

IN THE MATTER OF: BERT LEROY HUNTER, CP-81
POTOSI CORRECTIONAL CENTER
ROUTE 2, BOX 2222
MINERAL POINT, MISSOURI 63660

TO: THE HONORABLE MEL CARNAHAN
GOVERNOR OF THE STATE OF MISSOURI

**APPLICATION FOR STAY OF EXECUTION, INVESTIGATION OF FACTS,
AND REPRIEVE FROM DEATH SENTENCE**

EXECUTION SET FOR JUNE 28, 2000 12:01 a.m.

**Cheryl A. Rafert
Post Office Box 19763
St. Louis, Missouri 63144
(314) 963-9697
Facsimile: (314) 963-7544
Missouri Bar No. 30548**

**Leo N. Griffard, Jr.
Post Office Box 2006
Boise, Idaho 83701
(208) 331-0610
Facsimile: (208) 336-9133
Missouri Bar No. 33562**

Attorneys for Bert Hunter

INTRODUCTION

Bert Hunter is the first person scheduled to be executed under Missouri's current death penalty law who did not have a trial by a jury and did not have legal representation by an attorney at the time of his convictions. Of the forty-two executions in Missouri that have occurred since the death penalty was reinstated in the 1970s, every executed man had been convicted by a jury and had assistance of legal counsel.

Although Bert Hunter originally pled guilty and asked to be given a death sentence, he did so at a time when he was suicidal. Months before his plea, Bert attempted to commit suicide by shooting himself in the head. While he waited for his court date, he again tried to kill himself. Bert was placed on suicide watch in prison.

Bert Hunter was taken from a solitary confinement cell after a stay at a prison psychiatric facility to court to waive his constitutional right to a lawyer, waive his constitutional right to a jury trial, and plead guilty in a capital case. He informed the court that he had suicidal tendencies. The court allowed Bert Hunter to represent himself and accepted Bert Hunter's pleas of guilty to two counts of first-degree murder.

Bert Hunter soon changed his mind about wanting to die. Long before he was to be sentenced, he asked the court to set aside his guilty plea because it was made while he was under duress. There was no legitimate reason to refuse Bert Hunter a trial by jury. There would have been no harm and no delay to the prosecution had the case proceeded to trial. The court refused to allow Bert Hunter to withdraw his guilty plea. Instead, the court sentenced him to death.

1

The court was more than happy to go along with Bert's suicidal request to end his life, but refused to grant his constitutional right to a trial.

These are frightening facts. Bert Hunter, a depressed suicidal man, pleads guilty asking the court to quickly put him to death. Within three months and long before the date of sentencing, Bert Hunter's mental health improves and he wants to live. The court sees evidence that Bert has mental problems and a history of suicide attempts. Nonetheless, the court refuses to allow Bert Hunter a jury trial. The court sentences Bert to the ultimate punishment death.

In addition to this nightmare, there is evidence that Bert Hunter is innocent of first-degree murder. During the guilty plea, he gave the court inconsistent statements of the deaths of the two victims that did not match his previous statements and did not match the medical examiner's autopsy report. The court expressed doubt about the factual basis for one of the pleas, but accepted it anyway because that was Bert's wish. Bert Hunter's version of how he allegedly killed the other person was later discounted by the autopsy report.

An inquiry into this matter is necessary. Bert Hunter should not be executed when there exist questions regarding his innocence and the validity of his guilty plea.

SUMMARY OF FACTS

Bert Hunter was taken from a solitary confinement cell to court to waive his right to counsel, waive his right to a jury trial, and plead guilty in a capital case. He wanted to plead guilty so he could be sentenced to death. Plea transcript, at 74. Bert exclaimed that his life was not worth living. *Id.*, at 73 (Appendix, at 6). He was frustrated about not

2

being strong enough to kill himself without assistance. Plea transcript, at 76. He told the court he would rather be dead than alive. *Id.*, at 82. Bert Hunter had a history of suicide attempts, having tried to kill himself several times during his life.

How did Bert Hunter become so desperate to die? Why would he plead guilty to something he did not do?

Prior to his arrest in 1989, Bert Hunter had been a highly skilled and well-paid computer programmer. In 1982, he and his wife moved from Missouri to Florida where he had obtained a job making over \$40,000 a year. His wife, however, did not like living in Florida and returned to her home state of Missouri in 1987. Bert unsuccessfully tried to convince his wife to move back to Florida. He grew distraught about the separation from his wife.

