PETITION FOR EXECUTIVE CLEMENCY

of

DENNIS WAYNE EATON

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I. INTRODUCTION

What happened to Dennis Wayne Eaton at his capital murder trial in 1989 could never happen to him, or any other capital defendant, anywhere in America today. That his death sentence was gotten by means that today are unconstitutional and illegal is a fact. That he would not have been sentenced to death but for these unconstitutional and illegal means used against him is also a fact. Consider also the tremendous outpouring of support in favor of granting him clemency, his model behavior while in prison, and the lingering questions surrounding Mr. Eaton's guilt, and fundamental fairness cries out that clemency be granted. Mr. Eaton's death sentence should be commuted to life in prison without the possibility of parole.

II. FUNDAMENTAL UNFAIRNESS

Prior to his trial for capital murder, Mr. Eaton had already been sentenced to life in prison without the possibility of parole. This sentence came about as a result of Mr. Eaton's pleas of guilty to two murders committed in Shenandoah County the same day as Trooper Hines' death and his entering into a plea agreement on those charges.

Later, at his capital murder trial for killing Trooper Hines, Mr. Eaton's jury sentenced him to death based solely on a finding

that he would be a future danger to society even though he would never have been eligible for parole if given a life sentence. Mr. Eaton's jury never knew he would be ineligible for parole. Despite his repeated attempts at trial to tell his jury that he would never be eligible for parole if given a life sentence, and so would not be the future danger to society that he was falsely portrayed to be, he was denied this right. The jury was left to speculate upon Mr. Eaton's future release from prison in making its decision that he should be put to death. The trial court denied Mr. Eaton's jury access to a critical piece of accurate information when it called upon those jurors to decide between life and death.

Mr. Eaton's odyssey through this legal maze began on May 1, 1989, when the Commonwealth of Virginia charged Dennis Wayne Eaton by indictment with Capital Murder in violation of Section 18.2-31(f), Code of Virginia. The Commonwealth alleged that he committed the willful, deliberate and premeditated killing of Jerry L. Hines, a Virginia State Trooper as defined in Section 9-169.9, Code of Virginia, for the purpose of interfering with the performance of his official duties. A second count charged Mr. Eaton with the use of a firearm in the commission of a felony in violation of Section 18.2-53.1, Code of Virginia. Mr. Eaton pled not guilty to both charges and was tried by a jury on November 28, through December 1, 1989 and December 11, 1989.

On December 1, 1989, the jury found Mr. Eaton guilty of murder

of a police officer during the performance of his duties, a capital offense, and guilty of the use of a firearm in the commission of a felony. On December 11, 1989, the same jury sentenced Mr. Eaton to death for the capital murder and two years in the penitentiary for the use of a firearm in the commission of a felony. The trial judge imposed the sentence of death plus two years in the penitentiary upon Mr. Eaton on January 10, 1990.

Prior to his trial for capital murder, on October 13, 1989 Mr. Eaton pled guilty to the murders of Walter Custer and Ripley Marston and related crimes that occurred in Shenandoah County. Pursuant to a written plea agreement, he was to be sentenced to three life sentences plus 42 years, the sentences to run consecutively. [Exhibit 1]. The Commonwealth and Defendant stipulated that the evidence would show that the murder of Walter Custer and the murder-robbery of Ripley Marston were separate offenses and were not part of a common act, transaction or scheme. [Exhibit 1, page 4]. Mr. Eaton also pled guilty and was found guilty in Salem, Virginia, of murdering Judy McDonald, and pursuant to a plea agreement again sentenced to life in prison.

Under Virginia law, Mr. Eaton was ineligible for parole on his Shenandoah County sentences. Indeed, the plea agreement entered into in those cases specifically held that Mr. Eaton was not eligible for parole: "The Defendant acknowledges that by entering into this agreement ... that the Defendant would <u>not be eligible</u>

for parole pursuant to Virginia Code Section 53.1-151B1 (1988 Repl. Vol.), and that he has been so advised by his attorneys." (Emphasis in original) [Exhibit 1, page 5]. In an Advice of Rights form filed with the court, Mr. Eaton specifically stated that he understood that if he entered into the plea agreement he would never be eligible for parole, but that "[e]ven though I know that I will never be eligible for parole, I still wish to plead guilty to all charges." [Exhibit 2].

On November 21, 1989, again prior to Mr. Eaton's capital murder trial, the circuit court judge in Shenandoah County entered an order sentencing Mr. Eaton to three consecutive life sentences plus 42 years pursuant to the October 13 plea agreement. [Exhibit 3]. The trial judge specifically found that the murder of Walter Custer, Jr., and the murder of Ripley E. Marston were not part of a common act, transaction or scheme. [Exhibit 3, page 4]. The judge inquired whether Mr. Eaton understood that by pleading guilty and entering into the plea agreement he would be sentenced to life in prison "without eligibility for parole under the laws now in force." [Exhibit 3, page 2]. Finally, the judge ordered "that, under the provisions of Virginia Code Section 53.1-151B1, [Mr. Eaton] will not be eligible for parole". [Exhibit 3, page 5]. Prior to his capital murder trial, then, under existing Virginia law, pursuant to his agreement with the Commonwealth and as ordered by the Shenandoah County Circuit Court judge, Mr. Eaton could never

be released alive from prison.

At his capital murder trial, Mr. Eaton attempted to inform his jury of his parole ineligibility both as mitigating evidence and to rebut future dangerousness. In mitigation, he attempted to introduce his parole ineligibility as evidence of his character and record. He tried to show that he had waived all his constitutional rights and accepted responsibility for his other crimes. He tried to show that by pleading guilty to these other crimes he had saved the Commonwealth of Virginia the effort and expense of proving him guilty at trial. He tried to show that he agreed to spend the rest of his life in prison for these crimes. And finally, in rebuttal to future dangerousness, he attempted to introduce his parole ineligibility to show that he wouldn't be a danger to society in the future because he would never be released from prison in the future if given a life sentence. The jury that sentenced him to death never knew of his parole ineligibility.

At the beginning of his capital murder trial, Mr. Eaton attempted to question his venire about his parole ineligibility. [Exhibit 4]. He was denied this right. At the end of his sentencing trial he attempted to accurately instruct his jury of his parole ineligibility. [Exhibits 5]. He was again denied this right. But it was what happened to Mr. Eaton between the beginning and end that shocks the conscience.

At Mr. Eaton's sentencing trial, the Commonwealth Attorney

sought a death sentence based solely on future dangerousness; that is, the Commonwealth Attorney asked Mr. Eaton's jury to sentence him to death because he would be a future danger to society. In support of a finding of future dangerousness, the Commonwealth Attorney presented evidence that Mr. Eaton had committed the other three murders to which he had previously pled guilty.[1] The Commonwealth Attorney was allowed to introduce into evidence that part of the Shenandoah County order reciting the crimes and convictions while redacting any reference in the order to the fact that Mr. Eaton had been sentenced to life in prison without parole for those crimes. [Exhibit 6]. Mr. Eaton attempted, but was not permitted, to introduce the entire sentencing order and plea agreement showing that he wasn't the future danger falsely established by the redacted order. The complete order and plea agreement presented the complete truth -- that he was sentenced to life in prison without parole and so was not the future danger to society that he was falsely portrayed to be. Thus, while the prosecutor was allowed to present that part of Mr. Eaton's prior record establishing his convictions of prior violent felonies in support of a finding of future dangerousness, Mr. Eaton was denied the opportunity to present his complete prior record which, in rebuttal to future dangerousness, showed that he would never be

[1] These are the only crimes of violence in Mr. Eaton's record and they were all committed within a 12 hour period of time.

released from prison. In addition to rebutting future dangerousness, the plea agreement and complete order included the mitigating fact that he accepted and agreed that he would spend the rest of his life in prison, without possibility of parole, as punishment for those crimes. Although this rebuttal evidence and evidence of his character and record was definitively established prior to the beginning of Mr. Eaton's capital murder trial, it was literally "whited-out" of the sentencing order which his jury was allowed to consider.

