

PETITION FOR CLEMENCY

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

**IN THE MATTER OF KELVIN MALONE
SENTENCED TO DIE ON JANUARY 13, 1999**

INTRODUCTION

The final decision as to whether Kelvin Malone lives or dies rests with you, Mel Carnahan, the Governor of Missouri. It's not weak circumstantial evidence that threatens to kill Kelvin. It's the unlucky circumstance that Missouri thrust inattentive lawyers to represent Kelvin that threatens to kill him. It is important for you, Governor Carnahan, to realize Justice here extends far beyond whether procedures were minimally followed. Kelvin has suffered abysmal representation. There is an old joke that doctors bury their mistakes. This is no joke, and the Missouri Justice System cannot bury this mistake, especially now in this unique time in Missouri history so near to the time when Pope John Paul II will grace Missouri soil.

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

Clemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing a miscarriage 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... [2]

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. [3]

The Missouri Supreme Court also noted that it is the proper role of the governor to act when the courts decline. Indeed in Wilson v. State [4], the Missouri Supreme Court did not act to remedy a miscarriage of justice of the conviction of a mildly- retarded youth who was browbeaten into a confession to a murder he did not commit by the extremely aggressive interrogation tactics of deputy sheriffs. Another inmate in the Kansas penal system confessed to the murder Wilson had pleaded guilty to, offering convincing knowledge of the crime. You, Governor Carnahan, acted to correct this miscarriage of justice by granting executive clemency and commuting Wilson's sentence. As you know, Governor Carnahan, you are not restricted in your supreme clemency powers. You must answer only to your conscience in making the final decision to spare Kelvin's life.

You, Governor Carnahan, are the last resort for justice and mercy for Kelvin.

Kelvin's life should be spared because

- ✓ **1. Kelvin's lawyer failed to adequately prepare for trial.**
- ✓ **2. Kelvin's jury heard almost no evidence to spare Kelvin's life despite a wealth of mitigation, not limited to Kelvin's mental status and the family who loves him.**
- ✓ **3. Unlike others on death row who receive substantive review**

of adequate trial representation from the Missouri Supreme Court, Kelvin's post-conviction lawyer's omission of a proper signature constituted abandonment and barred Kelvin from receiving a review on the merits of the ineffective assistance of his trial counsel.

4. Kelvin's California capital appeals are not concluded. Kelvin's Missouri jury used that death sentence as justification for its death verdict. If that California death sentence is overturned, it would be unfair for Missouri to kill Kelvin for an aggravating circumstance that would no longer exist.

5. As a gesture of good will, two weeks prior to the arrival of Pope John Paul II, you, Governor Mel Carnahan, should grant clemency to a fellow human whose case is contaminated with serious errors. This historic and courageous human rights gesture will impress a watching world.

I. INEFFECTIVE TRIAL COUNSEL

No one insists that Kelvin should have received a perfect trial or have been represented by a "dream team" of lawyers. However, everyone insists Kelvin deserved fairness. He's entitled to a fair trial and adequate representation. He didn't get either.

Kelvin's miserable representation began November 23, 1983, a mere four months before the start of his capital murder trial, when lawyer William Aylward entered his appearance to defend Kelvin. Aylward did not get the prosecution's evidence in pre-trial discovery until January 17, 1984 - - 68 days before the trial! In that time, Mr. Aylward tried a capital murder trial from February 27, 1984 - March 10, 1984. Before that, he tried an armed robbery of an armored car case in the City of St. Louis. Kelvin's trial counsel did not seriously work on this case until about two weeks prior to the jury trial. Mr. Aylward put it best when he told the trial judge at the start of this case

that, "I do not feel I am adequately prepared to begin trial on this case at this time." [5]

At this point, Mr. Aylward tried to blame Kelvin for the case proceeding to trial that day stating Kelvin insisted that the trial go on at that moment. Any competent attorney would have known that this was not sound reasoning, and would not have acceded to Kelvin's stated desire at that time. As you will see in the second part of the petition, Kelvin had a history of mental difficulties. If Mr. Aylward had done his homework, he would have known that about Kelvin. (As you will soon realize, Mr. Aylward didn't do his homework.) Therefore, to take this unsound reasoning to go ahead and proceed to trial unprepared was not reasonable or fair on Mr. Aylward's part. As the trial progressed, Kelvin sadly discovered just how woefully unprepared Mr. Aylward was for any trial, let alone a capital trial. Kelvin suffered miserably through the mistakes Mr. Aylward's unpreparedness caused.

Among Kelvin's lawyer's many mistakes include, but are not limited to

**A. NOT CALLING MATERIAL WITNESSES
FROM THE SCENE WHO WOULD HAVE CAST
REASONABLE DOUBT ON THE PROSECUTION'S CASE;**

**B. A TOTAL FAILURE TO PREPARE AND ADDRESS
THE SUDDEN AND UNFAIR SURPRISE IN-COURT
IDENTIFICATION OF KELVIN AS BEING A MAN
NEAR VICTIM WILLIAM PARR'S CAB;**

**C. OVERLOOKING THE INCONCLUSIVENESS OF
BALLISTIC REPORTS THAT ALLEGEDLY CONNECTED
KELVIN WITH MR. PARR'S DEATH;**

D. A COMPLETE LACK OF KNOWLEDGE OF KELVIN'S

CALIFORNIA TESTIMONY. THIS FAILURE CAUSED THE CALIFORNIA PROSECUTOR TO MISLEAD THE ST. LOUIS COUNTY JURY TO BELIEVE KELVIN MADE ADMISSIONS ABOUT MR. PARR'S DEATH;

E. THE POTENTIALLY FATAL OMISSION OF PRESENTING TRUE MITIGATING EVIDENCE DURING KELVIN'S PENALTY PHASE;

F. THE FAILURE TO CONVEY TO THE JURY THAT THIS IS A WEAK CIRCUMSTANTIAL CASE RATHER THAN ONE SOLIDLY BUILT ON DIRECT EVIDENCE;

G. NOT REALIZING THAT THE CUMULATIVE EFFECT OF HIS MANY ERRORS WOULD LEAD KELVIN TO THE GAS CHAMBER (NOW LETHAL INJECTION).

