

**AMENDED
PETITION FOR EXECUTIVE CLEMENCY
FOR KENNETH M. STEWART, JR.**

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I. INTRODUCTION

On September 23, 1998, the Commonwealth proposes to execute Kenneth Manuel Stewart, Jr., for a domestic crime, that being the capital murder of his beloved infant son, Jonathan.^{1/} There has never been any question that Stewart is the causative agent who is responsible for Jonathan's death. The question instead has always concerned the degree to which Stewart understood what he was doing and whether he intended the deaths of his wife and child. That question is critical both to the degree of the offense of which Stewart is guilty and to the severity of punishment to which he may be justly subject in a humane society.

Evidence now available, but not presented to Stewart's jury, establishes the likelihood that Stewart killed his wife and son during a temporal lobe epileptic seizure.^{2/} Such a seizure would rob Stewart of the capacity to act with the willfulness, deliberateness, and premeditation that are prerequisites to conviction for first degree murder and capital murder. If Stewart acted without this specific state of mind, then he is not guilty of capital murder and should not be executed.

The Commonwealth has never come forward with new evidence rebutting Stewart's new evidence that Stewart suffered from such a seizure when he committed the crimes. Instead, the

^{1/} Stewart also was sentenced to life imprisonment for the first degree murder of his wife, who he killed in the same transaction.

^{2/} Temporal lobe epileptic seizures, unlike the better known *grand mal* seizures, do not involve falling down and writhing helplessly on the ground. Temporal lobe seizures can take various forms, ranging from periods of stupor (like sleepwalking) to severe panic attacks to episodes of mindless violence or self-mutilation.

Commonwealth has frustrated Stewart's attempts to further substantiate the facts concerning his state of mind.

That should not deter the Governor from exercising his power of mercy. In the past, Virginia's governors have not hesitated to commute a death sentence when questions concerning premeditation have arisen. Virginia's governors also have recognized that such questions are particularly likely to arise with respect to domestic crimes. The questions that have now arisen as to whether Stewart acted with the requisite "guilty mind" should lead the Governor, in keeping with that tradition, to commute Stewart's death sentence to life imprisonment.

There are other reasons why the Governor's mercy would not be misspent on Kenny Stewart. No one can reasonably dispute that Stewart's crime was, in some measure, the result of mental illness. There is significant evidence that Stewart inherited the same cluster of mental health problems that are rampant in his family. No one in such circumstances can have a normal and well-nurtured upbringing. These mental problems are, in that sense, characteristics over which Stewart had no control. That is a fact that compassion cannot ignore.

In addition, Stewart is without doubt as remorseful an offender as the Commonwealth has ever seen, and an offender's remorse has always been viewed as a factor favoring some degree of forgiveness. Stewart's criminal record at the time of his trial contained minimal evidence of any tendency towards violence. His disciplinary record since his conviction is that of a model and considerate prisoner. Should his sentence be commuted, he will pose no danger to the Commonwealth or to any individuals. Just last year, Governor Allen commuted a death sentence based on the belief that the condemned man in all likelihood would not be dangerous in the future. The evidence supporting that conclusion is not more compelling than the evidence that Stewart is not dangerous.

On these bases as well, Stewart asks that his sentence be commuted.

II. HISTORY OF THE CASE

A. THE CRIME.

Kenneth Stewart met his future wife Cynthia ("Cindy") at an Alcoholics Anonymous ("AA") function in Pennsylvania. Cindy had a history of alcohol abuse.

Stewart had a long history of drug and alcohol abuse that he had finally overcome at age 31. Stewart's pattern of substance abuse was typical of people who are self-medicating an underlying cyclical affective disorder, such as depression, rather than using drugs to "get high." Ex. 3 at pg. 2. And in fact, like virtually every other member of his immediate family, Stewart had suffered from major depression throughout most of his life. Because of the widespread depression and alcoholism in his immediate family, Stewart grew up in an environment of neglect and, sometimes, abuse. Stewart's major mental disorder, combined with long term drug and alcohol addiction and deprived upbringing, made his sobriety and stability inherently fragile. Indeed, the period from 1985 (when he finally overcame his substance abuse) and 1991 (when he killed his wife and son) constituted the only real period of sobriety in Stewart's life since his twelfth birthday.

Two years after their marriage, Stewart and Cindy moved to Huddleston, Virginia, at the urging of Cindy's parents. They moved into a farmhouse owned by Cindy's parents. After four years of marriage, during which they both remained clean and sober, they were blessed with a child, Jonathan.

In February 1991, three months after Jonathan was born, Stewart lost his job due to the lagging economy in the area. A few weeks later, Cindy asked Stewart to move out of the house. Cindy and Jonathan remained in the farmhouse, and Stewart moved to a trailer occupied by his

friend from AA, Paul Brooks. The separation initiated "a severe clinical depression" in Stewart. Ex. 6 at pg. 6.

Cindy unilaterally decreed that Stewart could not take Jonathan from the house and could visit him only when Cindy was there. Stewart was a devoted father, and his natural frustration at this restriction led him, immediately after he moved in with Brooks, Trial Tr. 2/5/92 at pg. 124, to make a remark to Brooks to the effect that "I just ought to go ahead and kill it and get it over with, just solve this problem." Brooks said Stewart was just trying to express his feelings of anger and hurt, as AA encouraged its members to do. Stewart expressed sadness and loneliness as well as anger when he returned from his visits with Jonathan. Trial Tr. 2/5/92 at pg. 112. During this time he was "acutely suicidal," Ex. 1 at pg. 30, and in the midst of a "major depressive episode." Trial Tr. 2/11/92 at pg. 163.

On April 18, 1991, Stewart sought medical help from a local health clinic, complaining of anxiety and depression. A nurse practitioner recommended Xanax, an anti-anxiety medication, and the doctor issued the prescription without either examining Stewart or talking to him. On May 9, 1991, Stewart returned to the clinic because of his continuing anxiety and depression. Again he was referred only to the nurse practitioner, who recommended Pamelor, an antidepressant medication. Again without examining Stewart or talking to him, the doctor issued a prescription for Pamelor, with directions to take one 25 mg pill each day at bedtime. Trial Tr. 2/5/92 at pp. 171-72; Ex. 2 at 3.

On Saturday, May 11, Stewart arranged to visit Jonathan on Sunday, and he picked up the Pamelor. Pamelor is an unusual antidepressant because it initially makes the patient's depression more profound; it does not begin to alleviate the symptoms of depression until the patient has taken it continuously for at least three weeks. Ex. 3 at pg. 6 ¶ 5(i). Saturday night,

Stewart took at least three to five doses of Pamelor (i.e., 75-125 mg); the number of pills left in the bottle indicates that he probably took seven doses (i.e., 175 mg). Ex. 3 at pg. 5 ¶ 5(d). The manufacturer of Pamelor recommends against dosages greater than 150 mg in all circumstances and advises that dosages above 100 mg be administered only under close monitoring. Ex. 4 at pg. 2 ¶ 8; Ex. 5 at pg. 2020. The adverse side effects of Pamelor, which can occur even at prescribed dosages, include delusions, anxiety, agitation, panic, hypomania, and exacerbation of psychosis. Ex. 4 at pg. 1 ¶ 4; Ex. 5 at pg. 2020. "The manufacturers of Pamelor specifically warn that: 'troublesome patient hostility may be aroused by the use of Pamelor' [T]he initial effect of Pamelor carries with it the risk of increased agitation and increased subjective suffering of depressive symptomatology." Ex. 4 at pg. 1 ¶¶ 5-6.^{3/}

Stewart also may have drunk a substantial quantity of alcohol the night before the offense.^{4/} Pamelor and alcohol interact synergistically. As a result, the combined depressive effect of the two substances together is significantly greater than the depressive effect of either drug alone. Particularly if one is already depressed, the combination of alcohol and Pamelor would increase the depression dramatically and significantly, placing one that much closer to psychosis. Ex. 3 at pg. 6 ¶¶ 5(j)-(k).