This action, were it to be attempted today, would not be allowed because it would be unconstitutional. That this action today would violate the Constitution of the United States, the highest law of the land, is not even debatable. In Simmons v. South Carolina, 512 U.S. 154 (1994), the United States Supreme Court specifically outlawed this practice of not allowing a capital defendant to rebut future dangerousness with evidence of his parole ineligibility.[2] Simmons held that, if a state seeks the death penalty based on a showing of future dangerousness, a capital defendant has a Due Process right to rebut this basis for death

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[2] The related question, whether or not a defendant has an Eighth Amendment right to inform his sentencing jury of his parole ineligibility that was established prior to his capital murder trial as mitigating evidence of his character and record, is the question currently pending before the United States Supreme Court in Mr. Eaton's Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals. We will immediately notify the Governor's office of a decision.

with a showing that, if sentenced to life, he would never be eligible for parole and so would not be a future danger to society. The question then became whether the Simmons holding applied retroactively to convictions that became final prior to 1994. This question was answered in the Virginia case of O'Dell v. Netherland, 117 S.Ct. 1969 (1997). O'Dell holds that the Due Process rule of Simmons does not apply retroactively to cases finally decided prior to 1994. The non-retroactivity holding of O'Dell could not have been more closely decided. The Supreme Court ruled five to four against O'Dell and upheld the Fourth Circuit Court of Appeal's decision. The Fourth Circuit's decision was an en banc seven to six decision against O'Dell. Dennis Eaton's legal fate as to whether he should live or die was determined against him all along the line by one vote in somebody else's case.

Would Mr. Eaton's fate have been different had he been able to tell his jury the truth about his parole ineligibility? Undeniably, the answer is yes. At least one juror who voted to sentence Mr. Eaton to death, Mr. Bruce Bratten, now swears under oath that, had he been given truthful information at trial about Mr. Eaton's ineligibility for parole from a sentence of life in prison, he would never have voted for the death penalty. [Exhibit 7]. And one juror is all it takes under Virginia Law. Virginia Code Section 19.2-264.4.E states that if the jury cannot unanimously agree on a verdict in a capital case then the judge

shall impose a sentence of life in prison.

But Mr. Bratten was not the only Eaton juror who expressed concern about not being told that there was no parole from a life sentence in this case. Two other jurors, Donna L. Markle and Patricia Ann Knipfer, filed an Amici Curiae brief with the U.S. Supreme Court in Simmons v. South Carolina, supra, expressing their concerns, as citizens and former jurors in a capital case, that they were not told that their alternative to the death penalty, life in prison, meant life without parole. [Exhibit 8]. Their concerns are very real and offer a perspective on clemency different from that of Mr. Eaton -- the perspective of the ordinary citizen of Virginia who is called upon to do his or her duty as a juror and make the ultimate decision between life and death in a capital case. Ms. Markle and Ms. Knipfer, in their Motion to File a Brief as Amici Curiae, state that they "are former jurors in a capital case who were denied the right to have information concerning the meaning of the life sentence alternative ... The amici are particularly interested in this [Simmons] case because it presents matters of concern to ordinary citizens who are called upon to serve as jurors in capital cases ... The interests of the amici are different from those of the parties in that they, as jurors, were called upon to make the ultimate decision of whether a person should live or die, a decision with which they must live forever. The amici feel that the state should not call upon

citizens to make that decision and then systematically withhold from them information that they would consider highly relevant to their sentencing decision." [Exhibit 8, pages viii - x].

They elaborate this concern in the body of the brief:

> The *amici* did their duty in rendering a sentencing verdict based on the evidence and on the law that they were given. Now, as part of the burden of their civic service, they must live for the rest of their lives with the memory of the irrevocable decision they made in the jury room. This is not, in a capital case, an easy thing to do. But what has happened in the *Eaton* case has made it much harder. For after participating in the decision to put Mr Eaton to death, the *amici* learned that his "future dangerousness" had been systematically exaggerated in the courtroom by the state's withholding from the jury the crucially important fact that he would never have been eligible for parole if the jury had let him live.
>
> The potential effect on Mr. Eaton of this manipulation of the jury's sentencing decision is obvious. But he is not the only one adversely affected. The *amici* as jurors who assumed personal responsibility for recommending his execution, also feel the impact of what occurred. Having learned of his parole ineligibility only after ordering his death, it is now much harder to believe that they did the right thing. And because what they did involved choosing death over life, this doubt can be a substantial burden to bear....
>
> The thoughts and feelings of the *amici*, of course, are no longer relevant to the judicial process: their jury service is over, and that is that. But they must live with their own feelings for the rest of their lives. It is no small thing to realize that one may have ordered the execution of a man who could and perhaps should have been spared.

> And it is no small thing that the state, without any good reason that the *amici* can see, has put its own citizens in so difficult a position. Jury service involves many sacrifices, but it should not require this.
> [Exhibit 8, pages 3-4, 5].

Finally, even without accurate and truthful information concerning their life sentence alternative to the death penalty, Mr. Eaton's life or death was an extremely close question with his jury at trial. After two and one-half hours of sentencing deliberations, the jury foreman sent a note to the trial judge stating the following:

> "We continue to be deadlocked with the same vote after two and one-half hours. The death verdict indicates that we must be unanimous. The life imprisonment does not indicate a unanimous vote is necessary. Please clarify."

The trial court judge, in response, sent the following note to the jury:

> "I cannot instruct you beyond the instructions which you have received; that if you are unable to agree to a penalty, please advise the court."
> [2-11-89 Tr., pp. 135-136][3]

Approximately three and one-half hours later Mr. Eaton's jury returned the sentence of death.

So where do we stand today on this issue? The Due Process

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[3] Citations designated "Tr." are to pages of the trial transcript.

issue has run it's course in the judiciary. The Simmons rule is blocked by the O'Dell procedural holding from being retroactively applied to Mr. Eaton's case. And there are sound, logical reasons why O'Dell was decided that way. In order to maintain a structured and competently functioning judicial system, it is important that judicial decisions be accorded finality. But along with this goal and inherent in this approach goes a coldness, a sense of inhumanity, of putting structural integrity above human life. The reality is that human sacrifices are being made on the altar of structural stability. Something as random as a timing quirk is determining whether men live or die.

Executive clemency is the means that can bring back the human touch in determining how our society deals with individuals. It can soften the harsh rigidity of across-the-board judicial procedural rule application. Executive clemency is the means of alleviating the fundamental unfairness of executing Dennis Eaton.

III. SUPPORT AND REHABILITATION

A. Maria Hines

Maria Hines, sister of slain Trooper Jerry Hines, respectfully requests that Dennis Eaton not be executed. [Exhibit 10]. She supports Mr. Eaton's Petition for Clemency and requests that his death sentence be commuted to life in prison without the possibility of parole.

Unless one has walked a mile in Maria's shoes, unless one has experienced in his or her life what Maria has experienced, complete understanding is forever elusive and the most one can hope for is a sense of trying to imagine her grief and her internal struggle that has led to her decision requesting that Mr. Eaton's life be spared. Jerry was Maria's baby brother and only sibling. She remembers him as a baby. She was there when he first began to talk. She was the older sister who comforted him when their father died unexpectedly of a heart attack when he was only three. She remembers him starting school, and that he would rather play than study. She followed his career through college, as a news anchorman at a local television station, and ultimately as a Virginia state trooper. She took pride in his accomplishments as a state trooper. And then she saw it all end when her only brother, her hero, was shot and killed on February 20, 1989. [Exhibit 11].

