
IN RE

DAVID L. FISHER

PETITION FOR EXECUTIVE CLEMENCY AND COMMUTATION OF THE
DEATH SENTENCE
BY THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA

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On behalf of DAVID L. FISHER

INTRODUCTION¹

David Lee Fisher asks that the Governor exercise his clemency power to commute his death sentence to a sentence of life in prison. In the alternative, David asks that the Governor grant him a new sentencing hearing. David has steadfastly asserted his innocence of the crime for which he was convicted, and he continues to maintain his innocence. Indeed, it is undisputed that he never killed anybody (he was convicted of murder-for-hire, and the actual killer is eligible for parole in six months.) Recognizing, however, that clemency is not frequently granted, David has narrowly tailored this clemency request to address that aspect of his case where the courts have most clearly failed to do justice: the sentence.

Due to the poor performance of his trial counsel, David never got the opportunity to present his story of the events surrounding David Wilkey's death in a complete and coherent fashion to the jury. Trial counsel failed to seek out witnesses that would have corroborated David's version of events, failed effectively to examine favorable witnesses that were called to testify on David's behalf, failed to challenge and impeach the credibility of witnesses testifying against David - at least one of whom is now known to

¹ Exhibits to this petition are enclosed in the Clemency Appendices, Volumes I-III. Pages in the appendices are numbered straight through with the designation "CA" preceding the number. The petition refers to exhibits by their CA numbers.

have lied - and failed to exclude untrue, unreliable, and inadmissible evidence from being admitted at trial. [CA 1717-78, Expert Testimony State Evidentiary Hearing].²

Perhaps most importantly, David's trial attorney failed to prepare a mitigation case for the sentencing phase of the trial, because he did not understand the significance of the separate sentencing phase. His admitted "strategy" was simply to hope that questions about guilt or innocence "might linger in the Jury's mind...[and] carry over into the death phase." [CA 1779-80]. Literally dozens of friends and family members would have presented non-cumulative testimony about David's reputation for non-violence, his generosity with both his time and his money, his concern for elderly neighbors, his reputation for kindness and compassion, his participation in volunteer organizations, and the positive impact that he has had on the lives of young people. [CA 896-1077]. The following is, in part, the story that the jury at David's trial should have heard, but did not, due to trial counsel's blunders.

The purpose of this petition is to show the David Fisher that the jury at his trial never got to see. The jury thought they knew the real David, but a cloud of lies - which the chief prosecution witness now admits - mistakes, and misunderstandings obscured him from their view. Here is the real person, seen with clarity through the eyes of the people who know him best, and here are the reasons that his life should be spared.

² Courts that have reviewed this case have agreed that David's trial counsel's performance was, at least in some respects, deficient. [CA 1177, 1296-97].

DAVID FISHER:
THROUGH THE EYES OF HIS FAMILY AND FRIENDS³

David Fisher's life has touched many people, as would the impact of his execution. To Jody Ayers, David's stepson from a prior marriage, he is "my father in all of the important ways" and "more like a father to me than my real father." [CA 1666-69]. David provided "guidance in times of trouble" when Jody had no one else. The David that Jody knows is "genuinely a good-hearted man, especially to anyone and everyone that was in some type of need," and Jody misses the "wonderful father figure" that he has been deprived of for the last thirteen years of David's incarceration. Jody wishes that the Governor could "know him the way I did, and not for the person he was made out to be."

To Tami McCune, whose real father was an abusive alcoholic, David became a great friend and father figure. [CA 1682-86]. Tami met David at a crucial point in her life, when she might easily have chosen a self-destructive path by dropping out of school or turning to drugs and alcohol. David gave her advice that she still lives by, and instilled in her the importance of a good education. At a time when she had very low self-esteem, he gave her a part time job to give her a sense of worth and security. "Over and over he kept telling me that I was going to be somebody and how smart I was. He helped me to see in others the good they had to offer, regardless of their outside appearance." Tami

³ This section describes the letters that have been written specifically in connection with this clemency petition. As discussed at pp. 31-43 below, many of these people would have testified at David's sentencing hearing if only they had been asked, and over thirty people submitted affidavits in David's habeas proceeding, attesting to his good character.

now passes along David's advice to her own daughter. She prays that you will spare the life of "the one person that always cared."

Doris Essary, a step-sister by marriage, knows David as someone that she "accepted and loved as [her] own big brother," who "protected her and her three sisters." [CA 1672-73]. Even though David had been "deprived of the love and attention that he needed from his own father," he was an excellent father to his children, whom he loves very much. David is on the prayer list at Doris' church. Doris looks to the Bible for comfort, and finds the example of King Solomon, a man raised to a position of power and endowed with the wisdom to understand "the necessity of mercy and compassion" and the ability to judge accordingly.

Carol Matsushino, a friend who has known David since she was a little girl, was "consumed" with sorrow when she learned that an execution date had been set. Her daughters, ages 2 and 6, could not understand why their mom was so sad. [CA 1678-79]. The David Fisher that Carol knows, is someone who "always manages to make me smile." Carol believes that "a part of me will die with him if he is put to death."

Jonathon Williams, a 14 year-old from Memphis, Tennessee, knows David is "Uncle Lee," whose "heart-to-heart letters" and good advice have been a "source of inspiration." [CA 1704]. David has been "like a mentor" who keeps Jonathon "on the straight and narrow."

To Norma Jones, David's aunt, he was a tender-hearted boy, respectful and kind to older people, who assisted her when her husband was killed in an accident. [CA 1676]. Norma writes, "Sir, I am 73 years old and have had a lot of troubles, but it would break a lot of hearts for David to be put to death."

Virginia Mattern came to know David four years ago as a pen pal. [CA 1680]. David counseled her teenaged son, Jeff, who had developed a drinking problem. By sharing his own experiences, David persuaded Jeff to turn his life around. Ginny believes that David's "personal story, told first hand, is more likely to influence others than a late evening execution."

Bobby and Sarah West of Heartbeat Prison Ministries have witnessed David's positive growth over the years of his incarceration. [CA 1702]. David has befriended many new-comers to Death Row. Often the first one to introduce himself, he has offered "comfort and assistance to many."

Patricia Steffans, David's sister, is a registered nurse in Foyil, Oklahoma. [CA 1698-99]. She writes of the pain that David's family has endured waiting to learn if David will live or die. Patricia adds the reminder that "they are also victims – victims of hurt, pain, and self-recriminations stemming from being unable to help him when he needed it the very most." As a nurse, Patricia confronts life and death issues – and the preciousness of human life - almost daily. It is difficult for her to imagine how members of her profession could participate in an execution: "Although I know that lethal injection is given by a medical professional I could not be the one that was placed in charge of such a task. I could not in the eyes of God say that a person deserves to die, and then take it upon myself to administer death."

The people listed above are just a sample of the many friends and relatives - among them, a school teacher, a corrections officer, a former sheriff, a nurse, a student, a housewife and mother, a minister, a small businessman, and many others from all walks of life - that have written letters on David's behalf. Please carefully read and consider the

letters that David's family members and friends have written, located at CA 1664-1704, 1711-16 and 1796-98. These are honest, hard-working people who cherish the life of David Fisher. These letters were not easy to write, but they were written in the hopes of communicating what David's life has meant, as well as the sorrow that his death would bring. In the words of Eugene Fortner, who signs his letter simply "Brother," many people hope and pray that you will "find it in your heart to spare David's life." [CA 1675].

THE FACTS OF THE CASE

David Fisher, who is now fifty-seven years old, was living in Charlotte, North Carolina at the time that he met David Wilkey. David (Fisher) had started his own business in Charlotte and worked a second job as a bail bondsman. He and Wilkey met at a local coffee house where Wilkey worked as a short order cook. David soon befriended Wilkey and allowed him to share his apartment, in return for assisting David with his business.

Wilkey began dating a young woman named Bonnie Jones, and they decided to marry. In preparation for his responsibilities as a married man, Wilkey attempted to take out a life insurance policy. Wilkey first asked his fiancée to be the beneficiary named on the policy, but she refused, stating that she wanted to wait until after they were married.

[CA 39, 473-74]. Wilkey next approached David, who also expressed reservations.

Wilkey eventually persuaded David to do him this favor. [CA 272-73, 352].

The insurance company initially rejected Wilkey's application, because David lacked an insurable interest. The insurance company only issued the policy after Wilkey signed a paper naming his estate as the beneficiary, instead of David. Once the policy

was issued, however, Wilkey changed the beneficiary from his estate back to David, because Wilkey had parted ways with his mother and did not want her to get a share of any insurance proceeds

On November 21, 1983, David, Wilkey, and a friend named Bobby Mulligan came to Virginia to go deer hunting with David's stepsons, who lived near Roanoke. A few days earlier, Jody Ayers, David's oldest stepson, had called to ask David if he would take him hunting on the opening day of deer season. [CA 181-85, 194-96, 1666-69]. David called Jody back the next day to tell him that he could. David asked at that time if Jody's mother (David's ex-wife), Barbara Lineberry, would object if he brought along a couple of friends, Wilkey and Mulligan.

David, Mulligan, and Wilkey checked into a motel the day before the hunting trip. David's stepsons, Jody and David Ayers, later joined the group at the motel. [CA 185-87]. That night, while David and his stepsons were preparing for bed, they overheard a heated argument taking place in the next room. Wilkey and Mulligan were fighting over Wilkey's fiancée, Bonnie Jones. Suddenly, Mulligan grabbed a pistol and pointed it at Wilkey, threatening to kill him. David broke up the fight and ordered Mulligan to leave the room if he could not calm down. [CA 221-24, 188-87, 196-99].

The next morning, the group left early to go hunting on a farm, where Jody had often hunted with his grandfather. David's youngest stepson, David Ayers, did not accompany them, because he was not old enough to hunt. [CA 222]. As they approached the property, Mulligan walked out ahead of the group into an electrified fence. [CA 110]. When he realized that Wilkey was laughing at him, Mulligan shouted, "Just keep on laughing, I'll kill you!" [CA 188-89, 202-03].

