

IN RE Execution of Sam Smith

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

To: The Honorable Robert Holden, Governor  
State of Missouri

The undersigned religious and civic leaders within the State of Missouri in support of clemency for Sam Smith state:

**I.  
EXECUTION SET**

1. The execution of Sam Smith has been set for May 23, 2001.
2. Court appeals apparently have been exhausted.

**II.  
PARDON POWER IS INHERENT TO THE PEOPLE;  
FOR THE WELFARE OF THE WHOLE  
CITIZENS HAVE STANDING TO APPLY**

1. The power to pardon, reprieve or commute is inherent in the sovereignty of the people of the state who have conferred the exercise of this power on the Governor by virtue of Article IV, Section 7 of the Constitution of Missouri. The power exists to serve the Common Good of all people of the state and not merely the individual under sentence.
2. The exercise of the pardon power is not dependent upon "one (the offender) who, on no sound principle, ought to have any voice in what the law should do for the welfare of the whole." *Biddle v. Perovich*, 274 US 479, 487 (Justice Holmes).

"A pardon in our days is not a private act of grace from an individual happening to possess the power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than the judgment fixed. \* \* \*The public welfare, not his (the prisoner's) consent, determines what shall be done." *Biddle*, supra, p. 486.

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3. By long-standing precedent, citizens of the State may apply for reprieve or commutation in behalf of the common good. Citizen applications have been presented and acted upon since the earliest years of Missouri statehood. One of the earliest women prisoners was pardoned upon the application of her neighbors. *Missouri Historical Review*, April 1, 1990, p. 293 et seq.
4. We request that the Governor inform us when this application is referred to the Board of Probation and Parole pursuant to Section 217.800, RSMo. in order that evidence of relevant facts and circumstances can be presented to the Board in conducting its investigation required by law.

**III.**  
**CLEMENCY SHOULD BE GRANTED BECAUSE OF EVIDENCE**  
**THAT MR. SMITH SUFFERED FROM POST TRAUMATIC STRESS DISORDER**  
**AT THE TIME OF THE MURDER**

1. Post traumatic stress disorder is a recognized condition that arises from exposure to life-threatening circumstances. Called PTSD since the Vietnam War, this condition was first recognized 150 years ago. There are six diagnostic criteria for PTSD including a triggering life-threatening event, re-experiencing and numbing phenomena and other physiological problems. While some of the signs and symptoms of PTSD are also found in other mental conditions, it is possible to get an accurate diagnosis of PTSD.

2. Evidence exists that Sam Smith suffered from PTSD. About four months before Mr. Smith killed fellow inmate Marlin May in a prison knife fight, Mr. Smith himself had been the victim of a prison stabbing which placed him in a prison hospital for seven days. Shortly after his stabbing in August 1986 Smith began to have nightmares in which he would continuously relive the attack upon him with associated mental and physical complications.

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3. Smith's symptoms had a direct effect on what happened on January 15, 1987, when a knife fight brought out at the Missouri State Penitentiary in Jefferson City.

A number of inmates, including Marlin May, had approached another inmate, Demetrius Herndon, and prepared to stab him as retribution for an incident the night before. Sam Smith, though not involved in this situation, saw what was about to happen and approached this group as a peacekeeper in an attempt to persuade the men not to fight, but to no avail. One of May's group used his knife to threaten Smith and told him to "butt out"; one of the other men stabbed Herndon and the fight ensued, eventually moving from the housing areas down several flights of stairs to the housing unit's lobby. Smith, who was initially unarmed, was able to disarm one of his attackers; he then sought to defend the unarmed Herndon, who was being stabbed by May. May advanced toward Smith, and both men stabbed at each other for some time until a correctional officer disarmed May. Nevertheless, the fight between May and Smith continued with Smith stabbing at May until the two were separated. May died of multiple stab wounds, and Smith was charged with first degree murder for his death.