Numbing, devastating, life-shattering grief is not something resolved in days, or months, or sometimes years. Many people are never able to resolve a life-event of such magnitude. Over the years, not a day has gone by when Maria did not think of her brother's death. She has described it as a cloud over her life. Mr. Eaton's death sentence began for Maria a search deep within her soul for answers to haunting questions. Maria's answer today is that killing is wrong, even when it is done in the name of justice

-- that killing is still killing, whether done by an individual or the state.

It is one thing to hold personal beliefs -- it is quite another to take action based upon those beliefs. Following ones own conscience is never an easy thing. Over the years Maria has, remarkably, been able to get beyond hatred and vengeance and is resolving her grief through forgiveness. But for Maria, this is not enough. To publicly support Dennis Eaton's Petition for Clemency is perhaps one of the most difficult decisions that Maria has ever made. She realizes that she confronts the massive current public support in favor of the death penalty that places public approval as high as 85 percent. She realizes that she risks forever alienating her relatives, Jerry's children, with her stance. And she also understands that Jerry was a well-known and much-loved police officer and that there will be those among Jerry's friends and colleagues, perhaps few but probably many, who will never be able to understand her beliefs and actions and that she will suffer the consequences of their disapproval.

Yet she knows that, in her life, killing is wrong and forgiveness is crucial, and so she takes a public stance against the killing of Dennis Eaton. With the upcoming execution, she is having to re-live her brother's death one more time and she knows first-hand the devastating effect that death sentences and executions can have on victims' families. She has experienced that

world where families of murder victims spend years being re-victimized by a system that doesn't work and only serves to prolong their grief, and she thinks that there must be a better way.

When struggling with the death penalty issue, Maria's thoughts would turn to Mr. Eaton's family. They had so much in common. Just as Maria had lost a brother, Mr. Eaton's family would lose a brother.

And now Maria has her memories of her brother, and those memories are sacred to her. Her brother was her hero. She now faces the very real prospect that another killing will be done and that this killing will be done in her brother's name. This is not how she wants her brother to be remembered. She has suffered enough. She respectfully requests that her position, her thoughts and feelings, be taken into account and that Mr. Eaton's death sentence be commuted to life in prison without parole.

B. Public Support

Since Mr. Eaton's execution date has been set, there has been a groundswell of public support in favor of granting him clemency. This has resulted in a grassroots effort to show, not that there are powerful and famous people who oppose his execution, but that there are ordinary people who want to be heard on the issue of executive clemency for Mr. Eaton and are concerned enough to sign their names to petitions opposing his execution. The original

petitions are too voluminous to attach as exhibits and are being submitted under a separate cover but the petitioners opposing Mr. Eaton's execution received as of this date may be summarized as follows:

Number of petitioners from Lexington and Rockbridge County	25
Number of petitioners from other parts of Virginia	227
Number of petitioners from other parts of the United States	198
Number of petitioners from other countries	1
Total number of petitioners opposing Dennis Eaton's execution	451

Mr. Eaton respectfully requests that the concerns of the ordinary people expressed through these petitions be considered and that executive clemency be granted.

C. Rehabilitation

Prior to the tragic and horrible eight hour period that resulted in four deaths, Mr. Eaton had never committed a violent act. He was not a violent man. He had worked hard at the same orchard for sixteen years and never displayed any violent behavior. [2-11-89 Tr. p. 77]. He was regularly trusted with his sister's and employer's children because he was a peaceful man. [2-11-89 Tr. p. 77, 85]. He was a man who shoveled his elderly neighbor's snow

in the winter, carried her groceries for her, and fixed her car when it was giving her trouble. [2-11-89 Tr. p. 81].

Since being imprisoned, Mr. Eaton has been baptized as a Christian and has found peace within himself. As part of the expression of his spirituality and faith he has conducted an extensive letter-writing campaign in an effort to reach troubled young people and help turn their lives around. Mr. Eaton holds himself up as an example of what can happen when a person turns from faith to a life of drugs and alcohol. From his cell on death row, Mr. Eaton does what he can to make the world outside a better place for the rest of us.

It is an understatement to say that in over eight years on death row Mr. Eaton has been a model prisoner. According to his prison records, Mr. Eaton has received only one rule violation charge while on death row: delaying, hindering, or interfering with an employee in the performance of his or her duties for failing to go into his cell in a timely manner when told to do so (Mr. Eaton is deaf in one ear). This occurred in November of 1993. As punishment, Mr. Eaton was given fifteen days of cell restriction, but that penalty was suspended for ninety days of good behavior. This is the only blemish to be found in an otherwise - perfect record of compliance.

In the harsh and sometimes brutal environment of death row, Mr. Eaton's record of compliance to the severely structured

prisoner regimen is simply remarkable. He has proven himself to be a model prisoner. And most significantly, he has balanced the eight hours of violence from his past with eight years of non-violence while in prison. There is not one hint of a violent act in Mr. Eaton's eight year prison record on death row. Mr. Eaton has established a record during his eight years on death row that effectively rebuts the future dangerousness concerns that were expressed at his trial and he today stands as living proof that he will not be a threat to others if allowed to live out his natural lifespan in prison.

IV. INNOCENCE

Mr. Eaton has adamantly and steadfastly maintained his innocence of this crime. While he freely admitted his guilt of the other three murders, from the very beginning he denied killing Trooper Hines, and he denies the killing today. Aside from the self-serving testimony of the jailhouse snitch, Chadwick Holley, the only other evidence of guilt produced at trial was circumstantial evidence that implicated Judy McDonald, not Dennis Eaton, as the person who killed the trooper.

When Trooper Hines first stopped the car with Mr. Eaton and Judy McDonald, Judy McDonald was driving. Eaton v. Commonwealth, 240 Va. 236, 241, 397 S.E. 2d 385, 388 (1990). Trooper Hines stopped Judy McDonald on suspicion of driving under the influence

of alcohol. Id. It was Judy McDonald, not Dennis Eaton, who was heard in the background on the police radio from Trooper Hines' car arguing with the trooper. Id. Trooper Hines was telling Judy McDonald, not Dennis Eaton to "hold still there, hold still there just a minute." Id. And when Trooper Hines call for assistance because "he was having a problem with a drunken driver," he was calling for help in dealing with Judy McDonald, not Dennis Eaton. Id.

Later that night, a Salem police officer first stopped the vehicle with Dennis Eaton driving at the drive-through window of a fast-food restaurant. The officer pulled in back of Mr. Eaton and Judy McDonald, opened his door and got behind it, pulled his gun and pointed it at the vehicle. He then demanded that Mr. Eaton and Judy McDonald put their hands over their heads. Mr. Eaton did as instructed and put his hands over his head. It was Judy McDonald who refused to comply and who seemed to be reaching down as if trying to get a gun. [11-29-89 Tr. p. 175]. It was only after the Salem officer opened fire on the vehicle that Mr. Eaton sped away.

When captured, Judy McDonald was tested for primer residue. The results showed that she had primer residue on her hand, indicating that she had handled and may have fired the murder weapon.

On two separate occasions, Mr. Eaton was extensively interrogated by trained police officers concerning all four

murders. During these police interrogations, Mr. Eaton freely admitted his guilt in the other murders and "related details of the murders of Custer and Marston." Eaton, 240 Va. at 243, 397 S.E. 2d at 389. But despite intensive questioning concerning the murder of Trooper Hines, he never admitted committing that crime.

Based on the totality of this evidence, serious doubts still remain as to Mr. Eaton's guilt of this crime. The evidence certainly did not rule out a reasonable hypothesis of innocence that it was Judy McDonald, and not Dennis Eaton, who shot the trooper.