To make the hunt more exciting, they placed a \$50 bet on who could shoot the first deer. [CA 1666-69]. David and Jody hunted one side of the farm, while Mulligan and Wilkey hunted the other side. The day wore on without success, and Jody lay down under a tree to take a nap. [CA 191-92]. Suddenly, David and Jody could hear shouts indicating that Wilkey had spotted a deer. [CA 204]. Wilkey went running after the deer, with Mulligan in hot pursuit. Wilkey and Mulligan, guns cocked, chased the deer down a slope into the woods. Mulligan slipped on a patch of wet leaves and grass, fell, and slid to the bottom of the hill. [CA 118].

When Mulligan collected his wits, he looked up, embarrassed to see Wilkey, two or three feet away, laughing at him. Mulligan snapped. He put the gun to his shoulder and shot, fatally wounding Wilkey. Mulligan has stated repeatedly, in court, in interviews, and in his affidavit, that he never intended to kill Wilkey. [CA 116-17, 1705-08].

As soon as David arrived on the scene and saw what had occurred, he yelled for Jody to run to the farm and call an ambulance. When EMS arrived, they found David cradling Wilkey's head in his arms. Mulligan was laying on the ground under a tree in shock. Local authorities investigated Wilkey's death and classified it as a hunting accident. [CA 126-27].

A few weeks after Wilkey's death, David contacted the insurance company about paying the policy. The insurance company hired an investigator to look into the case. After interviewing David and Mulligan several times and subjecting David, Mulligan, and Bonnie Jones to a polygraph test, the insurance company settled with David for a portion of the policy's value.

Two years later, Gerald Steadham, a former friend of David's, contacted the FBI, claiming that he had information about the hunting accident in Bedford County. Steadham, who owed David a substantial debt, told the FBI that he was coming forward because he feared for his life. Steadham claimed that David hired Mulligan to kill Wilkey in order to collect the proceeds from Wilkey's life insurance policy. The FBI had Steadham wear a "wire" and directed him to obtain David's confession to the murder of Wilkey. The FBI even paid off Steadham's debt to David, so that David would speak more freely. On six separate occasions the FBI taped conversations between David and Steadham, in which Steadham prodded David to confess (the "Fisher-Steadham tapes"). David never admitted culpability. However, David did claim on the tapes that he had been tried and acquitted of killing two people in Kansas and Illinois that he had, in fact, murdered. [CA 457-58, Excerpt from Fisher-Steadham tapes]. This claim later proved completely false - merely an empty "macho" boast. (David worked as a bail bondsman, in which line of work it was commonplace, and necessary, to maintain a tough appearance. This tough "front" sometimes included false bragging.) Based upon the Fisher-Steadham tapes, the case was given to a Virginia grand jury, which handed up indictments for murder-for-hire.

David and Mulligan were arrested in Charlotte, North Carolina, on November 12, 1986. Mulligan eventually confessed to the murder, following an alleged "jail house conversion." [CA 459-72, Mulligan Affidavit, Christian pamphlet placed in Mulligan's cell]. A few months later, in April 1987, he entered a guilty plea.

Prior to pleading guilty to capital murder, Mulligan learned that the prosecutor wanted him to testify at David's trial. Mulligan's attorneys assured him that he had a

90% chance of escaping a death sentence if he agreed to do so. [CA 1705-08]. Mulligan entered his guilty plea on April 7, 1987, and testified one month later as a key witness for the prosecution. The state prosecutor delayed Mulligan's sentencing until after David's trial.

The state's primary witnesses were Mulligan; Steadham, who testified that David admitted the crime, even though he never captured an admission on tape; and Wilkey's mother, who testified that the insurance policy on her son's life was forged. Another key witness for the prosecution was David himself, whose raunchy language, empty bragging, and "macho" talk on the tapes that Steadham surreptitiously recorded, falsely cast him as a dangerous "tough guy." These tape recordings, including two taped in violation of David's Sixth Amendment right to counsel,⁴ were played for the jury in their entirety without objection from David's counsel.

In his defense, David alleged that Mulligan killed Wilkey because of personal animosity, and that Mulligan had tried to save his own life by implicating David. David stated that he and Wilkey shared a close bond, and he offered witnesses to attest to their excellent relationship. [CA 169-80, 237]. David argued that the statements on the Steadham tapes were just empty "talk" of the kind customary among his friends. [CA 331-35, 169-175]. An expert witness confirmed that all of Wilkey's signatures on the insurance papers were genuine, except for one document that was not beneficial to David because it changed the beneficiary from David to Wilkey's estate. Crucially, Bonnie

⁴ The Commonwealth has conceded that these tapes were obtained in violation of David's Sixth Amendment right to counsel.

Jones even testified that she had declined Wilkey's offer to be the beneficiary on the policy and that she asked him to find somebody else. [CA 39]. The Bedford county jury found David guilty of murder-for-hire and sentenced him to death based on "future dangerousness."

SUMMARY OF THE ARGUMENT

David Fisher is not an appropriate candidate for the death penalty for many reasons. First, there is sufficient doubt about the fairness of David's trial and the reliability of the witnesses that testified against him to warrant commuting his death sentence to a sentence of life in prison. An affidavit recently signed by Bobby Mulligan raises important questions about David's culpability for the crime and about the fundamental fairness of David's trial. [CA 1705-08]. Mulligan, the alleged "hired," and the prosecution's star witness against David, now states that he was "manipulated" by the prosecutor into giving his testimony, that he said "exactly what the prosecutor wanted to hear," and that he testified against David for the "sole reason" of saving himself from the death penalty. [CA 1707].

Mulligan now also admits that he "disliked" the victim, because he thought of him as a "spineless weakling." In his affidavit, Mulligan states that he killed Wilkey "on my own," and not because he feared David. [CA 1706]. These statements corroborate the trial testimony by David and his stepsons describing the animosity between Wilkey and Mulligan. In addition, Mulligan's affidavit reiterates what he has been saying all along, that he "never meant to kill David Wilkey." [CA 1706]. Taken together with the trial evidence of Mulligan's fragile nerves [CA 91-92, 123-24], his drug use [136-38], his inability to recall important details of the so-called "murder-for-hire scheme" [CA 57-62,

101-02], and the fact that family and friends could not recall him ever receiving any large sums of cash - when by all accounts he would have “flashed around” any cash that he had [CA 896-907]- Mulligan’s recent affidavit strongly suggests that he acted alone. [*See generally* Mulligan’s Testimony at CA 47-168].

The other major witness against David was Gerald Steadham, who offered his services to the FBI to try to elicit a confession. Steadham owed David a debt of \$650, which the FBI paid to get Steadham back in David’s good graces. Steadham’s girlfriend at the time, Karen Reynolds Hopper, has signed an affidavit stating that Steadham told her of his intention to “frame” David for Wilkey’s death, because he would receive “a lot of money for doing so.” [CA 1804-08].

Second, there is substantial new evidence that undermines the reliability of David’s death sentence and warrants commuting his death sentence to a sentence of life in prison. Due to procedural constraints, this evidence - which did not surface until years after trial - has not been heard on the merits by any court. One of the jurors in David’s case has signed an affidavit admitting to serious juror misconduct. [CA 729-30]. (Even the District Court, although it found the claim procedurally barred, recognized that the prosecution would be “in trouble” if the claim were heard on the merits.) [CA 1267-68]. Juror Bertha Thomas states in her affidavit that she was “the lone hold-out” against imposing a death sentence. Contrary to the court’s explicit instructions, Mrs. Thomas discussed her status as the “lone hold-out” with her husband, Walter Thomas. Mr. Thomas admits telling his wife to go along with the rest of the jury and vote for death, and he corroborates his wife’s statements in an affidavit. [CA 732]. Mrs. Thomas says that she cast her vote to impose a death sentence because her husband told her to do so.

Under the Virginia death penalty statute, the trial judge cannot enter a death sentence without the unanimous recommendation of the jury. *See* Va. Code § 19.2-264.2-4. If Mrs. Thomas had not succumbed to her husband's improper charge not to hold out for a life sentence, the jury could not have voted unanimously in favor of the death penalty. Thus, the Judge would have been required by statute to impose a life sentence. *See* Va. Code § 19.2-264.4 (d)(2) ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life."). David only asks that the Governor impose the same sentence that he would have received if his jury had not been tainted. If he chose to do so, the Governor could even impose a harsher sentence - life without possibility of parole - than Judge Sweeney could have imposed under statutory law at the time of David's trial.

Third, David's death sentence is unreliable because the jury based its finding of the "future dangerousness" statutory predicate on false, misleading, and incomplete information. Under Virginia's death penalty statute, David could not have received a death sentence unless the jury found at least one statutory aggravating factor as a predicate for recommending the death penalty. *See* Va. Code § 19.2-264.2. Virginia's capital statute only provides for two aggravating factors: vileness and future dangerousness. *Id.* The jury explicitly rejected the "vileness" aggravator in David's case. *See Fisher v. Commonwealth*, 236 Va. 403 (1988) (holding that a verdict based solely upon "future dangerousness" rendered moot on appeal all issues related to "vileness"). They based their recommendation of the death sentence on the finding that David posed a "future danger" to society.

The jury's finding that David presented a "future danger" rested upon two equally important pieces of evidence: (1) testimony by Bobby Mulligan that David scared and intimidated him into killing Wilkey and (2) the Fisher-Steadham tapes, in which David boasted of "getting away with" other murders in Kansas and Illinois. Both were false.⁵

Bobby Mulligan's affidavit leaves no doubt that he lied when he testified that he was afraid of David. He now admits that he embellished his story to make it more dramatic – thereby increasing his own chance of escaping the death penalty. As his affidavit makes clear, Mulligan saw himself as an "actor" who played the role of the victim, and he disingenuously cast David in the role of the devil. [CA 1706-07]. In reality, Mulligan killed Wilkey "on his own," and not because he was coerced or intimidated. [CA 1706].

