opportunity probably came on May 13, 1980 when the other drive-by shooting occurred. However, Mr. Caldwell had no knowledge of the May 1980 drive-by shooting at the corner of Sarah and Olive.

Caldwell did witness and take part in the June 26, 1980 drive-by shooting in which Quintin Moss was killed. Caldwell has testified under oath that he observed Moss on the corner of Sarah and Olive that afternoon dealing drugs. Caldwell immediately paged Daryl Smith. (Hrg. tr. 75-76). A few minutes thereafter, Daryl Smith, along with Humphrey Scott, and Ronnie Parker drove to Sarah and Olive in a car owned by Ronnie Thomas-Bey and shot Quintin Moss to death.

The fact that Thomas-Bey's car was used in this drive-by shooting was significant and remarkable because of the uncontradicted fact that Thomas-Bey also became a federally protected witness, along with Caldwell, in the federal racketeering trial of United States v. Jerry Lewis-Bey, et al. (See Exh. 4). Thomas-Bey and Caldwell both testified for the government in the Lewis-Bey trial regarding numerous drug related murders that they personally carried in furtherance of a drug dealing enterprise. (Hrg. tr. 78, 82-87). As direct result of Caldwell and Thomas-Bey's testimony, many of the defendants in that case were convicted and sentenced to life without parole in federal prison. Appeals in these cases are currently pending by the defendants in the Eighth Circuit Court of Appeals in United States v. Darden, et al, No. 93-3386.

Mr. Caldwell later testified that he had heard from some of the shooters that they had ditched the car in the Laclede town area of St. Louis city with the guns still inside. Caldwell's descriptions of the weapons used are identical to those found by

the police in Thomas-Bey's abandoned car. (Trial tr. at 163) (Hrg. tr. at 77).

While Fitzgerald's recantation severly damaged the viability of the prosecution's evidence of guilt, Caldwell's testimony directly exonerates Larry Griffin from any involvement in the murder. When viewed together, it is beyond comprehension that based upon Caldwell and Fitzgerald's recent statements that there is not a very serious question whether Larry Griffin is guilty of the murder of Quintin Moss.

3. Jimmy Massey.

Another eyewitness to the murder of Quintin Moss has been located, who did not testify in the October 1993 hearing, a man named Jimmy Massey. Massey has stated in a sworn affidavit that he was walking on the corner of Sarah and Olive on June 26, 1980 when he observed the drive-by shooting of Quintin Moss. (Exh. 5). Massey stated that he saw three men in a blue car drive by and shoot Quintin Moss numerous times. Although Mr. Massey stated that he did not recognize any of the three men who killed Mr. Moss, Massey can unequivocally state that Larry Griffin was not among them because he knew Larry Griffin from the streets.

Mr. Massey also stated that he knew Quintin Moss because they grew up in the same neighborhood. Mr. Massey's description of the shooting is consistent with the account given by Kerry Caldwell, as well as much of the uncontroverted evidence presented at trial. These corroborating facts include the victim's address, the fact that at least two different guns were used including an automatic

weapon, and the fact that an innocent bystander had been shot in the buttocks. (Trial tr. at 46, 65). The federal courts, who refused to grant Mr. Griffin a new trial on the basis of the other new evidence, did not hear from Mr. Massey.[2] Mr. Massey's eyewitness account of the murder, which also exonerates Mr. Griffin, would have significantly bolstered the credibility of Kerry Caldwell, as well as the recantation of Robert Fitzgerald. When viewed in its entirety, the recent statements of these three individuals present a very strong case that the State of Missouri is seeking to execute the wrong man for the murder of Quintin Moss. Since the judiciary has failed to intervene to prevent this miscarriage of justice, Governor Carnahan is Larry Griffin's last hope.

II. THE JUDICIAL REVIEW OF MR. GRIFFIN'S CONVICTION HAS BEEN INADEQUATE, DEFICIENT IN NUMEROUS RESPECTS, AND HAS UTTERLY FAILED TO REMEDY THE GLARING INJUSTICES IN HIS CASE.