Central to capital litigation is the principle that no one may be sentenced to death unless the evidence attains an appropriate and acceptable level of certainty and reliability. As a society we can tolerate only a very slight amount of risk that an innocent or undeserving person might be put to death. It is contrary to the values inherent in our system of capital litigation that Mr. Eaton should be led to his death on the strength of the evidence adduced at trial against him.

So accustomed are we to the difficult burdens faced by prosecutors in obtaining convictions against persons charged with crimes -- for example, the various constitutional privileges against unreasonable search and seizure and self-incrimination -- that we often assume that convictions remove *all* doubt as to guilt. We forget that trials are affairs of probability. A criminal

conviction is actually a conclusion by the jury that the probability the defendant did not do the acts charged is acceptably small. This fact is indicated by the "beyond a reasonable doubt" standard for conviction. Absolute certainty is neither required nor expected. And since absolute certainty is not required for a guilty verdict, mistakes inevitably are made. The innocent are sometimes convicted at trial.

One reason we are willing to accept less than absolute certainty in criminal convictions is that the consequences of a mistake are not irredeemable; although the state cannot turn back the clock, it can release the prisoner and remove the stain from his name, and it can compensate him in other ways if it wishes.

This reason cannot salve our conscience when death is the penalty. Thus, while the consequences of a mistaken conviction in the ordinary criminal case are severe, the consequence of administering the death penalty to an innocent person is irreversible and absolute. The strength of the evidence against Mr. Eaton simply cannot ground the moral certainty of guilt that is required by a civilized society prior to putting one of its members to death.

V. CASE CITATIONS

The opinion of the Virginia Supreme Court on direct appeal is found at Eaton v. Commonwealth, 240 Va. 236, 397 S.E. 2d 385

(1990). The opinion of the Fourth Circuit Court of Appeals is found at Eaton v. Angelone, No. 97-15, Slip op. (4th Cir. March 24, 1998).

VI. CONCLUSION

Sometimes justice can be hard to obtain in courts hobbled by procedural rules designed to achieve efficiency and finality. Consequently, democracies grant to a single man the power to cut through rules and regulations and dispense final justice. For Mr. Eaton, the Governor of Virginia is that man. For the reasons set forth in this petition, we ask the Governor to do justice for Dennis Eaton and the Commonwealth by preventing his execution and commuting his sentence to life in prison without the possibility of parole.

DENNIS WAYNE EATON

BY: _____
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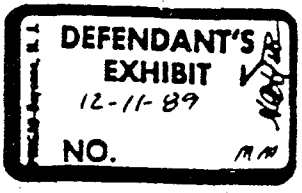
EXHIBIT 1

VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA

V. INDICTMENT NOS. 2767-2773

DENNIS WAYNE EATON



PLEA AGREEMENT

The Commonwealth of Virginia and the Defendant, DENNIS WAYNE EATON, hereby agree to the following disposition of this case:

I. CHARGES: (a) The Defendant, DENNIS WAYNE EATON, is charged with the following offenses:

INDICTMENT NO. 2767:

On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously, with premeditation, wilfully and deliberately kill and murder one Walter Custer, Jr., in violation of Section 18.2-32 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2768:

On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder in violation of Section 18.2-53.1 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2769:

On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously, with premeditation, wilfully and deliberately kill and murder one Ripley E. Marston in the commission of robbery while armed with a deadly weapon, in violation of Section 18.2-31(d) of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2770:

On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously rob one Ripley E. Marston of personal property and United States currency by shooting him with a firearm, in violation of Section

D.W.E.

18.2-58 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2771:

On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder and/or robbery, in violation of Section 18.2-53.1 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2772:

On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously break and enter a certain house, the property of Wallace Rickman, with the intent to commit larceny therein, in violation of Section 18.2-91 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth.

INDICTMENT NO. 2773:

On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously take, steal and carry away goods and property in the amount of Two Hundred Dollars ($200.00) or more, being the property of Wallace Rickman, with the intent to permanently deprive the owner of the possession thereof, in violation of Section 18.2-95 of the Code of Virginia of 1950, as amended, against the peace and dignity of the Commonwealth

(b) The statutory range regarding sentence with reference to the aforementioned Indictment are:

INDICTMENT NO. 2767:

Imprisonment in the State Penitentiary for life or any term not less than twenty (20) years.

INDICTMENT NO. 2768:

Imprisonment in State Penitentiary for two (2) years.

INDICTMENT NO. 2769:

Death or imprisonment in the State Penitentiary for life.

INDICTMENT NO. 2770:

Imprisonment in the State Penitentiary for life or any term not less than five (5) years.

1589
D.W.E.

INDICTMENT NO. 2771:

Imprisonment in State Penitentiary for two (2) years.

INDICTMENT NO. 2772

Confinement in the State Penitentiary for not less than one (1) years nor more than twenty (20) years, or in the discretion of the jury, or Judge sitting without a jury, be confined in jail for a period not exceeding twelve (12) months or fined not more than One Thousand ($1,000.00) Dollars, either or both.

INDICTMENT NO. 2773

Confinement in the State Penitentiary for not less than one (1) years nor more than twenty (20) years, or in the discretion of the jury, or Judge sitting without a jury, be confined in jail for a period not exceeding twelve (12) months or fined not more than One Thousand ($1,000.00) Dollars, either or both.

II. PLEA:

The Defendant agrees to enter A PLEA OF GUILTY to all Indictments mentioned above, to-wit: Indictment Numbers 2767 through 2773.

III. AGREEMENT AS TO SENTENCE:

a. The Defendant and the Commonwealth have agreed to the following disposition:

INDICTMENT NO. 2767:

Imprisonment in the State Penitentiary for life.

INDICTMENT NO. 2768:

Imprisonment in State Penitentiary for two (2) years.

INDICTMENT NO. 2769:

Imprisonment in the State Penitentiary for life.

INDICTMENT NO. 2770:

Imprisonment in the State Penitentiary for life.

D.W.E.

INDICTMENT NO. 2771:

Imprisonment in State Penitentiary for two (2) years.

INDICTMENT NO. 2772

Imprisonment in the State Penitentiary for twenty (20) years.

INDICTMENT NO. 2773

Imprisonment in the State Penitentiary for twenty (20) years.

b. The above sentences are to run consecutively.

c. The Commonwealth and the Defendant stipulate that the evidence would show that Indictment Numbers 2767 and 2768 are separate offenses from Indictment Numbers 2769, 2770 and 2771 and that said offenses were not part of a common act, transaction or scheme.

d. Unless the plea is rejected or withdrawn, the Defendant hereby gives up any and all motions, defenses, objections or requests that he has made or raised or could asset hereafter, to the Court's entry of judgment against him and the imposition of sentence upon him consistent with this agreement.

e. If after accepting this agreement the Court concludes that any of its provisions regarding the sentence or terms or conditions are inappropriate, it can reject the plea, giving the Defendant an opportunity to withdraw the plea.

f. That the Defendant understands the following rights and understands that he gives up such rights by pleading guilty:

1. His right to a trial by jury;

2. His right to confront witnesses against his and cross-examine them;

1591

D.W.E.