Kelvin's lawyer presented no evidence during the trial's guilt phase.

This certainly indicated to the jury that Kelvin had no defense. Nothing could have been further from the truth. Steven Ferrell told the police he saw someone in Mr. Parr's cab that night. They had him look at five photographs in what the police call a photo spread. Kelvin's photograph was one of the five photographs Mr. Ferrell reviewed. He could not identify any of the persons in the photographs as the person he had seen in the cab. [6] Michael Holloran worked as a security guard in a bank lobby and may have seen Mr. Parr shortly before his death. The police had Mr. Holloran hypnotized and he related that he spoke to a "real black man", age 28-32. Had Kelvin's lawyer bothered, he could have found some official document with Kelvin's description at or near the time of Mr. Parr's death. For example, included in the appendix is a police report dated February 6, 1981

that gives a description of Kelvin: **Malone, Kelvin Shelby, NMA, 20, 6-2,155
Blk/Brn, Dob: 1/10/61[7]**

That is nowhere near the man Holloran describes, and Mr. Aylward never presented this. These witnesses who saw Mr. Parr's killer and remembered the man in detail but could not identify Kelvin cast doubt on Kelvin's guilt. A minimally competent attorney would have offered the exculpatory testimony from Mr. Ferrell who saw the killer in the cab, looked at Kelvin's photograph, and stated Kelvin was not the man. When the prosecution rested its case without calling on-scene witnesses Ferrell and Holloran, a red flag should have gone up in Mr. Aylward's head. A competent attorney who had prepared his case would have realized the State knew its case was weak and these witnesses would have cast doubt that the right man was on trial.

This would have been readily evident to any mindful attorney in light of the surprise in-court identification by Mr. Richard Elder. On the day trial commenced, the prosecutor in open court told the judge twice that he knew of no witnesses who would be able to come into court and identify Mr. Malone.[8] However, a short time later the prosecutor advised that Mr. Parr's friend, Richard Elder, would identify Kelvin as the man he saw outside the bank shortly before Mr. Parr's death.[9] Had Kelvin received competent representation, trial counsel would have investigated prior to trial whether any of the witnesses could identify Kelvin. By neglecting this elemental task, Mr. Aylward was left with asking for long shot remedies like a mistrial or a continuance. No trial judge will grant a lawyer these extreme remedies when a lawyer fails to prepare his case like Mr. Aylward.[10] Though the fault belongs to Mr. Aylward, it's Kelvin who has suffered the consequences. Mr. Elder informed that he identified Kelvin by looking through the courtroom's doors' window during the afternoon before he testified. How was Mr. Elder permitted to look through this window prior to his testimony? Who

allowed this to occur? Was Mr. Elder guided to this place? In every criminal trial, both parties invoke the rule of sequestration. This means the witnesses do not sit in the courtroom to view prior testimony and they do not talk to other witnesses in order to get their stories straight. When sequestration's violated, you have results like the tainted, suggestive evidence that led to Kelvin conviction.

The questions posed remain hanging because Mr. Aylward never asked them. Any competent lawyer would have done so. This prejudiced Kelvin because the prosecutor's weak circumstantial case included Mr. Elder's suggestive in-court identification of the man he thought he saw near his friend's cab. In this weak case, the prosecutor needed every weak link in their chain in order to connect Kelvin to the scene. Mr. Aylward's oversight here contributed to Kelvin's condemnation.[11]

Along with Mr. Aylward's failure to investigate the witnesses, Mr. Aylward failed to adequately review the physical evidence. In a circumstantial case like this one, a reasonably competent attorney would have thoroughly examined the physical evidence. A glaring example here rests with the ballistics reports.[12] The prosecutor tried to establish a connection between a gun found with Kelvin in California with the ballistics here. Four firearms examiners reviewed the ballistics. Though FBI Firearms Examiner Dillon claimed there was a positive link between the gun and the St. Louis County ballistics, he's the only one of the four who made that claim. Only through his cross examination of Examiner William Crosswhite did Mr. Aylward bring out the fact that not every expert agreed that the ballistics linked Kelvin with the crime.

