

October 12, 1999

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
State Capitol, Third Floor
Richmond, Virginia 23219

Re: Jason Matthew Joseph – Petition for Clemency

Dear Governor Gilmore:

We write this Petition for Clemency on behalf of Jason Matthew Joseph, who is scheduled to be executed on Tuesday, October 19, 1999. For the reasons stated below, we plead that you exercise your broad powers of clemency and commute Jason's sentence from death to life in prison without possibility of parole.

Jason Joseph admits killing Jeffrey Anderson during the robbery of a Subway Sandwich Shop in Portsmouth, Virginia in 1992. Jason profoundly regrets his actions and would be among the first to agree that he deserves severe punishment for this and certain other crimes he committed in the fall of 1992.

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However, Jason does not deserve to be put to death. He was sentenced to death only because his jury was tragically ill-informed with regard to numerous matters that were critical to the sentencing decision. And he remains sentenced to death because ineffective legal representation and strict procedural default rules have so far prevented any court, state or federal, from hearing the merits of his claim that his sentencing trial was fundamentally unfair.¹

The clemency power provides you with the means to prevent this unjust execution from going forward. As the Supreme Court has said, executive clemency is "the 'fail safe' in our criminal justice system," *Herrera v. Collins*, 506 U.S. 390, 415 (1993), that "exists to provide relief from harshness or mistake in the judicial system . . . ," *Ohio Adult Parole Auth. v. Woodard*, 118 S.

¹ As of this writing, Jason has pending before the Supreme Court of the United States a petition for writ of certiorari and an application for stay of execution. The petition asks that the Court review whether his claim regarding jury misconduct, discussed below, should be heard on the merits. We expect a ruling from the Court by October 15 or 16. Obviously, if the Supreme Court grants a stay, this clemency petition becomes moot, at least for the time being. This petition presupposes that the Supreme Court will not grant a stay.

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Ct. 1244, 1251 (1998). It is a power that we urgently request you to exercise now to spare Jason's life.

Jason Is Not the Person Portrayed at the Time of His Sentencing Trial.

Jason is anything but the stereotypical death row inmate. He is friendly, funny and personable. He is well-liked by and has good relations with prison personnel. His latest annual psychological screening describes him as "neat, clean, cooperative" with a mood "appropriate to the situation." His prison record is clear of any significant disciplinary problems. Jason truly is different, as even a brief meeting with him, which we urge you to consider, will confirm.

Especially important, Jason does not deny responsibility for his crimes. The prison psychologist who conducted his most recent psychological screening states that he "shows remorse for his past actions," a fact that is borne out by a letter he wrote, on his own initiative, to Jeffrey Anderson's mother, in which he stated:

My irresponsibility and carelessness wrecked two families, mine and yours. I refuse to lay blame on any [one] or anything but myself. I was taught right from wrong when I was younger but still I chose to

do wrong. I was young, confused and listening to the wrong people but still I am the only one to blame. There were many nights I woke up in cold sweats apologizing to your son and this was before my trial, during and even today. I am truly sorry.

Ex. 1.

If Jason is a good prisoner and capable of sincere expressions of remorse to the family of his victim, how did he wind up on death row? How did the jury make such a horrific mistake?

We submit to you that there were three reasons, any one of which could have led the jury to the wrong result. **First**, the jury that sentenced Jason to death was influenced by false and highly inflammatory media reports that wrongly portrayed him as callous and unrepentant. **Second**, the jury was misinformed concerning the amount of time Jason would serve if sentenced to life in prison. **Third**, the jury did not have the benefit of compelling evidence that would have demonstrated to them that Jason's short spurt of criminal activity in 1992 was extremely uncharacteristic and is explainable by factors that were both beyond his control and incapable of recurrence in a drug-free prison

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environment. Together, these errors resulted in a tragically inaccurate sentencing determination that we urge you to exercise your clemency powers to correct.

The Jury Was Exposed to, and Took into Consideration, False and Inflammatory Newspaper Accounts that Wrongly Portrayed Jason As Callous and Remorseless.

The jury that sentenced Jason to death was almost certainly influenced by false, inflammatory and highly prejudicial media reports and editorials. Before and during the sentencing phase of the trial, the media printed accounts of the trial that featured an alleged comment that Jason supposedly made to Jeffrey Anderson's family. According to this account, sometime after the verdict at the guilt phase of the trial was read, Jason turned to the family, shrugged, and said "sh-- happens." Although this account was untrue, Jason's unsequestered jury was exposed to it and took it into account in imposing a sentence of death.

The jury found Jason guilty of capital murder on a Friday afternoon. After the verdict was read and the jury was polled, the trial judge in-

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structed the jurors to return the following Monday morning to begin the sentencing phase of the trial. Ex. 2 at 40A-42A.