Thus started a downward spiral into depression for Bert Hunter. He began using cocaine in ever increasing amounts. He attempted to commit suicide in 1988 by shooting himself in the head. The offenses for which he was convicted occurred later that year.

A psychiatric evaluation report filed by the prison hospital with the court before Bert pled guilty contained several notable findings. Appendix, at 20-24. The report indicated that Bert's mother had died when he was only three years of age, thereafter an abusive grandfather had raised him, he had been raised in an environment of extreme poverty, and other students teased him because of his poverty. *Id.*, at 21. Among other cruelties, the children laughed at him for eating lunches of cold biscuits and jelly. *Id.* The report also noted that Bert was experiencing a sense of hopelessness and had attempted suicide in the past. *Id.*, at 23.

Bert Hunter told the court that accepted his guilty plea that he wanted to die quickly because the conditions of his prison confinement were atrocious. Plea transcript, at 10. He referred to the place he was housed as the convict's nightmare. *Id.*, at 76. His cell consisted of a single bed and one window that was 8 X 10 inches in size. Floor space was only about twice the size of the bed. Bert had no access to a telephone, radio, or television. He could not leave his cell except for one hour every other day, with a ten-minute shower on alternating days. Bert said he was harassed constantly in prison. Bert attempted suicide while he waited for his court date.

The court allowed Bert Hunter to represent himself at his plea for death. Plea transcript, at 131. The court accepted Bert Hunter's guilty pleas, but expressed concern that there was a weak factual basis to support one of the murder convictions. *Id.*, at 131, 133, 141 (Appendix, at 11,13,17).

As soon as the court accepted Bert's guilty pleas, the judge ordered a second mental health evaluation. The court questioned whether Bert Hunter was mentally competent. Plea Transcript, at 135, 136, 138 (Appendix, at 14 16). The first mental health report

indicated that no determination could be made whether Bert was mentally competent. Appendix, at 24.

The second evaluation reiterated Bert Hunter's cocaine dependence, mourning of the death of his mother from fecal impaction when he was only three years of age, childhood of abject poverty, abusive grandfather, depression, and prior suicide attempts. Appendix, at 27-28. The report also mentioned that Bert had denied killing the victims. 30.

4

Bert Hunter decides he wants to live and requests a jury trial.

Several months before he was to be sentenced, Bert decided he wanted to live. On October 18, 1989, within three months of his July 21, 1989 guilty plea, and several months before his February 1990 sentencing proceeding, Bert Hunter filed a motion to withdraw his guilty pleas. His mental health was improving. He was no longer held in restrictive, solitary confinement, and he had reconciled with his wife. Despite Bert's desire to withdraw his guilty plea within three months of the time he pled, the court refused to set aside the plea and instead sentenced Bert to death.

Doctors find that Bert Hunter was unable to make a rational decision to plead guilty.

A subsequent mental health evaluation conducted during state post-conviction proceedings concluded that Bert Hunter was suffering from major depression at the time he pled guilty. Dr. William O'Connor testified that Bert Hunter was suffering from depression and cocaine withdrawal at the time of his plea. Post-conviction transcript, at 146. A Minnesota Multiphasic Personality Inventory (MMPI) test profile indicated major depressive disorder and paranoia. Appendix, at 37. Dr. O'Connor found Bert Hunter displayed suicidal tendencies and considered him to be at significant suicide risk. *Id.*, at 39. Dr. O'Connor concluded that Bert Hunter suffered from a mental disease or disorder at the time of his plea and lacked the mental competence to proceed on the case. *Id.*

During federal court proceedings, Dr. Robert Smith examined Bert Hunter. The district court and federal appeals court did not consider Dr. Smith's report because it was not a part of the state court record. Dr. Smith noted that all of the mental health experts

5

who evaluated Bert Hunter agreed that he met the criteria of cocaine dependence; three of the four doctors agreed he met the diagnostic criteria for depression; Bert Hunter suffered from the dual diagnosis of substance abuse and mental illness at the time of his guilty pleas; and the depression influenced Bert Hunter's judgment and impaired his ability to be objective, rational and fully capable of considering his options at the time he pled guilty. Appendix, at 41-44.

The state and federal courts have denied any relief to Bert Hunter, upholding the validity of his guilty plea. The Eighth Circuit Court of Appeals held that the state court's conclusion that the guilty plea was valid was entitled to a presumption of correctness. The Eighth Circuit failed to mention substantive evidence that rebutted this presumption.

