

Cathy Hall

PETITION FOR CLEMENCY

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

**IN RE: WILLIAM T. BOLIEK,
Sentenced to die August 27, 1997**

When we execute a capital defendant in this country we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. . . . My 24 years of overseeing the imposition of the death penalty from this court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.

Justice Harry Blackmun, McFarland v. Scott (1994)

I. INTRODUCTION

Missouri's criminal justice system has failed Ted Boliek. Had Mr. Boliek had a competent lawyer representing him at his trial or in his state post-conviction relief proceeding, he would not be facing execution on August 27, 1997. The most egregious of Mr. Boliek's lawyer's failures were these: First, Mr. Boliek suffered from a long history of substantial and well-documented mental disorders. His trial lawyer never bothered to investigate these, and never presented any of this crucial mitigating evidence to the jury. Second, the prosecutor introduced highly prejudicial inadmissible evidence of a tattoo of a shotgun on Mr. Boliek's shoulder which became the central theme in the prosecutor's case in both the guilt and the penalty stages of the trial. Mr. Boliek's lawyer never objected to introduction of this evidence or the argument relating to it.

The only court to examine the merits of Mr. Boliek's claims--the United States District Court for the Western District of Missouri--determined that (i) had Mr. Boliek's mental disorders been presented to the jury, the jury would not have sentenced him to death; and (ii) the prejudicial tattoo should have never been admitted into evidence, and so tainted the entire trial that both the conviction and sentence of death must be set aside.

The Eighth Circuit Court of Appeals reversed the District Court, not on the merits of the Court's determination, but solely on procedural grounds. The Court of Appeals ruled that because Mr. Boliek's court appointed lawyers failed to properly raise these issues in state court, it had to invalidate the Federal District Court's ruling on the merits.

The failure of Mr. Boliek's lawyers is manifest. His trial lawyer admitted his incompetent failures under oath. His post-conviction lawyer failed to meet with him and did nothing to protect Mr. Boliek's rights, and was forced to surrender his law license for neglect of clients and failure to attend hearings shortly after representing Mr. Boliek.

On the merits of these serious issues, Mr. Boliek should not die. The Federal District Court for the Western District of Missouri has already determined this.

It is a rare case in which a Federal District Court grants a habeas corpus petition, and the District Court's decision is important. It explains clearly to the Governor why Mr. Boliek's death in this case is wrong. It is now up to the Governor to prevent the injustice that will occur if Mr. Boliek is executed.

II. FAILURE TO PRESENT MITIGATION EVIDENCE

On September 26, 1984, Mr. Boliek was convicted of the first degree murder of Jody Harless. His trial lasted two days. The penalty phase of the trial lasted less than one hour including closing arguments and reading of instructions.

Mr. Boliek's trial counsel failed to investigate and prepare for the penalty phase of Mr. Boliek's trial, and instead concentrated only on the first phase, the guilt phase.¹ The trial counsel failed to even consider what information was available for mitigation in the penalty phase. D. Ct. 1206.² He admitted this failure in his deposition testimony: "I don't think I had like any outlines or notes or anything of that nature. It was consistent with my conclusion that, for whatever reason, it wasn't going to be a capital case. I had not put any extensive effort into the mitigation element." D. Ct. 1206. However, there was never any question that this was a capital case; that was the charge. Mr. Boliek's trial counsel stated that he was "shocked, devastated and panicked" at the jury's verdict because he had never participated in a penalty phase of a capital trial before, and more important, he had totally failed to prepare for this penalty phase. D. Ct. 1206.

The District Court determined that Mr. Boliek's trial counsel "in effect, did nothing to prepare himself to present mitigating factors. His decision to forgo any investigation did not result from a reasoned tactical decision,

¹ A capital murder trial is really two trials. The first trial is to determine whether the defendant is guilty of the crime charged. The second trial, the penalty phase, is to determine whether the defendant should be sentenced to life without parole or to death. To a competent trial lawyer, the penalty phase is just as important as the guilt phase, and depending on the facts of the case is often the part of the case that merits the most investigation and preparation.

