

IN THE MATTER OF:

**RALPH E. DAVIS, CP-78
Potosi Correctional Center
Mineral Point, MO 63660**

TO:

**THE HONORABLE MEL CARNAHAN,
Governor of the State of Missouri**

**APPLICATION FOR A REPRIEVE FROM, OR
COMMUTATION OF, A SENTENCE OF DEATH**

**ELIZABETH UNGER CARLYLE #41930
200 S.E. DOUGLAS, SUITE 200
LEE'S SUMMIT, MO 64063
816-525-2050**

**CEDRIC D. BROWN, #35592
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816/363-2795 * Fax 816/363-2799**

Attorneys for the Movant

I. INTRODUCTION

Article IV, § 7 of the Missouri Constitution and Missouri Revised Statutes §§ 217.800 and 552.070, authorized the Governor to grant reprieves, commutations and pardons.

This application for reprieve from or commutation of sentence of death is presented on behalf of Ralph Edward Davis, who is scheduled to die by lethal injection at 12:01 a.m., on April 28, 1999. Ralph is presently being held in the administrative segregation unit at the Potosi Correctional Center, under warrant of death, issued by the Missouri Supreme Court. Pursuant to the Missouri Constitution and the Statutes of the state of Missouri, Ralph Davis respectfully requests the Honorable Mel Carnahan, as Governor of the State of Missouri, to issue an indefinite stay of execution in order for Ralph to present facts and evidence in support of this application.

This case presents one of the rare circumstances where the victims family is also the family of the movant. The mother, son and daughter of the victim do not want to see the execution take place. The family seeks mercy for Ralph Davis. In addition to their appeal, Counsel for Ralph Davis is prepared to submit evidence in the form of documents as well as testimony showing the most egregious forms of error by trial and post conviction counsel, as well as by the state and federal courts. The office of the Governor has the obligation to be the "fail safe" in our criminal justice system. Herrera v. Collins, 113 S.Ct. 853, 854 (1993).

By submitting this application for commutation of sentence of death, Ralph Davis is requesting Governor Carnahan review the

claims and issues the state of Missouri and the federal courts have refused to consider.

This application will present a legal as well as a factual basis for granting executive clemency in this matter. The legal system has failed Ralph Davis. The last check in our system of government rests in your hands Governor Carnahan. Questions of life and death should not be made swiftly. In Mercer v. Armontrout, 864 F.2d 1429, 1431 (8th Cir. 1988) the same court that refused to issue a certificate of appealability and therefore did not review any of Ralph's claims of constitutional violations, discussed the responsibility of not rushing to judgment in taking the life of another:

Human life is our most precious possession. Our natural instincts guide us from birth to sustain life by protecting ourselves and protecting others. All notions of morality focus on the right to live and all of man's laws seek to preserve this most important right. When presented with challenges to a capital sentence, it would be easy to respond rhetorically by asking "what about the victim whom the defendant has been found guilty of unmercifully killing." But this approach fails to reflect on the ideal that a government founded by a moral and civilized society should not act as unmercifully as the defendant is accused of acting. If the original murder cannot be justified under man's laws, it is equally unlawful and inhumane to commit the same atrocity in the name of the state. What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. It should thus be readily apparent that the legal process in a civilized society must not rush to judgment and thereafter rush to execute a person found guilty of taking the life of another.

Counsel for Ralph Davis respectfully requests the opportunity

to present on his behalf compelling evidence of the system gone awry from his defense counsel to the prosecution, from state to federal court. Ralph Davis' constitutional rights have been violated and you are the individual vested with the authority to correct this injustice. A review of the facts, law and circumstances of this case will lead to only one conclusion, and that is that this death sentence must be set aside and commuted to life in prison without the possibility of parole.

II. FACTUAL HISTORY OF THE CASE

Susan Davis disappeared without a trace on June 9, 1986. In March, 1988, police discovered the car in which Ms. Davis was last seen driving in Boone County, Missouri. The car was discovered in a rental storage unit in Cole County Missouri. The vehicle was placed in the storage unit by Ralph Davis. On the basis of evidence found in the car and statements made by Ralph, he was arrested and charged with the murder of his wife. To date, no body has been found and Ralph has maintained his innocence. The Boone County Prosecutor initially charged Ralph with second degree murder. Jeffrey Rosenswank, the Public Defender for Boone County was appointed to the case. Rosenswank requested several continuances prior to trial. Craig Johnston, an assistant public defender, informed Rosenswank that the charges in the case would be upgraded to murder one and the death penalty would be sought if he requested another continuance. Without informing his client, Rosenswank requested and was granted another continuance. After

the continuance was granted, the prosecuting attorney dismissed the charges of second degree murder and refiled the case by information as one count of first degree murder, with two aggravating circumstances.

The case went to trial on March 14, 1989, in the Circuit Court of Boone County, Missouri. Ralph was represented by Rosenswank and assistant public defender Joel Elmer. Ralph was found guilty of first degree murder and the penalty phase trial followed. The jury returned a verdict of death and the court entered judgment on the conviction on April 24, 1989. Ralph filed a pro se motion for post-conviction relief from his conviction and sentence. Ralph retained Gerald Bassett who worked in his father Merle Bassett's law firm. Bassett, left the practice of law due to personal problems shortly after being retained by Ralph. Bassett did little if any work on the post-conviction motion. While arrangements were being made to transfer the responsibilities from Gerald Bassett to new counsel, Merle Bassett became aware that the amended motion was due to be filed. Merle Bassett then prepared an amended petition and requested an additional thirty (30) day extension of time. Merle Bassett was unaware of the verification requirement and filed the document without Ralph's signature or verification. Merle Bassett was relieved as counsel on March 28, 1990, and was replaced by Thomas R. Schlesinger. Schlesinger presented evidence in front of Judge Frank Connelly on July 31, 1990. Judge Connelly overruled Ralph's Rule 29.15 motion and denied all relief requested. A consolidated appeal was filed in the Missouri Supreme

Court by Schlesinger and the Missouri Supreme Court affirmed the conviction and sentence of death on July 23, 1991. Ralph filed a petition for certiorari in the United States Supreme Court which was denied on January 13, 1992.

