PETITION FOR EXECUTIVE CLEMENCY

of

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I. THE COMMONWEALTH SHOULD NOT EXECUTE A MAN WHO MOST LIKELY IS INNOCENT

Joseph Patrick Payne is scheduled to be executed on November 7, 1996 for the 1985 burning murder of inmate David Dunford at Powhatan Correctional Center. A review of the evidence in Joe's case as well as the decisions of the state and federal habeas courts raises the real concern that the Commonwealth may be executing an innocent man, while it has put back on the streets of Virginia the convict who, by all accounts other than his own, actually committed the murder. This case is one of the rare few where clemency is appropriate.

A. Joe's Conviction is Based on The Word of "An Appalling and Known Prevaricator"

There likely has never been a capital murder conviction in Virginia based on weaker evidence of guilt than this one. The Fourth Circuit's recent decision denying Joe's appeal Exhibit 1 acknowledges that Joe's conviction "hinge[s]" upon the "eyewitness" testimony of one inmate, Robert Smith, a.k.a. "Dirty Smitty," who "a wealth of evidence demonstrat[es] . . . was an appalling and known prevaricator," and who received 15 years worth of sentence reductions in return for his testimony. No physical evidence linked Joe to the crime. The prosecutor, John Latane Lewis, III, concedes that "without question had [Smith] not been willing to testify, the Commonwealth would not have been successful in getting [a] conviction."

Although the jury did not hear this, the Department of Corrections ("DOC") investigators and the Commonwealth's Attorney

agree that, even among inmates, Smith stands out for his lack of credibility. They have testified that Smith is a "manipulative con man" who will lie whenever it is in his self interest; that Smith lied to them on a regular basis in attempts to receive more favorable treatment; and that Smith lied under oath in a number of other situations.

While the Commonwealth's Attorney represented to the jury that Smith had received 10 years worth of sentence reductions for his testimony, Smith ultimately received 15 years worth of sentence reductions and had a criminal sodomy charge, to which he had signed a sworn confession, dropped in exchange for his testimony. As a result of these reductions, Smith currently is walking the streets of Virginia rather than serving his 40 year sentence for a series of four armed robberies.

The Commonwealth admits that the prosecutor believed that Smith's credibility was so shaky, and the possibility of conviction so uncertain, that at the beginning of trial he offered Joe a plea bargain of life imprisonment and then dropped it to a 30-year sentence while the jury was deliberating. This would have had little effect on a man already serving a life sentence, but Joe turned down the deal, adamantly asserting his innocence.

B. Six Witnesses Say the Commonwealth's Star Witness Committed the Murder

Four inmate eyewitnesses (three of whom the jury never saw) have testified that they saw Smith commit the murder after Joe entered the shower room. Joe, Smith, Dunford and the inmates

allegedly involved in the conspiracy are white. All four of these eyewitnesses are black. Several of them explained that the murder was a "white thing" with which they did not initially want to be involved. They testified that they were coming forward because an innocent man is on death row for a crime they know he did not commit.

Two more inmate witnesses the jury never heard testified that directly after the murder, Smith boasted to them in the prison cafeteria line that he had just burned Dunford, gleefully sharing gruesome details of the murder. Another inmate witness has testified that on the eve of Joe's trial, Smith admitted that he was going to perjure himself and that he would "testify against his grandmother" to get the deal he was being offered.

C. The Star Witness Recanted

Over a year after Joe's trial, Smith gave us a 16-page, signed, sworn affidavit recanting his testimony against Joe and describing the life-threatening pressure corrections officials applied to coerce his testimony. Virtually all of the details of the recantation are corroborated by DOC records or the Commonwealth Attorney's files. (For example, the records confirm that Smith did indeed receive the additional inducements disclosed in the affidavit.) True to form, Smith subsequently recanted his sworn recantation, claiming that he had been coerced.

D. The Courts Have Avoided Dealing With the Troubling Evidence Demonstrating Joe's Innocence

Joe was given an evidentiary hearing in front of the state trial judge who had sentenced him to death. The judge refused even to admit into evidence Smith's sworn recantation and summarily found that all of the witnesses testifying on Joe's behalf were inmates not worthy of belief. Of course, the only evidence against Joe was the uncorroborated account of one inmate -- a suspect who had the greatest incentive to deflect the blame away from himself and whose testimony the Commonwealth procured in exchange for his freedom. In his conclusory seven-page order denying Joe's claims, the state habeas judge avoided making any findings about the abundant evidence of Smith's lack of credibility, instead emphasizing repeatedly that the jury believed Smith. The jury, however, never heard the evidence presented at the state habeas hearing. The state judge's refusal to address this abundant evidence undermining the credibility of Smith's trial testimony constituted a misapprehension of his fact-finding responsibilities in a state habeas proceeding. The federal courts that have reviewed Joe's case have denied relief, simply deferring to the state trial judge's flawed, perfunctory "findings."

E. Clemency Is Appropriate In Joe's Case

Based on the overwhelming evidence in the record of Joe's innocence, even as described by the Fourth Circuit, it is inconceivable that Joe would now be convicted of Dunford's murder. This is precisely the type of case where clemency is appropriate.

The Fourth Circuit in this case asserted that habeas corpus is not the "traditional forum" for Payne's claims of "actual innocence"; executive clemency is. *See* Exhibit 1, *Payne v. Netherland*, No. 95-4106, 1996 WL 467642 at *3 n.2 (4th Cir. Aug. 19, 1996), *citing Herrera v. Collins*, 506 U.S. 390, 400-02 (1993) (Clemency serves as the "fail safe" in our fallible legal system to ensure against the execution of an innocent man).

The fact that Joe is serving a life sentence for the 1981 murder of a convenience store clerk in Prince William County does not diminish his entitlement to clemency in the Dunford case. There was no justification for Joe's senseless actions that night in 1981, and he is serving a life sentence for that crime. Joe committed the 1981 murder in an alcohol and drug-induced stupor, immediately confessed, expressed remorse and attempted suicide several times after his arrest. The Director of the Forensic Unit of Central State Hospital, who normally testifies for the Commonwealth against defendants, examined Joe in connection with that prior crime and was convinced that he could be rehabilitated and did not have a propensity for violence. Joe has accepted his responsibility for that crime and has been punished. He is seeking clemency for a prison murder he did not commit.

If the death penalty is to remain legitimate and vital in the Commonwealth, it must be applied in a principled manner. This means that the death penalty should not be imposed where substantial evidence and the decisions of the habeas courts suggest that the man about to be executed probably is innocent of the crime

for which he was convicted. Granting relief in this case will, if anything, strengthen the Commonwealth's use of the death penalty. It will reaffirm that the Commonwealth administers this ultimate sanction in a fair manner and that executive clemency serves as a meaningful check on the system for those rare cases where substantial "lingering doubt" remains as to the guilt of the condemned man.