In fact the majority of the firearms examiners who reviewed the evidence stated

that the link was inconclusive. He failed to take the necessary steps to bring in Examiner Stubits and the business records of Senior Examiner Reeder whose testimony would have corroborated that of Examiner Crosswhite that the ballistics results were inconclusive. In fact, given the fact that Mr. Aylward called no witnesses, it's logical to believe the jury would have never heard about the inconsistent results but for the fact the State called Examiner Crosswhite and Mr. Aylward bothered to cross examine him. Had the prosecutor not called Examiner Crosswhite, given Mr. Aylward's record on this case, the jury would never have even received the fleeting hint it received about the ballistics reports' inconclusiveness. This point became critical because the prosecution argued that F.B.I. Agent Dillon, who claimed the results conclusively tied the weapon found near Kelvin to the bullet recovered from Mr. Parr's brain, was the more credible witness. (Given what we know today about the inconsistencies and the inaccuracies from F.B.I. laboratories, is that really a convincing argument to send a man to the death chamber?) Had Mr. Aylward not been ineffective, the defense could have countered Mr. Dillon's opinion with Examiner Stubits and the business records reflecting the findings of Senior Examiner Reeder, who was unavailable, having suffered from a massive heart attack. Again, but for his lawyer's ineffectiveness, Kelvin would not be facing Potosi's death chamber.

Also, yet another of Mr. Aylward's mistakes was his complete and total lack of knowledge about what transpired during Kelvin's trial in California. The Missouri prosecutors called Gary Admire, the lawyer who prosecuted Kelvin's case in California, to the stand to advise what Kelvin testified about during his California trial. Mr. Aylward's lack of knowledge of Kelvin's California testimony allowed this

California prosecutor to mislead the St. Louis County jury to believe that Kelvin made admissions about Mr. Parr's death. Though this is not the time to recount every inaccuracy that Mr. Aylward missed, there are two crucial inaccuracies that Mr. Aylward missed that strongly led to Kelvin's Missouri death sentence.

First, Mr. Admire recounted that before the police apprehended Kelvin, he fled from the San Jose police officers. Mr. Admire stated that Kelvin testified that he indicated that for various reasons he was afraid of being identified and apprehended for his activities. Mr. Admire coyly did not say what charges Kelvin was "afraid about." Clearly, Mr. Admire's testimony in this murder trial implied that Kelvin admitted murder. However, that's not true. In California, Kelvin testified when the police came to his car in San Jose he was wanted in Monterey County for "burglary, parole violation, possession of stolen property, reckless driving, evading arrest, and resisting arrest" - - no admission of any murder. Kelvin testified that he "stepped on the gas" because "I was wanted in Monterey County, and ... there was the weapons in the car, and I knew that it would be another charge" - - again, no admission of any murder. Mr. Admire's insinuation was wrong: Kelvin did not flee the San Jose police because he was wanted for murder, and Mr. Aylward did nothing useful to clear that up.

Second, Mr. Admire misled the jury that Kelvin admitted arriving in St. Louis at the Greyhound Station near the bank when and where Mr. Parr was last seen alive. Mr. Admire testified that Kelvin told the California jury that he arrived in St. Louis on March 18, 1981 on a Greyhound bus. The specificity with which Mr. Admire testified clearly placed Kelvin in the area of the crime scene at the appropriate time. Yet, this was not Kelvin's testimony. With disregard to the truth, the prosecutors led the jury to believe

that by his own California testimony Kelvin put himself at the crime scene at the time it happened. This was very powerful evidence and yet it was blatantly false. Nonetheless, Kelvin's lawyer failed to point this out during cross examination. In this, his performance was grossly deficient.

Though Kelvin's lawyer failed to recognize how crucial Mr. Admire's testimony had been, it was not lost on the prosecutors. This distortion was repeated in their closing arguments several times and emphasized over and over again, giving it more weight.

The St. Louis County prosecutor repeatedly argued Mr. Admire's false testimony, in guilt- phase:

Gary Admire also told you that Kelvin Malone admitted to coming to St. Louis on the bus and that he arrived sometime during the early morning hours of March 18th at that bus station.

Further, in guilt - phase:

Remember what he told Gary Admire... "I was going to leave San Jose and go to Hawaii." Why? "I didn't want the police to catch up with me." Evidence of flight is evidence of guilt. Would Mr. Malone say, 'Yes, I killed a cab driver in St. Louis?' Of course he wouldn't ... But he said enough ... Kelvin Malone, by his own admission, arrives in St. Louis at the bus station during the early morning hours of March 18.

Later, the prosecutor argued

Again, Mr. Admire told you Mr. Malone said that he arrived in St. Louis on the bus during the early morning hours of March the 18th. He arrived without sufficient money to take a cab. How else is he going to get from St. Louis to Berkley? He knows he's got the guns...

Kelvin's lawyer's failure here to effectively point out that it was untrue that Kelvin made

these blatant admissions is crucial because other than Mr. Admire's false and misleading testimony, there was only weak circumstantial evidence that Kelvin arrived by Greyhound on March 18, 1981. Again, but for Kelvin's lawyer's ineffectiveness, the outcome of Kelvin's trial would have been different.

As these examples clearly show, Kelvin did not receive effective assistance of counsel as is everyone's guarantee. In order to provide effective assistance of counsel to a person facing the death penalty, the attorney must conduct a thorough investigation of the circumstances surrounding the offense. The attorney must become thoroughly familiar with the facts the prosecution will present at trial. This familiarity comes through obtaining all the police reports, lab reports, experts' reports, and all documentary evidence the State has in its possession. It comes from interviewing and deposing the State's crucial witnesses. It comes from extensive communications with the client and conducting investigation to determine whether any defenses exist for the guilt phase of the trial. It certainly does not come from working on the case for a few days and does not magically occur overnight. It comes through work and preparation. That's the least that Missouri could have offered Kelvin in trial. Instead, without your mercy, Governor Carnahan, Kelvin faces execution after receiving terrible assistance of counsel.