² The opinion of the Federal District Court for the Western District of Missouri is attached at Tab 1. It will be referred to throughout this Petition as D. Ct. and then the page number. The District Court's opinion is well reasoned and thorough. It is a source of independent fact finding on the issues addressed in this Petition.

but instead arose from incompetence and a lack of experience. [Trial counsel's] total failure to investigate obviously fell bellow an objective standard of effective performance." D. Ct. 1206. (Emphasis added.) Had Mr. Boliek's trial counsel bothered to investigate mitigating circumstances, rather than having an attack of panic at the reading of the guilty verdict, he would have been prepared to present to the jury important mitigating factors relating to Mr. Boliek's mental condition, personal history, medical background, and history of drug addiction that the District Court determined would have, with a reasonable probability, caused the jury to spare Mr. Boliek's life. D. Ct. 1207.

A. History of Mental Disorders

During Mr. Boliek's federal habeas proceeding he was examined by a team of mental health professionals, psychiatrist, William Logan, M.D., a neuropsychologist, Dennis Swiercinsky, Ph.D., and a neurologist/psychiatrist, Dorsey Dysart, M.D. (Resumes of these doctors are attached at Tab 2.) Dr. Logan headed the team, and in his report, summarized the teams findings concluding that Mr. Boliek

suffers from a number of emotional problems which have affected his adjustment, including his behavior at the time of the homicide of Ms. Harless. These emotional difficulties would qualify as a mental disease or defect. These conditions include the following factors:

A major affective disorder with episodes of depression and manic hyperactivity.

Significant childhood illness and a hearing difficulty.

Family history of alcoholism, including father.

Family conflict, financial difficulty and frequent relocations.

Learning difficulties.

An attention deficit disorder.

Head injuries with subsequent seizures and severe headaches.

Cognitive deficits in processing information.

Episodic unprovoked attacks of rage and aggressive behavior.

Psychotic symptoms including intermittent hallucinations and delusional thinking.

Anxiety and panic attacks and anxiety related physical symptoms.

Significant substance abuse, including marijuana, alcohol, and stimulants such as amphetamines.

D. Ct 1210 (emphasis added); Reports of Drs. Logan, Swiercinsky and Dysart attached at Tab 3; Medical, Education, and Military Records Summary prepared by Dr. Logan attached at Tab 4.

MRI testing conducted by Dr. Dysart showed that Mr. Boliek's brain lacked coordination between the frontal lobes "consistent with ideational problems [and] episodic disinhibited explosive behavior." D. Ct. 1210.

Psychological testing conducted by Dr. Swiercinsky revealed "the presence of severe mental disorder." D. Ct. 1210. Neurological testing revealed organic brain damage and an organic mental disorder, with explosive tendencies. D. Ct. 1210.

The District Court concluded that the work of the mental health team confirmed Mr. Boliek's long history of mental problems. D. Ct. 1210. These mental health problems were diagnosed as early as 1975 when Mr. Boliek was in the army. He was discharged from the Army for these psychiatric problems. The problems were diagnosed again in Veterans Administration Hospitals, and continued up until the time of his trial in 1984. D. Ct. 1208-1209. Significantly, while he was awaiting his trial, doctors working with the jail prescribed psychiatric drugs for him including the following: Ativan, an anti-anxiety agent, Dilantin, for seizure control, Vistaril, a psychotropic medication, and Haldol, an antipsychotic medication. D. Ct. 1209. Moreover, Mr. Boliek was admitted to Fulton State Hospital during this time because he had attempted to injure himself. D. Ct. 1209.

No question existed as to Mr. Boliek's serious and longstanding mental disorders. The information was readily discoverable, and yet his trial counsel ignored it completely, never allowing a jury the chance to assess this critical information while deciding Mr. Boliek's fate.

B. Medical and Personal History and Drug Addiction

Mr. Boliek's medical and personal history was as compelling as his history of mental disorders, and in many ways is interwoven with his mental disorders.

Mr. Boliek suffered a number of head injuries. As a boy, he was struck in the head by a golf ball. This caused him to lose consciousness, and later resulted in further incidents of passing out, nervous spells, and seizures. D. Ct. 1207. In 1980, he suffered a blow to the head and was hospitalized at the Ozark Medical Center. Again it was observed that he lost consciousness and suffered from seizures. His family reported that after this incident he acted strangely and had twitching and jerking spells. D. Ct. 1207. These head injuries were relevant to Mr. Boliek's behavior problems (D. Ct. 1207) and to Dr. Dysart's and Dr. Swiercinsky's findings of organic brain damage.