There has been a disturbing trend in recent federal habeas corpus jurisprudence. In numerous cases, the federal courts have turned a deaf ear to several inmates' compelling claims of actual innocence, thus leaving the difficult decisions of whether a prisoner who has a valid claim of actual innocence should die to the chief executives of the states involved. The United States Supreme Court in Herrera v. Collins, 113 S. Ct. 853 (1993), held that federal courts cannot intervene to grant a death row inmate a

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[2]The affidavit of Massey has been recently presented to Judge Filippine in a motion to reexamine applicant's actual innocence claim pursuant to Fed. R. Civ. Pro. 60(b), which was filed on April 25, 1995. (See Exh. 14).

new trial on the basis of a free-standing claim of actual innocence. In reaching this conclusion, the Supreme Court noted that executive clemency, which is available in every state which has a death penalty, is the only available forum for inmates to assert their claims of innocence prior to execution.

Larry Griffin's claim of actual innocence has been repeatedly turned aside by the federal courts because under Herrera, it is practically impossible for a death row inmate to receive relief from the federal courts on a free-standing claim of actual innocence. Unlike the case of Lloyd Schlup, Larry Griffin did not have any underlying constitutional violations which were not reviewed under the actual innocence exception. Therefore, actual innocence cannot act as a gateway to review other constitutional claims because Larry Griffin claimed is that he is actually innocent without the presence of any accompanying or corollary constitutional violations.

In Schlup v. Delo, 115 S. Ct. 851 (1995), the Supreme Court noted the distinction between free-standing Herrera claims and the "gateway innocence" claims presented in Schlup's case. Although they didn't expressly define the standard of review for pure Herrera claims, the court noted that for a petitioner to prevail on a Herrera claim, he must meet an extraordinarily high burden, that for all practical purposes would be all but impossible for a habeas petitioner to meet. Id. at 861-862.

Therefore, Larry Griffin was placed in a tremendous legal bind as result of the Supreme Court opinions in Herrera and Schlup.

Because Larry Griffin had no independent constitutional violation flowing from his claim of actual innocence, he could not avail himself of the more lenient Schlup standard where actual innocence can act as a gateway to review otherwise barred constitutional claims. Since his actual innocence claim was a free-standing one like Herrera's, the standard of review was so rigid that no habeas petitioner, including Larry Griffin, could possibly meet it. Therefore, Larry Griffin's actual innocence claim has been turned away by the federal courts.

The opinions in Herrera and Schlup, read in conjunction with each other, appear to create a classic "catch-22" situation which was recognized by former Justice Harry Blackman. As Justice Blackman so eloquently stated:

> Having adopted an 'actual innocence' requirement for review of abusive, successive, or defaulted claims, however, the majority would now take the position that 'the claim of actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. In other words, having held that a prisoner who is incarcerated in violation of the constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.

Herrera, 113 S. Ct. at 880-881 (Blackman, J., dissenting).

The judicial review of Larry Griffin's case embodies the fears of Justice Blackman's dissent in which he warned against apparent

"result oriented" jurisprudence emerging in capital habeas corpus litigation. An examination of the federal court's treatment of Larry Griffin's actual innocence claims gives a name and a face to Justice Blackman's chilling warning about the hollowness of current federal habeas review of convictions and death sentences.

In federal district court, petitioner presented the testimony of Robert John Fitzgerald, Kerry Caldwell, Terrence McDonough, and Frederick Steiger in the October 6, 1993 evidentiary hearing on the issue of actual innocence. In that hearing, Fitzgerald reiterated that he perjured himself when he positively identified Larry Griffin in court and Caldwell provided direct exonerating testimony based upon his eyewitness account of the shooting of Quintin Moss. Nevertheless, Judge Filippine entered an order denying habeas relief, finding that neither Fitzgerald's or Caldwell's testimony were sufficiently credible to justify habeas corpus relief.

Larry Griffin, through undersigned counsel, has attempted to point out the absurdity of this finding in both the Eighth Circuit and the United States Supreme Court. Both of these courts, however, have turned a deaf ear to these claims. In fact, the Eighth Circuit did not even permit Larry Griffin, through counsel, to brief and argue the merits of his actual innocence claim before summarily rubber-stamping Judge Filippine's findings. (See Exh. 9).

If given a full and fair opportunity in the courts, counsel would have pointed out the fallacy in Judge Filippine's findings which are ludicrous as a matter of common sense. In regard to

Robert Fitzgerald, it is clear he had much to gain by falsely identifying Larry Griffin during his trial. Fitzgerald was incarcerated at the time he testified against Larry Griffin on several felony credit card charges. As soon as Larry Griffin was convicted, the St. Louis prosecutors marched him into court, agreed to let him be sentenced to time served and he was released from jail. (Exh. 6). Obviously, Fitzgerald had much to gain by falsely identifying Larry Griffin to the satisfaction of the prosecutors, namely his release from jail.