As you review the facts in this submission and the decisions of the habeas courts, we request that you keep in mind the following question: "Am I certain that the Commonwealth is executing the man who actually killed David Dunford?" If you cannot answer "Yes" to that question, then Joe should be granted clemency.

II.
THE EVIDENCE IN THE RECORD SUPPORTS JOE'S INNOCENCE

A. Murder and Department of Corrections Determination to Obtain a Capital Murder Conviction

On March 3, 1985, David Wayne Dunford, an inmate at Powhatan Correctional Center ("PCC"), was burned in his cell when an assailant padlocked his cell door, threw a flammable liquid into the cell and ignited the liquid with matches. Dunford died nine days later of burns suffered in the explosion.

One of the initial suspects in the case was inmate Robert Smith. Institutional officers claimed that Smith was seen around Dunford's cell at the time of the murder, and institutional reports indicate that Smith was in fact being investigated for his

involvement in the burning. *See* Exhibit 2, State Habeas Hearing Tr. 144; Mar. 12, 1985 Institutional Classification Committee Report.

Early in the investigation, Virginia DOC officials made it clear that it was "critical" to obtain a capital murder conviction in the Dunford murder. A similar burning murder had occurred at the Virginia State Penitentiary in 1982, and the Commonwealth had not obtained a conviction in that incident. On April 16, 1985, before anyone had been charged in the case, PCC Warden William Rogers wrote DOC Regional Administrator Fred E. Jordan seeking authorization to offer potential witnesses sentence reductions and emphasizing the need to obtain a capital murder conviction:

> [a]n inmate was burned in his cell . . . . **It is very critical to send a signal to others that this type of action will not be tolerated** and an extensive effort will be made to prosecute. **I can not think of a better signal to send than someone being convicted of capital murder.**

Exhibit 3 (emphasis added).

B. **Joe's Trial**

At Joe's trial in April 1986, the prosecution's case-in-chief consisted of the testimony of four inmate witnesses: Robert Smith, William Miller, Terry Stiltoner and Edgar Asher. Smith was the only Commonwealth witness who identified Joe as the murderer.

All four witnesses were inmates at PCC and had previously testified at an earlier trial against inmate Stephen Howard, who was convicted of conspiracy to murder Dunford. Each of these four witnesses had already received a ten-year sentence reduction in

exchange for their testimony in both trials. Exhibit 4. At Joe's trial, the Commonwealth's Attorney elicited from Smith testimony that he received a ten-year sentence reduction in return for his testimony in both cases. Exhibit 5. No information was elicited or disclosed about any other inducements given to Smith in return for his testimony against Joe.

None of the Commonwealth's inmate witnesses, other than Smith, claimed to have seen the murder. Rather, the three other witnesses admitted to their involvement in a conspiracy to kill Dunford, identified Howard as its organizer and leader, and asserted that Smith was also involved in the conspiracy. Although their accounts of the motive for the killing differed, they suggested to one degree or another that Dunford had run afoul of a white prison gang, the Pagans, of which Howard was a leader. *See* Exhibits 6 and 7, May 2, 1985 Statement of Robert Smith to Investigators. While they also alleged that the initial plan called for Joe to commit the murder, Exhibit 8, all three of these witnesses either testified or made statements to DOC Internal Affairs investigators prior to trial that Joe withdrew from the alleged conspiracy and backed out of the plan prior to the murder. Attached at Exhibit 9 is a summary of their testimony to that effect at Joe's trial and in pre-trial statements to investigators, along with the underlying transcripts.

Smith was the only witness to testify that he saw Joe commit the murder. Smith testified that on the day of the murder, he was

at the shower door on the top tier of PCC building C1 when he saw Joe commit the murder. Exhibit 10.

Smith also testified, and made statements acknowledging, that he was involved in a conspiracy directed by Howard to kill Dunford. Smith admitted he was involved in numerous discussions to plan Dunford's murder, participated in testing flammable liquid in Howard's cell several days prior to the murder, and kept the can of flammable liquid used to kill Dunford in his cell prior to the murder. Exhibits 11 and 7. He testified that, according to Howard's plan, he was supposed to put the padlock on Dunford's cell door. Exhibit 12. Smith further testified that he was scared of Howard and that Howard threatened to kill him if he did not follow through with the plan to kill Dunford. Exhibit 11 at Payne Trial Tr. 177.

No physical evidence connected Joe with the murder. The Commonwealth's capital murder charge thus rested squarely upon the uncorroborated eyewitness testimony of Smith. The Commonwealth's Attorney himself has repeatedly asserted that "[w]ithout question, had [Smith] not been willing to testify, the Commonwealth would not have been successful" in convicting Howard and Joe. Exhibit 13.

Defense counsel had subpoenaed sixteen potential witnesses to testify on Joe's behalf, but called only two witnesses at trial, and only one of any significance -- inmate Frank Clements. Exhibit 14. Clements testified that from his vantage point at the shower room door, he saw Smith commit the murder while Joe was in the shower. Exhibit 15. This account was consistent with, but more

detailed than, the testimony he had provided at Howard's trial, where he testified that he and Joe were in the shower room on the day of the murder when they heard a "woosh" and Smith came running into the shower.

Between the Howard trial and Joe's, one of defense counsel's associates had interviewed Clements, who explained that he did not go into more detail in his testimony at the Howard trial because he did not want to incriminate himself as a "watchperson." Exhibit 16. Clements indicated that he was prepared to provide all of the details at Joe's trial because Joe was facing a capital murder conviction. *Id.* The associate's notes of her pre-trial interview made it clear that Clements' testimony at Joe's trial would go beyond his testimony at Howard's trial, and suggested the need to allow Clements to explain the reasons for the difference. *Id.*

At Joe's trial, Clements testified exactly as he told the associate he would. But because co-counsel who called Clements to testify had not read the transcript of Clements' testimony at the Howard trial and was not aware Clements was going to testify he saw Smith commit the crime, Clements did not have an adequate opportunity to explain the reasons for the additional details in his testimony. Exhibit 17. The prosecutor was thus able to impeach him effectively on cross-examination.

The defense then rested on that low note, as it had already dismissed all of its remaining subpoenaed witnesses, some of whom would have been able to corroborate Clements' account. Exhibit 18. Counsel's decision to rest was made over Joe's vehement objection.

He insisted that he wanted to testify and to have the corroborating witnesses testify on his behalf. Exhibit 19.