The evidence on the Fisher-Steadham tapes that David had "gotten away with" other murders was also completely false. David's trial attorney failed to check his facts, so he did not present the evidence to the jury necessary to prove that those crimes were never committed. This error enabled the prosecutor to argue that Fisher was a highly dangerous man who mocked the legal system and flouted the law with impunity. [CA 449-56]. A search of the court records in Kansas and Illinois would have proven that the alleged trials and acquittals never occurred. [CA 549-55, 613-727]. David, in fact, had no prior record of violence whatsoever.

⁵ Although David had a substantial record of prior felonies, the majority of these offenses were for "paper" crimes such as forgery and uttering false checks. David had no prior convictions for violent crimes. [CA 518-48, 565-612].

Fourth, the fairness of David's death sentence is unreliable because David's trial counsel failed to present literally dozens of good character witnesses who would have given the jury insight into the kind and caring man that David truly is. Capital murder trials are split between the guilt/innocence phase and the penalty phase for the precise reason that a conviction should not equate with a death sentence. The penalty phase opens the door for mercy to place its check and balance upon the urge for vengeance. David's trial counsel, however, foreclosed the possibility for mercy by failing to present a mitigation case. This clemency petition seeks to provide the Governor with that portrait of David Fisher that the jury never got to see, and asks the Governor, at this final hour, to have mercy upon David and to commute his sentence to life in prison.

Fifth, the sentence is disproportionate to the crime, even if all doubts about the fairness of the trial are resolved against David. The triggerman in this case, Bobby Mulligan, received a life sentence with the possibility of parole. In fact, Mulligan is eligible for parole in September of this year. Even if the Governor were to sentence David to life without the possibility of parole, his sentence would still be harsher than the sentence of the actual killer, who still lives in hope that he will someday be set free.

The circumstances of the crime distinguish it from other cases in which a death sentence was imposed. David Fisher has never killed anyone. To our knowledge, no person in Virginia has ever been executed as the "hirer" in a murder for hire scheme. David would be the first. In fact, under very analogous circumstances in the Robin Radcliff murder-for-hire case, the outcome was exactly the opposite of the outcome in David's case. Robin Radcliff, also convicted as a hirer in a murder-for-hire scheme, received a life sentence as the less culpable of the co-defendants. Whereas, Mario

Murphy, the “triggerman,” received a death sentence as the most culpable. [CA 1414-81].

PART ONE:

Questions about the Fairness of the Trial and the Reliability of Key Witnesses Warrants Commutation

A. Bobby Mulligan’s Affidavit

On February 26, 1999, Bobby Brice Mulligan, the prosecution’s star witness against David, signed an affidavit “correcting” the testimony that he gave at David’s trial in 1987. [CA 1705-08]. These so-called “corrections” cast substantial doubt on the truthfulness and reliability of Mulligan’s testimony. Although Mulligan has not completely recanted his trial testimony, his affidavit, nevertheless, presents a very different version of the events surrounding Wilkey’s death than the story that the jury heard and believed to be true. Mulligan’s affidavit thus casts doubt upon the fairness of David’s trial, the reliability of his sentence, and, ultimately, upon David’s guilt.

Both Mulligan and David were arrested by the FBI in November 1986. On April 7, 1987, Mulligan pleaded guilty to the capital murder of David Wilkey as part of a murder-for-hire scheme, and implicated David as the man who hired him. On July 2, 1987, Mulligan, the “hired” in the alleged murder for hire scheme, testified against David at trial. At the time of David’s trial, Mulligan had not been sentenced. [CA 89]. The power of Mulligan’s testimony derived in large part from Mulligan’s claims that he was promised nothing in exchange for his testimony and that he did not know what his sentence would be. [CA 89-90]. According to Mulligan, his only reason for testifying was to “get myself right” with God to “go to heaven.” [CA 90].

Reviewing courts have accorded great weight to the reliability of Mulligan's testimony, because he knowingly "exposed himself" to the death penalty by pleading guilty to capital murder without any guarantee from the prosecutor about the sentence that he would receive. Magistrate Conrad, in his Report and Recommendation to the District Court called Mulligan's testimony, "virtually unimpeachable," because he concluded that Mulligan had "nothing to gain and everything to lose." [CA 1162]. District Court Judge Kiser agreed. In a section of his opinion entitled "The Importance of Mulligan's Testimony," he called Mulligan's testimony "extremely reliable" and "a virtual bar" to any showing that David was prejudiced by the errors of his trial counsel. [CA 1276, 78]. The Fourth Circuit also noted the importance of Mulligan's testimony to the prosecution's case, since he provided the only "first hand" account of the events. [CA 1333].

Like the courts, the jury was unaware of Mulligan's acting talent and placed great faith in the truthfulness of his testimony. In juror interviews, conducted in anticipation of the federal habeas evidentiary hearing, jurors revealed that Mulligan's testimony was pivotal to both the guilt/innocence and sentencing decisions. One juror, Marjorie Miller, who was interviewed on May 21, 1997, believed that Mulligan was "learning disabled," and that he had been "victimized" by David Fisher. [CA 1794]. She blamed David for having "ruined" Mulligan's life. [CA 1795]. Others recalled in vivid detail Mulligan's dramatic account of the hunting expedition and his description of Fisher forcing Mulligan to kill Wilkey. [CA 1794-95].

Bobby Mulligan's recent affidavit, signed February 26, 1999, proves that such faith in the reliability of Mulligan's testimony was misplaced. Before he ever pleaded

guilty, Mulligan learned that the prosecutor wanted him to testify against David Fisher. Mulligan's attorneys assured him that he had a 90% chance of escaping the death penalty if he would cooperate with the prosecution's case against David, and Mulligan personally believed that "in order to save myself from the death penalty, I had to testify against David Fisher." [CA 1705-06].

Mulligan's testimony was not motivated by his desire to go to heaven. His motivation was just the opposite; Mulligan did everything he could to "save myself" and forestall his day of reckoning. He now admits that "the sole reason that I testified [against David Fisher] was to save my own life." [CA 1706].

Not only were Mulligan's motivations far from pure, but the content of his testimony was tainted as well. Mulligan also states in his affidavit, "It was clear to me when I testified that I had to say exactly what the prosecutor wanted to hear." [CA 1706]. According to Mulligan, the Commonwealth's attorney "manipulated" him into giving the testimony that he gave at David's trial. [CA 1707]. In Mulligan's own words, he was "worked by the system."

Mulligan now admits that he played the part of an "actor" on the stand, who adjusted his performance to appeal to the only audience that mattered to him, the prosecutor. [CA 1707]. He cried phony tears, added theatrical flourishes, and "enhanced or embellished" key parts of his testimony to "please" the prosecutor. [CA 1706-07]. Mulligan acknowledges, that his acting skills certainly had an impact on the jury as well: "I think that the jury believed me over David Fisher, in part, because I was a good actor."

Among his many theatrical flourishes, Mulligan testified that immediately before he pulled the trigger to kill David Wilkey, he looked up to see David (Fisher) standing at

the top of the hill, “look[ing] like the devil standing over top of me.” [CA 68]. Mulligan described for the jury how “scary” David Fisher looked and how “scared” he felt at the sight of the “devil” on the hill. He claimed that he shot Wilkey at that moment to “get the devil out of there.” [CA 116].

As Mulligan now admits, this “devil” story was a “complete fabrication.” [CA 1706]. He invented the details while preparing for his testimony to add “drama.” Mulligan was never afraid of David Fisher. David did not force, frighten, or intimidate him into killing Wilkey. Mulligan acknowledges “I did that on my own, and I take full responsibility for his [Wilkey’s] death.”

Troubling unanswered questions have always enshrouded the facts of this case and plagued the would-be story-teller intent on stringing them into a coherent tale. Certain aspects of the story are clear: Mulligan shot Wilkey. Wilkey died. Wilkey had an insurance policy naming David as the beneficiary. What has never been clear, however, is why Mulligan shot Wilkey and what, if any, role David played in Wilkey’s death, beyond attempting to collect under the insurance policy when that opportunity presented itself.

Mulligan’s recent affidavit raises serious questions about David’s guilt and his involvement in the Wilkey murder. Mulligan now admits that he disliked Wilkey. [CA 1707]. He and the victim “did not get along very well.” He “thought that David Wilkey was a weak, spineless person, who could not think for himself,” a “follower.” Mulligan also states, however, that he “did not want to see [Wilkey] dead,” and that he “did not plan or intend to kill David Wilkey.” Mulligan reiterates the position that he has maintained from the beginning, he did not “shoot to kill David Wilkey.” [CA 1706].

These admissions corroborate the testimony that David Fisher's stepsons, Jody and David Ayers, gave at his trial. They testified that on the night before the hunting trip, Mulligan and Wilkey got into a fight in the motel room. According to Jody's testimony, Mulligan pulled a pistol on the victim and threatened him, and David (Fisher) had to break up the fight. [CA 186-87]. Jody testified that Mulligan had a "pistol pulled on Wilkey, and all I can recall is Mulligan kept telling him that he was going to shoot him." [CA 197]. David Ayers, Jody's brother, also testified that "David [Wilkey] was sitting on the bed [in the motel] and Bobby had a gun pointing it in David Wilkey's face saying that he was going to kill him." [CA 221-22]. Mulligan and Jody both testified that on the morning of the hunting trip Mulligan walked into an electric fence and got shocked. [CA 110, 188]. Mulligan admitted that the shock hurt, but claimed that the situation was "rather humorous" and that everyone, including himself, thought it was "funny." [CA 110-11]. According to Jody, however, when Mulligan realized that Wilkey, the victim, was laughing at him, he told him "keep it up and I'll kill you." [CA 189].

Mulligan denied any altercation with Wilkey at the hotel, because it would have spoiled the "plan" to lure Wilkey into the woods and kill him. [CA 106-08]. That testimony, however, was inconsistent with Mulligan's persistent position, from the time of David's trial [CA 116-17] to the present day [CA 1707], that he had never intended to kill Wilkey. Mulligan testified that he aimed high for Wilkey's shoulder, so as not to kill him. [CA 116]. Mulligan also testified that he never aimed at all. [CA 117]. Even when the prosecutor pressed Mulligan to admit that he realized - at the time of the shooting - that if he did not actually kill Wilkey there would be no payoff, the best the prosecutor

could pry out of Mulligan was an admission that Mulligan wanted to take advantage of the windfall after the “accident” occurred:

Yes, I - after the accident - not the accident, after it was over, like I said before, yeah, I felt like I didn't - I wanted my money I deserved it, I done it, I didn't have to like it. Nobody in here has to live with what I have to live with. [CA 166].