^{3/} Dr. Osran testified that although he diagnosed Stewart as suffering from major depression, Stewart "would be a good candidate [based on Stewart's family psychiatric history] for one of those individuals who may indeed down the road suffer from a manic episode." Ex. 8 at pg. 108. Dr. Osran also testified that Pamelor "is an anti-depressant medication that can cause somebody who has an underlying bipolar disorder to become manic." Ex. 8 at pg. 109.

^{4/} Stewart's friends found a half-empty liquor bottle in the trailer right after the offense, and defense counsel believed Stewart had been drinking before the crime. Ex. 1 at pg. 20; Ex. 11 at pg. 3. Before trial, however, Stewart denied having fallen off the wagon. In federal habeas proceedings, Stewart admitted to Dr. Lipman that he drank half a fifth of 100 proof vodka on Saturday night and finished the bottle on Sunday morning. Ex. 3 at pg. 6 ¶ 5(e).

On Sunday, still profoundly depressed and despondent over the break-up of his marriage, Stewart took a small pistol from Brooks' briefcase before going to visit his family. He had decided to plead once more for reconciliation, and if rejected, to kill himself. As described by the Supreme Court of Virginia, this is what happened:

On Sunday afternoon, May 12, 1991, armed with a .25-caliber semi-automatic pistol concealed in his boot, Stewart went to visit Jonathan. During this visitation with Jonathan, Stewart claimed that he unsuccessfully attempted to persuade Mrs. Stewart to reconcile with him.

After Mrs. Stewart's alleged rejection of his pleas, Stewart shot her twice. Although Stewart [later said that he] remembered shooting Mrs. Stewart, initially he claimed that he remembered nothing after that shooting until he found himself driving on a New York freeway. Accordingly, the sequence of events at the scene can be reconstructed only from the following inferences that could reasonably be drawn from the physical evidence at the scene, and from the testimony of expert witnesses who interpreted the physical evidence and photographs of such evidence.

Stewart shot Mrs. Stewart in an upstairs bedroom. He fired the first shot into Mrs. Stewart's head just above the bridge of her nose at a range of six inches or less, as the two stood facing each other. When Mrs. Stewart fell, her forehead came to rest on the surface of a nearby bed, close to its foot. Stewart then fired a second shot about two inches above Mrs. Stewart's front hairline into the frontal area of her skull as she lay on the bed. [The medical examiner testified that death was instantaneous from the first shot and that there were no other injuries.]

Later, Stewart went downstairs, where he killed Jonathan by firing two shots into the side of this head, near his ear. One shot was fired at a range of no more than an inch or two. [The medical examiner testified that death was instantaneous from the first shot and that there were no other injuries.] Stewart then carried Jonathan's body upstairs and placed it in the arms of Mrs. Stewart's body. Some time before, Stewart had moved Mrs. Stewart's body closer to the head of the bed with some force, causing her blood to spatter on the wall above the headboard.

Stewart then turned off the kitchen stove in which Mrs. Stewart had been cooking a casserole, put the family dogs on the back porch, closed both porch doors so that the dogs could not get out, turned on Mrs. Stewart's telephone answering machine, got her house key, and locked the house. Thereafter, Stewart took his wife's car, rather than his older pickup truck, and drove it to

New York State. As Stewart was driving through Bedford County, he threw the gun into undergrowth some distance from the road.

Approximately seven o'clock that same evening, Ruth Schultz, Mrs. Stewart's mother, came to the house from her nearby residence. After noticing blood in Jonathan's play pen, Mrs. Schultz went upstairs, where she found the bodies of her daughter and grandson on the bed.

Stewart v. Commonwealth, 427 S.E.2d 394, 398-99 (Va. 1993).

Early in the morning on the following Tuesday, Stewart found himself in upstate New York and saw that he had blood on his hands. Ex. 1 at pg. 17. He telephoned his friends Carolyn and Paul Brown. Carolyn Brown testified that Stewart asked, "Do you know what I did? Are they both dead?" He sounded remorseful, Brown testified, and said, "I have destroyed everything that meant anything to me. . . . I hope I get the death penalty; I am going to ask them to." He said he loved Cindy and Jonathan, that he had started drinking, and that his in-laws had offered him \$10,000 to leave. Finally, he said he was no longer armed and he wanted to come back, turn himself in, and attend the funeral of his wife and son. Trial. Tr. 2/11/92 at pp. 79-82.

On Wednesday afternoon, Stewart was arrested by the police for public intoxication and disorderly conduct in Parma, Ohio, a suburb of Cleveland — the city where his family had lived when Stewart was a teenager. In his first interview with Virginia police, Stewart said he remembered borrowing Brooks' gun and putting it into his boot, and that he had planned to take his own life if things did not work out with Cindy. He remembered going to see his son, sitting on the couch holding the baby, and pleading with Cindy for a reconciliation. He did not remember what happened after that, until he was driving on the freeway in New York State two days later. He said he left the car in a school parking lot, took a bus to Buffalo, and took

another bus to Cleveland. He did not remember shooting Cindy or Jonathan or any facts surrounding the event.

Following his arrest, Stewart was placed on a regimen of Xanax and Doxepin, which are drugs prescribed to treat anxiety and depression. Ex. 6 at pg. 4. He has remained on these medications ever since, under the treatment of the Department of Corrections' psychiatric staff. Prison medical records reflect that Stewart has continued to suffer from depression, panic attacks, and anxiety. Ex. 6 at pg. 4. His daily dosages of both drugs have been increased several times over the course of his incarceration. The prison psychiatric staff at various times also has prescribed Buspar and Tranxene for anxiety and Prozac for depression.

Several months after the arrest, Stewart thought he remembered where he threw the gun, and he said he did not want anyone to find it accidentally and get hurt. He helped an officer draw a map of the location, and the police even took Stewart to the area where he "remembered" throwing gun. After carefully searching the area, they could not find the weapon.^{5/} The next day, Stewart said he wanted the electric chair because he could not live with what he had done.

From the date of the shooting, Stewart has been unable to recall the events surrounding the actual shooting of his wife and son.

^{5/} Police also never found the car that Stewart "remembered" abandoning in a school parking lot in New York State, nor were they able to corroborate any of Stewart's other sporadic "memories."

B. PROCEDURAL HISTORY.

Stewart's trial for capital murder began on February 4, 1992, in Bedford, Virginia. The jury convicted Stewart of capital murder on February 7, 1992. It recommended a death sentence, and the court imposed that sentence on May 5, 1992. The Supreme Court of Virginia affirmed, *Stewart v. Commonwealth*, 427 S.E.2d 394 (Va. 1993). Certiorari was denied. *Stewart v. Virginia*, 510 U.S. 848 (1993).

When Stewart tried to drop state habeas corpus proceedings, the Circuit Court for Bedford County conducted a competency hearing. Based on the examination and testimony of Dr. Hadley Osran, who was at that time the chief forensic psychiatrist at Central State Hospital, the court determined that Stewart was not competent to waive these appeals. He filed a petition on June 30, 1995. A few days later, Virginia Code § 8.01-654(C)(1) became effective, and the petition was transferred to the Virginia Supreme Court for consideration under its original jurisdiction. The petition was dismissed on March 18, 1996.

Stewart again tried to waive federal postconviction proceedings. On July 2, 1996, Stewart's mother, as his next friend, moved the District Court for the Eastern District of Virginia to stay Stewart's imminent execution and to appoint counsel. In light of the state court's ruling on competency, the district court granted a stay to determine if Stewart's mental condition had changed. The Commonwealth's motions to vacate that stay were denied. *Stewart v. Angelone*, No. 96-6 (4th Cir. July 8, 1996); *Angelone v. Stewart*, 518 U.S. 1035 (1996). Stewart later decided to pick up his appeals, and he was substituted for his mother. On the Commonwealth's motion, the case was transferred to the Western District of Virginia.