Despite the missteps of defense counsel, the Commonwealth's Attorney felt that Smith's credibility was sufficiently shaky and the possibility of conviction so uncertain that he twice offered Joe plea bargains during the trial, first a life sentence and later a 30 year sentence. *See* Exhibit 20. The Attorney General's office characterizes it as follows:

> Not only did the defense team feel that it had done a good job in impeaching Smith, so did the Commonwealth. The Commonwealth's plea offer came down from life to thirty years while the jury was deliberating.

Exhibit 21, Brief For Respondent-Appellee in the Fourth Circuit, p.23 n.23.

Such a plea would have had a negligible effect on Joe, as he was already serving a life sentence, but Joe turned it down, adamantly asserting his innocence. The jury convicted Joe and, after a sentencing phase, sentenced him to death on the grounds that the crime was vile. The jury did not find the other statutory aggravating circumstances, *i.e.*, that Joe represented a "future danger" to society.

C. State Habeas Hearing

1. Eyewitness Testimony Implicating Smith

At the state habeas hearing, Joe produced significant evidence that he was innocent and that his conviction was unconstitutionally based on the perjured testimony of Robert Smith. In addition to Frank Clements, two other eyewitnesses, Eddie Phillips and Zeb

Artis, came forward after Joe's trial to support Joe's claim of innocence. These witnesses testified that they saw Smith burn Dunford after Joe had entered the shower on the morning of March 3, 1985. Neither of these witnesses had anything to gain by testifying on Joe's behalf. Both Phillips and Artis are black, and they testified that they are not friendly with Joe or with other white prisoners in general. Exhibit 22. Both men stated they were coming forward because "there's an innocent man . . . on death row for a crime that he did not commit." *Id.* at 78; *see also id.* at 72. A fourth inmate, Jeffrey Austin, also black, corroborated the eyewitness testimony of Phillips, Artis and Clements. He was subpoenaed and ready to testify at Joe's trial, but was never called to the stand.

Below are excerpts of the testimony of each of these witnesses at Joe's state habeas hearing.

a. Eddie Phillips

On the morning of the murder, Phillips was in a cell across and one tier down from that of Smith and the victim Dunford. *See* Exhibit 23.

> [T]his particular morning, I seen Joseph Payne and Frank Clements go in the shower together -- not really together, coming out of the tier, went in the same shower . . . .
>
> Q. Did you hear anybody yell to them or not while they were entering the shower?
>
> A. A guy from cell -- one cell from me, was out on the tier calling, . . . Jeffrey Austin . . . He asked Payne for some cigarettes. . . . [T]hat's when Payne stopped and told him that . . . he didn't have any

> cigarettes. Payne proceeded on to the showers. . . . And right across from me is -- this is where inmate Smitty's cell is. But he's one tier up, but right across from me. . . . [H]e come out the cell, and . . . he was standing on the tier. . . . And Smitty was observing the police [corrections officer] making his rounds. So after the police made his rounds, Smitty went back in his cell, come back out, had a can -- paint can like . . . and some matches. . . . And he had a pair of state jeans on with no shirt on. He went on down to [Dunford's] cell and had . . . a pad lock, you know, to put on Dunford's door -- put a lock on his door and threw . . . whatever he had in the can, I don't know what it really was . . . threw it in there -- threw a pack of matches and . . . .
>
> Q. All right. And what happened?. . . .
>
> A. It was a big ball of confusion -- a lot of smoke, fire and stuff jumping out of Dunford's cell. . . . Smitty jumps, goes in the shower, beside of Frank Clements -- [Clements] was standing at the shower had the door open, looking out the shower, and Smitty goes back and goes in the shower.

Exhibit 23, State Habeas Hearing Tr. 54-58 (the following day, Smith boasted about "burning the dude up"). Phillips described the murder as "a white thing," with which he initially wanted no involvement, especially since another life sentence would not have significantly affected Joe. *Id.* at 59-60. He explained that the reason he came forward only after Payne's trial is that he knows "they condemned the wrong man."

> [I]t was a white guy's problem, you know, and . . . I stay out of white folk's problems . . . [B]ut later on, to me, it won't no white or black problem [anymore], because they condemned the wrong man. So to me, it [became] a human problem.

Id. at 72.

b. Zeb Artis

On March 3, 1985, Zeb Artis was housed directly across from Dunford's cell on the same tier.

> As I was going back to my cell, I seen Frank Clements and Joe Payne heading to the shower. So I'm sitting at the side of the door by my cell and I'm looking out from the door, and I sees . . . Robert Smith leaning over the tier.

Q. All right. And what do you remember that Robert Smith did?

A. I seen Robert Smith duck into his cell and come back out of it as fast as he came in the cell. So I stepped out on the tier, and Robert Smith told me to get back in my cell. . . . He waved me off and told me to get back in my cell, so, you know, I went back in the cell.

Q. And what does that mean to you, when somebody waves you off?

A. Something going to go down. . . .

Q. What did you see Robert Smith do at that time?

A. At the time, I seen Robert Smith coming down the tier with a paint can in his hand, right, and he stopped around about one cell from the laundry room. And -- step to the side, and put the paint can down and put a padlock on the door. . . . After he did that, he took some stuff he had in a can and threw it in [Dunford's] cell. . . . And then . . . he had some matches in his mouth. He took the match and strike them and stepped to the side, and threw it inside the cell. . . . A cloud of smoke and flames finally come out of the cell, and it damn near went through mine -- hit my cell, because I'm straight across from the cell, and I seen him, and the coffee I had [in] my hands spilled all over the floor in my cell, right. Smitty stepped to his right and disappeared in the shower.

Exhibit 24.

When asked why he was coming forward for the first time only after Joe's trial, Axtis responded "[b]ecause there's an innocent man there on death row for a crime that he did not commit." *Id.* at State Habeas Hearing Tr. 78.

c. Frank Clements

> [E]very morning, they ring this bell and it's time for them to open the doors. So I come out of my cell. Mr. Payne slept a cell before me. He came out his cell. He was ahead of me going to the shower. . . . And when we got to about the middle-ways of the tier, . . . Dirty Smitty was leaning on the rails, just leaning there. . . . When we got to the showers, and this guy named Superfly -- another nickname -- called up to Joe and asked him did he have a pack of cigarettes.
>
> Q. Is that Mr. Austin?
>
> A. Yeah. . . . And . . . Joe says no, he didn't have any, so we proceeded to the shower. . . . When we got in the shower, [Payne] got in the shower . . . I came to the door and opened it up to see who else was coming in the shower. I seen Dirty Smitty coming down the hall with a paint can in his hand. And he went to about two or three doors down from the shower. And it looked like he put something on this door, it was a lock or whatever. I assume it was a lock. And then he took the stuff in the can and he threw it in the cell. And I guess he threw a match in, because I heard -- that's when I heard the whoosh sound. . . . And then . . . [Dirty Smitty] comes in the shower.