On July 27, 1992, Ralph filed a pro se petition for writ of habeas corpus under 28 U.S. Code §§ 2254. The district court appointed Randy Schlegel on January 30, 1992. On April 19, 1993, Schlegel was granted leave to withdraw and on October 15, 1993, Elizabeth Unger Carlisle was appointed as Ralph's counsel. The district court was presented twenty-four (24) claims and declined to consider most of them due to procedural bars. Ralph was denied relief without a hearing.

Ralph Davis filed a motion in the district court for a Certificate of Appealability. On October 29, 1997, the district court entered an order denying the Certificate of Appealability without discussing any issues in the case. Ralph then filed a motion in the court of appeals for a Certificate of Probable Cause and Certificate of Appealability. The Eighth Circuit Court of Appeals denied Ralph's Certificate of Appealability without a written opinion and on August 10, 1998, the court of appeals denied Ralph's motion for Rehearing and Suggestions for Rehearing En Banc. A petition for writ of certiorari to the United States Supreme Court was filed on October 21, 1998, and was denied by the U.S. Supreme Court on March 22, 1999. On the same day the attorney general filed a motion to set execution date with the Missouri Supreme Court. The Missouri Supreme Court has scheduled April 28,

1999 as the execution date.

III. REASONS TO GRANT EXECUTIVE CLEMENCY

MEMBERS OF THE VICTIM'S FAMILY DO NOT WANT TO SEE THE EXECUTION CARRIED OUT

The victim's family has the greatest stake in seeking the punishment of one convicted of a capital offense. The wishes of the family should be given great weight in the decisions made by the state in taking the life of someone in the name of that family's loved one. In this rare instance where the victim's family is also the family of the condemned, it seems only fitting that the same consideration be given when the family does not want to see the execution carried out.

Counsel for Ralph Davis contacted Janet Wray, the mother of Susan Davis, the victim, as well as Robert Davis the victim's son. Both Janet Wray and Robert Davis do not want to see the execution carried out. Counsel spoke at some length with Mrs. Wray. She stated Ralph Davis was always nice to her and she did not want to see the execution take place. Mrs. Wray said she raised Ralph and Susan's children, Robert and Angela Davis, and that they are not in favor of seeing the execution take place. Mrs. Wray has forgiven Ralph. Mrs. Wray is a Christian and cannot live with hate. Mrs. Wray said if the sentence was changed from death to life in prison, Robert and Angela "would not have to face this thing."

Robert Davis is the son of Ralph and Susan Davis. Robert has discussed the impending execution with his grandmother, Janet Wray, and both are in agreement the execution should not be carried out. Robert said his mother is resting now and that his father is the

one who is here and the one Robert is concerned about now. Robert said if his father is not executed he will continue to have a relationship with him. He will visit him in the Potosi Correctional Center and Ralph will be a contributing member of the family. Robert also has numerous questions about his childhood that only Ralph can answer. Robert remembers many good times from his childhood and does not want the memory of his father scarred by having his father executed. (Exhibit 1. Affidavit and statement of Robert Davis.)

Mrs. Wray has found it in her heart to forgive Ralph Davis, she has set an example of Christian love and forgiveness. She is not only concerned for the well-being of Ralph Davis but also for her grandchildren. This family has suffered enough. The execution of Ralph Davis would only bring more pain to this family. Any punishment beyond life in prison is unnecessary and excessive, in light of the feelings of the family.

IV. INEFFECTIVE ASSISTANCE BY APPOINTED COUNSEL

A. BREACH OF DUTY OF LOYALTY

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, hence counsel owes the client a duty of loyalty and a duty to avoid conflicts of interest. Cuyler v. Sullivan, 446 U.S. 335 at 346, 64 L.Ed.2d 333, 100 Sup.Ct. 1708 (1980). Jeffrey Rosenswank, the public defender for Boone County was appointed to represent Ralph Davis in June of 1988. The original charge in State v. Ralph Davis was second degree murder and armed criminal action. Trial counsel

obtained a number of continuances prior to trial. Rosenswank, the lead counsel applied for a continuance in November of 1988, thirteen (13) days before the trial was to commence. The motion for continuance was to be taken up by the court the week beginning Monday, November 21, 1988. Craig Johnston, the first assistant in the office of the Boone County Public Defender, received information that a decision had been made in the prosecutor's office in regard to Ralph's case. Johnston was told if trial counsel's third continuance was denied that the case would be tried in two weeks as scheduled on the charge of murder in the second degree. However, if the continuance was granted, the decision had been made to upgrade the case to murder in the first degree. Johnston immediately sought Rosenswank to convey this information and advised him to withdraw the continuance motion. Johnston found Rosenswank having drinks in the Boone County Tavern. Johnston related the information about the continuance and its consequences. Rosenswank informed Johnston he would be out of town when the continuance motion was to be heard and that Johnston was to argue the motion in his absence. Rosenswank told Johnston "get the continuance, do it for me." The following Monday Johnston appeared on behalf of trial counsel and brought before the court the motion for continuance. Exhibit 2. (Affidavit of Craig Johnston). Ralph was never informed of the fact that an additional continuance would mean dismissal of the second degree murder charge and the refileing of the case as a first degree murder case. Ralph was opposed to the continuance and informed Johnston of his opposition. Johnston

told Ralph the continuance was to allow time for a second DNA test on the blood found in the vehicle. Upon hearing these reasons Ralph was outraged and stated "why we waitin' to get that DNA there's no dispute whose blood that is." Ralph saw the issues of trial as whether his wife was dead and, if so, who had killed her. Ralph wanted to go to trial as scheduled.