Mr. Boliek had poor health as a child. When he was three, he was hospitalized for six months for tuberculosis. His tuberculosis treatment continued until he was 12 with relapses requiring hospitalization. D. Ct. 1207. His aunt, who acted as his mother, noticed a personality change in Mr. Boliek after the long hospitalization for tuberculosis. He had temper tantrums and threw things, and the hospital used physical restraints to tie the three year old down. D. Ct. 1207.

Medical problems plagued Mr. Boliek throughout his life. While in the Army, he was treated over 50 times for medical complaints and injuries, in addition to the psychiatric problems for which he was discharged. D. Ct. 1207. After leaving the Army, he was treated in Veterans Hospitals for a variety of problems. D. Ct. 1207-1208.

The District Court found that Mr. Boliek "had a troubled and difficult childhood" and that this information would have been helpful in the penalty phase of the trial. D. Ct. 1207. The Court noted that Mr. Boliek was born out of wedlock as a result of a rape, and his mother gave him to her brother and sister-in-law to raise. Her brother, however, was an alcoholic, and the family moved frequently, up to six times in one year alone. A psychiatrist that examined Mr. Boliek in 1980 determined that these frequent moves contributed to Mr. Boliek's inability to hold a job. D. Ct. 1207.³

Mr. Boliek had a long history of drug addiction that began when he was in junior high school. The District Court found that this "long history of drug abuse was especially crucial at the mitigation stage in light of testimony that [Mr. Boliek] had been using large amounts of drugs and alcohol before and during the death of Jody Harless." D. Ct. 1208.

C. Mitigation Evidence Would Have Made a Difference at Trial

This information would have provided important and sympathetic testimony for the penalty phase of the trial, and yet Mr. Boliek's trial counsel ignored it. The District Court noted:

Given the sympathetic light in which [Mr. Boliek's] past behavior could have been presented including his family and medical background, and given the evidence of medically significant conditions and disorders, suicidal tendencies, drug abuse and intoxication, this Court finds that it was unreasonable for counsel to have presented no mitigating evidence. This Court can not say with absolute certainty how the jury would have considered the mitigating evidence, but they deliberated almost three hours without it.

D. Ct. 1211.

As the District Court noted "none of the mitigating evidence was hidden from counsel. He could have easily spent more time talking to [Mr. Boliek] about his medical, educational, social, and psychological background." D. Ct. 1207. Instead, trial counsel relied upon his hope that the jury would not find Mr. Boliek guilty of capital murder in the guilt phase of the trial, and did nothing to prepare for the penalty phase. This hope was in vain, however, because Mr. Boliek's trial counsel performed abysmally in the guilt phase of the trial as well, condemning Mr. Boliek to a guilty verdict on first degree murder.

III. TATTOO

Mr. Boliek has a tattoo of a smoking double barrel shotgun on his back near his shoulder blade. Underneath the shotgun is the inscription "Death Dealer." Even though the tattoo was completely irrelevant to any

³ A history of Mr. Boliek's life is attached at Tab 5. It shows the wealth of information that was available to Mr. Boliek's trial counsel for mitigation.

issue in the case, and was highly prejudicial, the prosecution turned the tattoo into the theme of its case against Mr. Boliek. D. Ct. 1213.⁴

The prosecutor elicited testimony from three key witnesses regarding the "Death Dealer" tattoo. The trial transcript clearly shows that the prosecutor made a special effort to lead each witness into mentioning the tattoo. Trial Transcript at 262, 270 and 325. In addition, the prosecutor made inflammatory and highly prejudicial comments regarding the tattoo during closing argument. He again mentioned the tattoo in his rebuttal argument during the sentencing phase of the trial. D. Ct. 1212, 1214.

During the closing arguments of the guilt phase of Mr. Boliek's trial, the last comment made by the prosecutor was the following prejudicial and inflammatory statement regarding the "Death Dealer" tattoo:

[S]o don't come to me after this trial and say "Well, I believe that he did it, but I wasn't sure." That belief comes from the evidence in this case. . . . And the tattoo was a shotgun with smoke coming out [it] of that says "Death Dealer" and you know, you tie those things together and they all came true. If something happened to Jody Harless, Ted Boliek killed her. Jody Harless, one of her last words was "Ted Boliek's going to blow my head off" and he did it. And Ted Boliek writes on his body and prints for everyone to see that he's [the] "Death Dealer" and then he did it. And Ted Boliek is guilty of capital murder and deserves no sympathy from you.