Exhibit 25.

d. Jeffrey Austin

> On this particular morning, I seen Joe Payne and Frank Clements going in the shower on the top tier, which was C tier. . . . And at the time, I was getting ready to go to work in the kitchen, so I stepped out and asked him and Frank . . . Clements whether I could borrow some cigarettes from them, right. So both of

them replied they didn't know. They proceeded on into the shower on the C tier there.

Q. Did you see Robert Smith that morning?

A. Yes, sir. . . . He was about five cells down from the shower. He had on a pair of blue jeans. He was putting on some plastic kitchen gloves. . . . I observed him standing on the tier and I went on back into my cell to proceed to get ready to work in the kitchen. . . . Then . . . I heard an explosion. That's when I stepped out onto the tier, I seen Smitty, Robert Smith, running down to the shower . . . from the man's cell.

Exhibit 26.

The Commonwealth attempted to discredit the testimony of Joe's witnesses -- Phillips, Artis, Clements and Austin -- by cross-examining them (more than six years after the crime) concerning the minutiae of what each individual was wearing and who said what to whom. Although there were, understandably, some minor memory differences,[1] their accounts were consistent in all material respects.

None of the testimony of these eyewitnesses is inconsistent with the trial testimony of any Commonwealth witness, except, of course, Smith, or with any physical evidence presented at Joe's trial. In addition, unlike all of the Commonwealth's inmate witnesses at Joe's trial, the witnesses who came forward on Payne's behalf had nothing to gain as a result of their testimony.

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[1] For example, on cross-examination, the Commonwealth tried to create differences as to whether Payne was wearing a towel or a robe, Exhibit 27, or whether Austin asked Payne for cigarettes or vice versa, *id.* at State Habeas Hearing Tr. 83, 286.

Other witnesses at the habeas hearing also implicated Smith. Two inmate witnesses, Jesse Pritchard and Van Parker, testified that directly after the burning, in the cafeteria line, Smith bragged about having killed Dunford, offering gory details about how the skin on Dunford's hands was seared to the bars of his cell door. Exhibit 28. Both witnesses were subpoenaed to testify at Joe's trial, but were dismissed by defense counsel and taken back to prison without being called to testify. *Id.* at State Habeas Hearing Tr. 219-220, 230-231; Exhibit 29, Federal Petition for Writ of Habeas Corpus, ¶¶ 81-82.

John Berlin, a former inmate in the Virginia correctional system and a friend of Smith's, also testified to a conversation with Smith on the eve of Joe's trial where Smith admitted that he was going to lie against Joe because "I'd testify against my grandmother today . . . to get the hell out of jail." Exhibit 30, State Habeas Hearing Tr. 256. When Berlin heard the news that Joe had been convicted of capital murder, he immediately contacted Joe's counsel to report his conversation with Smith. Exhibit 31, State Habeas Hearing Tr. 258-60; Federal Petition For a Writ of Habeas Corpus ¶ 84.

2. <u>Recantation of Commonwealth's Only Eyewitness</u>

At the hearing, Joe offered a 16-page, sworn, notarized, handwritten affidavit, signed by Smith on every page, taken at the Augusta Correctional Center on December 17, 1987 by Joe's habeas counsel in the presence of a witness, Marie Deans of the Virginia

Coalition of Jails and Prisons. Exhibit 32, Handwritten and Typewritten versions of Dec. 17, 1987 Affidavit of Robert Francis Smith. In the affidavit, Smith admitted that he perjured himself at Howard's trial and Joe's; that Joe was in the shower when the murder occurred; that Internal Affairs Investigators Thomas Fairburn and Garland Stokes told him what to say; and that he was allowed to coach other witnesses. The affidavit detailed threats made against Smith by the DOC investigators in an effort to coerce his testimony against Howard and Joe. *Id.* It also described inducements offered to him beyond the disclosed ten-year sentence reduction, including a promise that he would receive an additional sentence reduction and that a sodomy charge pending against him would be "taken care of" in return for his testimony. *Id.*

Virtually all of the details in the affidavit are corroborated by DOC records.[2] *See* Exhibit 33, Federal Petition For a Writ of Habeas Corpus ¶¶ 86-111 (summarizing the corroborated details). For example:

- DOC and court records confirm the additional five-year time cut and the dropping of a criminal sodomy charge Smith received in exchange for his testimony. *See* Smith's Affidavit, Exhibit 32, ¶¶ 20, 55; Exhibit 35, Smith's confession, sodomy charge, and subsequent dismissal of charge; 10-year sentence reduction dated Jan. 27, 1986, 5-year sentence reduction dated Sept. 5, 1986.

- Smith's recantation indicates that he suggested he be allowed to coach reluctant Commonwealth inmates on what

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[2] Interestingly, Smith's version of the incident in his recantation corresponds with a pre-trial statement he made to defense counsel's associate Mark Tyndall, in which he claimed that Payne was in the shower when the murder happened. Exhibit 34.

to say and was given such an opportunity. Smith's Affidavit, Exhibit 32, ¶¶ 27, 30. The prosecutor's files corroborate that Smith wrote the prosecutor a letter asking to "help" Commonwealth witness William Miller with his testimony. Exhibit 36. Smith was given contact with both Miller and Commonwealth witness Terry Stiltoner prior to their testimony. Exhibit 37.

- Smith admitted in his affidavit that he continually vacillated in his willingness to testify against Joe and that at one point he threatened the prosecutor that he would call Joe's trial counsel to admit he perjured himself. *See* Smith's Affidavit, Exhibit 27, ¶ 52. According to Smith's affidavit, DOC investigators, in turn, threatened Smith with perjury charges if he changed his story and convinced him to write a letter to the prosecutor recanting this intention. *Id.* at ¶¶ 53, 54. In fact the prosecutor's file contains just such a letter from Smith, Exhibit 38, as well as other letters evidencing Smith's continual vacillation and attempts to receive additional favorable treatment. *See, e.g.*, Exhibit 39.

At the hearing, Smith disclaimed almost every assertion in the affidavit. He testified that although he had signed every page of the affidavit and initialed all crossouts, the words in the affidavit were not his; he did not know the content of what he was signing; and he was coerced into signing the statement, which was invented by Joe's habeas counsel. Exhibit 40. The court refused to allow Deans, who was present when Smith made the statements in his affidavit, to testify in order to refute Smith's testimony at the hearing. Exhibit 41. Asserting "I have an opportunity to demonstrate that Mr. Smith flat out lied to you just minutes ago," Joe's habeas counsel proffered that Deans would testify that the affidavit accurately represented Smith's statements during the meeting and that Smith had read the affidavit as it was prepared prior to signing it. *Id.* at State Habeas Hearing Tr. 209-10.