3. His right to present evidence and call witnesses in his defense, knowing that the Commonwealth will compel witnesses to appear and testify;

4. His right to be represented by Counsel (appointed for him, if he cannot afford to hire his own) at the trial of proceedings; and

5. His right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.

III. OTHER TERMS AND CONDITIONS:

a. The Defendant acknowledges by entering into this agreement and entering pleas of guilty to the Indictments aforesaid and having heretofore entered a plea of guilty and having been found guilty of murder in the Circuit Court of the City of Salem, Virginia, that the Defendant would not be eligible for parol pursuant to Virginia Code Section 53.1 - 151 B1 (1988 Repl. Vol.), and that he has been so advised by his attorneys.

b. That this written plea agreement contains all the terms and conditions of this plea agreement; and the Defendant understands that any promises made by anyone, including his lawyer, that are not contained within this written plea agreement, are without force and effect, and are null and void. That there are no other promises or agreements not contained in this Agreement, and that this Agreement constitutes the entire understanding of the Commonwealth and the Defendant.

I, DENNIS WAYNE EATON, have read this Agreement with the assistance of Counsel, understand its terms, understand the rights

I give up by pleading guilty in this matter, and agree to be bound according to the provisions herein.

And, further, that I, DENNIS WAYNE EATON, am not on or under the influence of any drug, medication, liquor or other intoxicant, and that I, DENNIS WAYNE EATON, am at this time fully capable of understanding the terms and conditions of this plea agreement.

Dated: October 13, 1989

Dennis Wayne Eaton
DENNIS WAYNE EATON

We have discussed this case with our client in detail and and advised him of his constitutional rights and all possible defenses. We believe our client understands this plea agreement including the range of punishment he faces and the consequence of his plea with respect to his right to parole and the constitutional rights he gives up by entering into this Agreement. We believe that the plea and disposition set forth herein are appropriate under the facts of this case. We concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Dated: October 13, 1989

Counsel for Defendant

Counsel for Defendant

1593

D.W.E.

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

Dated: October 13, 1989

Commonwealth's Attorney

D.W.E

1594

EXHIBIT 2

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF SHENANDOAH

COMMONWEALTH OF VIRGINIA

v.

DENNIS WAYNE EATON,

Defendant

ADVICE OF RIGHTS CONCERNING PAROLE ELIGIBILITY

I, Dennis Wayne Eaton, having agreed to plead guilty to all charges, and having been advised of the rights that I am waiving in so doing, have conferred with my lawyers specifically about the question of whether I would ever be eligible for parole if I enter into this plea agreement. They have told me, and I understand, that under Virginia law I will never be eligible for parole if I plead guilty to the charges now pending against me in Shenandoah County, including two charges of murder. I understand that my only chance of ever receiving parole is if the Virginia General Assembly changes the law. I also understand that there is no reason to think that the General Assembly will change the law, either now or at any time in the future. Even though I know that I will never be eligible for parole, I still wish to plead guilty to all charges.

10/13/89
Date

Dennis Wayne Eaton
Dennis Wayne Eaton

William B. Allen, III

J. Lloyd Snook, III

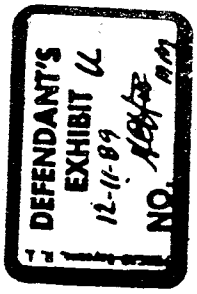
1595

A Copy, Teste:

M. G. Sayers Clerk

By D.C.

EXHIBIT 3



VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA

V. DOCKET NOS. 2767 THROUGH 2773

DENNIS WAYNE EATON

ORDER

CAME the 13th day of October, 1989, Dennis L. Hupp, Esquire, the Attorney for the Commonwealth, William B. Allen, III, Esquire, Counsel for the Defendant, J. Lloyd Snook, Esquire, Co-Counsel for the Defendant and Dennis Wayne Eaton, the Defendant, in person; and also came Linell Berger, Court Reporter, after having been duly sworn, the Honorable Perry W. Sarver, Judge, presiding; these matters coming before the Court for consideration of pre-trial matters.

WHEREUPON, Counsel for the Defendant did advise the Court that the Defendant wished to enter pleas of guilty to all indictments, pursuant to Plea Agreement.

WHEREUPON, after the Defendant was sworn, the Court did make numerous inquiries of the Defendant concerning his understanding of his constitutional rights and of the material elements constituting the offenses charged against him and the range of punishment applicable, and further concerning his understanding that the Court is not bound by the terms of any plea agreement which may have been negotiated; and, pursuant to Rule 3A:8 of the

Rules of the Supreme Court of Virginia, the Court is of the opinion that the Defendant is entering his pleas of guilty freely and voluntarily and with an intelligent understanding of the nature of the charges and the consequences of this plea after full consultation with and representation by competent Counsel.

WHEREUPON, the Court did make specific inquiry as to whether the Defendant understands that by entering into this plea agreement and entering his pleas of guilty, he will be sentenced to life in the penitentiary without eligibility for parole under the laws now in force, and the Defendant did answer in the affirmative.

WHEREUPON, the Clerk did arraign the Defendant, and the Defendant did plead guilty to each indictment.

WHEREUPON, the Attorney for the Commonwealth did proffer certain evidence to which the Defendant did not object.

WHEREUPON, the Court did deem the evidence sufficient to convict the Defendant and did then hear argument of Counsel in support of the plea agreement; and, the Court did state that the plea agreement would be accepted.

WHEREUPON, the Court did demand of the Defendant if he had anything to say or knew of any reason that judgment should not then be pronounced against him, and the Defendant answered that he had nothing further to say.

WHEREUPON, the Court, upon the pleas of guilty and the evidence proffered by the Commonwealth, does find the Defendant guilty of capital murder, first degree murder, robbery, two counts of use of a firearm in the commission of murder, statutory burglary, and grand larceny, specifically as follows:

INDICTMENT NO. 2767: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously, with premeditation, wilfully and deliberately kill and murder one Walter Custer, Jr., in violation of Virginia Code Section 18.2-32.

INDICTMENT NO. 2768: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder in violation of Virginia Code Section 18.2-53.1

INDICTMENT NO. 2769: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously, with premeditation, wilfully and deliberately kill and murder one Ripley E. Marston in the commission of robbery while armed with a deadly weapon, in violation of Virginia Code Section 18.2-31 (d).

INDICTMENT NO. 2770: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously rob one Ripley E. Marston of personal property and United States currency by shooting him with a firearm, in violation of Virginia Code Section 18.2-58.

INDICTMENT NO. 2771: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder and/or robbery, in violation of Virginia Code Section 18.2-53.1

INDICTMENT NO. 2772: On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously break and enter a certain house, the property of Wallace Rickman, with the intent to commit larceny therein, in violation of Virginia Code Section 18.2-91.

INDICTMENT NO. 2773: On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously take, steal and carry away goods and property in the amount of Two Hundred Dollars ($200.00) or more, being the property of Wallace Rickman, with the intent to permanently deprive the owner of the possession thereof, in violation of Virginia Code Section 18.2-95.

WHEREUPON, the Court does specifically find that the murder of Walter Custer, Jr., and the murder of Ripley E. Marston were not part of a common act, transaction or scheme. The Court's previous Order joining the offenses for trial was made pursuant to Rule 3A:10 (b) (ii), in that the Defendant, his Counsel, and the Commonwealth's Attorney, all consented thereto, there having been no finding that the offenses met the requirements of Rule 3A:6 (b).

WHEREUPON, pursuant to the plea agreement entered into by the Attorney for the Commonwealth, Counsel for the Defendant, and the Defendant, the Court does impose the following sentence:

1. a. In respect to Indictment No. 2767, the Defendant is sentenced to confinement in the penitentiary for life.

b. In respect to Indictment No. 2768, the Defendant is sentenced to confinement in the penitentiary for two (2) years.

c. In respect to Indictment No. 2769, the Defendant is sentenced to confinement in the penitentiary for life.

d. In respect to Indictment No. 2770, the Defendant is sentenced to confinement in the penitentiary for life.

e. In respect to Indictment No. 2771, the Defendant is sentenced to confinement in the penitentiary for two (2) years.

f. In respect to Indictment No. 2772, the Defendant is sentenced to confinement in the penitentiary for twenty (20) years.

g. In respect to Indictment No. 2773, the Defendant is sentenced to confinement in the penitentiary for twenty (20) years.