ISSUES WARRANTING EXECUTIVE INTERVENTION

A. Bert Hunter's guilty plea should have been withdrawn.

1. A common reason for suicide, depression, caused Bert Hunter to plead guilty.

Bert Hunter was not competent to enter guilty pleas because he did not possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and [have] a rational as well as factual understanding of the proceedings. *Dusky v. United States*, 362 U.S. 402, 402 (1960)(per curiam)(quotations omitted).

The plea court made several comments about the unusual nature of Bert Hunter's request to be sentenced to death. The plea court noted, "it's a rare thing to have somebody come up and say they want to plead guilty and get the death penalty. That is a little unusual." Plea transcript, at 10. The court added, "it's a little unusual that

6

somebody comes in and says they want to plead guilty and they want to get the death penalty." *Id.*, at 12. The court questioned whether Bert Hunter was suicidal when the court asked whether he was "trying to do a Gary Gilmore deal and that whole thing?" *Id.*, at 16. The court stated, "[i]t's not my function in life to be a part of a legal suicide." *Id.*, at 28. The plea court claimed it did not "want to be part of some game where [Bert Hunter was] just trying to get the State to take [him] out if [he has] suicidal tendencies." *Id.*, at 99. To this, Bert Hunter responded that he did have suicidal tendencies. *Id.*

Bert Hunter testified at his plea hearing that "being strapped on that gurney at Potosi would be a blessing to the State and myself." *Id.*, at 73 (Appendix, at 6). Bert Hunter remarked that he would take his own life if given a painless way. *Id.*, at 74 (App., at 7). He admitted to attempting suicide the prior year while he was a cocaine addict. *Id.*

A psychiatric evaluation report filed with the plea court by Fulton State Hospital before Bert Hunter pled guilty indicated that Bert suffered from a history of cocaine abuse, had been raised in an environment of extreme poverty, was teased by other students because of his poverty, had been raised by a physically abusive grandfather after his mother died when he was only three years of age, was experiencing a sense of hopelessness, and had attempted suicide in the past. Appendix, at 21, 23.

Dr. Surjit Singh's pre-plea psychiatric report concluded that he was unable "to determine whether [Bert Hunter] is competent and responsible for the crimes he committed."

Appendix, at 24. Dr. Singh did not issue a finding that Bert Hunter's guilty plea was made in a knowing, intelligent, and voluntary manner. The report referred to Bert's desire to die and his self-destructiveness. *Id.*, at 23. Such findings support a conclusion that Bert Hunter's guilty plea is invalid.

7

As soon as the plea judge accepted Bert Hunter's pleas, he ordered a second mental health evaluation. Plea transcript, at 136. The plea court had residual doubts about Bert Hunter's mental competence as evidenced by the ordering of a new mental health examination. The plea court acknowledged that it was not a psychiatrist. *Id.*, at 135 (Appendix, at 14). The court noted that although it had accepted the plea, the court wanted to be sure that Bert was competent when he entered the plea. Plea transcript, at 136 (Appendix, at 15). This indicates that the plea court was not firmly convinced that Bert Hunter was competent to plead guilty at the time the court accepted the guilty pleas.

The new mental evaluation, conducted by Dr. Sam Parwatikar, reiterated Bert Hunter's cocaine addiction, detailed his impoverished childhood and abusive grandfather, indicated he was depressed because his wife had separated from him, revealed that he was experiencing extreme paranoia, cited prior suicide attempts, and reported that he indicated that he was not guilty of the charges. Appendix, at 30. Nonetheless, Dr. Parwatikar concluded that Bert Hunter was mentally fit to plead guilty.

Only one doctor, Dr. Parwatikar, found Bert Hunter was mentally competent. The fate of whether a man lives or dies by execution should not rest on the conclusion of one doctor when there is substantial evidence from all other examining doctors that refutes Dr. Parwatikar's conclusion.

Dr. Lee Evans also examined Bert Hunter after he pled guilty and before he was sentenced. Dr. Evans testified that Bert Hunter was engaged in the most extensive cocaine use he had encountered up until that time. Plea transcript, at 161 (Appendix, at 40). Dr. Evans testified that cocaine withdrawal could result in depression and have other adverse effects. *Id.* Depression is a mental disease and can cause self-destructiveness.