In contrast, Robert Fitzgerald had absolutely nothing to gain by coming forward some twelve years later and admitting he committed perjury in Larry Griffin's 1981 trial. The critical question becomes which statement is more credible: the 1981 trial testimony in which Fitzgerald felt pressured to identify Mr. Griffin to get his deal to be released from jail; or his 1993 recantation in which he exposed himself to potential perjury charges by recanting his in-court identification. The answer is obvious, the 1993 recantation, under any objective view of the totality of the circumstances, is the statement of Fitzgerald that has the most credibility. By analogy, under common law and most state hearsay rules, statements against penal interest are viewed to have enhanced credibility rather than diminished credibility as Judge Filippine apparently found under these circumstances. Therefore, petitioner believes that Judge Filippine's finding that Fitzgerald's 1993 statements lack credibility is totally without

foundation and should be ignored by the Governor in reviewing this application.

Similarly, Judge Filippine found that Kerry Caldwell's testimony exonerating Larry Griffin lacked credibility.[3] This is also an extremely ironic and perverse conclusion in light of the fact that Caldwell had previously testified in the very same court for the federal government in the prosecution of the Moorish Temple defendants. Based upon Caldwell's testimony, several men are serving sentences of life without parole in the federal penitentiary. Recently, the St. Louis prosecutors have filed state capital murder charges against many of the Moorish Temple defendants and have indicated that they will seek the death penalty against each of them for drug related murders committed during the 1980's. To attempt to obtain death sentences against these individuals, the prosecution intends to use Kerry Caldwell as a prosecution witness in their upcoming state court trials.

If any of the Moorish Temple defendants are sentenced to death and later come before the federal courts for judicial review, will those very same courts overturn their death sentence because Caldwell lacks credibility? The court's treatment of the Caldwell credibility issue is a striking example of a perverse double standard that appears to exist in criminal cases. If a convicted felon gives testimony that helps the prosecution or the government,

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[3]One of the primary factors relied on by Judge Filippine in finding that Caldwell lacked credibility was the fact that Daryl Smith and Humphrey Scott are dead, and Ronnie Parker's whereabouts were unknown. It is now known that Parker is alive and serving a life sentence in Potosi for another murder. (See Exh. 14).

he is credible; however, if his testimony helps exonerate a criminal defendant, his testimony is unworthy of belief. Most experienced criminal practitioners are aware of this unspoken rule, which sadly pervades the criminal justice system and reeks of corruption and promotes injustice whenever it is followed.

Because of the failure of the federal courts to intervene to prevent the unjust execution of an innocent man, this decision now falls to the Honorable Governor Carnahan as Chief Executive of the State of Missouri. Although many death row inmates profess their innocence and most of these claims are meritless if not frivolous, Larry Griffin strongly believes a full review of the record in his case shows that his claim of innocence is real and substantial.

A compelling case could be made that Larry Griffin's claim of actual innocence is even stronger than Lloyd Schlup's. As the Governor is aware, Schlup was convicted solely on the basis of the eyewitness testimony of two prison guards. Exculpatory evidence in Schlup's case consists of other eyewitnesses to the crime as well as a videotape which contradicts the testimony of those two eyewitnesses. However, neither of the two eyewitnesses in Schlup's case have recanted or backed off of their positive identification of Lloyd Schlup in any manner whatsoever.

In Larry Griffin's case, the only eyewitness has stated under oath that his positive in-court identification of Larry Griffin was false and that his out-of-court photo identification was tainted by suggestive police misconduct. Fitzgerald's recantation of his

eyewitness testimony is the factor that makes Griffin's case of actual innocence stronger than Schlup's.

Jimmy Massey and Kerry Caldwell have come forward to give new eyewitness accounts exonerating the applicant, which is the same category of newly discovered evidence that exonerated Schlup. However, Griffin's case of innocence involves an additional, and arguably more compelling factor not present in Schlup, the recantation of the testimony of a key prosecution witness at trial. As result, Mr. Griffin believes that his application for clemency should, at the very least, receive treatment similar to Lloyd Schlup's; and Mr. Griffin would not object to the appointment of an independent board of inquiry, or the formation of any other neutral body to conduct an objective and thorough review of the evidence in his case.