Rather than inform his client or at least abide by his wishes, Johnston, carried out the request of his superior by persuading Ralph to accept the continuance. The court granted the continuance and on December 16, 1988, and prosecutors refiled charges of murder in the first degree. Ralph was never informed of the consequences of a continuance in this matter. Johnston was aware that Ralph did not want a continuance even without the knowledge of the possibility of the upgrade in charges. This gross dereliction of duty on the part of the public defender, Jeffrey Rosenswank, as well as his first assistant, Craig Johnston, violated the code of professional responsibility and took away Ralph's right to be informed and make the decisions concerning his case.

Counsel's function is to assist the defendant. From this function is derived a general duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the progression of the litigation. Strickland v. Washington, 466 U S 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). Rosenswank's actions go far beyond that of ineffective assistance of counsel. His actions were a gross

dereliction of duty. Rosenswank made a life and death decision for Ralph and didn't even have the decency to consult with him before making such a decision. Rather than using his time to prepare for trial, Rosenswank made a strategic decision over drinks at a local tavern. Then with conduct equally as outrageous Johnston, knowing the consequences of his actions and without informing Ralph, persuades him to consent to an act almost certain to result in a sentence of death. The most basic duty counsel has is the duty of loyalty. Strickland v. Washington, at 696. It is difficult to imagine counsel being more ineffective. By counsel's actions he invited the prosecution to dismiss the charges and refile to seek death.

In light of these actions no court in the state of Missouri or in the federal judicial system has seen fit to reverse the sentence of death and remand this case for a new trial. Ralph Davis has the constitutional right to effective assistance of counsel at trial. In this case not only was critical information withheld from Ralph Davis, but there was collusion between Rosenswank and Johnston in not discussing the matter with Ralph. Rosenswank, while at a tavern, instructs his assistant to get a continuance for him (referring to Rosenswank). Johnston, knowing Ralph's feelings about the continuance, failed to inform Ralph knowing Ralph would never agree to the continuance if fully informed. This was done without consideration for the person who in all rights should make the final decision. Then counsel goes further and persuades Ralph to agree to it without giving him information so he could make an

informed decision. These acts go past ineffective assistance of counsel and should be considered malpractice.

B. INADEQUATE PREPARATION FOR TRIAL

Once the continuance was granted and the case was refiled as a first degree murder case, counsel failed to investigate for mitigating evidence. No social history was done and counsel did not look into any other defenses such as diminished capacity. Counsel went to trial and presented two theories in the guilt-innocence stage of the trial. The first theory of the case was that Susan Davis left the defendant and moved to Texas. The second theory was someone other than Ralph committed the murder. With these two opposing theories it is not surprising the jury went along with the prosecution's theory that Ralph committed the murder.

Defense counsel presented eight (8) witnesses in the penalty phase of the trial. Counsel was so unprepared that he was surprised by one of the witnesses he called to testify on Ralph's behalf. A law enforcement officer was called as a witness to testify to Ralph's perfect behavior as an inmate in the county jail pending trial. This witness testified to Ralph's violent behavior as an inmate, rather than praising him as a model prisoner. The remaining witnesses were asked perfunctory questions by trial counsel and gave very brief conclusory answers describing Ralph as a neighbor and father in non-descriptive terms. None of the witnesses were asked to explain or illustrate any of answers.

While substantial mitigating evidence of physical, emotional

and sexual abuse of Ralph as a child was available, counsel failed to investigate and present any of this evidence. Counsel also failed to have any psychological testing done in order to determine the impact such childhood trauma would have on his client. Competent legal counsel in a first degree murder case in which the state was seeking death would investigate the client's family background and social history. Had Ralph's counsel taken the time to interview available witnesses, the following information would have been gathered which would have presented formidable mitigating evidence as well as the factual basis for a diminished capacity defense.

**V. INEFFECTIVENESS OF COUNSEL IN FAILING TO
INVESTIGATE THE FAMILY HISTORY, MENTAL HEALTH CLAIMS
AND TO PRESENT MITIGATING EVIDENCE**

A. FAMILY HISTORY

Ralph Davis was born in Anniston, Alabama, in 1945. His mother was an unmarried girl nineteen (19) years of age. Ralph's maternal grandfather, Jim Pyles, was considered an important man on the colored side of town. Big Jim always carried a .45 caliber pistol and everyone knew it. He may have been the only black man in Anniston who could make white policemen back down. Big Jim's business was bootlegging liquor in a state in which sales of alcohol was closely controlled. Jim gave alcohol to his children and his wife was an alcoholic. At home, Big Jim controlled his family. As a child, Ralph once saw him drag his wife off the porch and "beat the hell out of her". Ralph's biological father, Walter Jackson, Jr., upon finding out he had impregnated Jim Pyles oldest

daughter, ran off to another state. The Jacksons, Ralph's paternal side of the family, also had a history and reputation for violence. Ralph's uncles on his father's side grew up to be no-account drunkards, "Mean as rattlesnakes," in the recollection of one of Ralph's brothers. The patriarch of the family was Papa Jackson. He controlled his family and even kept girlfriends living in his house along with his wife.