The following morning, a Saturday, the leading newspaper in the Tidewater Virginia area, the *Virginian-Pilot and Ledger Star*, printed an account of the trial that featured in its lead paragraphs an alleged comment that Jason made to the victim's family, in the courtroom, some time after the verdict was read. According to this account, Jason turned to the family, shrugged, and said "sh-- happens." Ex. 3.

Jason's trial counsel say they were "shocked" when they saw this article because they knew it was categorically false. Ex. 4 at 48A. They knew the story was untrue because they were on either side of Jason from the time the jury returned with its verdict until Jason was outside the courtroom after court had adjourned for the day. They neither saw any such incident nor heard their client make such a comment. To the contrary, they had warned Jason in advance not to say anything when the verdict was read, and Jason followed their instruction. Ex. 4 at 47A-49A. Nor is there anything in the trial transcript indicating

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that Jason said anything to anyone or that anything unusual occurred in the courtroom from the moment the verdict was read until the court adjourned for the day. Ex. 2 at 40A-43A.

Notwithstanding trial counsel's shock at seeing the false newspaper account, and notwithstanding the obvious possibility that the unsequestered jurors were directly or indirectly exposed to it while in the community over the weekend, trial counsel did nothing to avoid or remedy the prejudice the article could cause to their client. When court convened on Monday morning, they did not even request that the jurors be asked if they had read or heard anything about the trial over the weekend.

Even worse than Saturday's article was an editorial that appeared in the *Virginian-Pilot* on Tuesday morning, the second and final day of the sentencing phase of the trial. That editorial, entitled "Adding Insult to Murder," repeated the reporter's claim that Mr. Joseph had made the "sh-- happens" statement. The editorial went on to ask "[h]ow can anyone be so hard-hearted?" and to urge readers to "[i]magine the pain — and the anger — that comment inspired"

in the family of the victim. The editorial closed by pronouncing the alleged statement "a despicable postscript to a heinous crime." Ex. 5 at 52A. Despite the fact that the unsequestered jurors could easily have been exposed to this editorial as well, trial counsel did nothing to avert or remedy the prejudicial effect. Within hours after publication of this all-but-explicit plea that the jury impose the death penalty, the jury did precisely that.

On direct appeal, Jason was represented by one of the two lawyers who represented him at trial. This lawyer did not raise on appeal the jury's possible exposure to the prejudicial newspaper accounts or, obviously, his own failure to do anything about it. Nor could he reasonably have done so under Virginia's appellate procedures. In order to demonstrate that Jason was actually prejudiced, appellate counsel would have been required to show that the jury was in fact exposed to the newspaper accounts and was influenced by them in sentencing Jason to death. Under Virginia law, such extra-record evidence could not be presented on direct appeal.² Instead, it had to be presented during the

² In Virginia, claims that rely on facts not appearing in the trial record cannot be
(continued...)

post-conviction proceedings provided for as part of Virginia's appellate review process.

After the Virginia Supreme Court affirmed Jason's conviction and sentence on direct appeal and the U.S. Supreme Court denied certiorari,³ the Virginia Supreme Court appointed a solo practitioner in Portsmouth to represent Jason in state post-conviction proceedings. This lawyer did nothing to investigate or present either the jury misconduct claim or counsel's failure to deal with the claim at trial. In fact, he admitted under oath in the federal habeas proceeding that he conducted no independent investigation of anything. He did file a petition raising some other issues, but even then, when the Commonwealth moved to dismiss the petition, he filed no response. The unopposed motion to

² (...continued)

raised on direct appeal. See *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). See also Va. Code Ann. § 17.1-313(A) (Michie 1999); *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997), cert. denied, 118 S. Ct. 907 (1998); *Goins v. Commonwealth*, 470 S.E.2d 114, 124 n.2 (Va.), cert. denied, *Goins v. Virginia*, 519 U.S. 887 (1996); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 n.4 (Va.), cert. denied, *Roach v. Virginia*, 519 U.S. 951 (1996); *Walker v. Mitchell*, 299 S.E.2d 698, 699-700 (Va. 1983).

³ *Joseph v. Commonwealth*, 452 S.E.2d 862 (Va.), cert. denied, *Joseph v. Virginia*, 516 U.S. 876 (1995).

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dismiss was granted by the Virginia Supreme Court in a three-sentence order issued on November 20, 1996. Ex. 6.

Jason's federal habeas counsel did conduct an investigation, however, and that investigation confirmed what had been trial counsel's worst fears. Two jurors acknowledge under oath that they were aware of the alleged "sh-- happens" comment at the time of the jury's sentencing-phase deliberations, that it was discussed during those deliberations and that it influenced their decisions to impose the death penalty. One juror says that it "contributed to my feeling that Mr. Joseph had no remorse over what had happened." Ex. 7 at 53A. Another juror states that the comment "was clear evidence of [Jason's] total lack of remorse." Ex. 8 at 55A-56A.

