IN THE MATTER OF:

GEORGE B. HARRIS
Potosi Correctional Center
Mineral Point, MO 63660

TO:

THE HONORABLE MEL CARNAHAN,
Governor of the State of Missouri

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

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP
GARDINER B. DAVIS #29127
MARK A. THORNHILL #26326
1000 Walnut, Suite 1400
Kansas City, Missouri 64106
Telephone: 816/474-8100
Facsimile: 816/474-3216

ATTORNEYS FOR PETITIONER

IN THE MATTER OF	)	
	)	
GEORGE B. HARRIS	)	**THIS IS A DEATH PENALTY CASE. EXECUTION IS SET FOR SEPTEMBER 13, 2000**
	)	
POTOSI CORRECTIONAL CENTER	)	
MINERAL POINT, MO 63660	)	
	)	

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

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

Comes now George B. Harris, by and through counsel, Gardiner Davis and Mark Thornhill, and petitions the Governor for an order under Missouri Constitution Art. IV, Section 7 and Sections 217.800 and 217.220 Mo. Rev. Stat. (1994), granting him a new trial, or an order that his sentence be commuted from death to life imprisonment without eligibility for parole. In the alternative, Mr. Harris petitions for a stay of execution pending an investigation by a board of inquiry appointed pursuant to Section 552.070; such board of inquiry being necessary and appropriate to reconsider the circumstances of Mr. Harris's conviction.

I. SUMMARY OF REASONS JUSTIFYING EXECUTIVE CLEMENCY

George Harris's life should be spared because:

- Carrying out his death sentence would be an extreme miscarriage of justice. His sentence is grossly disproportionate to the facts of his case. At the very most, Mr. Harris is guilty of second degree murder, and is probably not guilty

of any homicide, since he shot the victim without deliberation and in self defense, as attested by a disinterested eyewitness.

- Witnesses whose testimony would have helped prove that Harris was acting in self defense, that the victim had a reputation for violence, and that this homicide was not premeditated, were not heard by the jury due to the incompetence of trial counsel.
- The only prosecution witness who claimed to have seen the shooting, Michael Taylor, was himself a crack dealer whose account of events provided the sole basis to suggest that Harris did not act in self defense.

II. INTRODUCTION

George B. Harris has been on Missouri's death row for over 10 years as a result of firing one shot during an argument with a man he did not know. Due largely to the incompetence of his trial counsel, Mr. Harris's story that he lawfully acted in self defense against a violent man who was physically threatening him was never effectively told or properly presented to a Missouri jury. The absence of deliberation and the need for self defense remove this case from the category of first degree murder. On the facts of this case, George Harris should never have been eligible for the death penalty.

Missouri permits the death penalty to be imposed only for the crime of first degree murder. This category is reserved for the most heinous murders: those that are done with "malice aforethought," or premeditation. Without this element, a defendant may be convicted of no more than second degree murder, and is ineligible for the death penalty.

Mr. Harris's first degree murder conviction resulted from the incompetence of his trial counsel, who remarkably tried the case without having located and interviewed the eyewitnesses to the shooting. Because of his deficient investigation, counsel failed to contact Ben Brown, a disinterested eyewitness whose testimony would have corroborated Mr. Harris's self defense claim. The necessity of finding Brown was glaringly obvious, since he was listed as an eyewitness in the police report. Mr. Brown, in a sworn affidavit obtained by Mr. Harris's present counsel, states that he was never contacted by Harris's trial counsel, but that if he had been asked, he would have testified that he saw Willoughby, the victim, arguing with Harris, then reaching for his gun, when Harris shot him. At Harris's trial, the only eyewitness called by the state was the victim's best friend, Michael Taylor, who testified that Harris gunned down Willoughby in a merciless manner. Harris, who testified on his own behalf, stated that he shot the victim in self defense. Thus, the jury was left with the dilemma of which self-interested witness to believe, and Ben Brown's eyewitness testimony would have been crucial in establishing Harris's self defense claim. To put Harris to death because of the sloppy, ineffective defense of his trial counsel would be unconstitutional and palpably unfair.