D. Ct. 1213.

There is no question that the prosecutor's sole reason for introducing the "Death Dealer" tattoo was to impermissibly identify Mr. Boliek as a "Death Dealer" and set the stage for arguing that Mr. Boliek had acted in conformity with this label and killed Ms. Harless.

No competent attorney would have allowed such prejudicial evidence and arguments to be presented to a jury without objecting. However, Mr. Boliek's trial counsel failed to object to the tattoo evidence and argument. D. Ct. 1214. The trial attorney later admitted this "grave error." D. Ct. 1214. During his deposition, the trial attorney testified that "he did not object to the admission of the evidence during the guilt or penalty phase, because, 'he did not have the presence of mind to object.'" D. Ct. 1214. He admitted in his deposition, however, that the arguments of the prosecutor were objectionable and that he should have objected to them. D. Ct. 1214.

Unquestionably, Mr. Boliek was prejudiced by his trial counsel's failure to object to the "Death Dealer" tattoo. The evidence was equivalent to Mr. Boliek admitting to the jury that he was a "Death Dealer." In a case where a defendant has been accused of killing a person with a shotgun, it is hard to imagine anything more damning than the introduction of evidence that the defendant has a tattoo of a smoking double-barreled shotgun on his body with the inscription "Death Dealer" underneath it.

⁴ An outline of the facts of the case is attached at Tab 6.

The District Court agreed. It found that the evidence regarding the "Death Dealer" tattoo was "totally irrelevant" to any issue in the case and that "the jury should not have heard testimony or argument about it." D. Ct. 1213. The District Court found that there was no issue of identity in the case and that the only reason that the prosecutor introduced the tattoo evidence was to inflame the jury and to show that Mr. Boliek acted in conformity with his tattoo. D. Ct. 1213. The District Court found that "no reasonable attorney would have failed to object" to the evidence. D. Ct. 1214.

Moreover, the District Court held that the "tattoo evidence and government's arguments were highly prejudicial, especially in light of the other evidence presented in the prosecution's case. The District Court found that the evidence against Mr. Boliek was not overwhelming. It noted that: "Jill Harless testified that she did not see [Mr. Boliek] shoot the victim. There was no physical evidence connecting [Mr. Boliek] to the crime. All of the evidence pointing to [Mr. Boliek] as the shooter was circumstantial. The tattoo evidence labeled [Mr. Boliek] as "Death Dealer," a characterization that the defense had little chance to overcome." D. Ct. 1214.

The tattoo evidence and argument from the guilt phase also greatly influenced the jurors in their penalty deliberations. All of the evidence from the guilt phase was considered by the jurors in the sentencing phase. In addition, the prosecutor reminded the jury of the tattoo evidence in the penalty phase closing arguments by stating that Jody Harless, the victim, "had the 'Death Dealer' take her life for his own wants."

The District Court agreed that the "Death Dealer" tattoo evidence "tainted" the sentencing phase of the trial. D. Ct. 1214. The District Court correctly noted that this evidence could well have influenced the jury's opinion regarding Mr. Boliek's "character, mind set and other such factors." The District Court further stated that the "jury could have easily been influenced by the tattoo evidence in determining that Mr. Boliek killed Jody Harless to prevent her from testifying against him -- the only aggravating circumstance the jury found."⁵ D. Ct. 1214. The District Court concluded that "prejudicial [tattoo] evidence may have had an even greater impact at this stage than at the guilt stage." D. Ct. 1214.

There is little doubt that the District Court's findings in this regard are correct. A defendant's moral character is of the utmost importance in a capital murder sentencing hearing.⁶ If the jury believes that a defendant is

⁵ Under Missouri capital punishment statutes, a jury must find at least one statutory aggravating circumstance prior to returning a sentence of death.