Thus, the evidence that was submitted with Jason's federal habeas petition and is attached here leads inexorably to the conclusion that at least some members of the jury became aware of the statement attributed to Jason by the local newspaper through exposure, either directly or through conversations with family or friends, to the false newspaper accounts themselves. Further, the

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evidence shows clearly that these inaccurate accounts ended up influencing at least two jurors, and no doubt others, to vote to impose the sentence of death.

These facts, if confirmed at an evidentiary hearing, would unquestionably entitle Jason to a new sentencing trial before an impartial jury. *See Remmer v. United States*, 347 U.S. 227 (1954). But Jason never got that hearing. His claim that he was denied a fair and impartial jury was rejected by the federal courts, not on the merits but solely because Jason failed to raise the claim before the Virginia state courts. And Jason failed to raise the claim in state court solely because, at the only stage of state proceedings at which he was allowed to assert such a claim, he was denied by the state the assistance of a competent lawyer to do so. The federal courts in effect ruled that the incompetence of Jason's state habeas counsel was no concern of theirs, since they read the U.S. Constitution as requiring no lawyer at all at that crucial stage of the state's criminal appellate process. *See Joseph v. Angelone*, 184 F.3d 320, 1999 U.S. App. LEXIS 15500 at 5-6 (4th Cir. July 12, 1999).

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Put simply, Virginia imposes procedural rules require the assertion of certain important constitutional claims in state habeas proceedings only, and then, in cases like this one, fails to appoint to appoint counsel competent enough to investigate and assert those claims in post-conviction proceedings. When the Fourth's Circuit's rigid views regarding procedural default and the right to post-conviction counsel were added to the mix in this case, Jason was denied an opportunity to have any court — state or federal — consider his claim that he was sentenced to die by a tainted jury.

Confidence in the integrity and fairness of the process by which our government puts its citizens to death will be severely undermined by the execution of a prisoner who can demonstrate — but to no avail — that his sentence was obtained in clear violation of his fundamental constitutional rights. Your clemency power is all that remains to prevent this travesty of justice from occurring.

The Jury Was Seriously Misinformed Concerning the Amount of Time Jason Would Serve if Sentenced to Life in Prison.

The second serious flaw in Jason's sentencing trial arose when the trial court refused to allow Jason's lawyers to tell the jury that if it sentenced Jason to life in prison he would serve at least 25 years, even with maximum good-time credit, before becoming eligible for parole.⁴ Numerous studies and surveys have established that the length of time a defendant will serve before becoming eligible for parole is a critical consideration for jurors forced to choose between imposing a sentence of life imprisonment and the death penalty.⁵ Indeed, these studies demonstrate that, when told that a life-sentenced prisoner would be ineligible for parole for at least 25 years — as was true in Jason's case

⁴ Since Jason's capital murder conviction was his third felony conviction, he was at the time subject to a minimum sentence of 30 years. *See* Va. Code § 53.1-151.C (Michie 1994 Supp.). Maximum good time credits would have reduced that number to 25.7 years. *See* Va. Code § 53.1-199.

⁵ *See* William J. Bowers and Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William W. Wood, III, Note, *The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989).

although the jury did not know it — jury support for the death penalty appreciably declines.⁶

Although the right of a criminal defendant to present accurate and relevant evidence on issues the jury will consider in the sentencing phase of a capital trial is protected by both the Eighth and Fourteenth Amendments,⁷ the federal courts that decided Jason's post-conviction appeals felt compelled to defer to Virginia law with respect to the admissibility at the sentencing phase of his trial of information regarding parole eligibility. And, under Virginia's hard-and-fast rule, evidence concerning parole eligibility is inadmissible unless the defendant would be completely parole ineligible.

The rule barring the introduction of evidence concerning parole eligibility was first announced in *Coward v. Commonwealth*, 164 Va. 639, 178 S.E. 797 (1935). In that case, the jury made a specific inquiry as to "what time

⁶ *Brown v. Texas*, 118 S. Ct. 355, 355 n.2 (1997) (and empirical data cited therein).

⁷ *See Gardner v. Florida*, 430 U.S. 349, 362 (1977); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (plurality).

the defendant would get off while he was confined in jail." 164 Va. at 643, 178 S.E. at 798. The trial court responded to this query by detailing the then applicable rules for "good behavior" reduction of a sentence. *Id.* The Virginia Supreme Court held that this was error and that "[t]hese jurors should have been told that it was their duty, if they found the accused guilty, to impose such sentence as seemed to them to be just. What might afterwards happen was no concern of theirs." *Id.* at 646, 178 S.E. at 800. After *Coward*, it became standard practice in Virginia to refuse to answer questions from juries concerning the possibility of a defendant being paroled, pardoned, or benefited by an act of executive clemency.