Unfortunately, because of the federal court's refusal to intervene in the cases of possibly innocent inmates on death row, this task has fallen to the governors of several death penalty states. Larry Griffin's case is strikingly similar to that of a death row inmate from North Carolina, Anson Avery Maynard, whose death sentence was commuted by former Governor Jim Martin in 1992. In Maynard's case, a key witness recanted her testimony after Maynard had been convicted and placed on death row. Despite his claims of innocence, the federal courts refused to intervene. Seven days before his scheduled execution, Governor Martin commuted Maynard's sentence to life in prison. See GREENSBORO NEWS AND RECORD, June 27, 1993, pg. B-6. (Exh. 10).

In similar situations, former Governor Douglas Wilder of Virginia commuted the death sentences of Joseph Giarratano, Herbert Bassette, and Earl Washington on the eve of their executions based upon the fact that newly discovered evidence created doubts as to whether they were guilty of the offenses for which they were condemned to die. (See RICHMOND TIMES DISPATCH contained in Exh. 11).

Finally, Larry Griffin would like to bring the Governor's attention to the case of Ronald Monroe, a former Louisiana death row inmate. Former Governor Buddy Roemer commuted his death sentence to life imprisonment in 1989 based upon his doubts as to whether he was guilty, notwithstanding the fact that the federal courts had refused to intervene. Former Governor Roemer eloquently stated his position regarding whether a state's chief executive should intervene to prevent a potentially unjust execution of an innocent man:

> In an execution in this country, the test ought not be reasonable doubt. The test ought to be, is there any doubt? . . . Monroe met the test for guilty but not execution.

NEWSDAY, August 18, 1989, pg. 15. (Exh. 12).

In a capital case it would offend fundamental notions of justice and fairness to permit an execution to go forward if there is any doubt whatsoever regarding the guilt of the condemned. Larry Griffin's case is riddled with doubt. To permit his execution under these circumstances would forever stain the integrity of Missouri's system of justice. Governor Carnahan should therefore act, under the powers vested in him by the

constitution and laws of the State of Missouri, to prevent this travesty of justice from occurring.

III. LARRY GRIFFIN DID NOT RECEIVE A FAIR TRIAL, IN WHICH HE WAS PROVIDED WITH COMPETENT COUNSEL AND ALL OF THE EVIDENCE FAIRLY AND EFFECTIVELY PRESENTED.

Undersigned counsel for applicant Larry Griffin strongly believes that Mr. Griffin did not receive a fair trial for numerous reasons. As previously noted, counsel also strongly believes that the federal habeas review in his case was inadequate to fully and fairly address all the constitutional issues in his case. In fact, the Eighth Circuit Court of Appeals neglected to address several issues that were in his case. (Exh. 13). As result, Larry Griffin has not received any relief by any court reviewing his conviction despite the existence of several compelling constitutional claims affecting the fairness of his trial which are outlined below.

A. <u>Ineffective assistance of trial counsel</u>.

Larry Griffin has alleged in his federal habeas litigation that his trial attorney, Frederick Steiger, was constitutionally ineffective in numerous respects. Mr. Griffin has noted earlier that Mr. Steiger was a young attorney, fresh out of law school, who had never tried a murder case at the time he proceeded to represent Larry Griffin in a trial for his life. To his credit, Mr. Steiger now candidly admits that he was overmatched by the experienced prosecutor Gordon Ankney. Mr. Steiger also candidly admits that he made numerous mistakes during Larry Griffin's trial. Finally, Mr. Steiger admits that he suffered from a common delusion among inexperienced attorneys who are handling their first capital trial,

a irrational belief that the defendant would certainly be acquitted in the guilt stage, thus any preparation for the penalty phase would be unnecessary.

An examination of the record from Larry Griffin's trial, as well as evidence that has surfaced in connection with the federal habeas corpus action, strongly indicates that Mr. Steiger did not perform effectively and competently in defending Mr. Griffin at trial. The first instance of Steiger's ineffectiveness involves his failure to discover and utilize other available information in an attempt to impeach and attack the credibility of the state's star eyewitness, Robert John Fitzgerald.