8

Plea transcript, at 164 (Appendix, at 41). People who are depressed will begin feeling very worthless, hopeless, suicidal, extreme guilt. *Id.* Dr. Evans noted that the judgment of a depressed person will be adversely affected and thus will lose an ability to make decent judgments. Plea transcript, at 165 (Appendix, at 42). Dr. Evans found that there was no depth to Bert Hunter's decision to plead guilty. Plea transcript, at 176, 187-188. Dr. Evans diagnosed Bert Hunter as suffering from depression meeting the DSM-III criteria for a mental illness. *Id.*, at 189, 191. Dr. Evans doubted whether Bert Hunter was acting in a knowing, intelligent, and rational manner at the time he pled guilty. *Id.*, at 196 (Appendix, at 44).

During post-conviction proceedings, Dr. William O'Connor examined Bert Hunter. Dr. O'Connor concluded that:

[I]t is clear that a major depression affects judgment and that the degree of depression, while it does not interfere with the knowledge of technical court procedures, it would prevent an individual from making decisions with respect to a possible death penalty; individuals with this degree of depression do not anticipate any positive future events and can clearly be considered at significant suicide risk.

Appendix, at 39.

The post-conviction court did not state why it rejected Dr. O'Connor's conclusions and instead adopted Dr. Parwatar's conclusions. By offering no explanation for why it credited one doctor's diagnosis over the diagnosis made by other doctors, the state court infused the death penalty process with improper arbitrariness.

9

2. Atrocious prison conditions compounded Bert Hunter's depression and suicidal tendencies.

The conditions of Bert Hunter's prison confinement also spurred Bert Hunter's decision to plead guilty. Bert Hunter testified at the guilty plea that the conditions of confinement were a significant factor in wanting to plead guilty. Plea transcript, at 78.

A correctional officer described the conditions in a hearing held after Bert Hunter pled guilty. The officer testified that Bert Hunter was confined in a single prison cell of a very small size that held a twin bed; he was confined in the cell and permitted out only every other day for about one hour; he was allowed either to shower or to walk in a security area during the release from his cell on alternate days; he ate all of his meals in his cell; he did not have access to exercise equipment, a telephone, television, or radio; and he had only limited opportunity to talk to other inmates through the prison walls. Plea transcript, at 204-210.

At a pre-sentencing hearing, Bert's wife, Deanna Hunter, testified that he had written several letters to her while in prison stating that he was suicidal, he wanted to die as soon as possible, and he had attempted to commit suicide during confinement while waiting to plead guilty. Plea transcript, at 162, 168, 173.

3. Bert Hunter's guilty pleas were invalid because he was not mentally competent at the time of his pleas.

The conviction of a defendant who is legally incompetent violates due process. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). To be valid, a guilty plea must be a voluntary and

intelligent choice among the alternative courses of action open to the defendant. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "[I]f a defendant's guilty

10

plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Bert Hunter lacked the mental capacity required to waive the cornerstone trial rights of a United States citizen the right to be tried by a jury of one's peers, the right to confront one's accusers, and the privilege against self-incrimination. A defendant waives these three federal constitutional rights when pleading guilty. *Godinez v. Moran*, 509 U.S. 389, 397 n. 7 (1993).

Bert Hunter's guilty pleas were not made in a voluntary, intelligent and knowing manner. He was not competent to represent himself and enter valid guilty pleas because he was suffering from clinical depression.

Bert Hunter's decision to discharge counsel, plead guilty, and present no defense was the result of mental illness. At the time he pled guilty, Bert Hunter was suffering from clinical depression, which meets the diagnostic criteria of a mental disease or defect; suffering from the adverse effects of withdrawal from cocaine; and suffering from the poor conditions of prison confinement that included being held in restrictive isolation in a small cell. Bert Hunter's state of mind precluded him from making a voluntary, knowing, and intelligent plea of guilty.

4. There was no legitimate reason to deny Bert Hunter a jury trial.

It is strange that, at the time of the guilty pleas, the court recognized the unusual nature of Bert Hunter's desire to proceed without counsel, plead guilty, and request a death sentence, yet the court refused to grant Bert's request to withdraw his guilty plea well before the sentencing date.

11

There was no prejudice or harm to the state if the plea court had permitted Bert Hunter to withdraw his plea. On the other hand, the prejudice and harm in not granting this request was enormous Bert Hunter would die.