In *Hinton v. Commonwealth*, 219 Va. 492, 496, 247 S.E.2d 704, 706 (1978), the Virginia Supreme Court discussed the policy behind the rule announced in *Coward*. In *Hinton*, the trial court responded to a jury's question concerning parole by instructing the jurors that "early release [of prisoners] is not for the Court or jury to be concerned about." *Hinton*, 219 Va. at 494, 247 S.E.2d at 705. However, the trial court then described the manner in which early

release might occur and told the jury that "[s]ometimes people never serve their entire sentence." *Id.* The trial court concluded by stating that it "would like to advise [the jury] about the probability of early release, but I'm not allowed to tell you what it is in order that you may take it into consideration when you fix punishment." *Id.* at 494-95, 247 S.E.2d at 705. Following this instruction, the jury returned in only five minutes with a verdict imposing the maximum sentence possible for the defendant's offense. *Id.* at 495, 247 S.E.2d at 706.

The Virginia Supreme Court reversed, stating that "Virginia is committed to the proposition that the trial court should not inform the jury that its sentence, once imposed and confirmed, may be set aside or reduced by some other arm of the State." *Hinton*, 219 Va. at 495, 247 S.E.2d at 706 (citing *Coward*, 164 Va. at 646, 178 S.E. at 799-800). Rejecting the Commonwealth's contention that the trial court's error was not sufficiently prejudicial to warrant reversal, the court said:

[T]he jury's question would have been necessary only if one or more of the jurors contemplated voting for a sentence less than the maximum; the inquiry would have been superfluous if the jury had already

decided to assess [the maximum penalty]. Thus, as a result of the improper emphasis on post-verdict procedures . . . it [is] likely that some member of the jury, influenced by the improper remarks, agreed to fix the maximum penalty, when he or she otherwise would have voted for a lesser sentence. Consequently, prejudice to the defendant is manifest.

219 Va. at 496-97, 247 S.E.2d at 706-07.

Coward and *Hinton* were both cases in which informing the jury of all the facts regarding parole eligibility resulted in prejudice to the defendant because it played to the jury's fears that the defendant might be released too early. Applying the result, if not the logic, of these cases, Virginia courts have refused to tell juries in capital cases, including Jason's, what the true meaning of a life term is, even when it is the defendant, not the prosecution, who asks for and would be benefitted by the instruction. See *Joseph v. Commonwealth*, 249 Va. 78, 452 S.E.2d 862 (1995), *cert. denied*, 516 U.S. 876 (1995).

The Virginia Supreme Court now seems to have realized the illogic and unfairness of such a policy. Just last month, in *Yarbrough v. Commonwealth*, 1999 WL 731760 (Va. Sept. 17, 1999), the court was faced

with a case in which the trial court had refused to instruct that jury that, if sentenced to life in prison, the defendant in a capital case would be ineligible for parole. The Virginia Supreme Court reversed:

[W]here the jury is delegated the responsibility of recommending a sentence, *the defendant's right to a trial by an informed jury requires that the jury be adequately apprised of the nature of the range of sentences it may impose so that it may assess an appropriate punishment.* The underlying concern is whether issues are presented in a manner that could influence the jury to assess a penalty based upon "fear rather than reason." Where information about potential post-sentencing procedures could lead a jury to impose a harsher sentence than it otherwise might, such matters may not be presented to the jury. Thus, it has long been held in this Commonwealth that it is error for the trial court to instruct the jury that the defendant would be eligible for parole or could benefit from an executive act of pardon or clemency. Unquestionably, it was this long-standing rule which prompted the trial court's refusal of Yarbrough's proffered "life means life" instruction and its response to the jury's question concerning the meaning of a life sentence. However, the present case presents the diametrically opposite situation: a case where information about post-sentencing procedures is needed to prevent a jury from imposing a harsher sentence than it otherwise might render out

of speculative fears about events that cannot transpire.

Id. (emphasis added; citations and footnote omitted).

In this case, as in *Coward*, *Hinton*, and especially *Yarbrough*, the jury imposed a harsher sentence than the facts of the case could justify out of speculative fears that Jason would be paroled if sentenced to life in prison. Less than two hours into its sentencing phase deliberations, Jason's jury returned to the courtroom and said that one of the jurors had the following question: ". . . if Jason were given another life sentence, would the two run concurrently, as the jury has already given him a life sentence on the robbery?" The judge responded: "Unless the Court expresses differently, no sentences given in any case run concurrently."