Joe moved to have Smith's affidavit introduced into evidence under the "declaration against interest" exception to the hearsay rule. Exhibit 42. He further argued that, in any event, in a habeas case involving the potential innocence of a condemned man, the Constitution prohibits the rigid application of evidentiary rules to bar introduction of such clearly relevant evidence. *Id.* The circuit court deferred decision on that issue and ultimately, in its February 6, 1992 order, summarily refused to admit the affidavit into evidence. Exhibit 43.

3. Testimony Concerning Well Known Lack of Credibility of Commonwealth's Only Eyewitness

Every witness at the habeas hearing who was asked about Smith -- including the Commonwealth's Attorney, the DOC Internal Affairs investigators who handled the case, and even Smith himself -- testified that Smith was a "manipulative con man" who would say whatever was necessary to benefit his needs. Exhibit 44 summarizes the testimony of Commonwealth Officials. Lead Investigator Fairburn agreed that even before Joe's trial, Smith lied regularly to Commonwealth officials in order to receive additional favorable treatment. Exhibit 45. Investigator Stokes testified that Smith lied under oath in a proceeding in Wise County Circuit Court concerning promises allegedly made to him in connection with Howard's case and Joe's case. Exhibit 46. Investigator Elwood Barrick testified that he believed Smith's sworn confession to sodomizing an inmate at knifepoint was a ruse Smith invented in order to obtain a transfer. Exhibit 47. Former PCC Warden William

Rogers testified that no warden wanted Smith at his institution after he began cooperating in Joe's case because Smith kept seeking additional special favors in return for his continued cooperation. Exhibit 48. At the hearing, when Joe's prosecutor, Commonwealth's Attorney Jack Lewis, began to explain Smith's manipulative, lying tendencies, the court cut him off, asserting it did not want to hear more cumulative testimony concerning Smith's character. Exhibit 49.

Virtually all of the inmate witnesses who testified at trial or at the habeas hearing explained that Smith's nickname was "Dirty Smitty" because he had a reputation in prison as a con man one simply could not trust. Exhibit 50 contains a summary of the relevant testimony along with the underlying transcript excerpts. At the habeas hearing, even Smith himself acknowledged that he was a lying con man:

> Q. Why do they call you Dirty Smitty?
>
> A. [T]he reason they call me Dirty Smitty is because if I went and borrowed $5 from you and all of a sudden it came time to pay and I didn't have it, why I'd be out to give you a song and dance.

Exhibit 51.

4. <u>Undisclosed Inducements</u>

Although Smith testified at Joe's trial that all he was promised in return for his testimony against both Howard and Joe was the ten-year sentence reduction he had already received, Exhibit 52, his letters to the DOC and his habeas hearing testimony

demonstrate the opposite. In a May 30, 1986 letter to the Manager of the Virginia DOC Interstate Corrections Compact, Smith complained:

> Further, . . . the myth that I received a sentence reduction for my cooperation and testimony in the Howard and Payne trials, is just that, a myth. **The Dept. of Corr. (internal affairs) and the Commonwealth told me I would receive a sentence reduction after each of the trials, but I only received the one.**

Exhibit 53 (emphasis added). Smith testified at the state habeas hearing that he was not "really sure if it was . . . [Investigator] Fairburn or Stokes," who, prior to Joe's trial, promised Smith he would be recommended for an additional sentence reduction. Exhibit 54.

Only three days after Smith wrote the letter claiming he had not received the second sentence reduction he was promised for his testimony against Joe, Investigator Fairburn initiated a request to PCC Warden Rogers that Smith be recommended for another sentence reduction. Exhibit 55. Ultimately, Smith received an additional five-year time cut, raising the total sentence reduction for his testimony at both trials to fifteen years. Exhibit 56. (As a result of these sentence reductions, Smith, who was serving a 40-year sentence for a series of 4 armed robberies, *see* Smith's record, Exhibit 57, was released from the custody of the DOC sometime in September, 1995).

At the hearing, Investigator Fairburn denied that Smith was ever promised an additional sentence reduction in return for his testimony against Joe. Exhibit 56 at State Habeas Hearing Tr. 591-

95. Remarkably, Fairburn claimed that after Joe's trial, he decided gratuitously to recommend Smith for an additional sentence reduction simply because he and Warden Rogers "felt [that Smith] should have [another] time cut." *Id.* at 592-94. Fairburn testified that Smith's letter claiming he was promised an additional sentence reduction is a lie and that it is pure "coincidence" that he decided to initiate an additional sentence reduction request shortly after Smith began complaining about not receiving what he was promised.[3] *Id.*

Internal Affairs Investigator Barrack testified that he had been in charge of the investigation of a forcible sodomy charge to which Smith had signed a sworn confession and for which Smith was indicted in Buckingham County in February 1985, just one month before Dunford's murder. Exhibit 59. Barrack testified that when he discovered that Smith was a possible witness in the Dunford murder, he recommended to the Commonwealth's Attorney in Buckingham County that the sodomy charge against Smith be *nol prossed* if Smith "agreed to testify" against Howard and Joe. Exhibit 59. The charge was in fact *nol prossed* after Smith testified against Howard, at the same time that Smith received his 10 year sentence

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[3] Fairburn also admitted that in his entire career as an investigator (he is now retired), this is the only case in which he ever recommended any sentence reduction at all, let alone two reductions. Exhibit 58, State Habeas Petition Hearing Tr. 580; *see also* Exhibit 56 State Habeas Petition Hearing Tr. 591-95.

reduction.[4] Exhibit 61. The dismissal of the sodomy charge against Smith was not disclosed to Joe's counsel, and thus, was never presented to the jury.

III.
THE COURTS HAVE AVOIDED CONFRONTING THE OVERWHELMING EVIDENCE UNDERMINING CONFIDENCE IN JOE'S CONVICTION

A. Powhatan County Circuit Court's Decision

In a seven-page order dated February 6, 1992, Powhatan County Circuit Judge Thomas Warren summarily denied Joe's habeas petition, without citing a single page of the habeas hearing transcript. Exhibit 43. Judge Warren's order categorically stated that "[n]o credible evidence was produced at the hearing that [Smith] perjured himself at trial or that the prosecution knowingly used perjured testimony." *Id.* at ¶ 1. The order conclusorily stated that the hearing testimony of the eyewitnesses who saw Smith commit the murder -- Eddie Phillips, Zeb Artis and Frank Clements -- was "in hopeless conflict," although it did not identify the conflict. *Id.* at ¶ 4.[5] Judge Warren asserted, with no specific explanation, that

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[4] The account of the dropping of the sodomy charge in Smith's recantation is entirely consistent with the Investigator's testimony. In the recantation affidavit, Smith stated that an Internal Affairs investigator advised him that the sodomy charge would be "take[n] care of" in return for his testimony against Howard and Payne, and that after Howard's trial but before Payne's trial, he was advised that the sodomy charge had in fact been dropped. Exhibit 60, Dec. 17, 1987, Affidavit of Robert Smith ¶¶ 20, 23.