III. STATEMENT OF THE CASE

Harris's conviction arose from the shooting of Stanley Willoughby in the living room of a drug house owned by Michael Taylor in Kansas City. The shooting took place on the evening of March 11, 1989, during an argument between Harris and Willoughby regarding Willoughby's failure to return a pair of guns owned by Harris. Harris, testifying on his own behalf at trial, explained that during the course of the argument Willoughby appeared to reach for his gun. In reaction, Harris

jumped up from his chair, moved sideways, and fired one shot in an effort to stop Willoughby. No other shots were fired.

Michael Taylor, who acknowledged that Willoughby had been his best friend, was the only eyewitness besides Harris who testified at Harris's trial. Taylor, who was also a drug dealer, told a different version of events, namely that the shooting was unprovoked and sudden. Although the police report identified several possible eyewitnesses to the shooting, only Harris and Taylor appeared at trial. Ben Brown, who was in the house that evening and witnessed the shooting, was not contacted by Harris's trial counsel and did not testify at his trial. Had he been called, Brown would have stated that Willoughby was the aggressor in the dispute and appeared to be reaching for a gun when Harris jumped up and shot him.

After hearing eyewitness testimony only from George Harris and Michael Taylor, the jury found Harris guilty of first degree murder and sentenced him to death. His appeals to the Missouri Supreme Court and his *habeas corpus* petitions to the federal courts with appropriate jurisdiction have been unavailing. See State v. Harris, 870 S.W.2d 798 (Mo. 1994); Harris v. Bowersox, 184 F.3d 744 (8th Cir. 1999). Mr. Harris has exhausted all legal remedies available to him. Therefore, for the following reasons, executive clemency is warranted.

IV. GEORGE HARRIS'S ACTIONS DO NOT WARRANT A FIRST DEGREE MURDER CHARGE, AND LIKELY WARRANT NO MURDER CHARGE AT ALL

First degree murder, with the possibility of a death sentence, is an unusual, statutorily created category of homicide allowing the most severe punishment for extremely heinous crimes. The essential element of first degree murder is cool, unimpassioned premeditation, sometimes called "malice aforethought." In Harris's case, even assuming all the state's evidence against him to be

true, Harris shot Willoughby suddenly during a quarrel. This inescapable fact compels the conclusion that Harris was not acting with cool premeditation.

Under Missouri law, a person commits first degree murder when he "knowingly causes the death of another person after deliberation upon the matter." Mo. Rev. Stat. § 565.020(1) (1994). The Missouri Supreme Court describes the deliberation necessary for a first degree murder charge as a "cool and deliberate state of mind." State v. Simmons, 955 S.W.2d 729 (Mo. 1997). The element of deliberation is what separates first degree murder and second degree murder; only first degree murder requires unimpassioned premeditation that the law calls deliberation. See State v. Rousan, 961 S.W.2d 831 (Mo. 1998).

George Harris shot Stanley Willoughby in the living room of a crack house during an argument. Willoughby was the "doorman" at this crack house, and was well known as a tough, violent character. Ex. A at 1. Kendra Remmer, Willoughby's girlfriend and mother of three of his children, stated in an affidavit that he almost always carried his 9mm Beretta with him and that he was well known as a tough and violent fighter. Ex. B at 1. The prosecution presented no evidence that Harris, prior to the evening in question, had ever met Willoughby, much less that he had any reason to want to kill him.

Harris had left two guns for safekeeping at the home of Michael Taylor. When he went to Taylor's house that evening to retrieve his property, Willoughby was at his post; when he could not produce the property, an argument ensued. The argument apparently lasted several minutes, and got quite heated, with raised voices and threatening gestures. See State v. Harris, 870 S.W.2d 798, 804 (describing the facts of the case); Ex. A at 2. The record contains inconsistent statements about the exact number of witnesses, but it is clear that several bystanders were present in the downstairs area

of Taylor's house. It was in the downstairs living room of this drug house, and during the heated argument, that Willoughby appeared to reach for his waist, where he was known to keep his gun, and Harris fired a single shot that proved fatal. Ex. A, Affidavit of Ben Brown, at 1-3; Ex. C, Trial Transcript at 873-76.