II. KELVIN RECEIVED A HORRENDOUSLY DEFICIENT PENALTY PHASE

During the penalty phase, Kelvin continued to receive ineffective assistance of

counsel. As was readily evident by reviewing the guilt phase, Mr. Aylward proved that two weeks is not enough time to prepare an adequate penalty phase. For Kelvin's penalty phase, Mr. Aylward presented no witnesses to humanize Kelvin or to explain the circumstances of his life. He called only one witness, a dry academic who testified that there was no evidence to support the view that the death penalty is an effective deterrent. You can just hear the jury say "Big Deal." His lack of investigation, preparation, and presentation for his client showed Mr. Aylward was in no way mindful as the basic philosophy for all capital cases articulated in Lockett v. Ohio:

In capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual and the circumstances of a particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[13]

The entire penalty phase - including jury deliberation on the appropriate punishment - lasted only four hours. The only aggravating evidence introduced by the prosecutors were Kelvin's prior convictions and sentences from California which the prosecutors read to the jury from the certified court records.

Again, Mr. Aylward would blame Kelvin for insufficient penalty phase. He stated that Kelvin told him not to bother his family because Kelvin did not want to put his family through the trauma of another trial. However, Kelvin was on trial for his life. A lawyer's actions in serving his client must be reasonable. If Mr. Aylward had reviewed the California transcripts, he would have realized that Kelvin had, in fact, a loving support system of family and friends who readily would have assisted Mr. Aylward in Kelvin's defense. (Included in the appendix is family testimony from the

California proceeding. Also, in the appendix are letters from Kelvin's family to assert they gladly would have assisted Kelvin's lawyer.) [14] Also, had Mr. Aylward even skimmed the California transcript, he would have noted Kelvin had mental difficulties. Mr. Aylward should have, at the very least, made a phone call to Kelvin's parents and simply state Kelvin was going to trial for his life in St. Louis County. Yet, no one gave Kelvin or his family that simple dignity.

For its part, the defense presented one witness : a Saint Louis University professor who offered his general expert opinion that the death penalty was not an effective deterrent to crime. Mr. Aylward did not investigate or present any evidence about Kelvin's family, his upbringing, or his social, educational, psychological, or physical history. A glaring example of Mr. Aylward's deficiencies includes him asking the jury to find that Kelvin's age at the time of the offense was a mitigating factor, but never telling the jury how old Kelvin was. Governor Carnahan, you must realize that the record indicates that Kevin had a beard at trial. Thus, it would have been unreasonable to expect that the jury to intuit that Kelvin was a very young man based on his appearance at trial.

Mr. Aylward's communication with Kelvin was so limited that he did not know Kelvin had two children. Mr. Aylward never spoke to Kelvin's parents. Governor Carnahan, Kelvin's parents, the rest of the family, and his friends would have readily testified during the St. Louis County penalty phase just like they did in California had Mr. Aylward bothered to called them.

Mr. Aylward also did not request a psychological evaluation nor did he review the extensive psychological profiles developed on Kelvin for his California proceedings. Mr. Aylward made no specific preparations for the penalty phase other than contact

one academic and one religious expert on the death penalty who did not testify.

It's completely unreasonable for Kelvin's lawyer to abdicate his responsibility and duty to investigate and understand the life he was asking the jury to spare. Kelvin and his lawyer barely communicated until about two weeks prior to the trial, at which point counsel focused on the guilt phase of the trial. Thus, Kelvin's lawyer knew very little about what he would find if he had investigated Kelvin's personal history. Without the necessary background information, Kelvin's lawyer was in no position to advise Kelvin on the crucial importance of mitigating evidence and on the likelihood that his family's testimony would have saved his life.[15]

It's clear that Mr. Aylward's performance during the penalty phase was unreasonably deficient because he had a wealth of information at his fingertips from which he could have drawn a picture of Kelvin for the jury.[16] But for Kelvin's lawyer's failure to use the readily- available defense evidence, the jury would have learned the following information from his family, friends, educators, and psychologists. Kelvin is mixed-race son of a white mother and a black father. He is the third child and oldest son in a family of seven children. Kelvin is also the father of two children who were ages one and four at the time of the trial. His father's career in the military until 1971 kept him from the family for long periods of time during most of Kelvin's childhood. The family moved often. These frequent relocations interrupted his education and exacerbated his academic and disciplinary development. His most consistent childhood home was Seaside, California which suffered intense racial tensions during Kelvin's youth. Kelvin was teased constantly for his mixed-race background and had difficulty finding

acceptance with either the white community or the black community. Kelvin's small size and frail physical condition made him a target of constant ridicule. Kelvin dropped out of school in the tenth grade. His siblings and schoolmates described Kelvin as unpopular, hyperactive, a loner, and a child who was easily manipulated.

Unknown to the jury was that Kelvin had several falls and head injuries as a child. Two of these falls required overnight hospital stays -- one when he was eighteen months old and the second when he was ten years old. Had Mr. Aylward done his homework, he would have known Dr. Craig Rath, a clinical psychologist had testified for Kelvin in California and could have been made available to testify to Kelvin's St. Louis County jury. Dr. Rath spent at least nine hours with Kelvin over several visits, administered psychological tests, and reviewed sixty-four reports based on interviews with people from Kelvin's past.

Based on this data, Dr. Rath diagnosed Kelvin as having suffered from untreated attention deficit disorder (ADD) as a child. Then, as an adult, he suffered from antisocial personality disorder and residual ADD. Dr. Rath would have explained that in residual ADD the hyperactivity that characterizes childhood behavior often goes away but serious problems with impulsivity, attention span, and organizational skills remain. Dr. Rath would have also testified that because Kelvin's ADD was the result of a small amount of organic brain damage, the roots of his problem are non volitional.