Mulligan reiterates in his affidavit that he “did not shoot to kill David Wilkey.” [CA 1707]. He meant to aim at his shoulder. Nor did he “plan or intend to kill” Wilkey. Until the moment that he pulled the trigger, all of his threats were nothing but “macho bragging.” Basically, Mulligan just snapped.

Mulligan admitted at David's trial that he was frequently “under the influence of narcotics and alcohol” during the time period of Wilkey's murder. [CA 136-38]. He admitted to taking both speed and cocaine. Mulligan's friends and his acquaintances in the Myrtle Beach area confirmed that he was a heavy drug user. [CA 896-907, 1816-19]. At the time of Wilkey's murder, Mulligan, an epileptic, was not taking any seizure medication, causing him to have “seizure after seizure after seizure.” [CA 163-64]. Mulligan also admitted to having “a very bad nervous system” that eventually led him to suffer a nervous breakdown. [CA 124].

Mulligan's recent affidavit, taken together with the evidence of the animosity between Wilkey and Mulligan, Mulligan's drug and alcohol abuse, and his fragile mental state at the time of Wilkey's murder, suggest a very different story from the one told at David's trial; a story which actually clarifies many of the inconsistencies in the prosecution's case against David Fisher. Mulligan's affidavit suggests that the true story is the one that David has been telling all along: Mulligan and Wilkey had grown to

dislike each other, due to Mulligan's jealousy over Wilkey's fiancée, Bonnie Jones. This mutual dislike came to a head during the hunting trip, erupting in a fight at the motel room between Wilkey and Mulligan, in which Mulligan pulled a gun on Wilkey. Tempers flared again on the day of the hunt, when Wilkey embarrassed Mulligan by laughing at him after Mulligan walked into an electric fence. Mulligan finally reached his breaking point when, after chasing Wilkey and the first deer of the morning into the woods, Mulligan, a large man, slipped on wet leaves and slid down the hill on his backside. Embarrassed, Mulligan looked up to see Wilkey laughing at him for the second time that day. Mulligan snapped. He raised the gun to his shoulder, and shot - intending to wing, or maybe merely to frighten Wilkey. Instead, he killed him.

This alternative story would explain why Mulligan could tell the jury almost no details about the planning or preparation of this so-called "murder for hire" scheme. [CA 47-168, Mulligan's Testimony]. It explains his haziness about the insurance policy and his inability to recall dates, dollar amounts, and strategy. Mulligan was not even certain how much money he was supposed to get. [CA 127-28]. It explains why Mulligan did not display any sudden wealth in 1984, despite the fact that Mulligan's family and his acquaintances in Myrtle Beach all said that he was the kind of person who would have "flashed" any substantial amount of money that he received. [CA 896-907]. It also explains his conflicting testimony at trial, and henceforth, that he never intended to kill Wilkey. As the prosecutor himself implied, if this was really a murder-for-hire, it would make no sense for Mulligan to shoot to miss, because he could get paid only if he killed Wilkey.

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Mulligan had a history of shifting the blame for his misconduct to others. [CA 1809-1815, 1816-1819]. It was clear that the prosecution intended to paint Wilkey's death as a murder-for-hire; and, indeed, Mulligan had attempted to take advantage of Wilkey's demise by urging David to split part of the insurance policy with him. Mulligan was looking for a way out, and he jumped at the opportunity when his attorneys offered him a 90% chance of escaping the death penalty.

B. Karen Hopper Reynolds' Affidavit: Gerald Steadham "Framed" David Fisher

The other major witness against David was Gerald Steadham. Steadham had, at one time, been David's friend, but the two had quarreled over a \$650 debt that Steadham owed. Two years after Wilkey's death, Steadham approached the FBI claiming that he could prove that the "hunting accident" was no accident. Steadham offered his services to the FBI to try to elicit a confession, but claimed that his life was endangered by the debt that he owed to David. The FBI paid the debt to get Steadham back in David's good graces.

Steadham's girlfriend at the time, Karen Reynolds Hopper, signed an affidavit in 1994, stating that Steadham told her of his intention to "frame" David for Wilkey's death, because he would receive "a lot of money for doing so." [CA 1804-08]. Steadham made it clear to Ms. Hopper that he intended to "make it look as if David Fisher committed the crime, even though [Steadham] believed that David Fisher had not committed this crime." Steadham said that he was in trouble with the law and that he would not be prosecuted if he got David to confess. [CA 1807]. Steadham mentioned that he was working with Michael Benfield of the FBI, who had given him money. Ms. Hopper told

David's trial attorney that she did not want to testify to the "framing" at David's trial, because she was afraid of what Steadham might do to her. [CA 1808].

David Fisher's conviction and sentence rest upon the twin pillars of Mulligan's testimony and the Fisher-Steadham tape recordings. Courts and jurors alike believed that those pillars were solid. When tested, however, these pillars crumble to the ground, and with them crumbles any assurances about the reliability of David's conviction and sentence.

PART TWO: Juror Interference

Juror Bertha Thomas, who described herself as the "lone hold-out" for a life sentence, changed her vote because her husband, Walter Thomas, told her to do so. Mrs. Thomas signed an affidavit, before her death in 1993, attesting to the improper communication with her husband. In her affidavit, Mrs. Thomas stated:

From the very beginning of the sentencing deliberations, all of the other eleven jurors were in favor of the death penalty. I was not. I was the lone "hold-out" juror against a sentence of death. The others wanted the death penalty just because Mr. Fisher was guilty. Finally, my husband told me that if I was the only one against it then I had better go along with the rest of them. That is the reason I ended up voting for the death penalty. [CA 729-30.]

Mrs. Thomas also recalled another non-juror telling the jurors at a lunch break that David had threatened to kill every one of them if and when he got out of jail.

Walter Thomas, Bertha Thomas' husband, also signed an affidavit before his death in 1995. [CA 732]. Mr. Thomas recalled that his wife told him during the trial that she was the only juror that wanted to vote for a life sentence. Mr. Thomas corroborated his wife's statements and admitted that he told her that she should go along with the rest of the jurors and vote for death. "The next day, that is just what she did." [CA 732]. Mr.

Thomas also told his wife that "when a gun is used in cases like that, they should give the death penalty every time." [CA 732].

Although both Bertha Thomas and her husband Walter are now deceased [CA 742-54], their granddaughter, Julia Looney, signed an affidavit attesting to a conversation with her grandmother about casting her vote in favor of David's death sentence. [CA 740-41]. According to Ms. Looney, "Although I don't remember everything she said, I do remember that she wouldn't have voted for the death penalty if her husband Walter hadn't pressured her to vote for the death penalty." [CA 740]. Ms. Looney "definitely remembered that [Bertha Thomas] felt she had been coerced by Walter into giving a death sentence." [CA 742].

Those close to Mrs. Thomas expressed surprise that she would have been involved in handing down a death sentence. Her minister, William Waters, remembered her as "a good Christian woman" for whom such an action would have been out of character. He was not surprised, however, to learn that Mrs. Thomas had attempted to correct her error by admitting what she had done. [CA 1794]. Bertha's daughter and son-in-law confirmed that the Bertha and Walter Thomas' affidavits were completely in keeping with their respective characters. They were not surprised that Walter would have "instructed" Bertha how to vote, since he was "in favor of frying people for all kinds of offenses." [CA 1790-92]. Helen Frazee, a friend of Bertha's, also stated that Walter would clearly dictate to Bertha how to handle a difficult or complicated situation. [CA 1794].

Had Mrs. Thomas not been influenced by the improper communication with her husband, she would have voted for a life sentence, thereby destroying the jury unanimity

necessary to impose the death penalty. The General Assembly has provided that if the jury cannot unanimously recommend the death sentence, the trial judge must impose a life sentence. Virginia law requires (1) the jury's unanimous finding of at least one aggravating factor and (2) the jury's unanimous recommendation of the death penalty in order to impose a death sentence. *See* Va. Code §19.2-264. Thus, had Bertha Thomas voted her conscience, under Virginia law, Judge Sweeney would have been required to impose a life sentence on David.

Due to Virginia's rules governing procedural default, no court has ever considered this evidence of jury interference on its merits. However, the magistrate judge, in his report to the district court, recommended that David be granted an evidentiary hearing on this claim. He even opined that David might be entitled to relief: "An intimation to the jurors that the defendant had threatened to kill them if he were ever released from prison and a suggestion to one of the jurors by her husband that she should relent to the pressures of the eleven other jurors clearly posed a substantial danger to proper deliberation by the jury." [CA 1248-50]. The district court, nevertheless, overruled this finding and refused to hear this claim on the merits, because it determined that the claim was procedurally barred. However, the district court indicated, during a motions hearing on October 3, 1997, that if David's juror interference claim were heard "on the merits" the attorney general would "be in trouble." [CA 1267-68].

Indeed, Fourth Circuit precedent is quite clear that any unauthorized private communication, contact, or tampering with a juror during trial about the matter pending before the jury is presumptively prejudicial and requires a hearing on the issue. At this hearing the Government bears the burden of proving that the improper contact was

harmless to the defendant. If the Government cannot carry that burden, the remedy is a new trial or new sentencing hearing. *See Remmer v. United States*, 347 U.S. 227, 229 (“any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is ... presumptively prejudicial”); *Stockton v. Commonwealth*, 852 F.2d 740 (4th Cir. 1988) (holding that a restaurant proprietor’s comments to jurors that they “ought to fry the son-of-a-bitch” denied the defendant his right to a fair and impartial jury and warranted vacation of his death sentence); *see also United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996) (holding that improper contact with one of the jurors warranted remand for a new trial, even where juror interference did not come to light until eight years after trial). [CA 1386-1406].