Nine months after Ralph's birth his mother married a soldier who had returned home from the war. Thomas Davis, Jr., was a strong, good-looking farm boy. Tom Davis, Jr. returned from Europe decorated for combat valor. Tom was a good provider. He got a job paying five times the minimum wage in an Anniston foundry. He bought a nice, white-painted house with a wood fence. Ralph said, "He was the best man I ever knew, bar none." Thomas was mild-mannered. He played horsey with Ralph and until Ralph was five he thought Tom Davis was his natural father. Other children were born to the family. Ralph's mother had one child each year for the next five years. In all, the couple had four boys and a girl. One of the middle boys died in infancy. Thus Ralph grew up with three younger half-brothers, Tom, Albert and Charles, in that order, and a baby half-sister, Diane, who was the youngest. All of the children were born within a five year span from 1945 to 1950.

Thomas Davis re-enlisted in the Army in 1949. The decision to re-enlist was based primarily on the violent nature of Ralph's mother. Within the Davis household Ralph's mother ruled. She was not a diminutive woman and enforced her will with unrelenting

violence. Over the years her husband's body was covered with scars. Most of these acts of violence were witnessed by the children. One time she shot Tom Davis in the shoulder with a pistol. From the wound, the children saw blood running down the sleeve of his uniform shirt. Another time she marched into the bedroom with a loaded shotgun in her hands. The children all followed and stood in the doorway. As they watched, their mother stood at the foot of the bed and raised the shotgun at the mound of covers. The sound of the discharge was deafening but not so loud that they could not hear their mother shouting "There, I've killed him. I've finally killed the son-of-a-bitch." Fortunately she was mistaken, Tom Davis was not in the bed that day.

Mrs. Davis was a depression-plagued young lady. At age twenty-four, she had already bore six children. She didn't want to be a mother. Once her husband left she began to drink heavily and regularly. She squandered whatever money came her way, money she earned and money that Thomas sent every month during the years he was away, and later money the children would earn and give to her. Their lives changed markedly from the life Tom Davis had provided for them. Mrs. Davis gave the children an existence of dire poverty. They grew up barefoot and the clothes they had came from the Salvation Army. As things spiraled out of control, Mrs. Davis looked for a way out. One day she took Ralph and his three brothers and infant sister into the kitchen and told the children to lie down on the floor and go to sleep. With the children all on the floor, she turned on the gas outlet on the stove and the heater

by the wall, then she laid down with the children and closed her eyes. She soon passed out. None of the children moved until Ralph's half-brother, Tom, the next oldest and the only Davis child destined to go to college, got up and turned the gas off.

Mrs. Davis's drinking habit used up all the family's money. It was not long before she was forced to move the family to a small apartment with cold concrete floors. The apartment had a kitchen, a bathroom and two bedrooms. There was one sink and one toilet. There was no bathtub. From the tiny apartment the family's next move was a tenement house with one bathroom. The Davis children lived in one room with their mother; an aunt, an uncle and their three children lived in another room; and another aunt, uncle and two children lived in a third room. An old lady lived there, too. Altogether sixteen (16) people. Mrs. Davis then went to work as a domestic. Due to her lack of education and training it was the only work she could find.

At home Mrs. Davis made Ralph and the other children do all the domestic chores. In the completion of these chores she demanded perfection. Ralph was in charge and he was responsible. He would be required to stand inspection when she returned home. There was dusting, cooking, dish washing and laundry to be done. Ralph learned to do them all. Mrs. Davis even made her sons wash her used sanitary napkins made from old sheets. Ralph's youngest brother, Albert, recalls, "I still can remember the awful smell of them." Ralph, the oldest son, resented being the woman in his mother's house. He was not alone in his resentment. Albert also

remembers the disgrace of boys doing girls work.

When Mrs. Davis was drinking she was uncontrollable and unpredictable. Any and all the children in the house could become the target of her wrath. Albert, now in middle age, recalls, "Our mother came home drunk one night and started beating on us. I remember Ralph getting Bubba, as we called Tom, me and himself out of her way. She was crying and saying she was going to kill all of us. She did nothing to Charles and Diane, the two infants. Ralph took us to our grandmother's, house. On our way we had to go through a place called "Frog Eye". It was very dark and I was scared to go through there. Ralph took us the long way around because of my fear. After reaching our grandmother's house, we told her what had happened. She fixed us something to eat and took us home. My mom was sitting on the sofa passed out with a knife in her hand and Diane in her arms. I was scared as hell that she had done something to her. When we entered the front door I was standing behind Ralph and Bubba. After they got the knife and Diane from her, Ralph took us to our bedroom. From the room I remember not understanding what was going on, but I could hear my Mom crying and saying "I can't take care of these children".

Tom, the brother between Ralph and Albert in age, describes many years of his childhood from the perspective of a graduate school education and the affluent life style which comes from extraordinary success which he found as an executive in the world of business, "Our mother couldn't handle alcohol." He described her as "a lunatic when she was drunk. She would pull out a shotgun

and shoot it, she would point knives at us. She would put us out of the house. We were very afraid of her when she was in this mood. She would go off unprovoked. She would grab one of us and hold a knife at our throat saying, 'I'll kill you. I'll take your life. I never wanted you. I never wanted to be a mother.' She would also do this when she was stressed out. We would do anything to appease her." "My sister was whipped a lot. When she beat you, she beat you until you couldn't feel it anymore. She would use a stick or an extension cord until she drew blood. Even up to the time we were thirteen or fourteen." "Mom could get offended by anything. She could be mad at my father or stressed by our crowded living conditions or economic situation. I am sure that she felt there was no way out when the gas was turned off and there was no money for food much less for dresses or going to the hairdresser. She must have felt that she had no power over her life.

"Ralph and my mother had difficulty. He was not treated kindly by her. My mother had a sharp tongue. She was very emotional. She was very verbal and extraordinarily physical in her punishments. She was too harsh in her punishments and she would say that she didn't want to be your mother, it would make you feel empty, unwanted. You felt that her problems were your fault." "I don't know how I escaped. Ours was a hellhole of a life."