[5] Since the state habeas court's order was issued, Joe repeatedly has defied the Commonwealth to identify in the record any "hopeless conflict" in the materially consistent eyewitness testimony of Phillips, Artis and Clements. The Attorney General's (continued...)

none of Joe's other inmate (or former inmate) witnesses was credible. *Id.* at ¶¶ 5-6. The order also stated, without elaboration, that "[t]he Court has absolutely no reason to believe that time cuts or any other inducements were authorized or promised that were not disclosed at trial." *Id.* at ¶ 12.[6]

The order held Smith's recantation was inadmissible hearsay, without addressing habeas counsel's claim that the "declaration against interest" exception applied or the more fundamental claim that in a habeas proceeding a court should not bar such probative evidence of innocence. *Id.* at ¶ 9. Judge Warren made no finding as to Smith's credibility at all except to note that "the jury thought Smith was a credible witness." *Id.* at ¶¶ 2, 19.

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[5](...continued)
response has been limited to citing picayune differences, six years after the fact, concerning whether Joe was wearing a robe or a towel and who initiated a conversation about cigarettes directly before the murder. Exhibit 62, Brief for the Respondent-Appellee, p.10 n.4. No one can find **any** material conflict, let alone a "hopeless conflict," in the testimony of these witnesses because none exists.

[6] This categorical statement is astonishing. It is uncontroverted that Smith was given an additional 5 year time cut that was not disclosed at trial. *See* Exhibit 35 at Bates No. 01417. The only question is whether Smith understood, prior to testifying against Payne, that he might receive such an additional benefit in return for his testimony. In order for the state habeas court to make its finding, it must have believed that

- the Commonwealth, for no good reason, took an additional 5 years off the sentence of a convicted felon who had already received a 10-year time cut in exchange for his testimony; and
- it was a pure "coincidence" that three days before the Commonwealth "unilaterally" initiated the additional time cut, the felon wrote a letter, apparently lying, about being promised just such an additional time cut.

This latter finding is perhaps the most troubling. It constitutes an abdication of the state habeas court's fact finding responsibilities. In a hearing whose primary purpose was to present a wealth of evidence the jury never heard undermining the credibility of the Commonwealth's uncorroborated "eyewitness," it was improper for the court to rely on the jury's verdict as a reason not to address this wealth of evidence.

B. District Court's Dismissal of Joe's Habeas Claims

After his petition for appeal to the Virginia Supreme Court was summarily denied, Joe filed a federal habeas petition in the United States District Court for the Eastern District of Virginia, Richmond Division. In addition to asserting the claims he had raised in his state habeas proceedings, Joe also moved for a federal evidentiary hearing on the grounds that the state habeas court's summary conclusions were not fairly supported by the record, and that the state court failed even to address Smith's credibility. In a written memorandum and order of June 6, 1994, the district court dismissed all of Joe's claims and denied his motion for an evidentiary hearing. *Payne v. Thompson*, 853 F. Supp. 932, 941 (E.D. Va. 1994), Exhibit 63.

As to Joe's claims that his conviction was based on perjured testimony and that the Commonwealth knew or should have known that the testimony against Joe was perjured, the district court first held that a demonstration of perjured testimony, without a showing that the prosecution knew of the falsity of the testimony in

question, was insufficient to warrant habeas relief. Exhibit 63, 853 F. Supp. at 936-37. Citing several pages of the 833-page state habeas hearing transcript in which the prosecutor made the unsurprising assertion that Smith did not admit to him that he was committing perjury, Exhibit 64, State Habeas Hearing Tr. 772-73, 779, 782, the district court held that the state habeas court's findings were fairly supported by the record. *Payne*, 853 F. Supp. at 937. Those cited pages from the direct and cross-examination at the state habeas hearing of Joe's prosecutor concern only his personal interaction with the Commonwealth trial witnesses. They do not in any way address the overwhelming evidence adduced at the state hearing supporting Joe's perjury claims, nor do they address either the knowledge or actions of Internal Affairs investigators and other members of the prosecution team.

Citing several more pages of the prosecutor's state habeas hearing testimony, *id.* at 763-71, 779-80, the district court held that the state habeas court's finding that it had "absolutely no reason to believe that time cuts or any other inducements were authorized or promised that were not disclosed at trial," was "fairly supported by the record." *Payne*, 853 F. Supp. at 938. Again, nothing in these cited pages demonstrates anything more than that the prosecutor himself was not personally aware of undisclosed promises and inducements made or initiated by investigators and about which much of Joe's evidence is entirely uncontroverted.

As to Joe's actual innocence claim, the district court, without discussing the evidence Joe presented, summarily held that

Joe "cannot meet the 'extraordinarily high' threshold standard established by *Herrera v. Collins*, 113 S. Ct. 853 (1993)] for such claims." *Id.* at 937, Exhibit 63.

C. **Fourth Circuit Denial of Payne's Appeal**

In denying Joe's appeal, the Fourth Circuit, like the district court, simply deferred to the state habeas court's conclusory "findings." Exhibit 1 at *3. The most striking thing about the court's opinion is the way Joe's probable innocence, and Smith's probable guilt, jump off the pages of the Court's own summary of the evidence.

The Fourth Circuit's description of Joe's trial suggests that there was substantial doubt as to Joe's guilt. First, it describes the tenuous nature of the prosecution's case:

> In his direct testimony [at trial], Smith acknowledged that he had been involved in the planning stages of the conspiracy [to kill Dunford], that he had multiple prior felony convictions, and that he had received a ten-year reduction in his sentence for testifying against Payne and another coconspirator; other witnesses asserted that Smith was a liar and a cheat. Two additional prosecution witnesses implicated Payne in the conspiracy to murder Dunford and testified that Payne planned to commit the murder. One of these witnesses was so unstable that the prosecutor announced to the court prior to his testimony that his mental stability was questionable. The remaining witness concluded his cross-examination by stating that **Payne withdrew from the conspiracy prior to the day of the murder**. . . .

Id. at *1 (emphasis added). The decision describes the defense case and the sense of both parties that conviction was unlikely.