Stewart filed his federal habeas petition on January 21, 1997. The district court dismissed that petition on August 4, 1997. Following the denial of his motion to alter or amend

the judgment, Stewart timely noted his appeal on October 3, 1997. The Fourth Circuit affirmed the district court's decision, effective July 21, 1998. Stewart filed a petition for writ of certiorari in the United States Supreme Court on September 10, 1998. The Court denied that petition on September 18, 1998.

III. KENNETH STEWART DID NOT HAVE A "GUILTY MIND." HE WAS TEMPORARILY INSANE AT THE TIME OF THE CRIME, OR AT MOST WAS GUILTY OF A LESSER DEGREE OF HOMICIDE.

Premeditation, deliberation, and willfulness are essential elements of the offenses of capital murder and first degree murder. If the defendant does not have the requisite mental state, his crime can be no greater than second degree murder; depending on the circumstances, he may be not guilty by reason of insanity or guilty only of manslaughter. Because Stewart has never been able to recall what happened when he killed his wife and son, the evidence at trial that he acted with the required *mens rea* ("guilty mind") has always been circumstantial, derived primarily from Stewart's conduct before the crimes and his apparently deliberate actions after the crimes, such as turning off the oven and securing the dogs on the porch.^{6/} The parties disputed premeditation at Stewart's trial. Based on the limited information available to them, the jurors decided that Stewart had the required *mens rea* for first degree murder and capital murder.

^{6/} Deputy Sheriff George Anderson testified at Stewart's trial that Stewart told him, "it was 'premeditated to kill my wife.'" An interview transcript shows Stewart saying, in the context of a discussion about whether Sergeant Mayhew could arrange for Stewart to get the death penalty, that "it was premeditated and executed." Trial Tr. 2/6/92 following pg. 244 (second interview transcript at pg. 236). Even assuming that Stewart — a very poor reader who has trouble with words like "symptom," "hoarseness," and "editorial," Ex. 1 at pp. 24-25; Ex. 12 at pg. 6 — knew the meaning of the word "premeditated," his suicidal tendencies cast doubt on the trustworthiness of that evidence.

Neither the prosecution nor the defense presented evidence about Stewart's capacity to form the required *mens rea*. There was no testimony from mental health experts at the guilt-or-innocence phase of the trial. Everyone presumed that Stewart was "in his right mind" at the time of the offense, and that the only question was whether he acted in the heat of passion (i.e., committed second degree murder) or acted willfully, deliberately, and with premeditation (i.e., committed first degree murder or capital murder).

Now there is evidence that Stewart has temporal lobe epilepsy ("TLE"), a form of organic brain disorder associated with acts of violence.⁷¹ Ex. 9 at pp. 1-2. It is firmly ingrained in Virginia law that a person who kills during an epileptic seizure is legally insane and is not criminally responsible for his acts. In *Lucas v. Commonwealth*, 112 S.E.2d 915 (Va. 1960), for example, which concerned a death-sentenced man who had killed his wife, his son, and his daughter, the Supreme Court of Virginia reversed the conviction because the jury had not been instructed that it could find Lucas not guilty by reason of insanity if they believed he killed while in the throes of an epileptic seizure. Even the most skeptical jury, presented with credible evidence that the defendant killed during a TLE seizure, and applying the "beyond a reasonable doubt" standard, likely would find him guilty of a lesser degree of homicide; not first degree murder or capital murder.

Stewart's evidence regarding TLE comes from Dr. Donald Morgan. Dr. Morgan is board-certified in General Psychiatry and Forensic Psychiatry. He is a Professor of Psychiatry at the University of South Carolina School of Medicine, the Deputy Director of the Hall

⁷¹ A diagnosis of TLE generally must be confirmed with brain scans. As discussed below, the Department of Corrections has made a definitive diagnosis of TLE impossible, because it has refused to transport Stewart to the Medical College of Virginia or any other facility where these scans can be performed.

Psychiatric Institute, and the Director of the Forensic Psychiatry Training Program. Dr. Morgan's evidence is supplemented by information presented in the popular book *Seized* by Eve LaPlante (Harper Collins Publishers 1993). A copy of *Seized*, which is about temporal lobe epilepsy as a medical, historical, and artistic phenomenon, is annexed to this application for executive clemency. *Seized* is particularly useful for its anecdotal information, which explains the causes of TLE and shows the broad range of symptoms and behaviors that are associated with this disorder.

Dr. Morgan has identified specific facts indicating not only that Stewart probably has temporal lobe epilepsy, but also that he had a seizure while he was visiting his wife and son at their farmhouse on May 12, 1991. Dr. Morgan examined Stewart and reviewed the pertinent records and evidence. He identified the following four factors from pretrial files and reports that establish the probability that Stewart has temporal lobe epilepsy:

1. Stewart was administered the Minnesota Multiphasic Personality Inventory ("MMPI-2"). The Lachar-Wrobel Somatic Symptoms of the MMPI-2 contained twelve positive responses indicating a history of convulsions, fainting spells, headaches, and weakness. Stewart's responses on these items are indicative of temporal lobe epilepsy.^{8/}
2. Stewart's friend, Art Dalton, was interviewed on May 23, 1991. In that interview, Dalton stated that shortly before the offense, Stewart complained of new and severe headaches. These kinds of headaches are associated with temporal lobe epilepsy.

^{8/} Three of the true/false questions on the MMPI (and Stewart's answers to those questions) are particularly revealing:

142. I have never had a fit or convulsion. (False)
159. I have never had a fainting spell. (False)
229. I have had blank spells in which my activities were interrupted and I did not know what was going on around me. (True)

3. After his arrest, Stewart reported that he had experienced a sudden, strong, foul smell that was associated with a headache while he was visiting his wife and son at the farmhouse. Nothing in the trial record explains the presence of such a smell. Olfactory hallucinations involving unpleasant smells are one sign of temporal lobe seizure.
4. Stewart has no specific memory of the incident or the events immediately following the incident. Individuals who experience an epileptic seizure remember little or nothing of what happened during the period of the seizure, and the inability to remember may be an indicator of such a seizure.

Ex. 9 at pp. 1-2. Two additional facts, based on information in *Seized*, further support the conclusion that Stewart suffers from temporal lobe epilepsy:

5. Stewart has chosen electrocution over lethal injection. His reason, which he conveyed to his lawyers, is that the gurney — with arm-boards sticking out at the sides — becomes a cross, and the condemned man is strapped onto a crucifix. Stewart sincerely believes that it is wrong for a sinner like him to die in the same position as the Son of God. Hyperreligiosity is a common characteristic of temporal lobe epilepsy. *Seized* at 213-14.^{2/}
6. When the prison pharmacy temporarily runs out of the prescription medications that Stewart takes for his depression, or when he otherwise becomes nervous, he tends to scratch himself until he bleeds. On September 15, 1998, he showed counsel a raw wound on his upper arm, about the size of a half-dollar, that resulted from recent scratching. Stewart told counsel that the prison psychiatrist had asked about the scratching, and Stewart told him that he feels better when he sees his own blood flowing. Self-mutilation is a common characteristic of people with TLE. *See Seized* at 1-10.

Dr. Morgan also provided a basis for believing not only that Stewart had a seizure while he was visiting his wife and son on May 12, 1991, but also that it was a violent seizure. As previously noted, Stewart took between three and seven doses of Pamelor the night before the offense. Pamelor lowers the convulsive threshold and increases the likelihood of a seizure. Dr. Morgan said the fact that Stewart had not previously taken Pamelor also explains why he is not

^{2/} Both before trial and at the state court competency hearing three years later, Stewart indicated that he spent most of his time in prison studying the Bible. Ex. 1 at pg. 19; Ex. 8 at pg. 24.

known to have had such a violent seizure before. This is consistent with the manufacturer's warning that Pamelor can arouse "troublesome patient hostility." Ex. 4 at pg. 1 ¶ 5. In other words, both the timing and the violent intensity of the seizure would be the expected result of Stewart taking a large amount of Pamelor the previous night.