By posing this question, the jury demonstrated, first, that it knew a "life" sentence meant something less than life, and, second, that it was concerned about the length of time Jason would have to spend in prison if given another life sentence. The judge's answer in effect informed the jury that the court could very well cause the "life" sentence for the murder conviction to run concurrently

with the "life" sentence for the robbery conviction, leaving open the possibility that if the jury imposed a life sentence for the murder, Jason might be released on parole after serving a relatively short term in prison.

Jason's trial counsel objected to the court's instruction. As he said, "[c]learly, someone in that jury room is now not believing that life means life as they're supposed to believe; they're back there considering concurrence, consecutive, parole possibilities, all the many things that they're not supposed to consider."

Now we know that counsel's concern that the jurors did not believe "life" meant "life" was well-founded. Juror Helen Sasser states in an affidavit that the jury believed that "a life sentence for [Mr. Joseph] would have meant he could have gotten out of prison in only sixteen (16) years. All of us were concerned about how soon Mr. Joseph could get out of prison if we sentenced him to life." Ex. 7. Tragically, the jury arrived at the conclusion that Jason would be eligible for parole in only sixteen years — a conclusion that was

completely incorrect — because "one of the . . . jurors [claimed to know] that that was what a life sentence meant." Ex. 10.

Juror Mark Kent described the devastating effect of the jury's mistake:

Several of the jurors in Mr. Joseph's case were concerned about the meaning of a life sentence. We knew that "life" did not mean life with no possibility of parole but we were unsure as to just how long a life sentence would be for Mr. Joseph. As a result of this concern, we asked a question of the judge regarding whether his sentences would run concurrently or consecutively. The judge refused to answer the question. Then, several of the jurors who did not initially want the death penalty changed their minds and voted for a death sentence.

Ex. 8 at 1-2 (emphasis added). The affidavit of juror Carl Forbes further confirms the terrible cost of the jurors' ignorance of the facts:

[T]he jurors were not unanimous in the sentence of death because there was concern about how long Mr. Joseph would be in prison if we sentenced him to life imprisonment. That concern led to our question to the judge about whether Mr. Joseph's sentences would run concurrently or consecutively. After the judge did not answer our question, all of the jurors decided to vote for the death penalty.

Ex. 8 at 55A.

It is clear that the length of sentence was an important consideration to Jason's jury and that the jury was badly misinformed on that subject. This is plainly a case where the jury's sentencing verdict was based on fear and speculation, not reason and fact. Clearly some of the jurors were predisposed toward a life sentence. Had they been allowed to know the facts, they would not have been forced to act on the basis of other jurors' inaccurate speculation and would likely have held out for life, which, in the absence of unanimity, is the sentence the court would have had to impose. At this point, the only way this grave injustice can be corrected is to commute Jason's sentence to life in prison without possibility of parole — a sentence even harsher than the sentence the jury would likely have imposed in this case had it known all the facts..

Jason's Short Spurt of Criminal Activity in 1992 Was Extremely Uncharacteristic and Explainable by Factors Both Beyond His Control and Incapable of Recurrence in a Drug-Free Prison Environment.

Jason Joseph is not and never has been a hardened criminal. Up until six months before Jeffrey Anderson's murder, Jason had lived a life that the Commonwealth's own mental health expert termed "quite admirable" — this despite the fact that he grew up in a family and in neighborhoods in Brooklyn and Queens, New York where drug abuse and violence were commonplace.

Notwithstanding his severely disadvantaged background — including a family with a long history of neglect and abandonment, physical and sexual abuse, drug and alcohol abuse, and mental illness — Jason managed to stay free of any significant problems with the law until he was twenty years old. Jason attended high school through his senior year, although he fell a few credits short of graduating. During the next year, Jason held a succession of minimum-wage jobs at fast-food restaurants and became engaged to Portia Johnson, the single mother of two small children.

But in the spring of 1992, Jason suddenly found himself unemployed, unskilled, and unable to support his new family. He became exposed to and began to hang out with hardened criminals, including a man

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named Kaisi Powell, his sister's boyfriend, who had a long history of murder, robbery and drug abuse. Soon Jason became addicted to crack cocaine.

Jason's use of crack and other hard drugs had an immediate effect on his personality. He quickly became involved in increasingly more serious crimes, starting with a shoving match with sheriffs' deputies and escalating to holdups of convenience stores to obtain money for drugs. It was during the second holdup that Jeffrey Anderson was killed. When Mr. Anderson tried to make a break for the back room, Jason shot at him once. The bullet struck Mr. Anderson in the shoulder but passed through his aorta, causing him to bleed to death before he reached a hospital. At the time of the shooting, Jason believed Mr. Anderson had been wounded only in the arm. It was not until later that evening that Jason learned from a news program that Mr. Anderson had died.