Courts are constrained by rules of procedural bar and default, but the Governor is not. As the magistrate judge indicated, the evidence of jury interference during David’s trial raises substantial doubts about the fairness of the jury deliberation process that led to his death sentence. David respectfully asks the Governor to impose that sentence which would have been imposed, if not for the improper jury interference that occurred in his case – a sentence of life in prison.

PART THREE:

The Jury Received False and Misleading Information about Future Dangerousness

Under Virginia’s statute the death penalty cannot be imposed unless the jury finds at least one of two possible aggravating factors, commonly referred to as “vileness” and “future dangerousness.” In David’s case, the jury expressly rejected the vileness predicate, but found that the future dangerousness predicate warranted recommending a death sentence. The jurors, however, based their finding of the future dangerousness

predicate on a wildly inaccurate picture of David – a picture that David’s own attorney unwittingly helped to paint.

The jury believed that David had viciously murdered two people in Kansas and Illinois, based upon conversations between David and Steadham recorded on the Fisher-Steadham tapes. On those tape recordings, David boasted of slitting a girl’s throat and hanging her upside down. [CA 457-48]. David specifically claimed that he was tried for both of the alleged murders and acquitted, despite his guilt. [CA 458]. Juror John Campbell, stated in an interview on June 3, 1997, that “the evidence that convinced everyone to vote for the death penalty was the tapes that they listened to.”

In fact, David’s boast to Steadham that he had gotten away with murder was pure fiction. Both the Kansas Bureau of Investigation, which holds records for all Kansas trial courts, and every trial court in Illinois have certified that David Fisher was never tried for murder in either state. [CA 549-55, 613-727]. Unfortunately, David’s trial counsel never provided the jury with evidence of this crucial fact, evidence easily obtained and presented by David’s counsel at the state habeas proceeding. The jury assumed that the words on the tape should be taken literally, because David’s attorney offered them no good reason to believe otherwise. Even the district court found trial counsel’s performance deficient in this respect. [CA 1296-97].

Why did David say that he had killed people if he had not? David was a bail bondsman, accustomed to talking “tough” to impress would-be bond-skips to stay in line. David and his friends often bragged about how “bad” they could be, but everyone understood that these were empty threats and exaggerations. Gerald Steadham owed

David a sizeable debt, and David was trying induce Steadham to pay back the debt. In David's circle of friends, it was natural to pile on the "b.s."

The failure of the jury to learn the indisputable fact that David had never "beaten the rap" for other murders was crucial to its decision to impose the death penalty. As noted above, the only aggravating factor found by David's jury was future dangerousness, and jurors interviewed after David's trial specifically cited the fact that "he had killed other people and got away with it" as a major reason for handing down a death sentence. [CA 1099, newspaper article].⁶ Juror Marjorie Miller recalled that David's "record" proved that he could not change. [CA 1795]. She referred to David's boasts on the "tapes" that he had "cut up two women like swine" in Emporia, Illinois, and was able to "put that behind him." [CA 1795]. Juror Miller vividly recalled the prosecutor's argument about how David had mocked the justice system. Because David had "gotten away with" murders in Illinois and Kansas, the prosecutor argued, David assumed that the "yokels" in Bedford County would be fooled as well. Juror Miller did not doubt that David committed the other murders, because she believed that the prosecutor would not have been allowed to present the evidence otherwise.

Although several witnesses testified that David threatened them or offered to commit other crimes, no evidence was presented to the jury that any of those crimes were ever committed, or that David followed through on any alleged threat or offer. [CA

⁶ This article erroneously identifies the juror making this remark as Bertha Thomas. Bertha Thomas was much older than the juror identified in this article at the time of David's trial, and, as her affidavit makes clear, such a statement would have been completely out of character.

1781-84]. Despite David's empty boasts, the reality is that all of David's prior convictions were for non-violent "paper" crimes. [CA 518-48, 565-612]. In fact, Bobby Mulligan himself admitted his friends were just "big talkers." [CA 1707]. The non-violent nature of David's background reinforces the point that while David may talk like a "tough guy," he is not a violent person. David's cavalier way with words has cost him his freedom, but it should not cost him his life.

The other major evidence of David's "future dangerousness" emerged from the testimony of the co-defendant Bobby Mulligan. Mulligan described David as "the devil" who hounded and manipulated Mulligan until Mulligan finally shot Wilkey to "get the devil out of there." [CA 68, 112, 116]. Mulligan's recent affidavit makes clear that he was not David's "victim," as one juror described him in an interview after the trial. [CA 1795]. Mulligan admits now that the description of David as the devil was "completely fabricated." Mulligan made that story up in preparation for his testimony at trial. Mulligan also states that David is not a dangerous person. In addition, Mulligan admits that he was never afraid and that fear of David did not cause him to kill David Wilkey. As his affidavit makes clear, Mulligan "did that on his own." [CA 1707].

As a result of Mulligan's lies and the failure of David's trial counsel to show that there were no previous murder trials, the jury believed that it had a basis for finding the required aggravating factor of future dangerousness. It is now clear that that basis never existed, and that this fifty-seven year old man with no history of violent crime - and no history of violence in the more than twelve years that he has been in prison - is not a danger to anyone.

PART FOUR:
**Trial Counsel's Actions and Omissions at the Penalty Phase Ensured that
David Fisher Received the Death Sentence**

The Supreme Court has held repeatedly that a sentencing body may not be precluded from considering any aspect of a defendant's character, record, or any aspect of the offense as a mitigating factor and the basis for a sentence less than death. *See Buchanan v. Angelone*, 118 S.Ct. 757, 761 (1998). "Of course, the rights to present, and to have the sentencer consider, any and all mitigating evidence means little if the defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." *Strickland v. Washington*, 466 U.S. 668, 706 (Brennan, J. concurring in part and dissenting in part).

If even one juror is touched by some small quality in the history or character of the defendant, that is justification enough for him or her to cast a vote for mercy. Trial counsel in Mr. Fisher's case foreclosed that possibility by failing to seek out and present evidence that would have allowed the jury to see David Fisher as a human being, rather than a cold-blooded killer.

In state habeas proceedings on his claim of ineffective assistance of counsel, David presented mitigating testimony from more than thirty witnesses who were known to trial counsel and could have been called. Instead he recycled four guilt phase witnesses whose testimony covered a meager fourteen pages of a 2,488 page transcript. [CA 437-48]. By failing to call the people who knew David the best, his trial counsel thwarted the very purpose of conducting a separate penalty phase.

Over thirty witnesses - family members, friends, neighbors, employers - would have testified to the many hardships that David overcame, growing up in poverty in the

coal mining town of Iron Mountain, Missouri; the way that he overcame the abuse that he suffered as a child to form close, caring relationships with other people; the way that he bonded with his stepsons and became more of a father to them than their natural father; his generosity; his many acts of kindness; his compassion for those who are suffering; the positive impact that he has had in so many lives; the good counsel that he has given to keep others from making the same mistakes in life that he has made; and the young people whose lives are success stories thanks to their association with David. [CA 757-895, 941-1077, Affidavits and Testimony of Character Witnesses]. Here is what those witnesses would have said:

A. **“When a child is raised without a father, I think he has difficulties getting along.”**

David Fisher was born in July 1941 in Iron Mountain, Missouri, the second of two boys born to Anna Bernice Burkhart and Arthur Fortner. David entered the world under difficult circumstances. When his mother was in her seventh or eighth month of pregnancy with him, she tripped over a stump and fell down hard on her stomach. She experienced “constant pain and nausea” throughout the remainder of her pregnancy. [CA 762-71, Affidavit of Bernice Burkhart].

When David was just ten days old, he started having seizures. At one point he fell unconscious following a seizure and became blue in the face. David remained unconscious and unresponsive for many hours. His mother feared that he had died. The local doctor remained by his bedside through the day and night until David regained consciousness early the next morning. David suffered convulsions once or twice weekly for the first six months of his life. [CA 763].

David's father deserted the family around the time that David was born, and never had much contact with David or David's older brother Eugene. "When a child is raised without a father, I think he has difficulties getting along. I believe the boys lost something by not having a father around." [CA 833-36, Affidavit of Norma Jones]. David's parents officially divorced 5 years later in 1946.

After her husband left, Bernice Burkhart and the boys lived with her mother, Grace Phegley, in an old wooden house with cracked windows. David's mother worked to support the family by taking in washing and sewing, doing housework, baking cakes and working in yards. The family lived on the vegetables from her garden and the chickens that they raised themselves. [CA 912, Testimony of Eugene Fortner]. When David was small, his mother received government assistance and his grandmother got a small old-age pension check that helped to make ends meet. [CA 764]. During World War II, David's mother left the boys with their grandmother so that she could move to St. Louis to work in a munitions factory.

Iron Mountain was a mining town in Missouri's "lead belt," and most boys grew up to work in the mines. David's grandfather, uncles and older brother all worked in the mines or quarries. David spent his early years playing on the tailings from the lead mines, thereby exposing himself to potentially toxic quantities of lead. [CA 911].

David suffered an unusual number of serious childhood injuries, including a major head trauma at age six - following which he was held back a year in school, a poisonous snake bite that almost killed him, several falls, and a ruptured appendix at age 16 that left him comatose for two days following emergency surgery. [CA 833-36]. The impact that these events may have had upon David's neurological development, impulse

control, rational thought processes, and the like, is unknown. [CA 475-517, Affidavit of David L. Shapiro, Ph.D.; Mental Health Records]. However, given what we do know today about the role that environment plays in development, the dangers of exposure to toxic substances, and the severe damage that can be caused by head trauma and the deprivation of oxygen to the brain, it is not difficult to imagine the impact.

David's father rarely visited. David's brother Eugene estimated that their father spent about 5 hours in the whole year with his sons. [CA 912]. His mother recalled that David was so desperate for a relationship with his father that David ran away from home at age 12 to find him. Later, David's mother received a phone call from the juvenile authorities in St. Louis. David had managed to travel, by himself, to his father's house in St. Louis. But his father wanted nothing to do with him and immediately turned David over to the juvenile department. [CA 765]. His father's rejection followed David throughout his life.