Dr. Rath's diagnosis is corroborated by a less-detailed report from Dr. William Jones, another California-licensed psychologist. Dr. Jones examined Kelvin and found he had a history of head trauma and underlying neurological dysfunction. Also, Mr. Aylward easily could have and should have built on these opinions and retained more experts to

corroborate these vital findings.

The outrage in Kelvin's case is all this mitigating evidence was easily available because Kelvin's California counsel had already developed it. All Mr. Aylward needed to do was pick up a telephone and contact them. Yet, Missouri could not provide Kelvin with trial counsel who would perform that minimal task.

Rather, the jury heard none of this. The fundamental fairness of Kelvin's penalty phase must be criticized. In order for any person to receive a fair penalty phase, the attorney must be familiar with the type of evidence that is relevant and admissible. In order to prepare for a penalty phase, the attorney must spend time not only interviewing the client, but the client's family, friends, teachers, former employers, anyone else who had significant contact with the client during the course of the client's life. The attorney must obtain documentary evidence such as school records, military records, medical records, prison records, DFS records, juvenile records, employment records, and any other records available in order to get a complete picture of the client's life to determine what can be presented in mitigation to weigh against a verdict for death. The attorney must investigate the client's mental status for evidence of low I.Q., mental retardation, or any mental illness. Finally, the attorney must investigate all evidence the State intends to prove as aggravating evidence during the trial's penalty phase in order to be able to effectively deal with it in trial.

That's the minimum our Justice System requires before giving and affirming a death sentence. None of this happened in Kelvin's trial because as Mr. Aylward stated that he was not prepared to try this case. There is no way anyone could do the minimally adequate job in a capital case in a mere matter of a few days. Had Kelvin received a fair

chance during penalty phase, the outcome of the proceeding would have been different. Governor Carnahan, you would join other august deliberative bodies when you grant relief after concluding there is a reasonable likelihood that the result of the punishment phase of the trial would have been different, had the defense presented a more extensive case in mitigation. Conservative bodies like the Missouri Supreme Court have ordered a new penalty phase to remedy injustices committed. A review of the last five years reveals the conservative Missouri Supreme Court reversing and remanding the following capital cases due to improprieties during penalty phases in the following cases:

Ernest Johnson decided May 26, 1998
Leon Taylor decided April 29, 1997
Shirley Phillips decided February 25, 1997
Walter Timothy Storey decided June 20, 1995
Shelby Debler decided August 20, 1993
Maria Isa decided March 23, 1993
[17]

In St. Louis, on October 15, 1996. the Honorable Robert Dierker, granted Mark Moore a new penalty phase after concluding that Mr. Moore's trial counsel conducted an inadequate penalty phase.[18] This failure alone has often been cited as more than enough reason to granting relief. However, Kelvin has not had this opportunity. As you will soon review, these remedies were not available because the courts have not reviewed the merits of Kelvin's claim of ineffective assistance of counsel because Kelvin's post-conviction attorney failed to obtain a proper signature, as will be discussed in the next section.

By the end of the trial, the terrible representation disgusted Kelvin. He did not

attend the farcical penalty phase. Kelvin's miserable trial representation ended when Kelvin learned about his death sentence, the one that could lead to his lethal injection, from a television near his cell rather than from his lawyer.

III. THE LACK OF A PROPER SIGNATURE SERVED AS A PROCEDURAL BAR TO HAVING KELVIN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL HEARD BY THE COURTS

Governor Carnahan, one would easily, but mistakenly, assume that these claims have already been meaningfully addressed by the courts. After all, Missouri has remedies for post-conviction relief claims of ineffective assistance of counsel, and executive clemency is usually the court of last resort. Governor Carnahan, you are Kelvin's **only** real chance for review and help. Carefully reviewing this case's sad, twisted procedural history clearly demonstrates this. In Kelvin's case, a Dickensian adherence to the rules and procedures (over substance) has caused Kelvin to slip through our safeguards.

Kelvin's attempt to having the performance of his trial counsel reviewed started on July 3, 1986 when Kelvin's post-conviction attorney Dorothy Hirzy filed a motion pursuant to Missouri Supreme Court Rule 27.26 alleging ineffective assistance of trial counsel. That motion was neither signed nor verified by Kelvin personally, but rather was signed and verified by Ms. Hirzy in the following manner, "Kelvin Malone by Dorothy Hirzy." [19] On March 13, 1987, an amended motion was filed by Ms. Hirzy. Again, that motion was neither signed nor verified by Kelvin, but was signed by Ms. Hirzy.

Circuit Court Judge Kenneth Weinstock dismissed this motion because Kelvin was incarcerated in California, and therefore was not in the custody of Missouri as required by the rule and thus could not invoke his rights until he was actually in the custody of Missouri. On March 8, 1988, the Missouri Court of Appeals affirmed the circuit court's dismissal holding that Kelvin could not pursue the motion at that time since he was still incarcerated in California, but that the dismissal was without prejudice to the filing of further post-conviction relief under the new Missouri Supreme Court Rule 29.15. [20] Under the change in the law, Kelvin's lawyer had until June 30, 1988 to have everything in order for Kelvin to pursue his claim of ineffective assistance of trial counsel.