On top of the physical and emotional abuse endured by the Davis children, there was another dimension which pervaded the childhood. Tom refers to this aspect of the family life as "my mothers infidelity." In Tom's view his mother's unfaithfulness to

Tom Davis, Jr., gave Ralph, "Total mistrust for women." He adds, "All my bothers have that." What the brothers routinely found in the years of their father's absence from the time Ralph was four to the time he was nearly twelve is described in detail by Albert, two and a half years younger than Ralph. "As a child I saw my mother have sex with men more times than the law allows. All of us did. We just opened the door and peeked in when she brought a man home. That's how I learned to perform [the sex act] by watching my mother." "I remember my Mom's boyfriend, Willie James [when we lived in the tenement house] we could hear them having sex all the time. When we lived in the tiny apartment before the tenement house, Ralph, Bubba and Mamma slept in the same bed. They would be in the bed while Mama was having sex with men." "One time I remember Ralph taking us around to the window of Mitch Cannon's apartment. We could hear our Mom in there making all kinds of sexual noises. When we got back to our apartment, Ralph said something like 'I told you all she was in there' and made us go to bed." "Another day this white man was in our apartment. He gave us some money to go to the store. On returning from the store we saw him on top of our Mom [having sex with her]. Ralph got real upset. He had something in his hand and we all got around the man and made him get off of her. We told him that our uncle Junior [a man everyone feared for his reckless violence] was coming and was going to beat his ass when he got here. That was a lie about Junior coming, but it worked."

"Do you know what a slut is? [his hand reached down to hover

inches above the floor] When blacks say a woman is a slut for taking other men to her bed, she is this low. That was my mother." "None of us [Davis brothers] trusts women. None of us, even Tom [who has had only one marriage]. He won't admit it, but when he got married I heard him talking to our father about hoping his wife didn't turn out like our mother. Myself, I've been close to maybe fifteen different women but never married one. I am afraid of women. I am afraid a wife will turn out to be like my mother."

B. MENTAL HEALTH CLAIMS

It is clear from the evidence educed from family members that trial counsel did absolutely no background investigation in an attempt to find mitigating evidence to present to the jury on Ralph's behalf. Had counsel simply spoken with Ralph's brothers and sister or other family members, he would have gained valuable insight into the childhood and upbringing which had a direct effect and impact on Ralph's life. This information compiled properly and placed before a mental health expert would have provided the basis for not only a diminished capacity defence but also moving and persuasive mitigation evidence that was so lacking in the presentation presented at trial.

The family history was presented to Dr. James Straub, who specialized in the treatment of adults who were victims of child abuse. Dr. Straub is a psychologist and lecturer in the Department of Psychology at the University of Missouri School of Medicine, located in Columbia, Missouri. Dr. Straub was readily available to trial counsel in this case. After examining Ralph and based on the

information previously presented, the conclusion and diagnosis of this expert is to a reasonable degree of medical certainty that at the time of the death of Susan Davis, Ralph Davis suffered from dissociative disorder [DSM-III-R300.15] approaching multiple personality disorder and post-traumatic stress disorder [DSM-III-R309.89]. Exhibit 3. (Report of Dr. James Straub). The disassociative condition approaching multiple personalities began very early in Ralph's childhood. Childhood abuse consisting of repeated traumas and intense fear, terror and helplessness, laid the foundation for post-traumatic stress disorder as well as the dissociative disorders approaching multiple personality disorder. When a child is severely traumatized and lives in an extremely chaotic environment particularly before the age of five (5), it is not uncommon for development of dissociated personalities. Dissociated personalities are sub-personalities that are able to help the child cope with the traumas in its life.

Dr. Straub is of the opinion that the stresses of a marriage on the verge of collapsing and the possibility of a loss of his most prized possession, that being his family, as well as the loss of his home and business caused tremendous stress as well as set up a traumatic event triggering the disassociative state and the necessary environment for a suppressed personality to emerge. The actions of this personality are very different from the main personality of which Ralph ordinarily displays. Exhibit 3.

C. PERSONALITY TRAITS

Not only would counsel have had the evidence of multiple

personalities and post-traumatic stress disorder, they would have had information on Ralph's main personality, that of being a caretaker and provider. Ralph's brother Albert recalls the roll model Ralph presented for his younger siblings. "At a very young age Ralph had to play a big brother, father and mother roll toward us. He was very protective." "At 32 South Allen Street, Apartment 4, in Anniston, we spent the roughest years of our young lives. We were basically raised by our brother Ralph who was still a child himself. He taught us things that our parents never did. During those years my father was in the military he didn't know what we were going through. If we had told him my Mom would have beaten us. My childhood experiences are still hidden in the back of my mind. I prefer leaving them there. I will say the pain of it is sickening as I think about those days."

While Mr. Davis, Jr. was away in the military, Mrs. Davis was arrested and sent to jail. The Davis children found themselves without anything to eat. Ralph, at age eight, took charge. He went out and returned with groceries. In the kitchen the other children gathered around and pulled groceries out of the bag. When the groceries ran out Ralph brought in sweet potatoes and vegetables from the neighbor's gardens. Ralph kept the children fed until their mother returned. Albert Davis credits Ralph with teaching him diligence and honesty. "Ralph got me my first job. I was eleven. The job was delivering sales papers [advertisements] from door-to-door for Porter's Meat House." I wanted to quit but Ralph wouldn't let me until the job was finished. Albert then got

a job working around a cash register. He states, "I had this job where I could have stolen money but I didn't because I would have had to face Ralph. You couldn't steal around Ralph." Ralph helped make college possible for Tom. When Tom was in college, Ralph let him use his car. Ralph gave Tom accessories needed to make a good impression; shoes, a state-of-the-art General Electric portable radio. When asked where his sense of family came from, Tom replied, "It sure couldn't have come from my parents." "It came from Ralph. Everything came from Ralph." When it came to family, Ralph was always the provider, the caretaker, the giver. And this was true not only in his dealings with his siblings and parents but also in his relationships with women and his children.