That Harris shot and killed Stanley Willoughby is not in dispute; but his state of mind when he did so presents the crucial distinction between a lawful first degree murder charge and a mere second degree murder case. The evidence showed that Harris shot Willoughby in the midst of an argument. This obviously fails the test of a killing that follows cool, unimpassioned deliberation upon the matter. The death sentence imposed on Harris for his actions that evening is grossly disproportionate to his crime, and to carry it out would result in a miscarriage of justice.

Furthermore, there is substantial evidence that Harris acted in self defense. The issue of self defense is normally a question decided by the trier of fact. In this case, the jury essentially had to choose between Michael Taylor's version of the events and Harris's, since neither side presented corroborating evidence or testimony. The crucial evidence to corroborate Harris's testimony was available through the disinterested witness Ben Brown. Harris's trial counsel did not even contact Mr. Brown, however, and as a result, the jury never heard his evidence that Harris acted in self defense. Upon being contacted by current counsel assigned to the case after the trial, Brown stated that he saw the shooting and that Willoughby appeared to be reaching for his gun when Mr. Harris shot him. Thus, given this fresh information that has come to light, granting executive clemency would not overrule any decisions made by the jury, but would simply take into account compelling information that the jury never heard.

V. GEORGE HARRIS'S CONVICTION IS UNCONSTITUTIONAL DUE TO THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL

Every accused has the right, under the Sixth Amendment to the United States Constitution, to be effectively represented by counsel in the defense of criminal charges. Competent legal assistance is a "fundamental component of the criminal justice system." See United States v. Cronic, 466 U.S. 648, 653-54 (1984). Failure to provide an accused with the effective assistance of counsel is a fundamental constitutional error that undermines the entire trial process. See Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir. 1976). Mr. Harris's trial counsel provided a level of assistance that falls below the constitutional threshold, and his sentence should be commuted because of the constitutional infirmities.

The United States Supreme Court has set out a two-part test for determining whether assistance of counsel falls below the level of competence the Constitution requires. First, the assistance of counsel must have been less than objectively reasonable. Second, the incompetence must have prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The first prong, reasonable performance by counsel, includes the requirement of a reasonable investigation of the facts or a reasonable decision that a particular investigation is unnecessary. See Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993).

The assistance provided by Harris's trial counsel was less than objectively reasonable. One of defense counsel's most fundamental obligations is to identify and present those witnesses who could help their client's defense. Ben Brown's name was mentioned in the police report of the incident as an eyewitness. Eyewitness testimony would clearly be crucial in establishing Harris's claim that he acted in self defense when he shot Willoughby. Despite this glaring need to contact

all possible witnesses, Harris's trial counsel never attempted to contact Brown. It is of no moment that Brown was listed in the police report only as "Ben," a 15 year old black male, with no last name given. Harris's trial counsel conducted a pretrial interview of Jarlath Potts, one of Brown's friends who was at the scene with him, but failed to ask him the obvious question: "Who else was there with you and how can I contact them?" Failing that, it would not have been difficult, and indeed would have been the reasonable course of action, to at least try to contact all the witnesses listed in the police reports. Trial counsel's failure to do so makes the assistance he rendered below the level required by the Constitution.

The ineffective assistance clearly prejudiced Mr. Harris, and the second prong of the test for constitutionally deficient assistance of counsel is thereby satisfied. Brown stated in his affidavit that Harris didn't "mean anything to him," Ex. A at 3, and there is no evidence contradicting his status as a disinterested witness. As stated earlier, the jury in this case was essentially left with a swearing match between Harris and Taylor, both of whom had a personal interest in the outcome. Brown's statement of the events, which corroborates Harris's account on all crucial points, clearly would have been very influential, and maybe dispositive, in the jury's determination of whom to believe.