4. During his closing argument, the prosecutor emphasized the fact that Smith kept stabbing May after his disarming as evidence of Smith's murderous, deliberative mental state. However the jury was not aware of the previous stabbing attack on Smith and that Smith had been experiencing symptoms of PTSD. In preparation for his trial, Smith told his attorney about the prior stabbing and its effect on him. He requested his attorney to seek expert assistance to determine whether his action in continuing to stab May after he was disarmed was the result of the prior incident. The attorney failed to request that a mental examination for PTSD be conducted for Smith.

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5. If Smith had the mental examination, it may have verified that he suffered from PTSD, in which case the disorder would have made Smith incapable of deliberating rationally upon anything at the time of the offense, much less the death of May.

#### IV.

### CLEMENCY SHOULD BE GRANTED BECAUSE OF SMITH'S WOEFULLY INADEQUATE LEGAL COUNSEL

1. The failure of Smith's attorney, David Kite, to request a mental evaluation determination of PTSD is just one example of the woefully inadequate legal counsel Mr. Smith received.
2. Mr. Kite lacked the experience to provide good legal counsel. Prior to representing Smith, Kite had never been lead counsel in any criminal case and had assisted in only one other, non-capital, criminal matter.
3. Kite's lack of experience was further demonstrated when he did not even investigate or prepare any mitigating evidence to be presented on Smith's behalf during the penalty phase. Preparation of the mitigating evidence was begun after the jury returned a guilty verdict. The burden of preparing the mitigating evidence fell to Kite's officemates, because, by all accounts, Kite was too distraught with the guilty verdict to continue with the trial. The officemates, who had never met or consulted with Smith prior to trial, had less than an hour and a half to prepare for the penalty phase. In light of counsel's lack of preparation for the penalty phase, it was not surprising that the jury deliberated than 80 minutes before recommending the death sentence.
4. Unfortunately, Mr. Kite's deficient performance did not stop with Smith's sentencing. At that time, Smith advised the trial judge that he was dissatisfied with the performance of Kite. The judge appointed new counsel to represent Smith on appeal. Kite was ordered to file the

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notice of appeal only and to then withdraw from the case. Rather than make any effort to withdraw as Smith's counsel or turn the case over to the new attorney as ordered, Kite continued to represent Smith on appeal and took the additional step of filing the transcript of Smith's trial in the Missouri Supreme Court on October 7, 1988, seven weeks before it was due, without informing Smith or his new attorneys that he had done so. Because of Kite's quick, quiet filing of the transcript, the 30-day time period within which Smith was required to file his written complaint about Kite's performance commenced and expired, without the knowledge of either Smith or his new lawyers. As a result of Kite's failure to communicate with either Smith or his new lawyers, Smith's written complaint against Kite was filed late.

5. Since then, Smith has presented his claims against Kite to the Missouri state and federal courts, but those courts have uniformly refused to consider his complaints against Kite because of the late filing of the written complaint.
6. In deciding Smith's case, two judges of the Missouri Supreme Court dissented from the majority opinion. These dissenting judges stated that Smith was unjustly deprived of meaningful state post-conviction relief, through no fault of his own. These dissenting judges stated:

"As in *Reuscher*, Smith faces the death penalty; therefore, the reliability and accuracy of the judgment outweigh all other considerations. Moreover, depriving Smith of the opportunity for Rule 29.15 review of his conviction and death sentence may in some ways constitute even more of an unfair and unjust decision than in the *Reuscher* case, if that is possible. This is true because the reason Smith filed his Rule 29.15 motion late was because the clerk of court did not advise the public defender that that office had been appointed by the trial judge to represent

Smith in the preparation of the Rule 29.15 motion. Meanwhile, Smith's trial counsel, even though he had been directed by the trial judge to withdraw upon appearance of the public defender, proceeded to file the transcript on appeal approximately seven weeks early. Smith's trial counsel, who had the same conflict of interest with respect to the Rule 29.15 motion as Reuscher's attorney had in that case,