On May 24, 1988, Ms. Hirzy filed another post-conviction motion denominated as his Rule 29.15 Motion.[21] This motion was also neither signed, nor verified by Kelvin as required by the Rule; rather it was signed by Ms. Hirzy even though the clear language of the Rule required that Kelvin sign and verify the motion. On July 19, 1988, Ms. Hirzy filed an amended motion. The amended motion was signed by Ms. Hirzy. This proved fatal to Kelvin's motion because the clear language of Rule 29.15 required verification of amended post-conviction motions.

Following an evidentiary hearing on January 12, 1989, the circuit court denied Kelvin's claim. He appealed to the Missouri Supreme Court. During the appeal, the State challenged **for the first time** Kelvin's original and amended motions as insufficient per Rule 29.15 (d) because the motions were unverified. The Missouri Supreme Court ruled that it was faced with an incomplete record on the verification issue and remanded the matter to the circuit court to conduct an evidentiary hearing and determine whether

Kelvin complied with the verification requirements. On January 19, 1990, the circuit court conducted the evidentiary hearing. Kelvin's lawyer filed a motion for leave to supply verification for the original and amended motions. That request was denied, and on March 26, 1990, the circuit court dismissed Kelvin's Rule 29.15 motion holding that the failure to file a properly-verified motion on or before June 30, 1988 deprived the court of jurisdiction to consider the claims' merits. The circuit court dismissed the motion and the Missouri Supreme Court affirmed that holding and the reasoning. [22] In effect, this denied Kelvin review on the merits of his being denied of effective and adequate assistance of trial counsel. Kelvin pursued his remedy of habeas corpus through the federal courts, but the federal courts lacked the power to provide relief because the failure to comply with the verification provision served as a procedural bar to the federal courts granting Kelvin relief.

Governor Carnahan, you must grasp the uniqueness of Kelvin's situation. First, verification is no longer required in the Rule 29.15 motion so no one filing an amended motion under the current version of the rule will be barred by the technicality of not having the client's signature verified. Second, the courts have now dropped the rigidity of its adherence to the rules at all costs. After Sanders v. State was decided in 1991, there is a remedy for the rare instances when a person may file a claim that may be out of time through no fault of their own. The Missouri Supreme Court has established explicit guidelines for counsel to follow in future cases where fairness demands a movant be allowed to file a claim out of time:

At such time counsel may seek leave to file

pleadings out of time, the motion shall set forth facts, not conclusions, showing justification for untimeliness. Where insufficiently informed, the Court is directed to make independent inquiry as to the cause of the untimely filing. The burden is on the movant to demonstrate that the untimeliness is not the result of negligence or intentional conduct of the movant, but is due to counsel's failure to comply with Rule 29.15. [23]

No court has applied the Sanders case retroactively to Kelvin. It's not Kelvin's fault that the law changed for the better after it was too late for the courts to help him. Given the way the lawyers Missouri had thrust upon Kelvin treated his case as if it were some afterthought, it's unreasonable to believe anyone here had much interest in looking out for Kelvin and pursuing this matter. Yet, it's not too late for you, Governor Carnahan. It's your duty with the supreme power of executive clemency to correct this manifest injustice. It's not fair to deny Kelvin full review and then kill him. The law must serve Justice, not merely slavishly adhere to heartless rules.

It's ironic in this time when many in the general public assume that defendants are always "getting off" on technicalities that Kelvin who has suffered serious and grave mistakes at trial and other state court proceedings will be killed on the technicality that he suffered ineffective assistance of trial counsel and was unable to show that miscarriage of justice to the Missouri Supreme Court because his post-conviction attorney failed to comply with the clear requirements of the post-conviction rules in effect at the time. The only remedy for these serious mistakes rests with you, Governor Carnahan, and your executive clemency power. [24] [25]

IV. KELVIN'S CALIFORNIA APPEALS ARE NOT CONCLUDED

It would be unfair to execute Kelvin on January 13, 1999 because his California appeals are not concluded. The only aggravating evidence the prosecutor used during the penalty phase were certified records that Kelvin had a death sentence in California. Obviously, Kelvin's jury used that as justification for their imposition of a Missouri death sentence. If that California sentence is reversed, it would be unfair for Missouri to kill Kelvin for an aggravating circumstance that no longer exists.

Attorney Peter Giannini filed a habeas corpus petition in the U.S. District Court for the Central District of California. A Motion of Summary on all claims has been fully briefed, and was taken under submission by the district court on December 9, 1998. The claims which should result in a reversal of Kelvin's conviction rest on two issues: substantial jury misconduct and false testimony from a jailhouse snitch. [26] [27]

As to the jury misconduct issue, Kelvin's sentence violates Ninth Circuit precedent relating to fair trials tried by impartial jurors. Kelvin had taken a polygraph which showed that he was not the actual killer of the victim. The trial court granted the admissibility of these results. Counsel for both sides conducted individual voir dire (jury selection questioning) of each potential juror regarding their knowledge of polygraphs, their experience with it, and their opinions about it. Dr. Diane Irwin was one of the potential jurors questioned about it. All previous jurors who had expressed an opinion regarding polygraphs and stated they could not fairly consider the matter had been excused by peremptory challenge by one side or the other. Dr. Irwin intentionally lied on voir dire that she had no experience with polygraphs and that she had formed no opinion regarding them. Dr. Irwin was a psychologist. She was ultimately selected as the

jury's foreperson. During the deliberations, one of the jurors stated that he had read in the newspaper that Kelvin's case was the first time a trial court in San Bernadino County had admitted polygraph evidence. The polygraph examiner had testified that Kelvin's responses were truthful when he denied killing the victim. Other members of the jury solicited Dr. Irwin's opinion regarding the validity of polygraph results during their deliberations. Dr. Irwin later admitted that she told the other jurors during deliberations that she had reviewed substantial research on polygraph reliability, and that contrary to the trial testimony, polygraph results were accurate only about half the time and could be manipulated. She told the other jurors that polygraphs were not reliable. According to Dr. Irwin the discussions concerning polygraphs were extensive and it weighed heavily upon the deliberations. Her contribution to these deliberations was extensive. Since the other jurors treated this juror-psychologist as an expert, they followed her opinions and disregarded the polygraph evidence.