The plea court supported Bert Hunter's wish for a state assisted suicide. When Bert decided not to commit suicide, the plea court proceeded to fulfill Bert's prior death wish. The laws of the State of Missouri do not support state-assisted suicide, and do not permit a person to kill another person who has retracted his or her thoughts of suicide.

5. The constitutional right to a jury trial is a fundamental right that should not be denied arbitrarily.

In our society, the constitutional right to trial by jury is guaranteed. The waiver of such a vital right should be scrutinized closely especially in a death penalty case. Missouri law favors the trial of criminal cases. *State v. Hardy*, 98 S.W.2d 593, 596 (1936); *Tillock v. State*, 711 S.W.2d 203, 205 (Mo. App. 1986).

In general, courts are reluctant to deny people their constitutional right to a trial by jury and all the constitutional rights that accompany the right to a jury trial, especially when the outcome results in the death penalty. "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized." *Brady v. United States*, 397 U.S. 742, 748 (1970).

When the present Missouri death penalty statute was written, it was unlikely that anyone considered that someone might plead guilty and request the death penalty. The death penalty statute is designed to afford specific rights through a trial by jury, including the rights to voir dire the jury panel regarding views that might preclude a fair decision and the right to present mitigating evidence in the punishment phase of the trial. The

12

death penalty statute does not provide what procedures must be followed in the event of a guilty plea.

Guilty pleas are often entered because the defendant is seeking to avoid the death penalty. See e.g., *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). It is extremely rare that a defendant will enter a guilty plea and request a death sentence. A guilty plea that results in the death penalty requires close scrutiny. There is a heightened need for reliability in capital proceedings. *Woodson v. North Carolina*, 428 U.S. 280, 304-304 (1976).

"[T]he greater the offense . . . charged . . . the greater is the caution exercised by and the greater is the reluctance on the part of the court in accepting a plea of guilty." *Hardy, supra* 98 S.W.2d at 596; *State v. Reese*, 457 S.W.2d 713, 717 (Mo. banc 1970)(citing *Hardy*). When the penalty may be death, "the court should proceed with care." *State v. Williams*, 361 S.W.2d 772, 774 (Mo. banc 1962).

In *Mercer v. Armontrout*, 864 F.2d 1429, 1431 (8th Cir. 1988), the Eighth Circuit Court of Appeals held:

Human life is our most precious possession. Our natural instincts guide us from birth to sustain life by protecting ourselves and protecting others. All notions of morality focus on the right to live and all of man's laws seek to preserve this most important right. . . . What separates the unlawful killing by man and the lawful killing by the state is the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon.

Even assuming that it was "legally" right to deny Bert Hunter's request to withdraw his plea and receive a jury trial, it is not ethically or morally right to execute a man who was denied his request for a jury trial under the unusual circumstances of the present case. Intervention by the Governor is necessary to remedy this wrong.

If the facts underlying Bert Hunter's case suicidal tendencies, depression, poor living conditions, change of heart arose in any other situation that did not involve the death penalty, then intervention to correct the injustice would be unquestioned. If someone entered a contract with a doctor to assist in a suicide, then changed his or her mind, should they not be allowed to cancel the contract?

B. Bert Hunter was not competent to represent himself.

The plea court permitted Bert Hunter to proceed *pro se* without determining his ability to represent himself. Bert Hunter acknowledged that he only "somewhat" understood the perils of self-representation. Plea transcript, at 25-26, 28 (Appendix, at 2-4).

The Sixth Amendment provides, In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense. The right to counsel is fundamental to our system of justice. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States Supreme Court has held:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or

evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

Courts must indulge every reasonable presumption against a knowing, intelligent, and voluntary waiver of the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). The court should make the defendant aware of the dangers and disadvantages of self-representation and inquire into his mental capacity to make an intelligent decision. *Faretta v. California*, 422 U.S. 806, 835 (1975). If an accused does not receive effective

assistance of counsel and has not competently and intelligently waived his constitutional right to counsel, the Sixth Amendment to the United States Constitution bars a valid conviction or sentence. *Johnson v. Zerbst*, 304 U.S. at 468.