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failed to give Smith any notice of the filing. Smith was not at fault in failing to timely file the Rule 29.15 motion. He did not intentionally or knowingly waive the filing of such motion nor did he attempt to use the rule 29.15 procedure for unnecessary delay or any other purpose for which it is not intended." (*Smith v. State*, 887 S.W.2d 601 (Mo.banc 1994))

7. If Missouri is going to impose the death penalty, at the very least it should insist that the defendant have due process in the courts. Evidence in this case suggest otherwise. Mr. Smith was represented by an inexperienced lawyer that was eventually disbarred for other reasons. When Mr. Smith was misled by this attorney on filing his complaint, he sought relief in the courts. Again he was denied due process by the courts by their refusal to allow him to file a new complaint. Mr. Smith has not received justice in the courts. Executive clemency is meant to be a failsafe measure to ensure justice. We urge the Governor to appoint a board of inquiry to examine these due process issues.

**V.**

**CLEMENCY SHOULD BE GRANTED BECAUSE  
THE MOTHER OF THE VICTIM OPPOSES THE EXECUTION OF SAM SMITH**

1. Many people in this country hold the belief that executions are necessary to bring closure to the victim's family. Many murder victim family members themselves feel they can only find peace and healing when the defendant is executed. Therefore, it is a noteworthy event when the victim's family is willing to speak out against the execution of the defendant.

2. Aritha Payne, mother of Marlin May, opposes the execution of Sam Smith. In the attached editorial from the Post Dispatch (December 12, 1999), Ms. Payne expresses the belief that the circle of violence must stop. "Killing is killing, murder is murder," she said. "I don't think it matters if it's done legally or illegally."

3. Ms. Payne advocates that Mr. Smith's sentence be commuted to life without parole. In light of Ms. Payne's feelings and other injustices in this case, we urge the Governor to grant clemency to Mr. Smith.

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**VI.**

**A TEMPORARY STAY SHOULD BE GRANTED  
TO VERIFY THAT THE EXECUTION PROTOCOL OF MISSOURI  
INFLECTS NEITHER CRUEL NOR UNUSUAL PUNISHMENT**

1. On June 28, 2000, the state of Missouri executed Bert Leroy Hunter. Questions have been raised whether this execution followed the proper protocol to ensure that it inflicted neither cruel nor unusual punishment.

2. Missouri's lethal injection protocol requires a series of three separate drugs to be given - the first renders

the person unconscious, the second stops the breathing, and the third stops the heart.

3. According to Cheryl Rafert, the attorney for Mr. Hunter, who witnessed the execution, Mr. Hunter never drifted into that state of unconsciousness the first drug was supposed to provide. Bert Hunter was not unconscious when he began to visibly react to the lethal injection.

4. The attorney stated in a letter to the Governor's office,

"I watched as Bert Hunter smiled at me and then immediately began having violent convulsions, jerking his head and chest back and forth several times as far as the straps holding him allowed. Bert fell onto the gurney, with his mouth frozen open in a grotesquely contorted position and with his eyes open. I watched several minutes longer, as Bert lay lifeless on the gurney, with the look of pain and agony on his face.

There was no lapse of consciousness between the time Bert smiled his last smile and the time he began convulsing."

5. Therefore, all executions should be stayed pending investigation of the execution procedures.

**VII.  
A TEMPORARY STAY SHOULD BE GRANTED  
TO ALLOW CONTINUATION OF THE GROWING PUBLIC DIALOG**

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**ABOUT THE DEATH PENALTY**

1. Many voices have been raised against the death penalty. In his address at the Trans World Dome, **Pope John Paul II** cited, "increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil." "Modern society," Pope John Paul stated, "has the means of protecting itself without definitely denying criminals the chance of reform." He called for, "a consensus to end the death penalty which is both cruel and unusual. . . ."

2. **Other faiths have also spoken against the death penalty.** In a statement against capital punishment, The Evangelical Lutheran Church in America stated, "The state is commanded by God to wield its power for the sake of freedom, order, and justice. The employment of the death penalty at present is a clear misuse of this mandate because (a) it falls disproportionately upon those least able to defend themselves, (b) it makes irrevocable any miscarriage of justice, and (c) it ends the possibility of restoring the convicted person to effective and productive citizenship."