Mr. Steiger learned through the pretrial deposition that Mr. Fitzgerald was enrolled in the Federal Witness Protection Program. However, Steiger utterly failed to pursue other avenues through the discovery process in order to find out more about why Fitzgerald was placed in that program and relocated to St. Louis with a new identity.

Undersigned counsel retained Boston investigator Terrence McDonough to locate and investigate the background of Mr. Fitzgerald. Mr. McDonough found out through available court records and other information in the Boston area the reason that Fitzgerald was placed in the witness protection program. Apparently, Fitzgerald was involved in the 1974 murder of a police officer in the Boston, Massachusetts area. (See Exh. 8). He agreed to snitch on his codefendants, most notably a man named Myles Connor, who later stood trial for that offense. (See Trial

tr. in Commonwealth of Massachusetts v. Connor). Obviously, had Mr. Griffin's jury heard that Mr. Fitzgerald was a federally protected witness because he was involved in the murder of a police officer, it would have severely damaged his credibility in the eyes of that jury.

The most discouraging thing, however, about the judicial review of this claim is that both Judge Filippine and the Eighth Circuit failed to understand the nature of the claim. Both of those courts apparently found that since counsel knew that Fitzgerald was in the program that there was no ineffectiveness from failing to find out more about why he was in the program.

Judge Filippine also denied Mr. Griffin's motion for discovery in order to ascertain more information about Fitzgerald's participation in the witness protection program and further denied him an evidentiary hearing on this claim and other claims in his second amended petition for writ of habeas corpus. Subsequent to Judge Filippine's orders, Mr. McDonough uncovered the aforementioned information about Fitzgerald's participation in the program. Thus, no court reviewing Mr. Griffin's conviction or sentence has ever had the opportunity to evaluate and review this information.

The most glaring example of ineffective assistance of counsel, however, was trial counsel's decision to put on an alibi defense without fully investigating the alibi for independent evidence that would either corroborate it or entirely destroy its credibility. As previously mentioned, Mr. Steiger put on an alibi defense

through the testimony of Gilbert Greenlee, Larry Griffin's sister's boyfriend, that Larry Griffin was with him on the afternoon of the murder selling a boat to an unidentified man who had responded to an ad in TRADING TIMES magazine. (Trial tr. at 329-340).

Mr. Steiger's fundamental blunder, which is inexcusable behavior for any reasonably experienced attorney, was his failure to attempt to corroborate the alibi through records or live testimony from the representatives of TRADING TIMES magazine. If Mr. Steiger had done his homework, he would have discovered the same evidence that the prosecution effectively used to rebut the alibi; that is, the records from TRADING TIMES magazine which strongly suggest that since the ad was cancelled during working hours on the day of the murder, that the actual sale of the boat probably took place the day before the murder. Had Steiger learned of this information before trial, he would have undoubtedly exercised his judgment not to put on this alibi defense and instead rely on the more reasonable theory of focusing his attack on the sufficiency and credibility of the prosecution's evidence. If this had been done, Larry Griffin, as well as his undersigned counsel, are both confident that he would have been acquitted of the murder in this case.

The federal court's review of this claim has been, to put it mildly, cursory and inadequate. It is astounding that either the district court or the court of appeals could conclude that trial counsel's ill-advised decision to put on this alibi did not have an adverse impact upon Mr. Griffin's defense at trial under the

familiar test outlined in Strickland v. Washington, 466 U.S. 688 (1994). Justice Blackman's prophetic words expressed in his dissent in Herrera also appear to be embodied in the federal court's review of the merits of this claim as well.

Other glaring errors by counsel which deserve brief mention include the fact that counsel failed to put on available evidence that Larry Griffin is lefthanded to contradict Fitzgerald's previous testimony that the assailant he identified as Larry Griffin shot the victim with his right hand. Trial counsel also failed to call an available witness, Robert Campbell, who could have totally debunked the prosecution's contention that Larry Griffin was somehow involved in the previous drive-by shooting which occurred in May of 1980. (Exh. 15).

Finally, Mr. Steiger completely failed to conduct any investigation or prepare in any fashion for the penalty phase of trial. Mr. Steiger was confident that he would secure an acquittal for Mr. Griffin thus, in his view, preparation for penalty phase would not be necessary. After the guilty verdict was returned, it is apparent that Mr. Steiger was demoralized and he offered absolutely no evidence and very little argument to the jury providing any reason for sparing Mr. Griffin's life. (Trial tr. 478-480). This deficient performance was clearly inexcusable, but as was the case with many of Mr. Griffin's other compelling claims, the federal courts have turned a deaf ear to them.