⁶ Courts have consistently held that character evidence similar to the "Death Dealer" tattoo is inadmissible when used to prove a defendant's bad moral character and/or action and conformity therewith. D. Ct. 1213-14. See Dawson v. Delaware, 503 U.S. 159 (1992) (evidence of membership in Aryan brotherhood constituted error where membership not relevant to any issues in proceeding); State v. Ellis, 820 S.W.2d 699, 702 (Mo.Ct.App. 1991) (evidence that defendant was a homosexual was inadmissible in prosecution for deviate sexual assault); Bellmore v. State, 602 N.E.2d 111 (Ind. 1992) (death sentence overturned in case where tattoo of knife with blood dripping off of it was referred to in

a "Death Dealer" and acted as a "Death Dealer" in committing the crime, it is much more likely to return a death sentence. The introduction of the irrelevant tattoo evidence and arguments horribly prejudiced the jury. This prejudice compounded Mr. Boliek's trial lawyer's failure to present mitigating evidence, as discussed above.

The District Court's opinion on this issue was overturned only on procedural grounds. The United States Court of Appeals for the Eighth Circuit did not hold that the tattoo evidence was non-prejudicial or otherwise admissible. Rather, the Court of Appeals applied the very strict federal procedure default rules that bar federal courts from addressing the merits of Federal constitutional claims if the claims are not first presented to the state courts. Thus, because Mr. Boliek had incompetent lawyers at his trial and at his Rule 27.26 post-conviction hearing, the Federal District Court's finding of these serious constitutional errors was invalidated.

It is very ironic, in an age when many members of the general public assume that criminal defendants are always "getting off" on technicalities, that in this case, Mr. Boliek, who suffered grave and highly prejudicial constitutional errors at his trial and other state court proceedings, will be executed on the "technicality" that his incompetent state-appointed lawyers failed to raise his valid claims at the proper time in state court. The only avenue for redress of these serious errors is with the Governor.

IV. MR. BOLIEK'S LIFE IS WORTH SAVING

Ted Boliek's life is worth saving. Mr. Boliek is a thoughtful, creative man. Since he was a teenager, he has written poetry and drawn pictures. Some examples of his drawing and poetry are attached at Tab 7. While his poetry and artistic abilities may not reflect those of a great poet or great artist, they do reflect his sensitivity, his thoughtfulness and, above all, show that he is not a heartless killer or animal.

It is important to also note that, prior to the crime for which he was sentenced to death, Mr. Boliek had never been charged with or convicted of any violent criminal act against another person. His prior criminal offenses involved property crimes and violations of the drug laws. Furthermore, while Mr. Boliek has admittedly had some troubles while incarcerated, such as violations for possession of controlled substances and conduct violations, he has not been involved in any violent acts against any inmate or guard.

Most or all of Mr. Boliek's troubles with the law were directly related to his drug addiction. At the time of Jody Harless' death, Mr. Boliek and all of the others involved, including Ms. Harless, were literally out of their mind on drugs. They had been injecting Preluden, an amphetamine, into their arms and had been drinking heavily. While Mr. Boliek's drug addiction does not excuse his crimes, his history of drug addition and his incapacitation by drugs at the time of the crime, together with his simple worth as a human being -- as evidenced by, among other things,

sentencing hearing at which defendant was being sentenced for stabbing and strangulation death).

his poetic and artistic abilities -- and the grave errors that occurred at his trial, militate strongly in favor of clemency in his case.

V. THE PROCESS HAS FAILED

Theoretically, a safeguard existed to insure that Mr. Boliek's rights would be protected in the event his trial counsel proved to be incompetent. That safeguard was a post-conviction proceeding, at the time called a 27.26 hearing, in which Mr. Boliek was allowed to show what is called "ineffective assistance of counsel." However, the only way that a 27.26 hearing could have been a useful forum for correcting errors that occurred at trial was if the claimant had a competent lawyer to investigate and prepare his claims. The lawyer that the State appointed to Mr. Boliek was a man who would soon surrender his license to practice law because he neglected clients and failed to appear at hearings, who took no interest in Mr. Boliek's case, failing to even meet with Mr. Boliek before his hearing, and who did nothing to prepare or investigate Mr. Boliek's claims.

Mr. Boliek's 27.26 counsel failed to learn about trial counsel's failure to present mitigation evidence or object to the tattoo evidence. He failed to confer with Mr. Boliek prior to the hearing, and failed to make any efforts to investigate or raise the ineffectiveness of Mr. Boliek's trial counsel. D. Ct. 1203. In fact the only claims, 27.26 counsel raised were those that Mr. Boliek drafted himself pro se.