Dr. Morgan concluded that if Stewart had a temporal lobe epileptic seizure while visiting his wife and son, this could cause him to commit an act of violence and kill them, and that the seizure would render Stewart incapable of knowing what he was doing. Ex. 9 at pg. 3. If Dr. Morgan specifically said that Stewart would meet both parts of the standard *M'Naghten* test for insanity: He would have a mental disease or defect, and as a result of that disease or defect he would not know what he was doing. Ex. 9 at pg. 3. Dr. Morgan's opinion about insanity was "strengthened by the fact that Stewart cannot remember what he did, that he gives various interviewers different accounts of the events, and that none of these accounts are self-serving." Ex. 9 at pp. 3-4 (emphasis in original). If Stewart killed his wife and infant son because he was experiencing a powerful brain seizure and did not know what he was doing, he is not guilty of capital murder.

Despite abundant opportunity, the Commonwealth has never come forward with any evidence showing that the factors identified by Dr. Morgan are not associated with temporal lobe epilepsy, that these factors did not in fact exist, that any of the tests done by the experts who examined Stewart for trial are capable of disclosing temporal lobe epilepsy, or that Stewart did not have a seizure at the time of the crime. This much therefore is known for certain: Stewart displayed symptoms of an imminent epileptic seizure just before the crime, his ingestion of Pamelor increased the probability that he had a violent seizure the next day, and a temporal lobe

seizure could have caused him to kill his wife and son at a time when he was incapable of forming the required *mens rea* for capital murder or first degree murder.^{10/}

All of this evidence — that Stewart may have TLE, that he likely had a seizure at the time of the offense, that the seizure could have caused him to commit acts of violence and kill his wife and son, and that he would not have known what he was doing — was never presented to the jury at Stewart's trial. The jury's verdict that Stewart acted willfully, deliberately, and with premeditation was a verdict given in ignorance of these critical facts. It cannot be said that any juror, conscientiously following the judge's instructions requiring proof of every element beyond a reasonable doubt, would ignore the acute relevance of this unrebutted evidence showing that Stewart did not have the necessary *mens rea* at the time of the killing. Thus, a proper respect for the informed decision of the jury would not be compromised by a grant of clemency.

In state habeas proceedings, Stewart tried to obtain the assistance of a psychiatrist to determine whether there was forensically significant brain damage that affected his criminal responsibility, but the state court refused to approve funds for an expert. Thus, regard for the decisions of the state court is not implicated by a grant of clemency.

^{10/} In federal court, Stewart moved under 21 U.S.C. § 848(q)(9) for the services of a forensic psychiatrist (Dr. Morgan) and for brain scans that were necessary to confirm Dr. Morgan's diagnosis. The Magistrate Judge found that the psychiatrist and brain scans were necessary, and he granted both requests. The Commonwealth did not object to the Magistrate's ruling on necessity or his authorization of testing. And though the Commonwealth conceded that the brain scans could not be done at the prison, that it routinely sends death-row inmates to the Medical College of Virginia ("MCV") for treatment or tests that it wishes to have performed, and that it has conveyed other death-row inmates to MCV for tests requested by counsel, the Commonwealth adamantly refused to agree to transport Stewart to MCV for the brain scans that the court had approved. When Stewart attempted to get a court order for the transport, the Commonwealth tenaciously (and successfully) opposed Stewart's motions. As a result of the Commonwealth's intransigence, therefore, no brain scans have been performed.

The federal courts refused to consider the evidence about TLE on the technical ground that it could consider only "new" evidence of innocence.^{11/} The federal courts held that this evidence technically was not "new" because the psychiatrist assisting Stewart's defense counsel could have developed it before trial. Although the federal court's restrictive definition of "new evidence" appears to be contrary to the recent decisions of the United States Supreme Court and decisions of federal courts of appeals in other parts of the country, the United States Supreme Court declined to review the ruling in Stewart's case. Even if the federal court interpreted the law correctly in Stewart's case, however, its decision was based on a technicality.^{12/} Thus, a proper respect for the decisions of the federal courts will not be upset by granting clemency.

^{11/} Ordinary citizens, schooled by popular fiction such as the motion picture *The Fugitive*, mistakenly assume that if a prisoner comes forward with credible evidence of innocence, it is never too late to show the court that there has been a miscarriage of justice and obtain relief. Except for the safety-valve of commutation, however, this is not true. Virginia courts can consider new evidence of innocence only if it is discovered within 21 days of the conviction. Federal courts do not have a time limit, but they impose other restrictions on post-trial evidence of innocence.

^{12/} The Fourth Circuit said that even if Stewart's evidence regarding temporal lobe epilepsy was "new," it was not sufficiently substantial to show actual innocence. In particular, the Fourth Circuit pointed out that Dr. Morgan's affidavit used tentative language, e.g., that Stewart "may" suffer from this disorder. When Stewart explained that the diagnosis of TLE necessarily would be tentative until he could obtain brain scans — which the Commonwealth had prevented him from doing — the Fourth Circuit said Stewart was not entitled to brain scans because they would not be "new" evidence. Thus, Stewart has been prevented, by the "newness" technicality, from confirming Dr. Morgan's preliminary diagnosis.

The Fourth Circuit also said that both the defense psychiatrist and the prosecution's psychologist testified at trial that Stewart "did not have such a mental illness at the time he committed the offenses." The record shows that this statement is factually wrong. Dr. Brown's testimony is found at Trial Tr. 2/11/92 at pp. 136-98, and his report is Ex. 1. Dr. Centor's testimony is found at Trial Tr. 2/11/92 at pp. 204-11. Stewart encourages the Governor's advisors to review that testimony. It shows that neither Dr. Brown nor Dr. Centor testified about TLE or tested Stewart for TLE. The only kind of organic brain damage that Drs. Brown and Centor rejected was damage that affects intellectual function — a category that does not include any form of epilepsy.

The federal court's ruling — if left undisturbed — does, however, raise the legitimate question of why Stewart did not develop this evidence at trial.

Stewart does not know *why*, but he does know *how*. Dr. Brown, the psychiatrist who was appointed to assist Stewart's lawyers at trial, never pulled together the disparate pieces of information in his files suggesting TLE. Stewart's history of seizures and convulsions, as shown on the MMPI report, Ex. 10 at pg. 9 (Somatic Symptoms) never made it into Dr. Brown's report. There is no indication that he shared this historical information with Stewart's lawyers. Dr. Brown included in his report the fact that Stewart had new and severe headaches and that "just before the offense occurred, he experienced a strong, foul smell that was associated with a headache," Ex. 1 at pg. 24, but he reported these as curiosities rather than as symptoms of a disorder. Dr. Brown was acutely aware of Stewart's memory lapse, but he did not link it to the headaches, smell, or history of seizures.

There were other factors in Stewart's background (such as head injuries and the surgery to remove the tumor behind his eye) that should have prompted Dr. Brown to order brain scans for organic brain damage. In Dr. Morgan's opinion, these factors should have caused a competent forensic psychiatrist to order a neurological consultation, neuropsychological testing, an MRI scan of the head, and a sleep/awake EEG with nasopharyngeal leads. Dr. Brown did not, however, order these examinations. Instead, he performed a neurological examination in which he tested Stewart's motor, sensory, and cerebellar functions and pathological reflexes. He also ordered a number of brain tests. According to Dr. Morgan, these tests are important in themselves, but they cannot rule out all forensically significant organic brain disorders, including temporal lobe epilepsy.

Dr. Centor, a psychologist who assisted the prosecutor at trial, also examined Stewart. He administered the Bender-Gestalt test, WAIS-R, and Rorschach test. Dr. Morgan explained that these tests function as gross screening devices for brain damage *that affects intellectual function*, but they do not identify other forensically significant forms of brain damage, including TLE.