> . . . Payne offered the testimony of another inmate, Frank Clements, who claimed to have seen Smith commit the murder. He further testified that Payne was taking a shower at the time of the murder. On cross-examination,

> however, the prosecution was able to demonstrate that Clements' testimony differed in critical respects from the testimony he had provided in the trial of one of Payne's coconspirators. Nevertheless, . . . so confident was the defense that the prosecution would fail that Payne rejected an offer—extended while the jury was deliberating in the guilt phase of the trial—to permit him to plead guilty and receive a sentence that would have been concurrent to the one he was presently serving. The jury nonetheless found Payne guilty of murder.

Id. at *1. The Fourth Circuit also recognized the reasonableness of defense counsel's "strategy" during the sentencing phase of the trial of "capitaliz[ing] on the lingering doubt the defense believed certainly must have existed in the jurors' minds." *Id.* at *2.

The Fourth Circuit's description of the evidence Joe presented in state habeas proceedings is equally compelling:

> Payne offered **copious evidence** in support of his . . . claims during the forthcoming evidentiary hearing. He presented the testimony of several inmates who asserted that they were eyewitnesses and had seen Smith commit the murder. The testimony of these witnesses was consistent to the extent that they all professed to have seen Smith approach Dunford's cell, lock it, and throw liquid into it immediately before the explosion. However, the testimony contained discrepancies concerning what Payne, Clements, and Smith were wearing the morning and whether Payne or another inmate had initiated a conversation immediately prior to the murder. Payne also presented the testimony of several inmates who claimed that Smith had boasted about committing the murder and had admitted that he intended to lie during the trial to implicate Payne in order to receive a reduction in sentence. In addition, Payne proffered a 16-page affidavit, signed by Smith, in which he fully recanted his trial testimony. Further, Payne presented evidence indicating that Smith had received an additional five-year sentence reduction, the dismissal of a forcible sodomy charge, and favorable parole consideration [none of which was disclosed to the jury]. Payne also offered **a wealth of evidence demonstrating that Smith was an appalling and known prevaricator.**

Id. at *2 (emphasis added).

Notwithstanding a recitation of the facts that demonstrates serious lingering doubt as to Joe's guilt, the Fourth Circuit denied Joe's appeal. As for Joe's claims of actual innocence, the Fourth Circuit, citing *Herrera v. Collins*, 506 U.S. 390, 400-02 (1993), held that such claims are more appropriately the province of executive clemency, not habeas corpus. Exhibit 1 at *3 n.2.

D. **Each Court Has Passed The Buck**

Each court that has reviewed Joe's case has chosen to defer to someone else rather than address what the Fourth Circuit characterized as the "copious evidence" of Joe's innocence.

The state habeas court deferred to the jury, who did not see the "copious evidence" presented at the state habeas proceeding. The federal district court deferred to the state habeas court, which deferred to the jury, who did not see the evidence. The Fourth Circuit, too, deferred to the state habeas court, which deferred to the jury, who did not see the evidence. In addition, the Fourth Circuit deferred to Governor Allen, indicating that executive clemency, not federal habeas corpus, is the appropriate forum to address Joe's innocence.

If clemency were to be denied on the grounds that the courts have already reviewed Joe's claims, then Joe would be executed without ever having had anyone take responsibility for addressing the "copious evidence" of his innocence. We urge you not to let that happen.

IV. JOE'S CASE IS ONE OF THE RARE FEW WHERE CLEMENCY IS APPROPRIATE

A. Executive Clemency is the "Fail Safe" For The Condemned Man Who May Be Innocent

Joe's case is unique. Generally, when capital murder cases reach this stage, there is a substantial degree of certainty as to the condemned man's guilt, as a number of courts have reviewed the record and fully addressed the petitioner's claims. Here, by contrast, an objective review of the record and the courts' decisions raises overwhelming doubt as to Joe's guilt. The Fourth Circuit's own recitation of the facts emphasizes the "lingering doubt" that surrounds Joe's conviction and demonstrates Joe's probable innocence.

The Fourth Circuit's opinion also asserts, however, that federal habeas courts are not the "traditional forum" to address such concerns. Exhibit 1 at *3 n.2. Indeed, the United States Supreme Court has emphasized that executive clemency is the appropriate avenue for relief based on evidence suggesting the innocence of a man on death row:

> Executive clemency has provided the "fail safe" in our criminal justice system . . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

Herrera v. Collins, 506 U.S. 390, 415 (1993).

Virginia Governors have provided just such a "fail safe" over the years. So far as we can tell, no one has ever been executed in

Virginia based solely on the uncorroborated testimony of a witness acknowledged to be unreliable. For example, in 1912 Governor William Hodges Mann commuted the sentences of Eugene Dorsey, Calvin Johnson and Richard Pines because the accomplice who testified against them had "proven himself to be unworthy of credit." *See* Governors' List of Pardons, Commutations, etc. and Reasons Therefor, March 4, 1912. In an explanation that is eerily applicable in Joe's case, Governor Mann asserted the necessity for clemency as follows:

> [The accomplice Smith] was a confessed perjurer, and the judge in sentencing him declared that he was a perjurer, and no human being can tell whether he told the truth first or last, and this is the condition which confronts my conscience and involves the lives of three men. If all these facts had been before the juries trying the cases, I would have less difficulty in reaching a conclusion, but they were not, and after careful thought I am in such a frame of mind that, while I do not think the prisoners entitled to pardon, I do not think it just to them . . ., or to the Commonwealth, which only desires to punish those certainly guilty, to permit them to be electrocuted and thus to put correction of any mistakes which may have been made out of the power of the State if the mystery which now surrounds the murder . . . shall ever be cleared up.

Id.

More recently, this same desire to punish only those "certainly guilty" and repugnance towards exclusive reliance on inmate or accomplice testimony in capital cases was the basis for Governor L. Douglas Wilder's commutation of Herbert Russell Bassette's death sentence. Bassette's conviction was based solely upon the testimony of **three** alleged accomplices. In 1992, Bassette's sentence was commuted because the unreliable testimony

of the three alleged accomplices was not corroborated, thus raising serious doubts as to his guilt. Exhibit 65.[7]

Joe Payne's case is one of the few arising in the Commonwealth where there is a need for the "fail safe" of executive clemency. Joe is scheduled to be executed based solely on the uncorroborated testimony of a convict who is a "known and appalling prevaricator," and is, by all accounts other than his own, the actual murderer. The state and federal habeas court decisions do not quell the lingering doubt in this case, and, if anything, suggest Joe's probable innocence. If the Commonwealth wishes to execute only those "certainly guilty," then Joe should be granted clemency.

B. Nothing In The Record Dispels The Concern That Joe Is About To Be Executed For A Crime He Did Not Commit

We urge you to attempt to seek some certainty in the record that Joe Payne, and not Robert Smith, actually murdered David Dunford. We submit that you will not be able to find it.