B. "There are ways to help a child without locking him up like an animal."

In 1954 when David was 13, his mother had twin boys, David's half-brothers, by a man who worked in the mines. David started getting into trouble around the time that the twins were born. Goldman Ottman, a neighbor whom David regarded as a substitute father, involved the boy in drinking and petty crimes. This activity landed David in the Boonville Training School for Boys. [CA 918-19].

After David got out of Boonville, he was like a different person. "It was like night and day, before and after Boonville." [CA 769]. His mother remembers that when she would visit him at Boonville, David always had a "distant" look in his eye and such a

quiet, somber manner that she was convinced he was being mistreated. David's mother suspected that the authorities at Boonville were forcing David to take medication, but the doctors there would not return her phone calls. "Taking him to Boonville was David's ruination. There are ways to help a child without locking him up like an animal." [CA 769].

David was incarcerated two more times during his childhood for petty crimes, at ages 14 and 16. At age 14 he was sent to Algore Reformatory. [CA 919-20]. At age 16 David dropped out of school following surgery for a ruptured appendix. He had done fairly well in school previously and wanted to return, but his teachers said that he had missed too many days to graduate that year. [CA 483, School Records]. Treatment for his appendicitis should have been sought much earlier, but the family did not have money to pay large doctor's bills. His mother recalls him vomiting what looked like ground coal and grass. David was hospitalized for several weeks following the surgery and nearly died.

According to his mother, David's real trouble began after he learned that he could not return to school. When he was only 16 or 17, he was convicted of check kiting and sent to Jefferson City, the state penitentiary, where he was locked up with an adult prison population that ranged from small time thieves to murderers. [CA 920]. His brother described Jefferson City as "a rough place." When he emerged, David was "grown up before his time." While David was at Jefferson City, his mother remarried, and she and the twins moved away from Iron Mountain, leaving David behind.

C. "The best you could treat a mother"

Even after David started getting into trouble, he remained considerate and affectionate toward his family. All of his relatives remember David as a loving young man, obedient and respectful. David's older brother, Eugene, a former chief of police, said David treated their mother "the best you can treat a mother." [CA 922]. On days when she was tired, David would do the ironing for her. "He never missed a birthday or Mother's Day or any kind of holiday." [CA 769-70]. David's trial counsel never contacted Mrs. Burkhart in preparing for the sentencing phase of David's trial.

Donald Fortner, David's younger half brother, recalled David's generosity, how he used to bring home gifts, take the whole family out to dinner, and how he helped their stepfather to buy a new car. As a teenager David wrecked his stepfather's car. He promised that someday he would buy him a new one, and he kept that promise. David counseled his younger siblings to get a job, to be honest, and to stay away from alcohol. When Donald got into some minor trouble for shooting at stop signs, David told him "to look at [my] life and to see that it was no way to live." He always told his brothers to stay away from the people that he was involved with. [CA 804-07, Affidavit of Donald Fortner].

D. "If he had a dollar and he could buy you something that would make you happy, he would spend his last dollar to do just that."

All of David's family members described him as a kind, generous, gentle, loving person. Mary Jane Kenagy, David's first cousin, described how "special" David made her feel when she was a little girl. [CA 957-64, Testimony of Mary Jane Kenagy]. She described how he would pick her up from school and tell jokes and stories. "He was

always trying to make me laugh, cheer me up.” “He’s just the kind of person that you just love.”

Ronald, David’s other half-brother, who worked as a corrections officer, observed that David never exhibited the violence or toughness that he sees in many of the men that he encounters at his job. [CA 947-48, Testimony of Ronald Burkhart]. He noted that David was a good brother and especially concerned about children. [CA 941-52].

David’s aunt, Norma Jones, recalled that after her husband Allen died, David would often call from Kansas City, where he lived at the time, to see if she was all right. “He would ask me if I wanted him to come and get me and take me to Kansas City for a visit and would tell me he had found the man for me. David was very protective of me.” [CA 835]. Mrs. Jones characterized David in the following way: “David would give you the shirt off his back if you asked for it. He was always very generous. If he had a dollar and he could buy you something that would make you happy, he would spend his last dollar to do just that.” [CA 835]. She noted his consideration for her poor health. “He knows I have arthritis, so he sends me labels with his address on them so I don’t have to write as much on the envelope.” [CA 836]. Mrs. Jones never knew David to be violent or to threaten anyone. In fact, “he would be more likely to stop someone from hurting another person.”

Even after he moved to North Carolina, David continued to stay in touch with his family, calling every week to check on his mother and brothers and visiting six or seven times a year. Today David continues to call and write his mother and siblings regularly from Virginia’s death row. David’s mother is seventy-seven now and in very poor health. She has suffered multiple heart attacks and complications from diabetes. Even at

the time of David's state evidentiary hearing, Mrs. Burkhart was too weak to travel and could not attend. Mrs. Burkhart has never enjoyed good health, but her condition has worsened dramatically in recent years. David's family members fear that if David is executed, the strain and anguish will be too much for his mother to bear.

E. "The only father I ever knew"

In August 1974 David married Barbara (now Lineberry). Barbara had three children from a prior marriage, but David Fisher soon became for Barbara's boys, "the only father [they] ever knew." [CA 993, Testimony of David Ayers]. David Ayers, the youngest, was only 18 months old when David Fisher became his "dad." David (Fisher) took the boys to church every week, helped them with their homework, and encouraged them to stay in school and to keep away from drugs and alcohol. [CA 998, 999, 1002]. He even paid for his stepsons to attend a private school. [CA 1000]. David took the boys hunting and fishing and to malls and carnivals. David Fisher played "a very big role" in the lives of his stepsons, Jody, Chris, and David. It would be "devastating" to these young men if he were executed. [CA 1003].

Even after Barbara and David divorced in 1981, David maintained a close relationship with his ex-wife and stepsons that lasts to this very day. [CA 990-1018]. David continued to provide support for Barbara and her children after the divorce, support which Joseph Ayers, the boys' biological father did not provide. [CA 994]. He went out of his way to make time for the boys, often sending them airplane tickets to visit him in Charlotte, NC, or driving to Roanoke to be with them. [CA 995]. As a testament to David's strength of character, David even became friends with Barbara's current husband, Leon Lineberry, after seeing that Leon would treat Barbara and her boys as

David felt they deserved to be treated. [CA 232-255, Trial Testimony of Barbara Lineberry].

F. "One of the kindest people I have ever known"

Those outside of David's family, who had the opportunity to watch him grow to manhood, confirm that there has always been a compassionate side to this man that the prosecutor portrayed as a monster. Ramona Tumlin, a family friend who has known David for 20 years, described David as "a gentle, tender-hearted and understanding person" and "one of the kindest people I have ever known." [CA 882-85, Affidavit of Ramona Tumlin]. "David Fisher would do anything to help people." When Mrs. Tumlin's husband died, David called from Roanoke and asked if she had family members to console her. When he heard that she was alone, he drove 100 miles from Roanoke, Virginia to High Point, North Carolina, to help her with funeral arrangements. Then he drove 300 miles to return her to her home in Atlanta, Georgia.

G. "One of the best employees McEwen ever had"

David was a valued and trusted employee, who never gave his employers a moment's trouble. Leon Newton, the vice-president and general manager of McEwen Funeral Services, Inc., called David "one of the best employees McEwen ever had ... always on time, reliable and hardworking." [CA 850, Affidavit of Leon Newton]. David's friend for fifteen years, Newton described David as "a kind and generous person who often went out of his way to help other people." Newton placed such trust in David that he gave his wife David's phone number to call in case there was ever an emergency when he was not home. "On several occasions, in the middle of the night, she called

David Fisher when she thought intruders were in the house, and he came right over to make sure that she was okay.” [CA 850].

Gerald Sink, David’s employer at Lotz G.S. Funeral Home would have trusted David to babysit his 3-year-old daughter. “David Fisher was the type of person who would go out of his way to help people, financially or otherwise. Overall, he was just a very generous person.” [CA 870, Affidavit of Gerald Sink]. If David were ever released, Mr. Sink would be “happy to hire him again.” [CA 871].

Maurice Trull, general manager of McEwen Funeral Home, remembered David as a gentle and caring individual who treated the bodies of the deceased with respect and exhibited remarkable kindness and sympathy for the bereaved families. [CA 888, Affidavit of Maurice Trull]. Garah P. Sell, another employer, recalled how David sat with and comforted Sell’s wife while he was in surgery and recovery. “He would always help people when they needed help with something.” [CA 867, Affidavit of Garah Sell].

Thomas Dillon Griffin, a co-worker, told the following story: His teenage daughter called the office in a panic because she thought that someone was breaking into the house, he had already left work for the day, but David took the phone call. By the time Mr. Griffin arrived at home, David was already at his house, checking on his daughter to make sure that she was safe. [CA 817, Affidavit of Thomas Griffin].

None of David’s employers ever knew him to raise his voice, threaten, or act violently. None could believe that David would even be accused of such a crime.

Jim Jordan, owner of Jordan Bonding Company, shed some light on the disparity between the David Fisher that everyone knew and the David Fisher presented on the Steadham tapes:

David Fisher wanted to maintain a reputation of toughness; and at times, I did hear him brag about acts of violence he had never committed in order to create and maintain his tough reputation. Despite his tough image, I knew David Fisher to be a caring and generous person who was always willing to go out of his way to help people. [CA 838, Affidavit of Jim Jordan].

The David Fisher on the Fisher-Steadham tapes was not a reflection of the real person. It was a mask that David wore to protect himself from the tough crowd that he encountered through his occupation as a bail bondsman. Unfortunately David, at times, also donned that mask in jest when he was around his friends. Of course, David never expected his macho "b.s." to be taken seriously, nor did he expect a friend to tape record their conversation and play the tape in court.