Counsel also failed to interview and adequately present evidence from Gwen Phillips, a woman Ralph spent five years with in a long-term committed relationship. From that relationship one child was born to the couple. Ralph acted as and became the father for three children she brought to the relationship. From 1965 until 1970, Ralph and Ms. Phillips made a life together. They started out in Tallahassee, Florida and moved to Washington, D.C. Had counsel presented evidence of this relationship, they would have gotten a glimpse into the type of man and provider Ralph was for his family.

Ralph met Gwen Phillips when he was twenty years old. She was older with three small children, two girls and a boy. Gwen and her children lived in a cramped apartment before meeting Ralph. At the time, Gwen was pursuing an education degree at Florida A & M

University. Ralph bought a car for her to help her get to class. They started living together and he found a bigger apartment and then a house where they could live as a family. Ralph built a playhouse for her children and Ralph not only worked but he took care of the cooking, sewing, cleaning and care of the house. Gwen recalls, "Ralph always found jobs." "If one wasn't what he wanted, he worked at it until he found another one. He kept finding jobs." She went on to say, "He never threw money away. He spend money freely on presents, nice things for Gwen and toys for the children." At Christmas and Easter, Ralph bought the children extravagant number of toys. On Christmas Eve there would be nothing under the tree and Ralph would tease the children about how bad they had been but then he would get up in the night and put the presents out. Come morning, "The tree would be loaded. Those children didn't want for nothing."

Ralph, Gwen and the children moved to Washington, D.C. where Ralph found work for himself and he helped Gwen get a job. They lived in a row house on a narrow street. Ralph often took the children on the bus to the mall and the monuments. He loved to take pictures of the children. Gwen recalls, "Ralph treated my children as though they were his own. They would come around him and hugged him around his legs. He was very affectionate to them. The kids knew that he loved them. He would tell them so." Ralph would play "horsey" with Gwen's boy and with their small son. "Ralph was the only father my children ever knew."

Friday night became a family institution which they called

"kids night." Ralph would ask the children what they wanted for dinner and then he would make whatever they chose. Gwen sums up the Ralph Davis she knew in these words, "He was a house man, a yard man, a family man." Not long after they arrived in D.C., Ralph started working two jobs to save money for house. Eventually they had enough money to put down and bought a house in Seat Pleasant, Maryland. The house had a yard with a white picket fence. Ralph built another playhouse for the children. He built on a new room so the two boys could have a bedroom of their own. He fixed up the basement, he planted flower outside. He got a dog for the older boy and a cat for Gwen. They bought furniture for the house and bought a car. Then one day for reasons that are still not clear to Gwen after 22 years, she got up one morning and as she and Ralph were dressing in the bedroom to go to work that day, she told Ralph that she was leaving him. He started talking about the furniture that we had bought and the car. Then, she recalls, "he started to cry."

All the information on Ralph's childhood and information from Gwen Phillips, was readily available to trial counsel. Armed with this information, counsel could have retained Dr. Straub or another psychologist to render an opinion as to the effects of Ralph's childhood and life experiences. Counsel failed in his duty to investigate and present this evidence. Counsel's failure to investigate left him with few options for the guilt/innocence phase of the trail. In the penalty phase there would have been compelling mitigation evidence that would have given the jury a

reason to vote for life. This wealth of information was never gathered and or presented. Due to the ineffectiveness of counsel the juries decision is unreliable. The courts have refused to grant relief where error is so overwhelmingly clear.

**VI. INEFFECTIVENESS OF COUNSEL CAUSING
COMPLETE BREAKDOWN OF TRUE ADVERSARIAL TESTING**

The level of incompetence by counsel that started prior to trial and continued throughout the representation completely destroying any true adversarial testing. The verdict in this case can not be considered a fair and just outcome. Counsel's ineffectiveness did not stop with his failure to investigate and present information on theories of guilt innocence, or mitigation. Counsel also failed to perform at a minimum level of competency during the trial of the case.

One of the most critical elements of any jury trial is picking the jury. In a capital case it will make the difference between life and death. The Eighth and Fourteenth amendments to the United States Constitution lend protection from unqualified and death prone juries. It is obvious the defense did not know or failed to follow the dictates of Wainwright v. Witt, 469 U.S. 410 (1985) the law controlling death qualification in voir dire at the time of the trial. Based on the incompetence of trial counsel, one of every five venirepersons was unlawfully stricken for cause based on their views regarding the death penalty.

Ralph Davis' jury was selected from the first seventy-two of one hundred twelve venirepersons who reported for jury duty. More than one-third of this sub-group, a total of twenty-six persons,

expressed some degree of conscientious scruples about imposing the death penalty. Trial counsel was unable to secure one of these twenty-six individuals for Ralph's jury. In fact, what is most distressing, is counsel for the defense struck some of these individuals for cause on the death-life qualifying issue. A check of the trial record reveals the following:

Venireperson Barbara Carter: I have strong reservations about [the death penalty] as it is used in the society at this time. [Assistant Prosecutor]: Under the circumstances that you felt were appropriate under the law and the evidence that you heard, could you consider the death penalty in this case?

Venireperson Barbara Carter: Well it would depend on the circumstance. I would hesitate.

Venireperson Barbara Carter: I don't know what evidence is going to be brought, but I would be inclined against it.

[Assistant Prosecutor]: Your inclination would be toward the alternative, life in prison without probation?

Venireperson Barbara Carter: Yes, although it seems almost as vicious.

[Assistant Prosecutor]: and you definitely have some hesitations and uncertainty about the death penalty; is that a fair statement?

Venireperson Barbara Clark: Yes.