Based on this information, both Dr. Centor and Dr. Brown testified at Stewart's trial that he did not have organic brain damage *that affects intellectual function*. TLE does not affect intellectual function, and it would not have been revealed by any of the tests given by either of these experts. Dr. Brown also testified that Stewart was not insane at the time of the crime. His testimony, however, was the product of his limited testing. It was not informed by any knowledge that Stewart might have TLE.

Dr. Brown also failed to recognize the effects of Pamelor. He told defense counsel that the worst effect from an overdose of Pamelor would be a ringing in the ears. Ex. 11 at 4. He apparently missed both the serious psychiatric side effects of Pamelor and the fact that it can arouse troublesome hostility.^{13/} Dr. Lipman, a neuropharmacologist, testified that Dr. Brown's advice to counsel about Pamelor was "incomplete, misleading, and greatly prejudicial to Mr. Stewart." Ex. 4 at pg. 1 ¶ 2.

The application for executive clemency, of course, is not about legal technicalities or about assigning blame. It is about truth and about mercy. If, in light of all the information that is available in 1998, there is good reason to believe that Stewart did not have a "guilty mind," and that he killed his wife and son without knowing what he was doing — that he was either

^{13/} Because Dr. Brown apparently did not consider the possibility of TLE, he also missed the fact that Pamelor lowers the convulsive threshold.

temporarily insane or was guilty of a lesser degree of homicide — then granting clemency would be an appropriate and compassionate act of grace.

Under similar circumstances, Virginia governors previously have exercised their power of mercy generously. Indeed, in *eleven* instances since 1902, Virginia's governors have commuted death sentences where "the evidence justified conviction for a lesser, non-capital offense or punishment." *Executive Clemency in Virginia: The Commutation of Death Sentences*, p. 12.^{14/} In commuting the death sentence of Monroe Lewis, Governor Montague relied on his doubt that the facts exhibited "such deliberation and premeditation as will warrant in a broad sense, murder in the first degree." *Id.*^{15/}

Questions of premeditation are especially likely to arise when the offense is a domestic crime, as it was in Stewart's case. Four cases involving domestic crimes have merited the mercy of Virginia governors. In such cases, as these governors recognized, the strong emotions unleashed by domestic discord clouded the view of premeditation.

For just such reasons, Governor Trinkle commuted the death sentence of Dixie Slater under circumstances indistinguishable in any important respect from those presented in Stewart's case. The governor noted that Slater "was a good citizen who fell in love with the victim, 'gave her a great part of his earnings and applied his devotion. All of a sudden she turned him aside, he sought to win her back and in a fit of depression and blinded by jealousy he killed her." *Id.* at 21.

^{14/} Governor Allen cited to *Executive Clemency in Virginia* to support his decision to commute the death sentence of William I. Saunders.

^{15/} Indeed, it would not be unprecedented for a defendant's epilepsy to figure in the Governor's decision to commute. Governor Stewart commuted the death sentence of James Hendley in part because Hendley was epileptic. *Executive Clemency in Virginia*, p. 22.

Stewart's case is remarkably similar and even stronger. After decades of depression, addiction, and misery, Stewart had cleaned up his life, pulled himself up by the bootstraps and for the first time in his life found stability, sobriety, and hope in marriage to Cindy. She suddenly asked him to leave and spurned his efforts to win her back. Then "in a fit of depression," and as the unrebutted evidence of Dr. Morgan shows, while probably in the mindless grip of a temporal lobe epileptic seizure, Stewart killed Cindy and Jonathan. Because Stewart did not have a "guilty mind" — because he was temporarily insane or, at most, guilty of a lesser degree of homicide — the death penalty is not legally appropriate. Stewart's death sentence accordingly should be commuted to life imprisonment.

* * *

In the remaining two sections of this petition, Stewart presents additional, independent reasons why it would be appropriate to commute his death sentence. However, those sections also provide important corroboration for Dr. Morgan's conclusion that Stewart likely killed his wife during a temporal lobe epileptic seizure.

These sections show that even at his worst, Stewart was never the kind of person who resorted to violence to solve his problems (except violence against himself), even during his long period of substance abuse. Killing his wife and child in order to settle a marital dispute is jarringly out of character. In this context, TLE is a more logical and reasonable explanation for Stewart's conduct.

These sections also show Stewart's great remorse, regret, and grief, starting from the moment he realized what he had done. His feelings are those of a normal, loving father who discovers that he is personally responsible for his own child's death. Stewart has punished himself (and plans to further punish himself by his choice of electrocution) more than any agent

of the state could possibly punish him. The nature and profound depths of his emotions are inconsistent with those of a person who committed deliberate, willful, and premeditated murder.

IV. KENNY STEWART'S PERSONAL AND FAMILY HISTORY OF MENTAL ILLNESS AND SUBSTANCE ABUSE MAKES IT INEQUITABLE AND CRUEL TO EXECUTE HIM

Throughout his life, Kenny Stewart has suffered from mental illness. The crimes for which he now faces execution are a consequence, in part, of his mental illness. This is true irrespective of whether Stewart suffers from the temporal lobe epilepsy for which there is evidence. His illness by no means is minor; it is instead an incapacitating major mental disorder. Indeed, in 1995, when Stewart attempted to drop his appeals, the Circuit Court refused to permit him to do so because his major depression, which was only in partial remission despite the prison's administration of powerful antidepressant medications, impaired his ability to make a rational choice about his legal options. Stewart's mental illness has been incapacitating in another way, too. It contributed to the abuse of drugs and alcohol that began when Stewart was an adolescent, and which continued for two decades. There is evidence that the deaths of Cindy and Jonathan may have followed Stewart's relapse into alcoholism.

What is more, there is compelling evidence that Stewart's illness is inherited. Stewart's father and all his siblings have been afflicted with mental illness or addiction. Major mood disorders, such as those from which virtually all the members on Stewart's father's side of the family suffer, cluster in families and have a substantial genetic component. Ex. 7 at pg. 2; Ex. 8 at pg. 41. Stewart's family history offers compelling reason to believe that Stewart's mental illness and his consequent long-term addiction to drugs and alcohol are born in the blood, not the product of choice or decision on Stewart's part.

In large measure due to the mental illness and alcoholism of his father, Stewart was raised in a debilitating environment. Stewart is not asking for pity because he was raised in a dysfunctional environment (although that is true). Rather, it is necessary to understand that his substance abuse and other problems are part and parcel of the mental illness that afflicts his entire family.

The poisonous combination of circumstances in Stewart's past led Commonwealth's Probation and Parole Officer Wayne L. Arthur to conclude that Stewart's was:

a tragic case of an individual raised in tumultuous domestic circumstances which led to the early onset of a substance abuse problem. Late 1960's to mid-1985 he lived a nomadic life style punctuated by unstable relationships, unstable employment, major substance abuse and related legal difficulties. At age 31 he finally attained sobriety and his life took on the first semblance of stability which lasted until the responsibility of domestic life, financial maintenance of a home and fatherhood overwhelmed an individual ill-prepared to deal with these stresses. His inability to cope with the termination of the marital relationship and separation from his son appears to have resulted in major depression, suicidal ideation, anger and loss of control culminating in the instant offenses.

Ex. 12 at pg. 9.

To the extent -- and as Officer Arthur's conclusion demonstrates, it is a very great extent -- that the deaths of Cindy and Jonathan are the consequence of his long-term addictions, his abusive upbringing, and especially his mental illness, the execution of Kenny Stewart punishes him for characteristics over which he had no more control than the color of his eyes or skin. That is both inequitable and cruel.

A. STEWART'S FAMILY HISTORY OF MENTAL ILLNESS AND ADDICTION.

The evidence is clear and unrebutted that Stewart's immediate family has a pervasive history of mental illness and drug addiction. Trial Tr. 2/11/92 at pg. 157.