Why was Jason's personality so profoundly affected by his addiction to crack cocaine? Important clues are found in evidence of Jason's medical history that was never presented to the jury — evidence that strongly suggests that Jason's violent behavior was at least partially explained by factors

beyond his control and incapable of recurrence in a drug-free prison environment.

Specifically, Jason's use of crack cocaine during a few short months in 1992 likely exacerbated a pre-existing brain injury, triggering immature judgment and violent overreaction to stress.⁸ Jason's brain injury never resulted in violent tendencies except during the short period in 1992 when he was using crack cocaine. Jason never had any trouble with the law before his cocaine addiction and has had no significant disciplinary problems while incarcerated. Quite the contrary, he has adjusted well to the prison environment when freed from the effect of street drugs. Dr. Gwaltney, the Commonwealth's

⁸ The courts have never permitted us to have Jason examined by appropriate experts to confirm the existence of brain damage. However, based upon Jason's medical and social history — which includes several serious head traumas, chronic migraine headaches that are associated with periods of behavioral distortion, lead poisoning, oxygen deprivation caused by asthma, intellectual deficiencies, and a family history of severe mental illness — a world-renowned neurologist at Georgetown University, Dr. Jonathan Pincus, has stated that "several factors point to the possibility that Mr. Joseph has brain damage that contributed to and may explain the criminal behavior for which he was tried and convicted." Moreover, cocaine use "tends to impose its own delusional regime on a user and can result in vascular and other damage which may exacerbate a pre-existing brain injury." Ex. 10.

expert witness at the sentencing phase of Jason's trial, testified that, while Jason was incarcerated at Central State Hospital for physical and mental testing, he was "entirely cooperative, adapted quite well in the hospital with some fairly severely mentally disturbed patients and he was absolutely no problem behaviorally" Jason's latest psychological screening by the Department of Corrections similarly describes him as "neat, clean, cooperative."

The jury that sentenced Jason to death was never told about his brain injury or the effects of his addiction to crack cocaine. To the jury, Jason's sudden turn to crime was as erratic and inexplicable as the crime itself. Jason was portrayed as senseless, impulsive, unpredictable, and unfeeling — the very scariest kind of criminal. It is little wonder that this misimpression, especially when combined with the false belief that Jason made an insensitive, uncaring remark to the victim's family and with speculative fears that Jason might be released in a relatively short time if sentenced to life, resulted in a sentence of death.

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If Jason's jury had known the true facts and had been given the sentencing option that you now have — life without possibility of parole — it almost certainly would have concluded that this is not a case in which the ultimate penalty of death should be imposed. If given a sentence of life in prison without possibility of parole, Jason will spend the rest of his days in a drug-free prison environment where he will be of no danger to others.

Conclusion

In 1924, Nathan Leopold and Richard Loeb, the pampered sons of wealthy and prominent Chicago families, were tried for murder. They were about the same age as Jason Joseph at the time of their crimes. They had senselessly tortured and mutilated a 14-year-old boy merely for the thrill of it. At their trial, there was no question about their guilt — the only question was whether they should receive the death penalty. Their lawyer, the famed Clarence Darrow, closed his summation to the judge who would impose sentence with these words:

The easy thing and the popular thing to do is to hang my clients. I know it. Men and women who do not

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think will applaud. . . . Your Honor stands between the past and the future. You may hang these boys; you may hang them by the neck until they are dead. But in doing so you will turn your face toward the past. In doing it you are making it harder for every other boy who in ignorance and darkness must grope his way through the mazes which only childhood knows. . . . I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men. When we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

Maureen McKernan, *The Amazing Crime and Trial of Leopold and Loeb* 304
(Notable Trial Library 1989).

The judge shocked the world by sentencing Leopold and Loeb to life in prison. Loeb was stabbed to death by another prisoner in 1936, but Leopold was released in 1958, after serving 34 years. He obtained a master's degree and died in Puerto Rico in 1971, after working for over a decade with the poor. Jonathan Turley, *The Crime of the Century*, XXII *Legal Times*, No. 19, at 28-29 (Sept. 27, 1999).

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In this case too, the road to the past will likely be more expedient and popular. But Virginia will be no safer if Jason is put to death, and it will be poorer in every moral sense of the word — poorer for denying him any opportunity to present his claim that he was denied a fair and impartial jury, poorer for denying him an opportunity to present truthful and relevant information to his jury concerning the sentencing options available to it, and poorer for denying the humanity of a confused but profoundly repentant and potentially promising young man.

So we too plead, as Clarence Darrow did, that you look to the future, to a time when reason and understanding, not hatred and cruelty, will control the hearts of men. Commuting the sentence of Jason Joseph is the right path, the path that will put Virginia on the high moral ground against those whose passions push them to vengeance and a more violent society.