Trial Transcript, 306, 307, 308. Here in after (Tr.T).

When the trial court entertained motions to strike venirepersons for cause, the defense moved to strike venireperson Barbara Carter. The defense also moved to strike venireperson Ronald Jones for cause. Venireperson Jones, after being ask by the assistant prosecuting attorney whether he could sign the verdict form, if he were chosen as foreman, stated he was not sure. Trial counsel did nothing to rehabilitate him. For that matter he did not do

anything to attempt to rehabilitate any venireperson during the life-death qualification portion of voir dire. Counsel demonstrated he had no knowledge or understanding of the principals in Wainwright.

Trial counsel also failed to question venirepersons as to the degree of weight they would give to mitigating evidence. Counsel never ask one scrupled venireperson if they could temporarily put aside their own beliefs in deference to the rule of law, the most basic question for the defense under the Wainwright standard.

Counsel's response to the motions from the prosecution to strike scrupled jurors for cause were wholly inadequate. For one response he said: "My continuing objection to the death penalty". (Tr.T 423) On another occasion he said "no objection your Honor[to the prosecution's motion to strike a scrupled juror for cause] well I object to the constitutional right".

The state was able to remove 13 of the twenty-six venirepersons for cause. That left thirteen venirepersons still available who held feelings against the death penalty. Even if the state used all nine of its preemptory strikes against the remaining thirteen there still would have been four available for the jury. This would have given Ralph a jury consisting of one third of its members having some reservations about the death penalty.

Ralph's jury was stacked with jurors with no reservations about the death penalty. Counsel's ineffective preparation and performance violated Ralph's Sixth, Eighth and Fourteenth amendment rights to a jury that fairly represented the community. This

includes individuals holding reservations about death as a punishment. Had counsel acted competently, there is a fair probability they would have returned a verdict other than death.

VII. PROSECUTORIAL MISCONDUCT

Ralph Davis plead not guilty, and proceeded to trial presenting the defense based on his innocence. He is assured this right by the Eight and Fourteenth amendments to the United States Constitution. In what was clearly a violation of those rights, the prosecutor elicited testimony and made arguments that directly contradicted these rights. The prosecutor elicited testimony and argued in both the guilt/innocence phase of the trial as well as in the penalty phase of Ralph's "refusal" to disclose the location of Mrs. Davis' body. The prosecutor used an emotionally charged issue, and in fact also violated Ralph's Fifth Amendment rights by eliciting testimony from the Captain of the Boone County sheriff's department. The testimony presented by the captain was Ralph had five opportunities to disclose the location of the body and that Ralph failed to do so. A detective with the Columbia Police Department also testified to Ralph's refusal to give a location of the body. The prosecutor called in several acquaintances to testify about conversations which they had with Ralph about his wife's disappearance without any disclosure by Ralph as to the whereabouts of her body.

In the guilt phase closing argument, the prosecutor made eleven references to the fact that Ralph did not disclose the location of his wife's body. One portion of the argument was part

of his plea for conviction. "When you come back with your verdict you can deliver a message that if you kill somebody, you're not going to get off just because you're able to hide the body". (Tr.T 1572). There was no objection by trial counsel. The Court also failed to correct the glaring violation of Ralph's Constitutional rights. While all of the testimony and arguments were being made, no one objected. There was no intervention of any type.

After presenting the testimony of these witnesses the prosecutor argued in effect, Ralph did not have the right to maintain his innocence. This violation of constitutional rights goes to the very heart of our criminal justice system, the idea that a defendant is innocent until proven guilty. The prosecutor would have the jury believe Ralph had some type of duty to disclose information he contends he did not have. Then to go even farther, the argument presented asks for punishment based on his exercising his right.

Then in his lust for a sentence of death, the prosecutor elicited from five penalty phase witnesses further testimony that Ralph did not disclose to them the location of his wife's body. The prosecutor then argued for Ralph's death due in part to his refusal to tell the location of the body.

"No body in this courtroom except one person knows where Susan's body is, and that's the defendant. And he's made his decision to not give that up. And that's an important factor to consider in fixing his punishment in this case. In our society... it's a religious thing... what we do when somebody dies... most of us ... including Susan Davis... don't leave anything permanent. All we leave is memories... society does something in addition... and that's the ceremony or the ritual and the burial. She has never had that burial." (Tr.T 1671-72).

Through out this entire process defense counsel did nothing to protect his clients rights. Justice Blackmar of the Missouri Supreme Court stated in his dissent from the ruling of the Missouri Supreme Court:

"I am startled by the State's argument that defendant was required to disclose the location of the body., lest he be labeled "cynical" and "remorseless" and thus condemned to death. This is an incredible theory, fraught with danger. Common sense teaches that to require the defendant to locate a body during the penalty phase is to trample the right of defendant to maintain his innocence. There is diminished use for appeals, post-conviction proceedings, or even habeas corpus if the defendant must somehow admit his guilt in pointing to the body. This concept bootstraps the defendant into an untenable position and it offends the constitution."

VIII. ABANDONMENT BY POST CONVICTION COUNSEL

After conviction and sentencing, Ralph was appointed a public defender to represent him in his post conviction proceedings. Ralph then hired Gerald Bassett to represent him. Bassett did almost nothing on the case. Then for personal reason never explained to Ralph, Gerald Bassett abandoned the practice of law. Exhibit 4. (Affidavit of Gerald Bassett) With five days remaining on the jurisdictional deadline for filing the post conviction relief motion, Gerald Bassett's father, Merle Bassett entered his appearance in the case. On the final day for the motion to be filed, the senior Bassett filed a motion that was not signed or verified by Ralph Davis. Exhibit 5. (Affidavit of Merle Bassett) Two days before a hearing on the states motion to dismiss, Merle Bassett filed his motion to withdraw. Bassett's stated reason for withdrawing was "I entered my appearance in Missouri as counsel for defendant on the basis that my son, Gerald would do the majority of

the work and research. Without the assistance of Gerald Bassett, I would be unable to adequately represent Defendant Davis". Thomas Schlesinger then entered his appearance on Ralph's behalf. The trial court entered its finding against Ralph on the issues in his pro-se petition as well as his amended petitions.