Stewart's father Kenneth, Sr., has a long history of mental illness and addiction. He was hospitalized in a mental institution in 1973 or 1974. He has been diagnosed as schizophrenic,

but he also has a long history of "mood swings," suggesting that he may also suffer from bipolar disorder (formerly known as manic-depression). He attempted suicide once by shooting himself. He has been prescribed anti-depressant and anti-psychotic medications. Like his father — Stewart's grandfather, Ex. 8 at pg. 163 — he has a long history of alcoholism. Ex. 7 at pg. 1; Ex. 8 at pg. 170; Ex. 12 at pg. 5.

Stewart's brother Craig also has a long history of mental illness. He suffers from bipolar disorder, subjecting him to depressive and manic episodes. In 1995, was hospitalized in mental institutions on three separate occasions. He has been in and out of mental institutions on a frequent basis since then. He has attempted suicide at least twice. He has been prescribed anti-depressants and the mood-stabilizer Lithium. Ex. 7 at pg. 1. Like his brother and father, he has a history of alcohol abuse. Ex. 12 at pg. 5. He was recently placed on total disability because of his mental illness.

Stewart's sister Lynn suffers from both bipolar disorder and schizophrenia. Ex. 8 at pg. 161. She takes Trazodone, an anti-depressant, for those conditions. Ex. 8 at pg. 161. She is on total disability because her mental illness is so severe. Ex. 8 at pg. 40. She has been institutionalized between 10 and 20 times — "lots of times," according to her mother, Ex. 8 at pg. 172 — beginning when she was twenty years old. She suffers from "mood swings, depression and hallucinations, and has previously been suicidal." Ex. 7 at pg. 2; Ex. 12 at pg. 5. Her first suicide attempt came when she was fifteen years old. Ex. 8 at pg. 162.

Stewart's sister Alesia (sometimes known as Lisa) has not been diagnosed with any mental disease. According to Lynn Stewart, this is only because she will not see a psychiatrist. Ex. 8 at pg. 163. Nonetheless, according to Craig's wife, she is "extremely moody." Ex. 8

at pg. 167. Alesia self-medicates her mental disorders: she is an addict. Ex. 8 at pg. 163; Ex. 12 at pg. 5.

As these facts show, mental illness is rampant in Stewart's family. Major mood disorders have a significant genetic component and can be inherited. Ex. 8 at pg. 41. Given that his father and every one of his siblings suffers from addiction and evident major mood disorders, there can be no doubt that Stewart's mental illness is his ill-fated legacy from his father. In this instance, Stewart follows in his father's footsteps not by choice, but by genetic command.

B. STEWART'S PERSONAL HISTORY OF MENTAL ILLNESS AND ADDICTION.

The consequence of that genetic command is that Stewart has a lifelong history of major depression complicated by decades of drug and alcohol addictions and childhood abuse. This history unquestionably is implicated in his commission of these crimes. Major depression is a major mental disorder. Ex. 8 at pg. 33. The evidence shows that Stewart has suffered from major depression for most of his life. Ex. 6 at pg. 3. Stewart's family describe him as having been "depressed ever since he was a kid." Ex. 7 at pg. 2. His depression and addictions have required repeated hospitalization and led to numerous suicide attempts through drug overdoses. Ex. 7 at pg. 2; Ex. 8 at pg. 171. The psychological tests performed on Stewart for his trial show that he is psychologically maladjusted, is subject to panic states, "reports bizarre or unusual sensory experiences and confused thinking," and is "prone to periods of intense anxiety and confusion" on a chronic and acute basis. Ex. 1 at pp. 26-27. The tests also provide indications of schizophrenia. Trial Tr. 2/11/92 at pg. 193. The pattern of his psychological testing is "typical of an individual whose [*sic*] been unable in life to achieve much of anything." Trial Tr. 2/11/92 at pg. 146.

Among the consequences of Stewart's mental illness has been a long history of addiction. Stewart's history of drug and alcohol abuse is "well documented." Ex. 6 at pg. 3. Stewart began to drink beer and smoke marijuana in 1966, when he was twelve years old. Ex. 6 at pg. 3. Within a year, he was drinking to intoxication frequently. Stewart's abuse of alcohol would continue for two decades, until 1985. Ex. 3 at pg. 3 ¶ 4.

Stewart also resorted to other drugs. His preferences varied from stimulants to depressants. Stewart's pattern and intensity of drug abuse does not indicate hedonism or pleasure-seeking. His pattern instead is consistent with the pattern of drug abuse engaged in by those seeking relief from psychic pain and depression — that is, from an underlying mental disorder — by medicating themselves. Ex. 3 at pg. 2 ¶ 2; Ex. 6 at pg. 3. The amphetamines that Stewart sometimes used are quite effective in treating depression; they are not prescribed for that condition because of the side effects from chronic use. Ex. 3 at pg. 2 ¶ 2.

At age fourteen, Stewart was hospitalized because of an overdose of LSD. Ex. 3 at pg. 3 ¶ 4(a). This was the first of over 200 LSD trips Stewart would take, Trial Tr. 2/11/92 at pg. 177, and also the first of numerous overdoses; Stewart admits to at least five. Ex. 6 at pg. 3. After this first overdose, Stewart began to use barbiturates, eventually graduating from oral ingestion to intravenous injection. He overdosed on barbiturates at age 15 and was again treated at a hospital. At age sixteen, Stewart switched from barbiturates to amphetamines, which he injected. He continued to use alcohol. Ex. 3 at pg. 3 ¶ 4(a).

Stewart's use of amphetamines was of such a toxic level as to induce hallucinations, suspicion, and paranoia. Ex. 1 at pg. 24; Ex. 3 at pg. 3 ¶ 4(b). This resulted in repeated overdoses and admissions to hospitals. Ex. 1 at pg. 10. Associated medical problems included nosebleeds and migraine headaches, and he suffered head trauma from a number of automobile

accidents. The notes from his hospitalization at age 27 for an overdose state that Stewart had been "injecting speed for nine months and using beer to sleep." Ex. 3 at pg. 3 ¶ 4(b).

In his twenties, Stewart switched from amphetamines to opiates. He overdosed on opiates on several occasions beginning in 1983. He was treated at a detoxification center in North Carolina at that time and diagnosed as suffering from depression. Around age 30, Stewart began to prefer the combination of valium and alcohol. This led to numerous drug overdoses and hospitalizations. When he was 29 years old, he was hospitalized for nearly two months as the result of a commitment order. Ex. 1 at pg. 5.

From 1984 through 1985, Stewart attempted to quit using drugs and alcohol at several rehabilitation centers and made several attempts at detoxification. Finally, in 1985, he succeeded at Craig Snyder's Halfway House in Pennsylvania. For six years thereafter, he used neither drugs nor alcohol. Ex. 3 at pg. 4 ¶ 4(c).

The lingering effects of his decades of drug and alcohol abuse, however, continued. Chronic amphetamine abuse can "kindle" the brain and increase the probability that the abuser will suffer a psychotic episode, either from psychosis-provoking circumstances — such as domestic discord — or from the influence of a drug — such as Pamelor and alcohol.

Yet another aspect of Stewart's history makes it more likely that he would succumb to psychosis. Stewart has a history of head injuries, many suffered while intoxicated. When he was two years old, his babysitter's son hit him in the head with a rock. That injury ultimately led to blindness. Years later, a tumor behind that eye required surgical removal. Ex. 1 at pg. 4. When he was eight years old, he was hit in the head with the metal end of a garden hoe and knocked unconscious. The injury left an open wound that required hospitalization. Ex. 1 at pg. 4.

This history is suggestive of brain damage. Even when an individual can compensate in daily life for the effects of brain damage, so that the brain damage has no effect on intellectual function, that "damage can have profound impact on the effects of drug action on the brain and behavior." Ex. 3 at pg. 2 ¶¶ 3, 3(a).