Moreover, the judge who presided over the 27.26 hearing, the same judge who presided over Mr. Boliek's trial, actively prevented Mr. Boliek from raising claims against his trial counsel. The District Court stated, "A review of [Mr. Boliek's] 27.26 proceeding reveals that interference by the 27.26 court provided an objective impediment to presentment of the ineffective assistance of [trial counsel claim]." D. Ct 1203. This was obvious from the following exchanges.

The judge, without allowing Mr. Boliek to confer with his court-appointed counsel, ordered him to list all the ways that his trial counsel had been ineffective. Specifically, the judge stated:

I want you to tell me now . . . in what other ways Mr. Sterling [Mr. Boliek's trial counsel] was ineffective in assisting. I want to hear every complaint you have against Mr. Sterling right now . . . so we don't have to plow this ground on February 10. Now tell me what else you have a complaint about.

D. Ct. 1203. (Emphasis added.)

While Mr. Boliek was able to explain a few examples of how he felt his trial counsel had been incompetent, he did not say anything about the failure to present mitigation evidence or the failure to object to the tattoo, the two most egregious errors his trial counsel made. The court then said to the 27.26 lawyer:

You may amend your pleading to include everything he's raised today, but you can't raise new items. That's right, because I want that exhausted today. Mr. Boliek is prepared, I assume, to testify to that because that's what he alleged [in

his pro se petition] and that's what we came here today for. That's what this hearing was for. He wants to expand it and I'm going to permit him to do that, but I'm not going to let him come back on the tenth and start all over again, or add to the allegations of what Mr. Sterling did. Now what Mr. Sterling did at the time of trial, he's [Mr. Boliek's] known that since the date of the trial and he either knows it now or doesn't and going back and talking to Doyle Williams [an inmate who helped Mr. Boliek with his pro se petition] is not going to help. That's what I'm trying to prevent. Do you understand that?

D. Ct. 1203. (Emphasis added.)

This was all a lawyer who had failed to make even the most rudimentary preparation for or investigation of Mr. Boliek's case, a lawyer who routinely neglected clients, needed to hear to effectively abandon Mr. Boliek and not attempt to raise the claims that truly had merit. This was the time for action that could have saved Mr. Boliek's life. This was the time that the claims the District Court found warranted reversal of Mr. Boliek's conviction and sentence of death needed to be raised in order to preserve them for review. If Mr Boliek's 27.26 counsel had raised these claims here, the Eighth Circuit would have affirmed the District Court's opinion, and Mr. Boliek would not be scheduled for execution.

Of the 27.26 judge's conduct at the hearing, the District Court stated, "It is absurd to expect an inmate to have the ability to assess his own trial and to present 'all grounds known' regarding the complex issue of ineffective assistance of counsel." D. Ct. 1204. (Emphasis added.)

The District Court's use of the word absurd is blunt, but accurate. The entire proceeding was absurd. It was the pretense of due process. The State provided Mr. Boliek a useless lawyer, who violated his duty to Mr. Boliek and provided him no assistance in preparation of his claims, and who disgraced his profession and lost his license to practice law. The 27.26 judge's intervention ensured that this lawyer would not raise the claims upon which Mr. Boliek's life depended.

No one insists that Mr. Boliek should have been given the best defense or the best lawyers. What he deserved was simple competence, a lawyer who took the time to investigate the case, raise obvious issues, and make obvious objections, a lawyer who was professional enough to avoid disbarment for neglect of clients. Mr. Boliek did not receive simple competence.

Justice should not depend on whether a person has the money to hire a competent lawyer. Whether a person lives or dies should not depend on who a person had for a lawyer at all. But these are the reasons Ted Boliek is scheduled to die. He is going to die because he was poor and had to rely on the State to provide his lawyers. He is going to die because the lawyers the state provided did not know or did not care what they were doing. He is going to die unless the Governor steps forward to correct this failure of the process.

The American Bar Association, a mainstream, well-respected organization representing all sorts of lawyers across the United States, has recognized how easily the process fails in death penalty cases. Without taking

a position on whether capital punishment is right or wrong, it has called for a moratorium on the use of the death penalty until such time as defendants are ensured due process at all stages of the proceedings. Copy of ABA resolution attached at Tab 8. The ABA notes in its report accompanying the resolution that,

Grossly unqualified and under compensated lawyers who have nothing like the support necessary to mount an adequate defense are often appointed to represent capital clients. In case after case, decisions about who will die and who will live turn not on the nature of the offense the defendant is charged with committing, but rather on the nature of the legal representation the defendant receives.