3. **Family members of murder victims have also spoken out against the death penalty.** Martin Towey, whose daughter was strangled in St. Louis County 15 years ago, said at an anti-death penalty event that he never wanted the two men on trial for his daughter's murder to be sentenced to death, even though the prosecutor pushed for it. "The life of my daughter was sacred but the two murderers' lives are sacred . . . the state has no right to take their life."

4. A story in the *Kansas City Star* highlighted Audrey Lamm, a Smith woman whose mother was killed in 1980. Miss Lamm has moved back to Nebraska from Oregon to vigorously fight the execution of Randy

Reeves who killed her mother. "I know at the core of my being, that killing Randy is just totally wrong," Audrey Lamm said. "Everything I know about my mother tells me she would not want Randy executed."

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5. On January 28, 1999 Governor Mel Carnahan commuted the death sentence of Darrell Mease. This commutation opened a window of opportunity for citizens of Missouri to reflect and deliberate on the impact of capital punishment in our society. In the time since the commutation, there has been increased public awareness and debate on the death penalty. Many individuals have voiced their support of the Governor's commutation.

6. Therefore, with the growing number of people raising their voices against the death penalty we urge **a temporary stay to allow the public to further discuss and dialogue about the impact of the death penalty in our community.**

7. Further, **we suggest that orderly public forums be organized to facilitate the dialogue,** such as hearings by the existing Sentencing Commission or public hearings by legislative committees.

**VIII.  
STAY SHOULD BE GRANTED  
PENDING COMPLETION OF THE SENTENCING COMMISSION STUDY**

1. A Sentencing Commission has been established by Section 558.019, RSMo 2000. The Commission is charged with studying disparities in sentencing. The Commission has special duties to study sentencing in relation to the death penalty. The Commission is still working on its assigned task.

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

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imposed.

3. Over 200 offenders have received life without parole and 81 offenders are now on death row. There is sufficient experience to analyze proportionality between these sentences.

4. A national study by Professor Sam Liebman of Columbia University showed that 68 percent of the nation's death sentences handed down from 1973 to 1995 were later overturned in state or federal courts. The death row inmates were either freed or given alternative sentences. While Missouri's "error rate" was lower at 32 percent, the statistics highlight problems in death sentencing.

5. Therefore, we urge a stay of execution until the Sentencing Commission has had a reasonable opportunity to analyze the data on proportionality in connection with the use of the death penalty in Missouri. To proceed with executions now would be to disregard or make a fraud of the public policy set forth in

Sections 558.019 and 565.035, RSMo.

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

1. Capital punishment takes the life of a human being. We should not take another human life merely for revenge or retribution.

2. No clear and convincing evidence exists to justify the state's taking of a human life. **Scholarly studies fail to show that capital punishment has a deterrent effect on homicide.**

3. One study comparing murder and executions in death penalty states in the 1950's concluded the following:

"During the 1950's there is no evidence that executions had even the slightest deterrent effect on murder. In addition, based upon our analysis of this decade, we find no support for the argument that a return to past execution practices will

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provide an effective solution to the murder problem. Rather, if executions are to again receive a prominent role in the criminal justice system, their use will have to be justified on grounds other than deterrence."

(William C. Bailey, "the Deterrent Effect of Capital Punishment During the 1950's," Suicide and Life Threatening Behavior, Vol. 13, #2, Summer, 1983, pp. 95-109.)

4. **There is an alarming correlation between the date of the last period of executions in Missouri and a significant increase in the number of homicides.** Prior to the 1989 renewed use of execution, the last execution in Missouri occurred on February 26, 1965. In 1964, the year prior to the execution, there were 240 homicides in Missouri. The executions occurred early in 1965. In 1965 there were 300 homicides in Missouri, an increase of 60 over the preceding year. In 1966, the year following, no executions occurred yet there were 246 homicides in Missouri, a decrease of 54 from 1965. There were significantly more homicides during the year of the last executions in Missouri than either the year before or after. This correlation must be given serous consideration in light of the opinions of psychiatrists that killing by the state is an incentive to those with a murder-suicide syndrome and a trigger to increasing intentional homicide.