Dr. Irwin's lies during voir dire hid the bias she had against polygraphs, which was critical to the defense, particularly with regard to the issue of the identity of the actual killer. Clearly, Dr. Irwin was unable to impartially judge the evidence. The polygraph was crucial to the defense in both the guilt phase and the penalty phase because it supported Kevin's contention that he did not kill the victim. This directly prejudiced Kelvin's case. Dr. Irwin's lies completely destroyed Kelvin's defense because she, as the foreperson, introduced extrinsic evidence into the deliberations. The case already had at least one prosecutor, it didn't need another one in the jury room during deliberations.

Dr. Irwin's misconduct are in direct violation of California legal precedent,

Dyer v. Calderon .[28] In the Dyer case, the federal Ninth Circuit Court of Appeals ruled that a juror who lied during voir dire under circumstances similar to Kelvin's case infects the trial. In California, the presence of a biased juror cannot be harmless error and it requires a new trial. Under the Dyer case, Dr. Irwin's misconduct will require that Kelvin's conviction and death sentence be reversed.

The second major issue that will result in Kelvin's California conviction and death sentence being reversed rests with the testimony of the prosecution's key witness, Charles Laughlin, the jailhouse snitch. Laughlin claimed to have spoken to Kelvin on numerous occasions when they were in jail together. Laughlin testified that Kelvin admitted to committing murders in California and Missouri. In the years since the trial, it has been shown that Laughlin's testimony about Kelvin's confession was false. The California Supreme Court has determined that Laughlin believed he had a deal on unrelated charges in exchange for testimony in Kelvin's case and he fabricated his testimony about Kelvin's confessions to him. At the federal district court level, Kelvin's lawyers have asserted that Laughlin's testimony violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Laughlin has conclusively been shown to be an opportunistic liar, who has been willing to say whatever necessary to get himself off from his latest legal mess. Since Kelvin's conviction was obtained in large part to Laughlin's false testimony, Kelvin will be entitled to a reversal of the California conviction and death sentence.

If the California death sentence is overturned, it will be gallingly unfair for Missouri to kill Kelvin over a legal aggravating circumstance that no longer exists. Even the conservative United States Supreme Court ruled in Johnson v. Mississippi that a death

sentence based at least in part on a prior invalid felony conviction violated the Eighth Amendment prohibition against cruel and unusual punishment.[29] If the federal district court grants Kelvin relief, that California conviction will be invalid, and it would not be fair to kill Kelvin over a major aggravator the jury considered that no longer would exist.

V. KELVIN'S LIFE IS WORTH SAVING

Governor Carnahan, attached to the petition in the appendix are letters and pleas from just some of the people Kelvin has touched. All beg that you spare his life and allow him to continue to be a part of their lives. Though Kelvin has been incarcerated since 1981, he has maintained a close relationship with his family and friends. Kelvin has been productive and will continue to be if you allow him to live.[30] A man can lead a very productive and meaningful life in prison. If you have not already seen this film, Governor Carnahan, I would encourage you to view "The Shawshank Redemption." The man Kelvin's friends and family know and convey to you in those letters can and will lead a useful life just like the characters played by Tim Robbins and Morgan Freeman, Jr. These letters do a far superior job of describing the man Kelvin is and the man he will continue to be in their lives than anything his lawyers here can write. His lawyers cannot put to paper the pain and anguish Kelvin's execution will cause. If nothing else, please carefully read each letter. Unlike the jury who knew nothing about Kelvin when it

condemned him, you will know the man the State wants you to kill.

V. CONCLUSION

Kelvin's case is a classic example of the process failures that can occur in death cases -- failures at trial, failures at post-conviction stage. These failures cost lives.[31]

But Kelvin's life can be saved. This case provides you, Governor Carnahan, a unique opportunity to show that Missouri does care about the Justice of the process. By taking action to correct the injustice of Kelvin's Missouri case, you, Governor Carnahan, can show compassion, concern, and mercy. Here, the wrongs and mistakes are so egregious and the consequences are so severe that you, Governor Carnahan, are fully justified in taking a positive action and granting executive clemency.

Most Missourians are unaware of Kelvin and the issue of whether he will die on January 13, 1999. It just takes too much time to grasp the details, too much effort to understand the developments that makes Kelvin's execution a grave wrong. Some may argue that the politically astute decision allows the execution to go on and lets Kelvin die. However, you, Governor Carnahan, are not known for the politically expedient decision, especially when that decision is not the just one.

Even those who favor the death penalty, if fully advised about the wrongs and mistakes in Kelvin's case would agree that Kelvin's death is not the decision that a careful consideration of the facts compels.

Careful consideration compels that no one in Missouri be put to death after a trial with terrible representation from a lawyer who readily admits in open court on the record that he is not prepared to go to trial.