Stewart's mental illness is a significant and meaningful disability in and of itself. But Stewart was further incapacitated by his upbringing. Partly as a result of his family's, and particularly his father's, mental illness and alcoholism, Stewart's upbringing was neglectful and debilitating. He suffered multiple and sustained traumas in childhood from parental mental illness and alcoholism, endured physical and emotional abuse, witnessed domestic violence towards his mother and siblings, experienced blindness in one eye at an early age which retarded him in his schooling, was the victim of sexual molestation, and lacked any meaningful parental supervision. Ex. 1 at pg. 27.

Stewart's childhood involved a great deal of "fussing and fighting." Ex. 1 at pg. 3. His father often came home drunk and violent; he "drank excessively and was at times physically abusive toward his wife and children." Ex. 12 at pg. 5. The father was arrested several times for incidents that occurred when he was drunk, including motor vehicle accidents and bar fights. Ex. 1 at pp. 3-4; Ex. 12 at pg. 5. At times, to keep her husband from abusing the children, Stewart's mother would "literally have to take them and run and hide. I've done that on more than one occasion and even they had to go out the window one night when it was snow on the ground, in their nightgown. [Alesia] was just a little thing and she was scared to death running down the street." Ex. 8 at pg. 171. On one occasion, Stewart's father threatened his mother with a butcher knife. Ex. 1 at pg. 4.

Because of his father's drinking and gambling, Stewart's family was often in financial straits. Ex. 1 at pg. 4. They moved around frequently to escape debts. Ex. 1 at pg. 3. The irresponsibility of her husband required Stewart's mother to work very hard to provide for the family. Ex. 1 at pg. 3. The result was that Stewart received virtually no parental supervision, except for the toxic supervision visited on the children when their father was drunk. Ex. 1 at pp. 6, 27. Stewart and his siblings were "'latch key kids' who were without adult supervision much of the time because of their parents [*sic*] employment and Mr. Stewart's alcohol abuse." Ex. 12 at pg. 5a. Kenny's grades in school were poor, and he failed the second grade. Ex. 1 at pg. 6.

When Stewart was six or seven years old, he was the victim of a single, but frightening, episode of sexual abuse. A man in the neighborhood struck up a relationship with Stewart by giving him candy and attention. One day he forced Stewart's pants down and performed oral sex on him. Ex. 1 at pg. 6.

Largely unsupervised as he was, Stewart became involved in delinquent activities. Ex. 12 at pg. 5a. When he was thirteen, he was involved with some other boys in stealing a bicycle. Ex. 1 at pp. 8-9. When he was fifteen, he was involved in a car theft ring in which an older man hot-wired the cars and had the teenagers drive them away. Ex. 1 at pg. 9. When Stewart was sixteen years old, he argued with his father over the latter's violence toward Stewart's mother. Following that argument, Stewart moved out of the house. Ex. 1 at pg. 4. At age eighteen, he introduced "women who wanted to become prostitutes to others who would manage" their activities. Ex. 1 at pg. 9. Thereafter, he engaged in a nomadic life characterized by drug and alcohol abuse, frequent overdoses suggestive of suicidal tendencies, and major depression. Ex. 12 at pg. 9.

Stewart's mental illness and incapacitating upbringing are both serious and severe. There can be no question that he killed his wife and child while he was suffering from major depression and under extreme mental and emotional distress. Ex. 1 at pg. 30. There also can be no question that Stewart's ability to overcome that episode and to deal with that distress was handicapped by long term addictions and by his debilitating upbringing. Ex. 12 at pg. 9. Certainly neither his mental illness nor his upbringing were factors within Stewart's control. And properly understood, his addictions to drug and alcohol were efforts to self-medicate his underlying profound depression. In sum, Stewart's commission of these offenses incontestably is a consequence to a great degree of characteristics beyond his control. To exact the ultimate punishment from Stewart on the basis of such characteristics is unjust, inequitable, and cruel. For that reason, Stewart's sentence should be commuted to life imprisonment.

V. KENNY STEWART'S REMORSE AND LACK OF DANGEROUSNESS FAVOR COMMUTATION OF HIS SENTENCE

A. STEWART'S BOTTOMLESS REMORSE AND REGRET FOR THE DEATHS OF HIS WIFE AND SON HAVE NEVER BEEN IN DOUBT.

Lack of remorse has figured prominently in the decisions of Virginia prosecutors to seek, and Virginia governors to administer, the death penalty. But if ever a defendant was remorseful about his wrongdoing, Kenny Stewart is that defendant.

Stewart's remorse was evident even before his arrest. Stewart telephoned his friends Carolyn and Paul Brown before his arrest. Prosecution witness Carolyn Brown testified that Stewart "sounded very remorseful." Trial Tr. 2/5/92 at pg. 134. His remorse was evident from his statement that "I have destroyed everything that meant anything to me," Trial Tr. 2/5/92 at pg. 134, and that "he just wouldn't be able to live with himself because of what he had done." Trial Tr. 2/5/92 at pg. 140. Indeed, Stewart was in such agony over what he had done that he

told Carolyn of his hope that he received the death penalty for his crimes. Trial Tr. 2/5/92 at pg. 136.^{16/}

Stewart's regret and sorrow did not go unnoticed by the police as he awaited trial. Deputy Sheriff (and prosecution witness) George Anderson testified that Stewart told him, "George, this is a hideous thing I have done, and I want justice done." Trial Tr. 2/6/92 at pg. 201. Anderson also testified that Stewart told him "I can't live in prison with what I have done." Trial Tr. 2/6/92 at pg. 204. Stewart even asked the police to help him get the death penalty. Trial Tr. 2/6/92 following pg. 244 (second interview transcript at pp. 232-36). At his sentencing hearing before Judge Sweeney, Stewart did not ask for mercy; in keeping with his deep remorse and regret, he asked for justice. Trial Tr. 5/5/92 at pg. 34.

That Stewart remains as profoundly remorseful now as he was then cannot be doubted. He has never questioned that he deserved to be punished for his crimes. Ex. 8 at pg. 43. A March 1994 psychiatric note in his prison medical records indicates that Stewart had dropped his appeals because he was "weary of dealing with the guilt." Ex. 6 at pg. 5. At a hearing held to determine whether Stewart was competent to volunteer for execution, Dr. Osran testified at the 1995 competency hearing that Stewart "described carrying a feeling of guilt and the deepest sense of grief mixed with loss" Ex. 8 at pg. 44. Stewart also expressed his remorse in 1995 to Dr. Lipman, the neuropharmacologist, who reported that Stewart "was terribly remorseful, tearful and horrified as he explained what little he remembered." Ex. 3 at pg. 6 ¶ 6.

^{16/} The Commonwealth's system of justice is not intended to provide a system for assisted suicide. Stewart's wish to be sentenced to death and his subsequent intermittent desire to drop his appeals therefore have no relevance to the resolution of this clemency petition. Stewart's intermittent desire to drop his appeals is a consequence, in part, of his major depression. Ex. 6 at pg. 7. In any event, Stewart's present wish is to have his sentence commuted and to live.

Most recently, both lay persons and professionals have speculated that Stewart's election to die by electrocution rather than lethal injection is motivated, in part, by a desire to punish himself even more than the state would punish him.

There is no need to belabor the point. The evidence is overwhelming that Stewart is intensely and thoroughly repentant and regretful for his crimes. There is no evidence to the contrary. That is a fact that prosecutors, judges, juries, and governors have always recognized as justifying mercy. It warrants mercy here.

B. STEWART'S CRIMINAL RECORD AND PRISON DISCIPLINARY RECORD ESTABLISH THAT HE IS NOT DANGEROUS.

Kenny Stewart's criminal record, even as it stands today, does not suggest that he poses any plausible threat of violence to anyone. This is true even of his capital conviction. Stewart's conviction is for a domestic crime. As is well known, the recidivism rate for individuals convicted of domestic murders is exceptionally low. The primary reason for this is that the conditions under which domestic crimes occur are extremely unlikely to be replicated. There obviously is no chance that the conditions under which Stewart's domestic crime occurred could be replicated; Stewart is and will remain in prison.