Only you, with the broad powers Virginia's founding fathers entrusted you with, can correct the egregious mistake this case represents. We urge you to grant this petition and spare Jason Joseph his life.

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Respectfully submitted,

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October 18, 1999

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
State Capitol, Third Floor
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Re: Jason Matthew Joseph — Petition for Clemency

Dear Governor Gilmore:

This letter supplements our October 12, 1999 Petition for Clemency on behalf of Jason Matthew Joseph, who is scheduled to be executed on Tuesday, October 19, 1999. During a meeting last Friday with your counsel, several questions were raised that we take this opportunity to answer in more detail than we were able to provide in person. Specifically, this letter provides further evidence showing that Jason would not be a future danger if sentenced to life in prison without possibility of parole and that the highly inflammatory media reports to which his jury was exposed during the sentencing phase of the trial were false.

Jason Will Not Be A Future Danger.

Our Petition states at page three that Jason's prison record "is clear of any significant disciplinary problems." Mr. Felton asked us whether there have been *any* disciplinary issues since Jason has been in prison. We identified two incidents, one involving a "sharpened" piece of metal found in Jason's sink, and another in which he threw a cup of water at an inmate and accidentally got some on a guard.

We have additional information concerning the former incident that we believe makes a significant difference in understanding the nature of that infraction. Also, we have identified in the prison records a third incident, even more harmless than the other two, that we had forgotten about at Friday's meeting and we here relate. The documentation we have obtained from the Department of Corrections concerning all three incidents is attached. See Exs. 1, 2, 3.

The incident involving the piece of metal found in Jason's sink occurred on May 29, 1996. Some of what Mr. Robinson said about this matter at the meeting on Friday was inaccurate and may have created a misimpression. We must emphasize that the piece of metal found in Jason's sink was *not* a weapon of any sort. Upon investigation, we have learned that

it was a flattened and then folded piece of aluminum from a soda can (not part of a headset), about 2½-inches long and about ½-inch wide at its narrowest point. It was found in plain view *on* Jason's sink, not hidden down the drain as Mr. Robinson mistakenly stated. Jason was using the object for its intended purpose at the time it was discovered — to keep the hot water running in his sink while he prepared some instant soup.

The hot water faucet in Jason's cell was the type that requires constant pressure in order to keep the water flowing. Jason had the idea (apparently common in the cellblock) to jam a piece of metal alongside the handle of the faucet so that he would not have to use his hand to keep the water on. The half-inch end of the aluminum was jammed around the cylindrical portion of the handle to keep the handle from returning to the off position. That end may have had the appearance of being "sharpened" from having been jammed into the edge of the faucet many times. No part of the piece of aluminum was filed or sharpened to a point. The half-inch end was its narrowest dimension.

A guard noticed that Jason's water was running all by itself and came to investigate. He found the piece of aluminum in plain view. Jason made no attempt to hide it and readily admitted possession of the device.

It is important to note that Officer K. Royster's report is not inconsistent with these facts except for reference to a headphone set. The report says:

I observed a 2½ inch piece of metal stuck into his sink. The metal was sharpened on one end and *looked to have come* from a headphone set. Therefore, I am charging inmate Joseph with offense code 224, possession of contraband.

Ex. 1 (emphasis added). Jason stated in explanation at the time: "I just used it to keep my hot water running for my soup." *Id.*

Significantly, the officer does not say that the object found stuck into Jason's sink was a weapon. It was reported as "contraband." This is consistent with our information that the object was not sharpened to a point and also that it was made from the thin aluminum of a soda can, which does not have sufficient rigidity to make an effective weapon. (Prison officials must agree, given the common distribution of soda cans to prisoners.) Also, the report says the object was found "stuck into his sink," not hidden in the

drain as we mistakenly said. Jason pleaded "guilty" to the offense and received ten days of loss of recreation, six of which had already been served at the time of the hearing. Ex. 1. The leniency of Jason's punishment confirms the non-serious nature of the violation.

The second incident that we mentioned on Friday occurred on April 10, 1996. Jason threw a cup of water at an inmate and accidentally got some on a guard. The officer wrote in his report:

On the above date I c/o K. Lutz and inmate T. Fry #221949 were assaulted by water thrown by inmate J. Joseph #213996. I was struck on back and upper right arm. Inmate T. Fry was struck in his face, chest and right arm. I am charging inmate J. Joseph with code 105. Assault upon any person.

Ex. 2. Jason said in his statement: "Me and Fry was joking like that all morning. I didn't try to throw any water on Lutz." *Id.*

Jason was put on pre-hearing detention as a result of this incident but was taken off before the hearing. The report recommending release from pre-hearing detention gave as the rationale: "Does not appear to be a threat to the security of this institution." *Id.* No further disciplinary action was taken.