H. "A feeling for people in need"

To a cynic, perhaps, it is unsurprising that David treated his family and employers well. The cynical would say that he sowed kindness strategically and solely to reap certain calculated benefits. But David also extended friendship, comfort, and assistance to many forgotten members of society, from whom he could expect no possible reward but the pleasure of their company and the gratification of doing a good deed. For example, David watched over Janie C. Kennerly, a seventy year old seamstress who suffered for the last 20 years from debilitating emphysema. Janie's condition made it difficult for her to leave her home, so David ran errands for her. He took her to the hospital when she was sick. He drove her to the grocery store, took her on shopping trips, and picked up her medicine at the pharmacy. He installed a smoke detector in her home, because he worried about her being trapped in a fire. He helped with chores. Once, Janie paged David when he was on a business trip, because she feared that she was having an asthma attack. David immediately turned the car around and came back.

“David Fisher never asked for anything in return for [these] acts of kindness.” [CA 841-42, Affidavit of Janie Kennerly].

Jean Grant Metts, a co-worker and friend, recalled that whenever David saw a person who looked homeless or down on his luck in a restaurant, he would buy that person some coffee or food or give him money. “I remember one Christmas, we were standing outside a Shoney’s restaurant, when we saw a homeless person shivering in the street. David Fisher went over and gave the man money, saying something like, ‘I have a feeling for people in need.’” [CA 847, Affidavit of Jean Metts].

Donald Penix, a police officer in Charlotte, North Carolina, often worked with David at crime scenes. The police called David when they needed to transport a victim’s body to the morgue. Penix recalled, “The thing that particularly struck me about David Fisher was that he seemed so genuinely saddened by the situation.” [CA 854, Affidavit of Donald Penix]. Penix also remembered David’s compassion for the victims’ families and his gentle and respectful handling of the bodies.

David expressed his concern and protection even for Charles Steadham, the son of the man who later betrayed David for FBI money. [CA 862-65, 1809-1815, Affidavit of Leslie Anne Sanders]. Charles’ mother explained that Gerald Steadham took little interest in Charles after he was born. “He wanted a girl instead of a boy.” [CA 863]. David, on the other hand, showed genuine concern for Charles. Since Steadham did not usually buy things for Charles, David would often fill in for the boy’s father. David used to give Charles Christmas presents and sign Steadham’s name to them “so Charles would think that his daddy loved him.” [CA 864].

David's acts of kindness and the lives that he has touched are too numerous to describe every one, but the affidavits and testimony of dozens of friends and neighbors, like Patty Furnish – a school teacher who has known David since she was a child, George Abdin – a roommate that David took in and taught to drive a car [CA 757-61], Lisa Brown Thomas – whose father overcame alcohol addiction thanks to David's intervention [CA 879-81], Karen Reynolds Hopper – who would trust David with her own children's care [CA 830-32], and John Whitley –who described David as “very active member of the Jaycees,” a local charitable organization [CA 893-95], are attached as exhibits to this petition at CA 757-895 and CA 908-1077.

All of this mitigating evidence of David's good character and his concern for those in need was available to David's trial attorney, but none of it was presented to the jury because his trial attorney failed to prepare for the sentencing phase of the trial. He admittedly devoted “the bulk” of his preparation to the guilt phase. All of these witnesses would gladly have testified on David's behalf at trial, had they just been asked. David's trial attorney instead re-cycled four witnesses left over from the guilt phase and hoped that questions about guilt or innocence “might linger in the Jury's mind...[and] carry over into the death phase.” [CA 1779-80]. (This statement alone highlights David's trial attorney's basic misunderstanding of the purpose and importance of the sentencing phase.) At least one juror (Bertha Thomas) was prepared to vote for a life sentence even without hearing all the mitigation evidence that ought to have been presented. Surely if the rest of the jurors had gotten the opportunity to hear what David's friends and family members had to say, others would have voted for life as well. We urge the Governor to

review all of the affidavits submitted, so that he will know the David Fisher that the jury was never given the opportunity to know.

PART FIVE:

The Death Penalty is a Disproportionate Sentence, Given the Circumstances of the Crime, the Fact that the Triggerman Received a Life Sentence and is Eligible for Parole this Year, and the Fact that Virginia Has Never Executed Any Other Hirer

Even if all doubts about the fairness of the trial are resolved against him, David Fisher should not be executed because the punishment is disproportionate. Bobby Mulligan, the man who actually shot and killed David Wilkey, received a life sentence with the possibility of parole. Mulligan is now 6 months away from parole eligibility. [CA 1705]. Even if the Governor were to commute David's death sentence to life without the possibility of parole, David's sentence would still be harsher than the sentence of the actual killer. Even if Mulligan is denied parole this time, he still lives in hope that he will one day be set free. While incarcerated, Mulligan has gotten married. He has taken classes and learned a trade. A normal life awaits him on the other side of the prison gates.

Life without parole is no small punishment. It is the second harshest sentence possible. For David Fisher, it would signal the end of all hopes for ever living a "normal" life - the daily comforts of home and family, the ability to take a walk or go for a drive, the satisfaction of earning honest wages - in short, the enjoyment of all those simple, basic freedoms that are so easily taken for granted. David does not ask for anything more than to be allowed to live out the rest of his days in a prison cell.

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David Fisher's case is dramatically different from every other case in which Virginia has carried out an execution: David has never killed anyone. No person in Virginia has ever been executed as the "hirer" in a murder for hire scheme. David would be the first.

In fact, in the Robin Radcliff "murder-for-hire" case the outcome was exactly the opposite. Robin Radcliff, a career criminal, who was convicted as the hirer in a murder-for-hire scheme, received a life sentence; while Mario Murphy, the actual killer/ hiree, received a death sentence. [CA 1414-81, Clemency Petition for Mario Murphy].

Robin Radcliff's case warrants discussion because her role in the murder of her husband was actually greater than any part that David may have played in Wilkey's death, and her actions were certainly more gruesome. Nevertheless, the prosecution saw fit to offer Robin a life sentence plus twenty years, which she turned down, and the jury elected to recommend a life sentence.

A. The Robin Radcliff Case:

Robin Radcliff began an affair with Gerardo Hinojosa, while her husband, James Radcliff, a Navy cook, was away at sea. Before her husband returned home, Robin discovered that she was pregnant. The pregnancy forced her to confess her illicit affair to her husband, who became angry and threatened divorce. Neither Robin nor Hinojosa wanted to end their affair. Robin's husband had a \$100,000 life insurance policy that named Robin as the beneficiary, so Robin and Hinojosa decided to kill Robin's husband, collect the proceeds of the life insurance policy, and run away together. [CA 1421-22].

To accomplish their plan, Robin and Hinojosa recruited five young people, including three teenagers and Robin's daughter and son-in-law. The oldest of the five

recruits was only twenty-one and the youngest was seventeen. Robin induced them to help her commit murder by offering payment and by suggesting that the life of her unborn child was at stake. [CA 1422].

The plan concocted by Robin and Hinojosa was as follows: Robin would lure her husband to the bedroom. The three boys would enter the apartment through an unlocked door. Robin would admit them to into the bedroom where they would kill Radcliff. On their way out, they would take certain items from the apartment to make it look like a robbery. Robin insisted that her thirteen year old son remain behind in the apartment with her, to corroborate the burglar story that she intended to tell the police. Robin even made love to her victim as she waited for her plan to unfold. [CA 1423-24].

Hinojosa gathered weapons for the boys who were to carry out the plan. He told them to strike Radcliff in the head with a barbell first to render him unconscious. He told them to get a gun that Robin had left for them in the trunk of her car. When the boys reached the house, Robin opened the door to her bedroom and ushered them in. Then she walked out into the living room while the boys murdered her husband. [CA 1423-24].

Two of the boys went to the bed where Radcliff slept, and one of them smashed him across the side of the head with the barbell; the other stabbed Radcliff in the chest. Then they switched weapons and attempted to cut Radcliff's throat. When the boys were finished in the bedroom, they came into the living room where Robin was waiting. She coolly pointed out which items they should take to make it look like a burglary. [CA 1425].

Left alone with Radcliff, Robin returned to the bedroom and climbed back into bed with her husband, who, despite his grisly wounds, was still clinging to life. Instead

of calling 911 immediately, Robin delayed. She rolled around in the blood of her dying husband to support her story. She finally called the paramedics when there was no chance of Radcliff's survival. The blood on her body had dried by the time the ambulance arrived. [CA 1425].

At Radcliff's funeral, Robin draped herself over the coffin and cried, "Who could have done something like this to you?" Seven days later, Robin and Hinojosa were married. Robin and Hinojosa were arrested after one of their teenaged accomplices confessed, in spite of their efforts to encourage all of those involved to "stick to the story." [CA 1426].

Hinojosa, who supplied the teenagers with weapons and instructed them in every detail of the murder, including where to place the blows, was offered a life sentence plus twenty years for capital murder and conspiracy. Hinojosa accepted the offer, while continuing to insist upon his innocence. Hinojosa will be parole eligible in 2016. [CA 1427-28].

Robin Radcliff, who master-minded the conspiracy to kill her own husband for profit, was the lynchpin that held the multi-membered conspiracy together, purposefully involved her own daughter and son-in-law in her nefarious plan, and even insisted upon having her thirteen-year-old son present in the apartment while the murder occurred, to bolster her alibi, nevertheless, was offered a life sentence plus twenty years by the prosecutor for her part in the capital murder and conspiracy. Robin turned him down. She went to trial, hoping for an acquittal, but instead was convicted and received a life sentence. She too should be eligible for parole in 2016. [CA 1428].

How is David Fisher more culpable than Robin Radcliff, who not only received a life sentence from the jury, but a plea-bargain offer from the prosecutor? He is not. Even putting aside the substantial doubts that remain about David's guilt, he nevertheless emerges as the less culpable of the two when his actions are compared against Robin Radcliff's. Robin cheated on her husband, got pregnant by another man, and then spear-headed a plot to kill her husband and profit by his death. Robin recruited teenagers to commit murder by promising cash and exploiting the fact of her pregnancy. Robin coerced her own children to participate in the crime, going so far as to force her thirteen-year-old son to stay at the apartment during the murder. Robin made love to her victim as she awaited the arrival of his killers. Robin calmly selected items for the killers to take as part of the cover-up, while her husband lay dying in the next room. Robin crawled back into bed and rolled in her victim's blood, while he was still alive. Robin delayed calling 911 until it was too late to save Radcliff.