The plea judge asked Bert Hunter only a handful of questions before declaring that he could represent himself without counsel. Plea transcript, at 25-26, 28 (Appendix, at 2-4). Bert Hunter's response that he knows he has a right to counsel and desires to waive it does not end a judge's responsibility. *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948). When Bert said he "somewhat" understood the risks of proceeding without counsel and that his life was "fraught with peril," the court failed to explain the peril or inquire into Bert's equivocal understanding of the situation. Plea transcript, at 26 (Appendix, at 3). In the case of Heath Wilkins, the plea court repeatedly discouraged Heath from dismissing counsel and offered repeated opportunities to reconsider and withdraw his plea of guilty. *State v. Wilkins*, 736 S.W.2d 409, 413-414 (Mo. banc 1987). The plea

15

court heard evidence from a psychiatrist before granting Heath Wilkins the opportunity to proceed *pro se*, postponed the proceeding to give Heath a week to contemplate his request, and admonished Heath not to plead guilty. *Id.*, at 413. When the hearing resumed, the plea court again strongly encouraged Heath to consult with counsel and set a hearing for several weeks later with the continued admonishment to reconsider his chosen course. When the court again convened to consider Heath's request, the plea court persisted in its efforts to convince Heath that his uncounseled course was unwise. *Id.*, at 414.

Heath testified that he preferred the death penalty to life in prison. *Wilkins v. Bowersox*, 145 F.3d 1006 (8th Cir. 1998)(slip op. at 6). He did not express any desire to not be executed until more than two years after he was sentenced, which was after his conviction and sentence had been affirmed by the Missouri Supreme Court. *Id.*, slip op. at 4, 7. No doctor who examined Heath at the time of his guilty plea found that he was incompetent to plead guilty. One doctor found Heath was mentally competent to plead guilty while another doctor offered no opinion regarding competency. *Id.*, at 5.

By sharp contrast, in Bert Hunter's case, the plea court encouraged Bert to proceed without counsel and failed to acknowledge evidence that the waiver of counsel was not being made in a knowing and intelligent manner.

Despite the plea court's efforts to dissuade Heath Wilkins from pleading guilty to a capital charge without assistance from counsel, the Eighth Circuit Court of Appeals found that Heath's waiver of counsel was not made in a voluntary and intelligent manner. *Wilkins v. Bowersox*, slip op. at 20-21. The Eighth Circuit Court of Appeals did not even permit Bert Hunter to raise the issue that his waiver of counsel was invalid on appeal.

16

The Eighth Circuit refused to allow Bert to brief this important constitutional issue, even though it was an issue resolved favorably for Heath Wilkins. The federal appeals court did not mention Heath Wilkins case in its decision of Bert Hunter's case.

Although Bert Hunter's case is far more compelling than that of Heath Wilkins case, Heath will live, while Bert is scheduled to die next week. This is arbitrary and unfair.

C. There is no factual basis supporting the convictions.

1. Mildred Hodges was not killed in a deliberate manner.

Bert Hunter told the court that "the death of Mildred Hodges was not caused by asphyxiation." Plea Transcript, at 36 (Appendix, at 5). He testified that Mildred Hodges was not murdered because there was no deliberation. *Id.*, at 90-91. He stated that no one intentionally suffocated her. *Id.*, at 121 (Appendix, at 10). According to the autopsy report, Mildred Hodges died as a result of heart disease, probably during an assault. Appendix, at 18.

The trial judge remarked "there is no indication of murder in the first degree concerning Mrs. Hodges." Plea transcript, at 131 (Appendix, at 11). The court remarked that the guilty plea to the death of Mildred Hodges was probably only "a matter of statistics." Plea transcript, at 132 (Appendix, at 12). The court stated that the factual basis is a bit thin. Plea transcript, at 133 (Appendix, at 13).

To be guilty of first-degree murder, the murder must be deliberate and intentional. Deliberation is a necessary element of first-degree murder. Section 565.020, R.S. Mo. Such was not the case with the death of Mildred Hodges. Bert Hunter should not have been found guilty of first-degree murder in Mildred Hodges' death.

17

2. Richard Hodges was not killed in the manner Bert Hunter claimed.

Bert Hunter told the court that he had killed Richard Hodges by holding his nose shut. Plea transcript, at 104, 108 (Appendix, at 8, 9). The medical examiner's autopsy report indicated that the cause of Richard Hodges death was due to compression of the neck (Appendix, at 19), which was inconsistent with Bert Hunter's testimony during the guilty plea. Thus, there was no reliable factual basis to support a first-degree murder conviction for the death of Richard Hodges.

3. Bert Hunter's numerous inconsistent statements render his confessions unreliable.

Bert Hunter made many inconsistent statements regarding what had transpired. Although he told the court that he should be convicted of murder, he told many other people including police officers, his wife, his stepson, and psychiatrists that he was innocent.