Careful consideration compels that no one in Missouri be put to death after a penalty phase that offered sparse to no mitigation despite a wealth of mitigating evidence that would have weighed against a sentence of death.

Careful consideration compels that no one in Missouri be put to death after full review of the terrible representation one received in trial is denied over the technicality that a proper verification was not obtained.

It's frightening to confront how badly the Justice system has failed Kelvin Malone and the citizens of Missouri who have a right to fair court procedures to test the correctness of its decisions. Someone must stand up, rather than hide behind legal technicalities, and say this is wrong. Our liberty, all of our liberty, depends on the criminal justice system's ultimate fairness. In rare cases such as this, it's the Governor who is fairness' final arbiter. Today, you, Governor Carnahan, are the last and final hope.

We respectfully request you, Governor Carnahan, commute Kelvin's sentence from a Missouri death sentence to a sentence on his Missouri case to life in prison without the possibility of parole and remand Kelvin to California in order to complete his California proceedings.

Governor Carnahan, if today you hear the voice of Mercy, harden not your heart.

RESPECTFULLY SUBMITTED,

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END NOTES

- [1] Herrera v. Collins, 113 S.Ct. 853 (1993).
- [2] Herrera v. Collins, 113 S.Ct. 853, 866 (1993).
- [3] Herrera v. Collins, 113 S.Ct. 853, 868 (1993).
- [4] Wilson v. State, 813 S.W.2d. 833, 834-835 (Mo. banc 1991).
- [5] See Aylward's comments to Judge Vorhees in Part I of Attachments.
- [6] See Police Report Concerning Steven Ferrell in Part II of Attachments.

- [7] See Police Report from Monterey, California in Part II of Attachments.
- [8] See Trial Transcript (pp. 251-254) in Part III of Attachments.
- [9] See Trial Transcript (pp. 320-325) in Part III of Attachments.
- [10] See Deposition of Richard Elder in Part III of Attachments.
- [11] See Richard Elder's Trial Testimony from Trial Transcript (pp.423-459) in Part III of Attachments.
- [12] See Ballistics Reports in Part IV of Attachments.
- [13] Lockett v. Ohio, 98 S.Ct. 2954, 2964, citing Woodson v. North Carolina, 96 S. Ct. 2978, 2991.
- [14] See Part V of Attachments.
- [15] In his dissenting opinion, Judge Heaney of the Eighth Circuit Court of Appeals forgave the procedural default finding " failure to file a timely-verified motion was the fault of appointed counsel, not Malone..." Malone v. Vasquez, 138 F.3d. 711, 726 (8th Cir. 1998). Turning to the merits of Kelvin's claims of ineffective assistance of counsel for failure to adequately represent him at the penalty phase of trial, Judge Heaney then properly noted that " Because Malone had twice stood trial in California, his Missouri trial attorney had a wealth of information from which he could have drawn a picture of Malone for the jury." Id. at 732. Indeed, this isn't a circumstance of counsel's failure to investigate and develop mitigation evidence. That had already been done in the California trials. Rather, counsel simply failed to ask for already developed mitigation evidence to use at Kelvin's Missouri trial with devastating consequences to Kelvin.
- Also read Statement of Dorothy Hirzy in Part VII of Attachments.
- [16] See Part V of Attachments.
- [17] State v. Johnson, 968 S.W.2d. 686 (Mo. banc 1998).
State v. Taylor, 944 S.W.2d. 925 (Mo. banc 1997).
State v. Phillips, 940 S.W.2d. 512 (Mo. banc 1997).
State v. Storey, 901 S.W.2d. 886 (Mo. banc 1995).
State v. Debler, 856 S.W.2d. 641 (Mo. banc 1993).
State v. Isa, 850 S.W.2d. 876 (Mo. banc 1993).
- [18] PCR No. 3350 in the Circuit Court of the City of St. Louis.
- [19] See Kelvin's Rule 27.26 Motion in Part VII of Attachments.
- [20] State v. Malone, 747 S.W.2d. 695 (Mo.App. 1988) in Part VII of Attachments.
- [21] See Kelvin's Rule 29.15 Motion in Part VII of Attachments.
- [22] State v. Malone, 798 S.W.2d. 149 (Mo. banc 1990) in Part VII of Attachments.
- [23] Sanders v. State, 807 S.W.2d. (Mo. banc 1991).
- [24] See Statement of Dorothy Hirzy in Part VII of Attachments.
- [25] See statement of David Hemingway in Part VII of Attachments.
- [26] See Statement of Peter Giannini in Part VIII of Attachments.
- [27] See Statement of Stephen Matchett in Part VIII of Attachments.
- [28] This is also the law in Missouri. Intentional nondisclosure by a prospective juror regarding a material matter during voir dire is clear grounds for reversal.
Brines, by and through Harlan v. Cibis, 882 S.W.2d. 138 (Mo. banc 1994).
Further, a juror should not bring in outside sources or information to jury deliberations like Dr. Irwin's studies regarding polygraph examinations which she conveyed to other jurors during deliberations. This too is jury misconduct in Missouri.
Compare State v. Cook, 676 S.W.2d. 915 (Mo. App E.D. 1984).

[29] Johnson v. Mississippi, 108 S.Ct. 1981 (1988).

[30] **Please carefully read letters from people who care deeply about Kelvin in its own attachment.**

[31] Please consider the letters/statements from prominent attorneys who have tried capital cases including Donald Wolff in its own attachment.