Throughout the habeas process, the responses to Joe's claims have focussed primarily on procedural arguments. Neither the pleadings in this matter nor the habeas court rulings address the fundamental contradiction in this case: On the one hand the Commonwealth readily concedes that Smith is a discredited, unreliable convict who will lie under oath whenever it suits his interest. *See, e.g.*, Exhibit 66, at 10-11 & n.5, 23. On the other

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[7] Governor Wilder also commuted the death sentences Joseph M. Giarratano and Earl Washington based on evidence demonstrating the likelihood of their innocence. Exhibit 65.

hand, the prosecutor, the Attorney General's Office and the state habeas judge categorically aver that there is "absolutely no reason" to disbelieve the uncorroborated trial testimony procured from this congenital liar in exchange for his freedom.[8]

None of the arguments raised during the habeas process satisfactorily addresses this concern. For example, one cannot rely on the jury's verdict to allay this concern, because the jury did not hear the "copious evidence" presented at the habeas hearing. Similarly, although the state habeas judge summarily asserted that all of the witnesses who testified on Joe's behalf at the sentencing stage are inmates unworthy of belief, such a facile dismissal of the eyewitness accounts of individuals with nothing to gain from their testimony ignores the fact that the only evidence against Joe is the account of one inmate who had every incentive to lie.

Nor is Smith's account corroborated by any physical or testimonial evidence. The Commonwealth's three other inmate witnesses (each of whom was freed in return for his testimony) all claimed that Joe withdrew from any alleged conspiracy prior to the day of the murder. See Exhibit 50. In fact, **of the eleven inmate**

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[8] We also urge you to examine the manner in which the Commonwealth procured Smith's testimony. Not only did the Commonwealth fail to charge Smith for his admitted involvement in the conspiracy to murder Dunford and give him a ten-year time cut. According to the DOC investigators, it also unilaterally gave this felon serving a 40-year sentence for a string of armed robberies an additional 5-year time cut for no reason at all. This unprecedented generosity led Fourth Circuit Judge William Wilkins, Jr. to ask at oral argument whether "the Commonwealth is now giving **freebies** to convicts."

witnesses to testify at the trial or the state habeas hearing, the only one to offer an account inconsistent with Smith's having committed the murder is Smith. Exhibit 67.

Finally, although there are a number of arguments in the record concerning the 1981 murder for which Joe is serving a life sentence, the facts of that case should not be used to justify Joe's execution for a prison murder he did not commit.

C. Payne Should Not Be Executed Based On The 1981 Murder For Which He Is Serving A Life Sentence

On February 4, 1981, Joe Payne murdered Mrs. Louise B. Winslow in a robbery of Winslow's Grocery Store in Bristow, Virginia. As the attached presentence report indicates (and as Joe readily agrees), this crime, which Joe committed with his foster brother while intoxicated, was an inexcusable act of violence. Joe immediately confessed to the crime, demonstrated remorse, and, on several occasions attempted suicide. He was charged with capital murder.

In preparation for trial, Joe's defense counsel in that case had him examined by the Forensic Unit of Central State Hospital in Petersburg, Virginia. Attached at Exhibit 68, is the August 31, 1981 letter from Joe's counsel to the Forensic Unit Administrator describing the reasons for the examination, Joe's background, and the circumstances surrounding the crime. After a thorough examination of Joe, as well as review of voluminous material provided by both the Commonwealth's Attorney and defense counsel, the State's Forensic Unit Director, Dr. James C. Dimitris, and its

Clinical Psychologist, Dr. Henry O. Gwaltney, concluded that Joe could be rehabilitated. Exhibit 69. Below are their conclusions:

> As a result of our examinations and review of material furnished to us, it is our opinion, with reasonable professional certainty, that Mr. Payne was under substantial emotional distress at the time of the crime. Although an individual who has sincerely attempted to support his family and achieve occupationally, he had been unable to do so and had recently lost his job due to reasons which he felt were entirely unfair. His marriage was disintegrating and his wife had definitely planned to leave him with a child that he cared very greatly about. This rejection on the job and by his wife was extremely distressing to Mr. Payne and the expectation of another child being born in the near future and his loyalty in attempt to help his brother taxed his limited resources substantially. This led to utilizing poor judgment through the excessive use of alcohol and resulting in the criminal act.
>
> Based on our entire experience with Mr. Payne, it is our opinion that with his desire and motivation, through the correctional processes available for youthful offenders, like the Southampton Correctional Center, he could be given the opportunity to develop into a more mature individual who could cope with life, as well as be given vocational and personal skills that will allow him to do so. This is based, of course, on the availability of such needed services and his willingness to be involved in taking advantage of the therapeutic and educational opportunities.

Id.

Based in part upon these findings, and the fact that Joe had no other record of violence,[9] the trial judge in the Winslow case found that Joe could not be determined a future danger, and that the appropriate sentence was life in prison.

Any argument, tacit or explicit, that it does not matter whether Joe committed the prison murder because he should have been

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[9] Joe's only other conviction was a grand larceny charge in 1976, for which the Circuit Court of Prince William County sentenced him to a two-year suspended sentence.

executed for the murder of Mrs. Winslow is dangerous and unprincipled. Such a position is premised on the assumption that it is acceptable for the Commonwealth to subvert the criminal justice process and the Constitution in order to obtain executions.

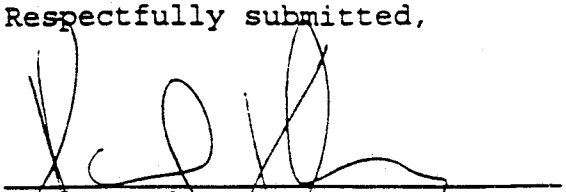
D. Granting Joe Clemency Will Strengthen The Death Penalty In Virginia

Most people in Virginia favor the death penalty. Most also are likely to agree that executions should be carried out only when there is reasonable certainty as to the guilt of the condemned man. Going forward with the execution of a man who probably is innocent of the crime for which he was sentenced places the goal of performing executions over the ends of justice. By contrast, granting clemency to Joe will assure the people of Virginia that there remains a "fail safe" in the Commonwealth for the rare cases like this one where the fallibilities of our criminal justice system result in the wrongful conviction and death sentence of an innocent man. It will send a signal that the Commonwealth is strong and fair.

V. CONCLUSION

We conclude with the question we started with: "Are you certain that the Commonwealth is executing the man who actually killed David Dunford?" We submit that the only reasonable answer based on the record and the habeas court decisions in this case is "No." Accordingly, we request that Joe be granted clemency.

Respectfully submitted,



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