2. Each of the sentences imposed herein shall run consecutively to, and not concurrently with, the other sentences imposed herein.

WHEREUPON, the Court did again advise the Defendant that, under the provisions of Virginia Code Section 53.1-151 B1, he will not be eligible for parole.

And the Defendant is remanded to the custody of the Sheriff.

And the costs of the prosecution are assessed against the Defendant.

THIS IS A FINAL ORDER.

ENTER this 21st day of November, 1989.

JUDGE

SEEN:

Dennis L. Hupp, Commonwealth's Attorney

A Copy, Teste: M. G. Sedgwick, Clerk
By: Diana J. Kinkead
1587

EXHIBIT 4

(8) PAROLE V. LIFE SENTENCE

a. Would it impair your ability to sit as a fair and impartial juror in this case you were asked to consider a sentence of less than death and you were instructed by the Court that you were not to concern yourself with the questions of the possibility of parole or return to society by Dennis Wayne Eaton?

b. If you sit as a juror in this case and you hear evidence that Dennis Wayne Eaton pled guilty to three (3) other murders that happened within hours of the charge you will hear for which he received a life sentence without the possibility of parole, would it impair your ability to fairly and impartially consider death as an appropriate punishment for capital murder?

Filed in the Clerk's Office of the Circuit Court of Rockbridge County, Virginia
on the 28th day of Nov. 19 89
Clerk
D. C.

EXHIBIT 5

INSTRUCTION NO. C

THE COURT INSTRUCTS THE JURY THAT:

As you deliberate whether life in prison or death is an appropriate punishment for Dennis Wayne Eaton's crime, you may consider as a possible mitigating factor that a sentence of life in prison means Dennis Wayne Eaton will not be eligible for parole.

INSTRUCTION NO. D

THE COURT INSTRUCTS THE JURY THAT:

When you assess the evidence presented by the Commonwealth in support of its contention that there is a probability that Dennis Wayne Eaton will commit future criminal acts of violence that would constitute a continuing threat to society, you may consider the fact that if you set defendant's punishment at life imprisonment, he will not be eligible for parole.

EXHIBIT 6

COMMONWEALTH'S EXHIBIT NO.4

VIRGINIA: IN THE CIRCUIT COURT OF SHENANDOAH COUNTY

COMMONWEALTH OF VIRGINIA

V. DOCKET NOS. 2767 THROUGH 2773

DENNIS WAYNE EATON

ORDER

CAME the 13th day of October, 1989, Dennis L. Hupp, Esquire, the Attorney for the Commonwealth, William B. Allen, III, Esquire, Counsel for the Defendant, J. Lloyd Snook, Esquire, Co-Counsel for the Defendant and Dennis Wayne Eaton, the Defendant, in person; and also came Linell Berger, Court Reporter, after having been duly sworn, the Honorable Perry W. Sarver, Judge, presiding; these matters coming before the Court for consideration of pre-trial matters.

WHEREUPON, after the Defendant was sworn, the Court did make numerous inquiries of the Defendant concerning his understanding of his constitutional rights and of the material elements constituting the offenses charged against him and the range of punishment applicable,

and, pursuant to Rule 3A:8 of the

Rules of the Supreme Court of Virginia, the Court is of the opinion that the Defendant is entering his pleas of guilty freely and voluntarily and with an intelligent understanding of the nature of the charges and the consequences of this plea after full consultation with and representation by competent Counsel.

WHEREUPON, the Clerk did arraign the Defendant, and the Defendant did plead guilty to each indictment.

WHEREUPON, the Court did demand of the Defendant if he had anything to say or knew of any reason that judgment should not then be pronounced against him, and the Defendant answered that he had nothing further to say.

WHEREUPON, the Court, upon the pleas of guilty and the evidence proffered by the Commonwealth, does find the Defendant guilty of capital murder, first degree murder, robbery, two counts of use of a firearm in the commission of murder, statutory burglary, and grand larceny, specifically as follows:

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INDICTMENT NO. 2768: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder in violation of Virginia Code Section 18.2-53.1

INDICTMENT NO. 2769: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously, with premeditation, wilfully and deliberately kill and murder one Ripley E. Marston in the commission of robbery while armed with a deadly weapon, in violation of Virginia Code Section 18.2-31 (d).

INDICTMENT NO. 2770: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously rob one Ripley E. Marston of personal property and United States currency by shooting him with a firearm, in violation of Virginia Code Section 18.2-58.

INDICTMENT NO. 2771: On or about the 20th day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously use a firearm in the commission of murder and/or robbery, in violation of Virginia Code Section 18.2-53.1

INDICTMENT NO. 2772: On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously break and enter a certain house, the property of Wallace Rickman, with the intent to commit larceny therein, in violation of Virginia Code Section 18.2-91.

INDICTMENT NO. 2773: On or about the 3rd day of February, 1989, in the County of Shenandoah, DENNIS WAYNE EATON did unlawfully and feloniously take, steal and carry away goods and property in the amount of Two Hundred Dollars ($200.00) or more, being the property of Wallace Rickman, with the intent to permanently deprive the owner of the possession thereof, in violation of Virginia Code Section 18.2-95.

WHEREUPON, the Court does specifically find that the murder of Walter Custer, Jr., and the murder of Ripley E. Marston were not part of a common act, transaction or scheme. The Court's previous Order joining the offenses for trial was made pursuant to Rule 3A:10 (b) (ii), in that the Defendant, his Counsel, and the Commonwealth's Attorney, all consented thereto, there having been no finding that the offenses met the requirements of Rule 3A:6 (b).

EXHIBIT 7

AFFIDAVIT OF BRUCE BRATTEN

I, Bruce Bratten, do hereby swear and affirm, that I was a sworn member of the jury panel in the matter of *Commonwealth of Virginia v. Dennis Wayne Eaton*, which tried and convicted Eaton of the charges of Capital Murder and Use of a Firearm, on or about November 28th through December 1, 1989.

On or about December 11, 1989, I, along with the same members of the jury who had rendered the guilty verdict, was given the task of rendering a sentence of either Life in Prison or Death. I was instructed that I was to consider Dennis Eaton's future dangerous to Society in making that ultimate choice. I was not informed that regardless the outcome of the matter before us, Dennis Wayne Eaton was ineligible for future parole consideration, and would never be released into the community.

It is my belief that as a juror asked to sit in judgment on Dennis Wayne Eaton, and to render a verdict as to Life or Death, I should have been informed of his ineligibility for parole.

It is my belief that had this information been made available to the other members of the jury, there would have been an impact on the "Life or Death" decision-making process which could have resulted in a verdict other than the death penalty given to Dennis Wayne Eaton.

I further affirm that had this information been made available to me, I would not have voted for the death penalty.

Bruce Bratten
BRUCE BRATTEN
3/18/95
DATE

STATE OF VIRGINIA
TO-WIT:
CITY/COUNTY FAUQUIER **SWORN** and **SUBSCRIBED TO** before me, a notary public, by Bruce Bratten on this the 18TH day of March, 1995.

Beverly S. Burns
Notary Public

My Commission Expires: 10/31/96

EXHIBIT 8

No. 92-9059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,

Petitioner,

vs.