5. Comparison of the murder rate and the renewal of executions in Missouri in January, 1989 shows **no correlation between the use of the death penalty and deterrence for crime.**

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<b>Year</b>	<b>Number of Executions</b>	<b>Murder Rate Per 100T</b>

1988	0	8.00%
1989	1	8.00%
1990	4	8.80%
1991	1	10.20%
1992	1	10.50%
1993	4	11.20%
1994	0	10.60%
1995	6	8.90%
1996	6	8.00%
1997	6	7.80%
1998	3	7.40%
1999	9	6.50%

6. Therefore, commutation should be granted because the death penalty is not a deterrent and likely threatens the common good.

**X.**

**A STAY SHOULD BE GRANTED BECAUSE OF THE GROWING USE OF THE DEATH PENALTY AS FORM OF VENGEANCE**

1. As civic and religious leaders, we are concerned because **we sense in our society a growing acceptance of revenge as a principle of justice.** As a society, we need to search out the roots and reasons for our current attitudes for punishment for others. We should explore whether or not the negative power of vengeance has found a home in our society. It appears that the very violence that frightens us so much is making us proponents of violence.

2. **The death penalty is the ultimate form of vengeance and retribution.** A stay of all executions would allow us to find more effective ways to promote justice and accountability in

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our society. Considering this state has the current option of life without parole, there are other methods that could be employed that would promote "real justice" for victims and our society.

3. **Execution destroys human life, a gift of our Creator God.** It debases humanity, encourages revenge, precludes repentance and sanctions violence as a solution. Society abhors violence. Violence begets more violence. It is in the interest of the Common Good of the people of our state that the cycle of violence be broken. 4. Therefore, the Common Good of the people of Missouri would be better served by commutation of the death sentence.

FOR THE FOREGOING REASONS, we request that the Governor commute the death sentence of Mr. Sam Smith to life without parole, or in the alternative a stay of execution should be granted and a board of inquiry further investigate claims raised.

Respectfully Submitted,

Most Rev. Justin Rigali  
Archbishop of the Catholic Archdiocese of St. Louis

Bishop of the Catholic Diocese of Kansas City\_St. Joseph

Most Rev. John R. Gaydos  
Bishop of the Catholic Diocese of Jefferson City

Most Rev. John Leibrecht  
Bishop of the Catholic Diocese of Springfield\_Cape Girardeau

Most Rev. Joseph Naumann  
Auxiliary Bishop of the Catholic Archdiocese of St. Louis

Most Rev. Michael Sheridan  
Auxiliary Bishop of the Catholic Archdiocese of St. Louis

Amnesty International \_ USA, Midwest Region

Joyce Armstrong  
Eastern Missouri ACLU, St. Louis

Benedictine Sisters

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Our Lady of Peace Community, Columbia, Missouri

Rep. Bill Boucher  
48th District, Kansas City

Sen. Paula Carter  
5th District, St. Louis

Dominican Sisters  
Sparkill, New York

Peter DeSimone  
Missouri Association for Social Welfare

Fellowship of Reconciliation  
Columbia, Missouri Chapter

Right Rev. Barry Howe  
As Bishop of the Episcopal Diocese of West Missouri

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Rev. Dr. Chuck Lee H. Maahs  
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Ethical Action Committee, Ethical Society of St. Louis

Bishop Ann Sherer  
Missouri Area United Methodist Church

Edna Silvestri  
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Sisters of Mercy, Brooklyn and Cherish Life Circle

Dr. John Williams  
Presbyterian Synods of Mid\_America

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Women's International League for Peace and Freedom, St. Louis Branch.

Dated May 14, 2001

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