B. Prosecutorial misconduct.

Petitioner's trial was also fundamentally unfair because of numerous instances of prosecutorial misconduct, including improper arguments, the failure to produce exculpatory evidence, and other specific instances which will be outlined below. First, prosecutor Gordon Ankney made several unconstitutional direct references to Larry Griffin's failure to testify in both his guilt phase and penalty phase closing arguments.

In the penalty phase, the prosecutor explicitly inquired of the jury:

> What was the defendant's testimony?

(Trial tr. at 400). In the penalty phase closing argument, the prosecutor delivered the following argument:

> Is there any remorse? Any remorse at all from this man? Any at all from that man that shows remorse? So does he deserve mercy?

(Trial tr. at 477).

Astonishingly, both Judge Filippine and the Eighth Circuit Court of Appeals held that these comments did not involve direct references or comments on Mr. Griffin's failure to testify in either the guilt or penalty phases of trial. This tortured reasoning cannot be reconciled with established law in this area and defies common sense. In addition, the Eighth Circuit did not even address this issue regarding the penalty phase argument in its opinion.

Larry Griffin also presented evidence to the federal courts that the prosecution failed to reveal exculpatory evidence to him

which would have aided his defense at trial. First, the prosecution failed to reveal that Robert Fitzgerald was arrested a few months before the murder for false impersonation of a law enforcement officer and assault. (See Exh. 7). Second, the prosecution failed to inform counsel of their knowledge of the reason Fitzgerald was placed in the witness protection program. In addition, petitioner believes that the prosecution hid from the defense the fact that Robert Campbell was an available witness, yet they chose not to call him in order to present the more favorable hearsay testimony of Officer Thomas Murphy. (Trial tr. 243-246) (27.26 tr. at 27-46). Campbell has since given statements to Mr. Griffin's representatives that he could not identify the car used in the May 17, 1980 drive-by shooting. Thus, had Campbell testified instead of Officer Murphy, the circumstantial evidence suggesting Larry Griffin was involved in the May 17 attempt on Quintin Moss' life would have been seriously discredited. (Id. at 27-46).

Mr. Griffin also believes there were some serious improprieties involving the plea bargain given to Mr. Fitzgerald on his pending credit card fraud charges in exchange for his testimony against Mr. Griffin. The prosecution and Mr. Fitzgerald both denied any favorable plea bargain was given to Fitzgerald in exchange for his testimony. (Trial tr. at 132-149). Yet, on the very day Larry Griffin was convicted of capital murder, prosecutors appeared with Mr. Fitzgerald in court, permitted him to be sentenced to time served, and he was immediately released from

jail. (Exh. 6). These facts belie the impression given by the prosecutor and Fitzgerald that he had not received any favorable treatment in order to testify against Mr. Griffin. Had the jury known that Mr. Fitzgerald would immediately secure his release from jail after testifying, this fact could have seriously undermined his credibility.

C. The refusal of the courts to consider the cumulative impact of numerous constitutional errors.

Both Judge Filippine and the Eighth Circuit Court of Appeals appeared to acknowledge that constitutional errors did occur in Mr. Griffin's trial, but concluded he was not sufficiently prejudiced by each individual error standing alone to justify granting him a new trial. Both courts, apparently following Eighth Circuit precedent, refused to view the errors cumulatively in determining the ultimate question of whether Mr. Griffin was sufficiently prejudiced to be entitled to a new trial. Mr. Griffin believes that the Eighth Circuit's refusal to consider the cumulative effect of the numerous errors that occurred at his trial is unfair as a matter of law and as a matter of common sense.

It makes absolutely no sense to consider each individual error in an isolated vacuum. It is much more logical to view the cumulative effect of all errors in conjunction with the totality of the evidence adduced at trial in order to determine the ultimate question of whether there is a reasonable probability that the jury's verdict would have been different. Both Judge Filippine and Eighth Circuit failed to do any sort of cumulative error analysis.