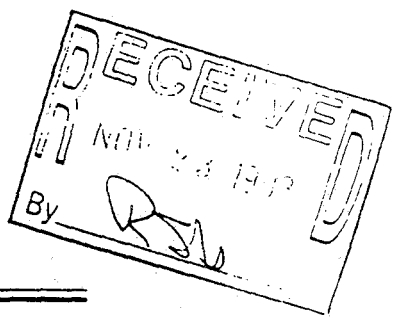
SOUTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

AMICI CURIAE BRIEF OF DONNA L. MARKLE AND PATRICIA ANN KNIPFER IN SUPPORT OF PETITIONER

WILLIAM C. PELSTER
Attorney for Amici Curiae
919 Third Avenue
New York, New York 10022
(212) 735-3000



No. 92-9059

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,
Petitioner,

vs.

SOUTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH CAROLINA

MOTION BY DONNA L. MARKLE AND
PATRICIA ANN KNIPFER FOR LEAVE
FILE A BRIEF AS AMICI CURIAE

Pursuant to Supreme Court Rule 37, Donna L. Markle and Patricia Ann Knipfer move for leave to file the brief submitted herewith as amici curiae.

Counsel for the Petitioner has consented to the filing of the brief, but counsel for the Respondent has refused consent.

Donna L. Markle and Patricia Ann Knipfer (hereinafter the "amici") are former jurors in a capital case who were denied the right to have information concerning the meaning of the life sentence alternative. In the case in which the amici served, the life sentence would have been life without the possibility of parole. Thus, the experience of the amici was similar to the experience of the jurors in the case before the Court.

The amici are particularly interested in this case because it

presents matters of concern to ordinary citizens who are called upon to serve as jurors in capital cases. The amici believe that the filing of their brief amici curiae is desirable because it presents to the Court significant information, based upon a unique perspective, concerning the issues presented in this case. The interests of the amici are different from those of the parties in that they, as jurors, were called upon to make the ultimate decision of whether a person should live or die, a decision with which they must live forever. The amici feel that the state should not call upon citizens to make that decision and then

systematically withhold from them information that they would consider highly relevant to their sentencing decision.

The amici believe that their brief will substantially assist this Court by providing it with a different perspective from which to evaluate the facts of this case. Accordingly, the amici respectfully request the Court to grant this motion for leave to file an amicus curiae brief.

Dated: November 15, 1993

Respectfully submitted,

William C. Pelster

William C. Pelster
Attorney for the Amici Curiae
and Counsel of Record
919 Third Avenue
New York, New York 10022
(212) 735-3000

No. 92-9059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JONATHAN DALE SIMMONS,

Petitioner,

vs.

SOUTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF AMICI CURIAE OF DONNA L. MARKLE AND PATRICIA ANN KNIPFER IN SUPPORT OF PETITIONER

Donna L. Markle and Patricia Ann Knipfer, former capital jurors, submit this brief as *amici curiae*, pursuant to Rule 37 of the Court's rules, to assist the Court in determining whether the Eighth Amendment entitles a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole.

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is filed on behalf of former jurors in capital sentencing proceedings who were denied accurate information regarding the meaning of the life sentence alternative. In the capital case in which these jurors served, the life sentence alternative would have been a life sentence without the possibility of parole. Denied that information, and operating on the commonly-held assumption that a life sentence carries the possibility of parole after a period of years, the jury sentenced the defendant to death. In doing so, they relied partly on the state's argument that the defendant would otherwise constitute a continuing threat to society. Had they been given accurate information regarding the nature of the life sentence alternative, that information would have been highly material to their decision regarding punishment.

These jurors may be called upon to serve again, and they are concerned that the situation described herein should not be allowed to recur, either to themselves or to other jurors in capital cases. They respectfully submit that their perspective on the question presently before the Court is unique, a perspective that the parties to this litigation cannot properly bring to the Court's attention. The *amici* are not attorneys, institutions or legal organizations and have no real interest in the ultimate outcome of the case before the Court. Their interest in this matter is the interest of ordinary citizens who are called upon serve on capital juries and who, in that capacity, desire to know the full truth about the choices they must face.

The *amici* respectfully ask the Court, in weighing the interests of the parties and determining the questions presented by this case, to also take into account the concerns of citizens such as themselves, who are called upon to decide the ultimate question of whether a fellow man or woman should live or die.

ARGUMENT

Donna L. Markle and Patricia Ann Knipfer served as jurors in the Virginia trial of Dennis Wayne Eaton, who was was tried and convicted of capital murder in the Circuit Court for the County of Rockbridge, Fauquier, Virginia, in November 1989. Before trial, Mr. Eaton pleaded guilty to three additional murders. As a result of those guilty pleas, pursuant to Va. Code Ann. § 53.1-151 B1, he would never have been eligible to be considered for parole had he been sentenced to life imprisonment. During the sentencing phase of the trial, the prosecutor argued that Mr. Eaton should be sentenced to death because he otherwise would commit acts of violence that would constitute a continuing threat to society. However, under an archaic state law Mr. Eaton was prevented from informing the jury of his ineligibility for parole if he were sentenced to life imprisonment. Unaware of the true meaning of the life sentence, the jury sentenced Mr. Eaton to death on the statutory ground of his "future dangerousness" to society.

The *amici* did their duty in rendering a sentencing verdict based on the evidence and on the law that they were given. Now, as part of the burden of their civic service, they must live for the rest of their lives with the memory of the irrevocable decision they made in the jury room. This is not, in a capital case, an easy thing to do. But what has happened in the *Eaton* case has made it much harder. For after participating in the decision to put Mr. Eaton to death, the *amici* learned that his "future dangerousness" had been systematically exaggerated in the courtroom by the state's withholding from the jury the crucially important fact that he would never have been eligible for parole if the jury had let him live.

The potential effect on Mr. Eaton of this manipulation of the jury's sentencing decision is obvious. But he is not the only one adversely affected. The *amici*, as jurors who assumed personal responsibility for recommending his execution, also feel the impact of what occurred. Having learned of his parole ineligibility only after ordering his death, it is now much harder to

believe that they did the right thing. And because what they did involved choosing death over life, this doubt can be a substantial burden to bear.

This Court has repeatedly recognized that jurors in capital sentencing proceedings serve in one of the most difficult capacities in the criminal justice system. *See, e.g., Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (referring to "the awesome power that a sentencing jury must exercise in a capital case"); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State"); *McGautha v. California*, 402 U.S. 183, 207 (1971) (referring to "the truly awesome responsibility of decreeing death for a fellow human" that is imposed upon capital jurors). This "awesome responsibility" carries with it certain inherent emotional and pyschological strain that is often overlooked by a criminal justice system concerned primarily with lawyers, defendants and judges.[1] Recent studies have indicated that jurors who have made the decision to sentence a defendant to death experience extreme emotional disturbances, sometimes for years afterward, as a result of having made that decision. *See generally* Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 Ind. L.J. 1333 (1993) (reporting results of various studies and suggesting that post-trial jury counseling may be needed in some cases).[2]

---

[1] As one judge in Howard County, Maryland aptly noted in discussing the effects of capital cases on jurors, "jurors . . . have kind of been the forgotten men and women of the criminal justice system." *See* Graciella Sevilla & Dan Beyers, *For Jurors, Grisly Trials Can Take Toll: Panel in Basu Carjacking Case Undergoes "Stress Debriefing"*, Washington Post, Aug. 20, 1993, at C1.

[2] Only recently has attention turned to the impact of capital trials on the jurors. Not surprisingly, those studies that have been done have concluded, as Bienen reports, that "[j]urors in capital cases, and jurors who actually choose the death penalty, may feel the burdens of this responsibility especially keenly." 68 Ind. L.J. at 1340. *See also* Kate Darby Rauch, *Some Juries Form Bonds That Last*

(Footnote continued)

As one commentator has noted, "[c]ommon sense suggests that virtually any person given the responsibility of determining whether a convicted murderer should be condemned to death or sentenced instead to life imprisonment would want information about what 'life' imprisonment really means." *See* William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989). It is simply wrong to subject jurors to the singularly difficult task of deciding whether a person should be executed and then to systematically withhold from them highly relevant information about the alternative sentence. Yet this is exactly what happened to the *amici*, and to the jurors in this case. *See Morgan v. Illinois*, 112 S. Ct. 2222, 2231 n.6 (1992) ("juries must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed") (citations and quotations omitted); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.").