Trial counsel further failed to locate or interview Kendra Remmer, Willoughby's common-law wife and the mother of three of his children. Had he bothered to speak with her, counsel would have been in a position to buttress Ben Brown's testimony regarding Willoughby's violent reputation and his penchant for firearms. Ms. Remmer would have stated that Willoughby was, like Michael Taylor, a crack dealer who was known to be violent and who habitually carried a gun. Affidavit of Kendra Remmer, Ex. B. She would have testified that the shooting had occurred at Michael Taylor's crack house. Her testimony would have confirmed the atmosphere of fear that was present when the

confrontation between Harris and Willoughby took place. Because of counsel's inadequate investigation, however, the jury never heard this crucial testimony.

VI. THE GOVERNOR SHOULD, AT THE VERY LEAST, APPOINT A BOARD OF INQUIRY TO HEAR AND WEIGH THE TESTIMONY OF BEN BROWN AND KENDRA REMMER

The Missouri Legislature, in an effort to ensure due process to those sentenced to death, has provided a mechanism to assist the Governor in his review of clemency petitions. Section 552.070 of Missouri's criminal code provides that the Governor may, in his discretion, appoint a special board of inquiry to investigate information bearing upon whether a person condemned to death should be granted pardon, reprieve, or commutation of sentence. Mo. Rev. Stat. § 552.070 (1994). This board's information gathering can include information not admissible in a court of law. Governor Carnahan should appoint a special board of inquiry in this case to investigate new information that has come forth and ensure that justice is done. Mr. Harris has been on death row for ten years now. Spending a few more months to ensure that justice is being done, when a man's life is at stake and compelling evidence exists that he may not be guilty at all, is the right thing to do.

A. The testimony of Ben Brown and Kendra Remmer, not heard at Harris's trial, should be heard and evaluated now.

While it is true that Brown's testimony was considered by appellate courts after Harris was already sentenced to death, it was not presented to the jury, who made the first and most important determination of Harris's guilt. Kendra Remmer's testimony has been considered by no court. In the interest of preventing a miscarriage of justice, the witnesses that trial counsel failed to call should be allowed to give their testimony. The appointment of a board of inquiry would provide a forum

to assure that Harris is not put to death without the consideration of all relevant testimony, not just what was presented in court.

B. Harris's prosecutor has publicly stated that the additional evidence tending to prove the innocence of Harris should be heard and evaluated.

George Harris is not alone in suggesting that his case merits further review. Patrick Peters, who prosecuted Harris's case, has recently publicly proclaimed his belief that evidence that Harris acted in self defense should be heard and considered before Harris's sentence is executed. In a recent interview, he said "If there is a possibility that . . . Harris acted in self defense, then it should be litigated. . . . [I]f there's a real issue as to whether or not he acted in self defense, don't execute somebody when that issue is still hanging out there." *Dateline Kansas City*, KSHB-TV, May 14, 2000. A review board should be given the opportunity to consider the statements of Ben Brown and Kendra Remmer and conduct its own review of the facts of this case to ensure that justice is done.

VII. CONCLUSION

George B. Harris will die on September 13th unless Governor Carnahan exercises his constitutional power to grant a pardon, commutation, or stay of execution. The wisdom of the Missouri Legislature in deciding to leave the final fate of a person condemned to die in the hands of the Governor, not the courts, is apparent in this case. Due to incompetent trial counsel, the jury never heard the testimony of Mr. Harris's most important corroborating witnesses. Subsequent appellate court decisions did not rectify this mistake. Now Governor Carnahan has a chance to ensure that justice is truly being done by fully considering the testimony that a competent lawyer would have presented at Harris's trial. Basic principles of justice and evenhandedness in applying the laws compel only one conclusion: George Harris's death sentence should not be carried out. His

punishment is totally disproportionate to his crime, and he may not be guilty of any crime at all. For the foregoing reasons Governor Carnahan should exercise his power of executive clemency.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

Gardiner B. Davis, MO #29127
Mark A. Thornhill, MO #26326
1000 Walnut, Suite 1400
Kansas City, MO 64106
Telephone: 816/474-8100
Facsimile: 816/474-3216

ATTORNEYS FOR PETITIONER

Dated this _____ day of _____, 2000.