Plea transcript, at 111, 150, 237, 243. Bert Hunter's inconsistent statements render his guilty plea unreliable.

4. There is evidence that a third party committed the crimes.

There is evidence that has not been investigated that tends to show that a third party killed the Hodges. FBI evidence indicates that a Dr. Pope was the possible killer. Post-conviction Legal File, at 46. In addition, a hair found at the crime scene did not match the hair of either Bert Hunter or Tomas Ervin, a co-defendant who was also convicted of these murders. Bert's wife provided a detailed statement to the police implicating a third party as having committed the crimes. The police intentionally omitted this statement from their police report and failed to pursue this significant lead.

18

THE GOVERNOR HAS AUTHORITY TO REPRIEVE DEATH SENTENCES

Article IV, Section 7 of the Missouri Constitution and Sections 217.800 and 552.070, R.S. Mo. provide that the Governor of Missouri has the power to grant reprieves, commutations, and pardons.

The Constitution of Missouri vests in the Governor the power of checks and balances in the matter of sentences of death. If a defendant has not received due process or a fair trial, as required by our system of justice, the only remedy is by act of Governor. It is the responsibility of the Governor to intervene and grant a stay of execution when there have been violations of the Constitution that our legal system has not addressed in an adequate manner.

The United States Supreme Court has made it clear that it is the responsibility of the Governor of the State to intervene and grant relief to prevent miscarriages of justice in death penalty cases. In *Herrera v. Collins*, 506 U.S. 390, 411-412, 415 (1993)(opinion by Rehnquist, C.J.), the United States Supreme Court held:

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages 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. 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.

The Missouri Supreme Court also recognizes that it is the proper role of the Governor to act when the courts decline to correct an unjust conviction or sentence. *State*

19

v. *Wilson*, 813 S.W.2d 833 (Mo. banc 1991)(case in which this Governor subsequently granted relief).

The execution of a human being must not occur when the criminal justice system has failed to ensure a just result. As held by the United States Supreme Court:

"The penalty of death differs from all other forms of criminal punishment not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice and it is unique finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Harmelin v. Michigan, 501 U.S. 957, 995-996 (1991)(quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972)(Stewart, J., concurring)).

The Governor of Missouri also has the authority to issue a stay of execution to ensure that this Application receives the full and fair review it deserves. *Potts v. Zant*, 638 F.2d 727, 730 (5th Cir. 1991)(Governor of Georgia granted stay of execution pending clemency consideration); *Miller v. State*, 473 S.W.2d 413, 414-415 (Mo. 1972)(stay of execution ordered by Governor pending a psychiatric review).

Section 552.070 allows the Governor to appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. Under the circumstances presented in the case before you, it would be prudent to appoint a board of inquiry to determine whether Bert Hunter should be executed.

20

CONCLUSION

Governor Mel Carnahan,

You have heard many pleas for mercy. It is a difficult job to weigh and decide issues that determine whether someone will live or die. The case before you is one that warrants your intervention.

You are the last resort for justice for Bert Leroy Hunter. The decision you as Governor face is whether you will exercise your power to intervene to correct Bert Hunter's unjust and unfair conviction and sentence.

The courts failed Bert Hunter. The plea court failed to do justice to Bert Hunter by allowing Bert Hunter to represent himself, accepting Bert Hunter's plea, and sentencing him to death. When there is any question whether Bert was not mentally competent to enter a plea of guilty, justice should fall upon the side of being conservative and cautious. Justice in this case would have been to withdraw the guilty plea and proceed to jury trial.

The appeals courts failed to do justice to Bert Hunter by not correcting errors made by the plea court.

For the reasons set forth above, we implore you to stay the June 28, 2000 execution of Bert Hunter, appoint a board of inquiry to gather information bearing upon whether Bert Hunter's convictions and death sentences should be upheld, and thereafter grant Bert Hunter whatever relief is just and proper under these circumstances.

21

Respectfully submitted

Cheryl A. Rafert
Missouri Bar Number 30548
Post Office Box 19763
St. Louis, Missouri 63144
(314) 963-9697
Facsimile: (314) 963-7544

Leo N. Griffard, Jr.
Missouri Bar Number 33562
Post Office Box 2006
Boise, Idaho 83701
(208) 331-0610
Facsimile: (208) 336-9133

Attorneys for Bert L. Hunter

22