The thoughts and feelings of the *amici*, of course, are no longer relevant to the judicial process: their jury service is over, and that is that. But they must live with their own feelings for the rest of their lives. It is no small thing to realize that one may have ordered the execution of a man who could and perhaps should have been spared. And it is no small thing that the state, without any good reason that the *amici* can see, has put its own citizens in so difficult a position. Jury service involves many sacrifices, but it should not require this.

In addition to the above concerns, there is another reason why capital juries in cases such as this one should be given accurate

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Beyond the Trial, Washington Post, Apr. 14, 1992, at Z10 (reporting that Washington jurors who sentenced Westley Alan Dodd to death experienced long-term emotional difficulties); Daniel Goleman, *For Many Jurors, Trials Begin After the Verdict*, N.Y. Times, May 14, 1991, at C1 (reporting study which concluded, *inter alia*, that "factors that made jurors more likely to have stress symptoms included having to rule on a death sentence. . .

information regarding the alternative life sentence. The use of juries in criminal cases, in addition to providing a group of peers to stand between the accused and the state, *Duncan v. Louisiana*, 391 U.S. 145 (1968), also serves the very important purpose of allowing the citizenry to play an active role in the functioning of their government. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922). As this Court explained in *Powers v. Ohio*, 111 S. Ct. 1364, 1366 (1991), "[j]ury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." The Court continued:

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. . . . [T]he institution of the jury raises the people itself . . . to the bench of judicial authority [and] invests the people . . . with the direction of society. . . . The jury system postulates a conscious duty of participating in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. . . . Jury service preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people. . . . It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for the law. . . . Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Id. at 1368-1369 (numerous citations and quotations omitted).

As with any other "democratic process," however, those who participate in jury service may not do so meaningfully if they

are systematically deprived of basic information regarding the alternatives they face. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Thus, where capital jurors are deprived of accurate information regarding the meaning of the sentencing alternatives, they are simply unable to consciously and intelligently participate in the "machinery of justice." Such denial limits the ability of those citizens to participate the processes of their government, harming not only the litigants themselves, but also the jurors and the community at large. *See Batson*, 476 U.S. at 87. It interferes with public participation in the processes of government, deprives jurors of the ability to prevent arbitrariness in the judicial system and undermines "respect for the law."

While the state may have some interest in concealing the truth from jurors, the *amici* simply cannot imagine what that interest might be in the present situation. Whatever interest the state may claim, however, the *amici* submit that they, too, are citizens of this Nation, and they respectfully request that in conducting whatever balancing the Court may do in this case their interests, concerns and experiences be taken into account, as well.

CONCLUSION

In deciding whether the Constitution requires that the capital sentencing jury be told that a life sentence would mean life without the possibility of parole, the Court should take into account, in addition to the arguments presented by the parties to this case, the interests of ordinary citizens who are called upon to serve as jurors and to make the ultimate life-or-death decision.

Dated: November 15, 1993

Respectfully submitted,

William C. Pelster

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EXHIBIT 9

AFFIDAVIT OF MARIA HINES

I, Maria Hines, do hereby swear and affirm the following:

1. That I am the sister of Trooper Jerry Hines who was killed while on duty as a Virginia State Trooper on February 20, 1989 near Lexington, Virginia;

2. That I am aware of the fact that a Jury convicted Dennis Wayne Eaton of the murder of my brother and sentenced him to "DEATH" for that crime;

3. That I am aware that prior to the trial for the murder of my brother, Dennis Wayne Eaton had been convicted of other crimes for which he had been sentenced to life in prison without the possibility of parole;

4. That I am aware that members of the jury who sentenced Dennis Wayne Eaton to "DEATH" have since rendered sworn statements to the effect that had they been made aware of the fact that Dennis Wayne Eaton would never have been eligible for parole, that they would not have sentenced him to "DEATH";

5. That I have personally communicated with Dennis Wayne Eaton and feel that his execution would be unjust, immoral, and contrary to my religious beliefs and that to execute Dennis Wayne Eaton will in no way honor my brother but, instead, will dishonor him;

6. That I ask that James Gilmore, Governor of the State of Virginia, exercise the power that he alone has to commute the death sentence of Dennis Wayne Eaton to "life in prison without parole" under the laws of Virginia allowing for clemency.

Maria Hines Dated this the 20th day of April, 1998
Maria Hines

NOTARY:

Commonwealth of Virginia ~~County~~/City of Roanoke

Subscribed and sworn to before me on this the 20th day of April, 1998.

My commission expires November 30, 2000

Dated 4-20-98

EXHIBIT 10

MY BABY BROTHER -- THE LOSS OF A SIBLING

I remember so well the day that he was born. He was my baby brother and only sibling, born when I was eight years old. I had so longed for a brother or sister, and he brought much joy into my life.

This isn't to say that all was peaceful with Jerry around. He was a ball of energy and, once he began to walk, tore up everything that he could get his hands on, even my most prized possessions. This resulted in many fights between us. Although he looked like an angel with his dark brown eyes and light brown curls, his behavior was often quite the opposite.

Tragedy occurred when Jerry was only three. Our father died unexpectedly of a heart attack, and our lives were drastically changed. I wonder how Jerry's life would have been different had he not been robbed of the influence of a father-figure.

When Jerry started to school, he wasn't the best of students. It wasn't that he was lacking in intelligence; only, I believe, that he couldn't sit still long enough to learn. He would have preferred to spend his time playing "Cowboys and Indians".

After graduating from high school, Jerry decided to go to college where he majored in English and Journalism. When he completed his degree, he worked for a time as an anchorman for a local TV station. He was restless, however, and surprised my mother and me by announcing that he planned to become a Virginia State Trooper. He said that he had always wanted to be a police officer and had to get this out of his system.

In addition to his regular police duties, Jerry became the editor of Trooper Magazine for the Virginia State Police Association and taught English at the police academy. Once, after two fellow police officers had been killed in the line of duty, he said in an interview as editor, "We'll do what we have to do. We'll keep on stopping the cars."

And he did. On the night of February 20, 1989, he stopped a car on suspicion of drunken driving. This resulted in Jerry's being shot and killed by an occupant of the car.

Instantly, he became a local hero. Thousands attended his funeral, including the Governor of Virginia. Jerry was eulogized well. They spoke of his devotion to his work, his community, his family. They recalled his dogged determination to acccomplish anything that he set out to do, and his ability to relate to the ordinary citizen.

His death was like a bombshell exploding in my life, with pain too deep to be felt, at least in the beginning. Then, several months into my grieving, I had an insight. I realized that Jerry, the police officer, was also MY hero; but the eight-year-old child in me was grieving the loss of the baby brother who had brought so much joy into her life.

Written by
Maria Hines
March 1996
In Memory of Jerry Hines

"Undercover Love" by Lucy Grijalva

Police survivor Lucy Grijalva has just published her first book, "Undercover Love" through LionHearted Publishing. It's a story about an undercover police officer and a schoolteacher. This is Lucy's first published novel but she has written numerous articles for trade magazines in the past. Lucy dedicated her work to her husband, Bill, who died while serving the Oakland (CA) Police Department on December 15, 1993. Novelist Lucy is raising two school-aged children and has a second book in the works. The book is ISBN 1-57343-002-1. You might want to read it.

Published in Concerns of Police Survivors Newsletter - Fall 1996