The third incident occurred on August 7, 1994, which would have been very shortly after Jason was transferred to the Department of Corrections after his trial. Jason was charged with "refusing to stand for count." Ex. 3. Jason's only punishment was a verbal reprimand. *Id.*

We are not aware of any disciplinary issues involving Jason since May 1996 — almost three and a half years. None of the reported incidents involved violence or threats of violence of any sort, unless you count accidentally splashing a small amount of water on a corrections officer during a practical joke. Thus, as we stated in the Petition, Jason's prison records are free of any significant disciplinary issues and confirm that he would not be a future danger if sentenced to life in prison without possibility of parole.

The Media Reports to Which Jason's Jury Was Exposed Were False.

In a letter to Jeffrey Anderson's mother, Jason says:

The second statement I was supposed to have made to your daughter-in-law about "shit happens" (excuse me) when I was found guilty at my trial. I never said anything to any member of the family and I am truly sorry if anything I said to my own family got misquoted.

Petition, Ex. 1 at 1.

In their affidavit, Jason's trial counsel also mention a possible exchange between Jason and his own family:

Sometime after the verdict was read, Mr. Joseph may have turned in the direction of his own family, which was on the opposite side of the spectator section from the victim's family. But we never saw or heard anything like what was reported in the newspaper, and when we read this report the day after the verdict was returned, we were shocked.

Petition, Ex. 4 at 3.

During our meeting on Friday, Mr. Goodman asked if Jason's sister recollected what Jason might have said to her. We interviewed Jason's sister more than two years ago and on Friday could not remember precisely what she had told us, other than that she had categorically denied that Jason had said anything like what was reported in the newspaper.

Since our meeting, we have found our interview notes and they confirm that Jason's family does not recall Jason saying anything offensive to anyone after the guilty verdict was read. We interviewed several of Jason's family members, including Jason's mother, Juliette Holmes, and two of his

sisters, Andrea Belton and Melanie Joseph, at Jason's mother's house in Suffolk, Virginia, on March 22, 1997. Our interview notes say:

Andrea, Melanie and Juliette insisted that Jason made no such statement but instead only turned to his mother and said "I'm sorry, Mom."

We do not pretend to understand how such an innocent statement could have been so badly misinterpreted. One could speculate that perhaps Jason said "sorry this happened" or "sorry it happened" and somehow that was reported as "sh-- happens." Because no court has ever held an evidentiary hearing on this critical issue, perhaps we will never know what actually occurred.

Perhaps the best evidence, however, that Jason never said anything remotely like what was reported in the media is the fact that the prosecution made no effort to exploit this remark during the sentencing hearing. Had the remark been made in the presence of and heard by all the jurors, as Juror Forbes contends (*see* Petition Ex. 8), then certainly the prosecutors would have heard it as well and would have exploited it during their closing statements to the jury. And had the statement been made as Jason was being taken from the courtroom (and therefore outside the hearing

of the jury), as the newspaper reporter later said was the case, then the prosecutor surely would have called a witness to testify to that effect at the sentencing hearing. After all, the alleged comment was devastating evidence of a heartless temper, as the *Virginian-Pilot* editorialized on the morning of the last day of the sentencing trial and as the juror affidavits submitted with our Petition confirm. The fact that the prosecution called no witnesses and made no statements to put the alleged "sh-- happens" comment before the jury strongly corroborates the evidence presented here and in our Petition that no such comment was ever made.

Conclusion

Jason does not deserve the death penalty. If you took the opportunity to meet this young man, even briefly, we are certain you would agree. He is on the verge of execution only because his jury was badly misinformed by false and inflammatory media reports, because of inaccurate speculation by some members of the jury about what its true sentencing options were, and because it was provided with no explanation, though one was readily available, for Jason's sudden deviant behavior.

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We ask you to sentence Jason to life in prison without possibility of parole. It is a severe sentence — more severe than the one Jason might have gotten if the courts had awarded him the new sentencing hearing he deserves. It would fully protect the people of Virginia. And it would tell the world that in Virginia vigorous enforcement of the criminal law is appropriately tempered with justice and mercy. As Portia said in her famous "quality of mercy" soliloquy in the *Merchant of Venice*, mercy "'tis mightiest in the mightiest: it becomes the throned monarch better than his crown; . . . it is enthroned in the hearts of kings, it is an attribute to God himself; and earthly power doth then show likest God's when mercy seasons justice." There is no case where these words could be more applicable — a case in which a young man is about to be executed because technicalities have precluded any court, state or federal, from overturning a clearly unconstitutional and inappropriate sentence of death.

Respectfully submitted,

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Attachments