The Missouri Supreme Court then decided State v. Oxford, 791 S.W.2d 396 (Mo.banc 1990). The court in Oxford held Missouri courts had no jurisdiction to consider grounds for relief raised in an unverified motion. While Ralph's case was pending, the Missouri Supreme Court decided Luleff v. State, 807 S.W.2d 495 (Mo banc 1991) In Luleff the court created a judicial remedy for movant under Missouri Supreme Court Rule 29.15 in situations where the movant has been "abandoned" by counsel's failure to perform required functions. If movant is found to be "abandoned" he is entitled to appointment of new counsel and 30 days to file a proper amended motion. The ruling in Luleff was applicable to Ralph's case but was not raised by Schlesinger. Exhibit 6. (Affidavit of Thomas Schlesinger)

Due to the actions and inaction of these three attorneys in critical stages of the appeal process, Ralph has never had a full and fair review of his case. The chronology of events shows not only did Ralph receive an inadequate defense at trial but was abandoned and put in a procedural quandary from the beginning of his appeals process. The aftermath of this state debacle is procedural bars that the district court used to deny access to full review of Ralph's claims.

IX. THERE HAS NOT BEEN A FULL FAIR FEDERAL REVIEW OF VIOLATIONS OF MR. DAVIS'S CONSTITUTIONAL VIOLATIONS.

Ralph Davis filed his petition for writ of habeas corpus in the United States District Court for the Western District of Missouri, raising numerous claims of constitutional error. The district court denied relief in large part due to procedural default because of the errors and omissions by post-conviction counsel. Because of the abandonment by counsel, the courts should have given Ralph a full review of his claims of constitutional error. This was not the case. Once the district court denied the petition, counsel requested a certificate of probable cause. The district court did not grant the certificate of probable cause to appeal or certificate of appealability. The court also failed to state any reasons for its failure to grant either certificate.

Ralph's counsel then filed for a certificate of appealability in the Eighth Circuit and again without explanation, the court denied the motion. The Eighth Circuit is the only circuit that has applied the standards of the AEDPA for movants who have filed petitions in the district court prior to its enactment. The position of the Eighth Circuit contradicts the United States Supreme Court ruling in

Lindh v. Murphy, 117 S. Ct. 2059 (1997). Due to the position of the Eighth Circuit, Ralph has not had a full and fair review of his claims in the federal court of appeals. Ralph's case has glaring constitution violation that the courts have never given a full review. Due to the actions and inactions of the state and federal courts, Ralph has one possible safeguard left. Ralph deserves to

have at least one fair and equitable review of the facts and circumstances of his case before he is executed.

**X. RALPH DAVIS HAS CHILDREN AND GRANDCHILDREN
WHO LOVE AND NEED HIM.**

Ralph Davis has six children and a number of grandchildren who love and need him in their lives. Ralph can continue to be a contributing member of society by being a father and grandfather to his children and grandchildren. Ralph also has a mother and father as well as brothers and a sister who will continue to have close and meaningful relationships with him.

Ralph's son Robert Davis wants to have the opportunity to have the relationship with his father he has not been able to have in the past. Due to his young age and inability to travel to Missouri to visit his father he has not been able to see him as much as he would like. Robert is twenty-one years old now and can make more frequent trips to visit his father. Ralph also has a seventeen year old daughter, Angela who will also be reaching an age where she will be able to more frequently visit and have contact with him. Ralph also has a son Edward in Florida, along with the children of Gwen Phillips who consider him to be their father. Sheila Sermon, Roderick Sermon and Deneen Finwick all consider Ralph to be their father. All of Ralph's children stay in contact with him. Ralph also has grandchildren. Sheila has three daughters, Deneen has two daughters and Roderick has a son. Ralph knows his grandchildren and even though they live in Florida he still talks to them by telephone. They have and will continue to send him cards and pictures. Gwen Phillips also has continued to

have a meaningful relationship with Ralph. They call and send letters to one another.

Ralph also has a close relationship with his brother Thomas Davis. Thomas lives in Maryland and the two talk on the phone and have become closer with the passage of time. Ralph also has a sister, Diann Davis he is in contact with. Ralph has a full life with people who love him and want to continue to have him in their lives. (Exhibit 7. Pictures of Ralph Davis' Family.)

CONCLUSION

Ralph Davis finds himself facing execution because the criminal justice system did not work properly. There was a complete breakdown of the system starting prior to trial with counsel who failed to inform Ralph of critical information in the case. Inadequate preparation and representation at trial put him on death row. His abandonment by post-conviction counsel has corrupted the appeal process and has denied Ralph full and fair access to review of his claims of constitutional violations. All of these factors contributed to the circumstances Ralph now faces.

The state of Missouri will not benefit from the execution of a man who has had his constitutional rights violated. The family of the victim, Susan Davis, asks that they not be burdened with the loss of Ralph Davis. The only fair and equitable remedy at this time is the commutation of the sentence of death for Ralph Edward Davis.

Respectfully submitted

ELIZABETH UNGER CARLYLE #41930
200 S.E. DOUGLAS, SUITE 200
LEE'S SUMMIT, MO 64063
816-525-2050

CEDRIC D. BROWN #35592
Public Interest Litigation Clinic
305 East 63rd Street
Kansas City, MO 64113
816-363-2795, Fax 816-363-2799

Attorneys for Movant