Additionally, Stewart was in his late 30's when he killed his wife and son. It is well understood that the tendency towards violence decreases with advancing age. Stewart now is at an age where the tendency towards violence is low even among those with long records of violent conduct. Stewart, however, has no such record.

Stewart's criminal record offers no evidence that only execution can prevent him from committing future acts of violence.^{17/} It is fair to say that all of Stewart's previous convictions

^{17/} Even the Supreme Court of Virginia, on direct appeal, recognized that Stewart's record is
(continued...)

arose out of his drug and alcohol abuse. Indeed, Stewart's criminal record includes no real crimes of violence, and at the time of his trial he had no felony convictions. Trial Tr. 5/5/92 at pg. 7. According to Stewart's presentence report, his convictions are as follows:

1. March 28 and September 30, 1974 — DUI, failure to stop at a stop sign, speeding, and driving with a revoked license;
2. February 23 and March 24, 1978 — Failure to yield right of way, hit and run (hitting a mailbox), and driving with a revoked license;
3. June 5 and July 27, 1979 — DUI, driving on the wrong side of the road, and vandalizing private property;
4. November 10, 1981 — DUI and driving with revoked license;
5. January 7 and January 28, 1982 - DUI, two counts;
6. August 19 and September 6, 1983 — DUI, assault on a police officer with a dangerous weapon (a pocketknife); and
7. September 27, 1985 — DUI.

Trial Tr. 2/11/92 at pp. 48-50; Ex. 12 at pg. 4.^{18/}

The only one of these offenses that could be described as possessing any attribute of violence is the assault on the police officer. In that incident Stewart, while intoxicated, "swung the said knife numerous times at the . . . officer." Trial Tr. 2/11/92 at pg. 50. The knife never came in contact with the officer, and the conviction is for a misdemeanor only. Trial Tr. 2/11/92 at pg. 54. Stewart was sentenced to six months in jail for this offense. Ex. 12 at pg. 56.

As the testimony at his trial suggested, these incidents were the product of Stewart's drug and alcohol abuse. Most of them arise out of his operation of an automobile while under the

^{17/} (...continued)

inconsistent with a person who poses a future danger. That court declined to uphold the jury's finding of future dangerousness.

^{18/} While there are no convictions, there is testimony that Stewart engaged in some minor drug trafficking. There also are reports that Stewart was involved as a juvenile in bicycle and car theft and when he was 18 years old in some peripheral way with prostitution. There is no testimony that any of this activity involved any violence. Trial Tr. 2/5/92 at pg. 10; Ex. 1 at pg. 9; Ex. 12 at pg. 5a.

influence. As discussed below, Stewart's use of drugs and alcohol is properly understood as his attempt to self-medicate longstanding severe clinical depression.

What this means is that the conditions under which Stewart's criminal record was compiled cannot now be repeated. So long as he is in prison, he cannot abuse drugs and alcohol, and his psychiatric condition is being monitored by professionals. Moreover, his imprisonment precludes the replication of the domestic situation that resulted in his prior acts of violence. And Stewart's prison disciplinary record is exemplary. As Sergeant Mayhew testified, Stewart never gave the police or the jail any trouble after his arrest. Trial Tr. 2/6/92 at pg. 12. Deputy Sheriff Anderson agreed that Stewart was a model prisoner. Trial Tr. 2/6/92 at pg.

Since his conviction, Stewart has continued his good behavior. On death row, he has committed no serious disciplinary infraction. He has three violations for failing to stand for count and one violation for taking a shower on the wrong day. The most recent of these violations was two years ago. Prison personnel have indicated that Stewart is "very pleasant, polite, always cooperative. . . . he's one of the most cooperative people we have." Ex. 8 at pp. 128-29. This excellent record exemplifies a successful transition to incarceration.

For all these reasons, there is no reason to believe that Stewart is likely to commit any future act of violence. In other words, the danger to the Commonwealth or to other individuals from Stewart's continued existence is negligible. His execution is unnecessary.

C. PAST CLEMENCY PRECEDENTS SUPPORT COMMUTATION OF STEWART'S SENTENCE.

Commutation of Kenny Stewart's death sentence is particularly appropriate in light of the commutation recently granted by Governor Allen to William I. Saunders. Officials of Danville, the city in which Saunders committed capital murder, came to the realization following

Saunders' conviction and condemnation that the evidence for his future dangerousness was not sufficient to support the ultimate punishment. Accordingly they asked Governor Allen to commute Saunders' sentence to life imprisonment. Governor Allen did so. For identical reasons, Stewart asks that his death sentence be commuted to life imprisonment.

The evidence that Stewart will not be dangerous is far better than the evidence that Saunders will not be. Given his age, his criminal record, the domestic nature of his crime, and his prison disciplinary record, there is no reason to believe that Stewart would pose a danger if his sentence were commuted.

This conclusion is buttressed by a comparison of Stewart's record with that of Saunders. Saunders' criminal record before his capital murder conviction, which involved both felonies and misdemeanors, included two statutory burglary convictions in 1987, one petit larceny and one receiving stolen merchandise in 1988, disorderly conduct and resisting arrest on March 11, 1989, and disorderly conduct in front of a school and misdemeanor assault and battery on a police officer on March 19, 1989. *Petition For Executive Clemency On Behalf Of William Saunders*, p. 24 (filed April 23, 1997). This does not include the highly suspect testimony by a prosecution witness that Saunders killed someone in Washington, D.C. the weekend before the capital crime for which he was on death row. *Saunders' Petition*, p. 23.

By contrast, all of Stewart's convictions stem from his alcohol and drug abuse. As explained below, that abuse cannot be understood apart from Stewart's personal and family history of mental illness. In any event, Stewart would be unable to resume that abuse in prison (even if he wanted to, which he does not), and there is thus good reason to believe that Stewart will not commit any violent act in prison.

Stewart's post-crime prison disciplinary record also is better than Saunders' record. Saunders' disciplinary record at the time his clemency petition was filed consisted of no fewer than 30 charges. While awaiting sentencing in Danville, Saunders had no fewer than 9 offenses, including arson (a criminal charge to which he pled guilty), setting fires to bedsheets, assaulting other inmates, and possession of a razor blade. Saunders' Petition, at 31-34. At Mecklenburg, Saunders was convicted administratively of no fewer than 21 offenses, including making threatening statements to a guard during a shakedown, possession of intoxicants, disobeying a direct order by refusing to be handcuffed for transfer, and twice threatening bodily harm to guards.

By contrast, Stewart is a model prisoner, with a mere handful of minor violations.

For capital punishment to be administered fairly, it must be administered consistently from one case to the next. Governor Allen recognized as much when he justified his commutation of Saunders' death sentence, in part, through reliance on the clemency decisions of previous governors. Moreover, the judicial sentencing process is a human endeavor; mistakes can and will be made. In commuting Saunders' sentence, Governor Allen recognized that correction of such mistakes is a noble function of clemency and a proper element of mercy.

Imprisoned for life, Kenny Stewart poses no danger to the Commonwealth or to any individual. His death sentence should be commuted to life imprisonment.

VI. CONCLUSION

The evidence at Kenny Stewart's trial demonstrated that his conduct was the product of mental disease and the lingering effects of long term substance abuse. Unrebutted evidence now establishes the additional likelihood that Stewart faces execution for acts he committed during a temporal lobe epileptic seizure, when he did not know what he was doing. That evidence casts

grave doubt on the circumstantial evidence that Stewart acted deliberately, willfully, and with premeditation. If he did not have the required *mens rea*, then he cannot be guilty of capital murder and he cannot justly be executed. Without question, Stewart is remorseful for his actions. Neither his criminal record nor his prison disciplinary record offers any credible indication that he will be dangerous if his sentence is commuted. Stewart's nonviolent history and profound remorse lend further support to the proposition that Stewart did not have a "guilty mind." For all these reasons, Stewart humbly petitions the Governor to commute his sentence to life imprisonment.

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