This view by Judge Filippine and the Eighth Circuit appears to be in conflict with a recent Supreme Court decision Kyles v. Whitley, 115 S. Ct. 1555 (1995), in which the Supreme Court held that when considering numerous instances where the prosecution withheld of exculpatory evidence, the cumulative impact doctrine should apply when considering whether there is a reasonable probability that the verdict at trial would have been different. Mr. Griffin believes that when all of the errors that occurred at his trial are viewed in their totality, it is clear that the cumulative impact of those errors create a reasonable probability that, had they not occurred, the jury would have acquitted him of capital murder.

D. CONCLUSION

Larry Griffin believes the record below establishes that other constitutional errors occurred at his trial, apart from the questions of his actual innocence, which rendered his trial fundamentally unfair. Sadly, the federal courts have refused to remedy these obvious errors. Larry Griffin thus finds himself in the position of asking the Honorable Governor Carnahan to act as the final safety valve to prevent his unjust and unconstitutional execution.

IV. LARRY GRIFFIN'S DEATH SENTENCE IS DISPROPORTIONATE TO THE FACTS OF THE CRIME FOR WHICH HE WAS CONVICTED.

Even if the evidence presented foreclosed all doubt of Larry Griffin's guilt for this murder, the death penalty would not be the appropriate penalty for this type of homicide. The crime for which Larry Griffin was convicted involved a drive-by shooting of a known

drug dealer, apparently in retaliation for the murder of another drug dealer. Mr. Griffin was sentenced to death on a finding of only one statutory aggravating circumstance, the fact that the circumstances of this shooting created a risk of danger to other persons.

A complete examination of the record reveals that this case is not an appropriate case for the death penalty, and Mr. Griffin and his current counsel are at a loss to understand why it was viewed as a death penalty case at the time which it was tried. From undersigned counsel's experience as a criminal defense attorney, he is unaware of any other Missouri case involving a drug related drive-by shooting in which the death penalty was either sought or obtained.

In fact, during undersigned counsel's career as a assistant public defender in the 1980's when drug related drive-by shootings sadly became commonplace, such crimes were almost always charged as second-degree murder. It was extremely rare for such a case to even justify a first-degree murder charge, and in those cases the death penalty was always waived.

Thus, even if the evidence of Mr. Griffin's guilt was overwhelming, this would not be an appropriate case for which this state should dole out the ultimate punishment. Coupled with the fact that there are serious questions as to whether Mr. Griffin is guilty and whether he received a fair trial, his execution for this crime would be unconscionable.

V. CONCLUSION.

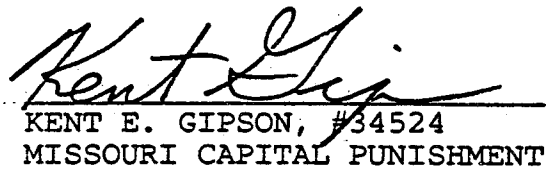
In the vast majority of cases, the criminal justice system works fairly; the guilty are convicted and justly punished, and the innocent go free. However, Missouri's criminal justice system is far from infallible. Innocent persons do get convicted and do sometimes get sentenced to death.

Since the United States Supreme Court has substantially limited and practically eviscerated the scope of federal habeas corpus review, it is very uncommon for a condemned inmate to receive any type of relief in federal court. This conclusion is borne out by examining the aforementioned cases of Mr. Giarratano, Mr. Bassette, Mr. Washington, Mr. Maynard and Mr. Monroe, each of whom were granted executive clemency by the governors of their states despite the fact that the federal courts refused to grant them any relief despite their compelling claims of innocence.

Governor Carnahan should, therefore, intervene and exercise his constitutional and statutory powers to prevent the obvious miscarriage of justice which would result from permitting the execution of Larry Griffin. For all the above mentioned reasons, Larry Griffin therefore, respectfully requests that Governor Carnahan, after a thorough review of his clemency application and supporting evidence as provided for under Missouri law, enter an executive order granting him clemency and either vacate his conviction without prejudice to the State of Missouri seeking to try him a second time, or in the alternative commute his sentence to that of life imprisonment without the possibility of parole for

50 years, or grant such other and further relief that the law may permit.

Respectfully submitted,



KENT E. GIPSON, #34524
MISSOURI CAPITAL PUNISHMENT
RESOURCE CENTER
5319 Rockhill Road
Kansas City, MO 64110
816/363-2795 • Fax 816/363-2799

Counsel for Petitioner

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