Report at page 5.

The National Association of Criminal Defense Lawyers has taken a similar position. It is "acutely aware of the grave deficiencies . . . in ensuring due process in the implementation of the Death Penalty today across the United States," and has called for a halt to executions until due process can be assured. Copy of NACDL resolution attached at Tab 9. The Criminal Law Committee of the Missouri Bar has done the same.

Missouri is scheduled to execute four men during August. This has drawn the attention of the St. Louis Post-Dispatch and the Kansas City Star, as well groups from around the world, Amnesty International, Missourians to Abolish the Death Penalty, the Coalition to Stop the Death Penalty, and others.

The Post-Dispatch, focusing on procedure, says:

But the Death Penalty is so final that it shouldn't be carried out until the defendant gets adequate representation. Even then, the execution of large numbers of people--nearly all of them poor and uneducated--violates the unwritten values of a civilized society.

Post-Dispatch Editorial attached at Tab 10.

Barbra Shelly, writing in the Star, notes that based on population, Missouri's execution rate is higher than "death penalty powerhouses Texas, Florida, and Virginia . . . Do we want this distinction?" She says:

The time is right to reconsider Missouri's commitment to capital punishment. New sentencing laws keep criminals imprisoned longer, and a life sentence means exactly that. . . . Evidence is strong that the threat of capital punishment does not deter people from crime, and the legal process leading to an execution costs the state even more than life imprisonment. If the purpose of death by lethal injection is not deterrence or economics, what is it? Some people say justice. Others say vengeance. It's a distinction not to be taken lightly, as the harsh days of August draw near.

Shelly column attached at Tab 11.

Mr. Boliek's case is a classic example of the process failures that can occur in death penalty cases, failures at trial, failures at the post-conviction stage.

These failures cost lives.

But Mr Boliek's life can be saved. This case provides the Governor a unique opportunity to show that Missouri does care about the process. By taking action to correct the injustice of Mr. Boliek's case, the Governor can

show compassion and concern and directly address the criticism death penalty opponents have leveled at the August executions, while at the same time demonstrating to those interested in tough law enforcement that he too believes in enforcement of the law.

In this case, the wrongs are so egregious and the consequences so severe, that the Governor is fully justified in taking action on Mr. Boliek's behalf.

VI. CONCLUSION

Most Missourians are unaware of Ted Boliek and the issue of whether he lives or dies in August. Many, if confronted with the question simply put would probably favor death. It takes too much time to grasp the details, too much effort to understand the subtleties, that make Ted Boliek's death a grave wrong. Some might argue that the politically expedient decision allows the execution to go forward, allows Ted Boliek to die. But this Governor is not known for the politically expedient decision, especially when that decision is not the right decision.

Even those who are for the death penalty, if fully educated about the wrongs that occurred in this case, would agree with the influential and growing voices against to the death penalty that Ted Boliek's death is not the decision that careful consideration of the facts compels.

Careful consideration compels that no one in the United States be put to death after a trial lasting only two days. Careful consideration compels that no one be put to death when represented by incompetent and disbarred lawyers. Careful consideration requires that someone with Mr. Boliek's mental and neurological problems not be put to death without the jury having considered any evidence of mitigation. It is frightening to confront how badly the system has failed. Someone must stand up and say that this was wrong. The liberty of all Missourians depends on the criminal justice system, ultimately, being fair. And in cases such as this, it is the Governor who is fairness' final arbiter. It is the Governor who is the citizen's last and only hope.

We respectfully request that the Governor commute the sentence of Ted Boliek from a sentence of death to a sentence of life without the possibility of parole. Alternatively, we request that the Governor order a new penalty phase trial for Mr. Boliek. Finally, we request a meeting with the Governor so that we can discuss this matter.

Respectfully submitted,

*Charles W. Gordon, Jr., #32985
The Gordon Law Office
4638 J.C. Nichols Parkway, Suite 213
Kansas City, Missouri 64112
Phone (816) 931-5557
Facsimile (816) 931-5938*

David J. DeSimone, #33759
DeSimone Pearson, L.C.
4330 Belleview, Suite 100
Kansas City, Missouri 64111
Phone (816) 753-2823
Facsimile (816) 756-3389

ATTORNEYS FOR WILLIAM T. BOLIEK