David, on the other hand, is not accused of killing a family member. Nor is he alleged to have hired children to commit his crime. Bobby Mulligan was fully an adult when he shot Wilkey. Mulligan admits that Fisher did not frighten or coerce him into doing anything. Mulligan shot Wilkey of his own free will. David did not delay calling for help. Even Mulligan testified that as soon as David saw that Wilkey had been shot, he yelled to Jody to go for help. [CA 70, 71, 114].

Nor can David's crime be considered more heinous than Robin's. All the medical evidence showed that Wilkey was killed by a single gunshot wound. [CA 3, 4, 8, 22]. Radcliff, on the other hand was clubbed in the head with a barbell, stabbed repeatedly in the chest, and then an attempt was made to slit his throat. Wilkey died very quickly.

Radcliff lingered, as his wife delayed calling paramedics and rolled around in his fresh blood to make her story more convincing. She finally called for help only when her husband could no longer be saved. Robin even played the grieving widow at her husband's funeral, and complained of mistreatment when police tried to question her.

Nor can lack of a prior criminal record distinguish Robin's case as more deserving of mercy. At the time of her husband's murder, Robin was on parole from more than twenty felony convictions. Robin began her criminal career as a teenager, convicted of felony forgery. She was charged with numerous probation violations and other crimes during a ten-year probationary period. She committed crimes in Texas, Virginia and Florida, specializing in forgery and fraud. In Texas she allegedly committed 28 crimes in addition to violations of the condition of her probation. Her probation was eventually revoked in Texas and she served jail time. [CA 1438-39].

There is simply no defensible reason to spare Robin Radcliff but execute David Fisher. The death penalty cannot be applied in an arbitrary and capricious manner – this violates the central lesson of *Furman v. Georgia*, 408 U.S. 238 (1972). But what could be more arbitrary than to allow Robin Radcliff to live, but David Fisher to die? What could be more capricious than to flip the outcome in such similar cases? This disparity in sentencing raises critical questions about whether consistent principles are being applied in Virginia in murder-for-hire cases. If hirers generally do not receive the death penalty in Virginia, then in order to execute a hirer the state should be able to point to some factor distinguishing David Fisher's case from all murder-for-hire cases. This it has not done.

David Fisher's case is, however, critically different from every other case in which the death penalty has been imposed: David has never killed anyone. There is no question who shot Wilkey. It was Bobby Mulligan. This central fact makes David Fisher's case unlike Tony Mackall's, Douglas Buchanan's, Ronald Watkins', Angel Breard's, Dennis Eaton's, Danny King's, Lance Chandler's, Johnile Dubois', Kenneth Stewart's, Dwayne Wright's, Ronald Fitzgerald's, Kenneth Wilson's, Kevin Cardwell's, Mark Sheppard's, Tony Fry's, and George Quesinberry's, the 16 men executed within the last year in Virginia.

B. Cases During Governor Gilmore's Term in Which the Death Penalty Has Been Imposed

1. Tony Mackall – Executed 2/10/98

Tony Mackall killed Mary Dahn, the clerk at the Riverview Shell Station in Woodbridge, Virginia, by shooting her in the head during the course of a robbery. Mackall stole \$515 from the cash register and fled. *See Mackall v. Commonwealth*, 236 Va. 240 (1988). [CA 1482-93]. The victim's husband, the manager of the station, was outside hanging Christmas lights when he heard the gunshot. Five-year-old April Dahn witnessed a masked man shoot her mother in the head and run away. The victim's husband found Mary Dahn lying on the floor of the cashier's booth. She died the next day. Shortly after shooting Mary Dahn, Mackall shot another person, Michael Keating, at a housing complex located a few miles from the gas station and stole Keating's car. Mackall accosted Keating and took his car keys and wallet at gunpoint. After starting the car, Mackall returned to Keating's apartment, and despite Keating's pleas not to shoot him, placed the barrel of the gun against Keating's head and shot him. Mackall ordered

Keating to stand up and shot him a second time in the head at a range of three feet. Mackall admitted shooting Dahn and Keating to his cellmate at Prince William County jail. Mackall said that the lady deserved to be shot in the head because she resisted giving him the money.

The prosecutor presented evidence to support both the vileness and future dangerousness aggravating factors. Mackall's record contained a long list of larcenies and burglaries. He spent a large portion of his life in correctional institutions, and had been released from confinement just two months prior to Dahn's murder. During his confinement, Mackall threatened correctional officers with violence, and was found in possession of a deadly weapon. Even Mackall's own expert witnesses, two clinical psychologists, stated that Mackall was extremely angry, hostile toward women and authority, resistant to treatment, and would probably be dangerous in the future.

2. **Douglas Buchanan - Executed 3/18/98**

In Douglas Buchanan's case, the defense conceded that Buchanan had killed his entire family - his father, step-mother, and both brothers (one ten-years-old, and the other thirteen-years-old) - within the span of two hours. *See Buchanan v. Commonwealth*, 238 Va. 389 (1989). [CA 1494-1509]. Buchanan and his wife, Christianne, drove to a spot on the Blue Ridge Parkway, a ten-minute walk from his father's house, and planned the killings. Then, Buchanan left his wife in the car and headed for his father's house, carrying a pair of gloves and a .22 caliber rifle. At the house, Buchanan and his father argued. Then his father broke off the argument and invited Buchanan outside to look at a recently purchased car. As his father walked to the door, Buchanan placed the rifle to the back of his father's head and shot him. His father fell to the floor. Then Buchanan

placed the rifle to his father's forehead and shot him between the eyes. He dragged the body into the master bedroom.

Fifteen minutes later, Buchanan heard his brothers arriving home from school. Buchanan waited behind the living room door, rifle in hand. As ten-year-old Donnie walked past the door where Buchanan was hiding, Buchanan shot him in the back of the head. Then he placed the rifle against Donnie's face and shot him near the temple. The other brother, thirteen-year-old J.J., tried to run when he heard the shots, but Buchanan shot him twice in the legs as he tried to flee. Buchanan then took J.J. into the house, where he shot him a third time in the forehead. Buchanan dragged his brothers' bodies from the living room. When Buchanan saw that J.J. was not dead, he grabbed a kitchen knife and stabbed him five times about the face and head.

Buchanan rested, awaiting the arrival of his stepmother. As she entered the house he hid behind the front door and tried to shoot her, but the gun jammed. He pulled the trigger again and the gun fired, grazing the side of her head. His stepmother fell to her knees, and Buchanan proceeded to stab her repeatedly in the upper chest with the same knife that he used to kill J.J. He slashed her throat from side to side, down to the vertebra column, severing the windpipe and all major veins and arteries in the neck. The jury based its recommendation of the death penalty on a finding of the vileness aggravating factor.

3. **Ronald Watkins – Executed 3/25/98**

Ronald Watkins killed William McCauley, an employee at Allied Services in Danville, Virginia, by stabbing him repeatedly in the back and shoulders and slitting his throat. *See Watkins v. Commonwealth*, 238 Va. 341 (1989). [CA 1510-18]. The victim's

neck was slashed in three places, cutting the jugular vein and severing the carotid artery on both sides. McCauley's father discovered his son's body in a storage room, lying face down in a pool of blood. The medical examiner concluded that McCauley was stabbed while in a kneeling or lying position. Watkins, a former employee at Allied Services, stole \$1,250 from the cash register and a file drawer. Another employee testified that Watkins had cased the store the evening before the murder. After his arrest, Watkins signed a statement for police stating that he killed McCauley and read that statement into a tape recorder. According to Watkins, McCauley had to be killed because he knew Watkins and could have identified him. The jury found both aggravating factors of vileness and future dangerousness. Watkins' own attorney referred to his client as a "vile monster."

4. Angel Breard – Executed 4/14/98

Angel Breard killed Ruth Dickie by stabbing her five times in the course of attempted rape. *See Breard v. Commonwealth*, 248 Va. 68 (1994). [CA 1519-30]. Police found Dickie lying on her back, naked from the waist down, with her legs spread wide. Her underpants had been torn from her body. She was bleeding profusely from five stab wounds to her neck. There was semen on her inner thighs and strands of her own hair, ripped from the roots, clutched in her bloodstained fingers. A telephone receiver near her head was also covered in blood. Breard had encountered Dickie late that night, walking alone along the street. He engaged her in conversation, then he followed her to her apartment and forced his way in. Breard admitted during his trial testimony that he carried a knife with him that night because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex

with [him]." Breard also admitted at trial to stabbing Dickie, removing her pants, and getting on top of her, before being interrupted by the apartment maintenance man knocking at her door.

Evidence at Breard's trial showed that he had attacked two other women, one before and one after Dickie's murder. Three weeks before Dickie's murder, Breard grabbed Celia Gonzales from behind and told her that he had a gun. He ordered her to go with him, but ultimately released her when he realized that he was being watched by a man in a nearby parked car. Before releasing Gonzales, Breard threatened to "get her later" at her home. Six months after Dickie's murder, Breard attempted to sexually assault Yvonna Price. Breard took Price to his apartment and started kissing her. When Price resisted, Breard pushed her to the floor, sat on her stomach, and started removing her clothing. When he began to remove his pants, Price screamed for help. Breard struck her in the face and tried to tie her hands with a telephone cord. He told her that he intended to have anal intercourse with her. A neighbor heard Price's screams and called the police. When the police arrived, they found Price, naked and hysterical. The jury in Breard's case returned a finding of both statutory aggravators.

5. Dennis Eaton – Executed 6/18/98

Dennis Eaton shot and killed four people, including one state trooper, before police finally took him into custody following a high speed chase through the streets of Salem. *See Eaton v. Commonwealth*, 240 Va. 236 (1990). [CA 1531-47]. Eaton first shot his roommate, Walter Custer, Jr., in an orchard near the mobile home that they shared. Eaton was high on alcohol and drugs at the time. Later in the day, Eaton went to the home of his friend and neighbor Ripley Marston, whom he killed for the \$15 in

Marston's wallet. Next, Eaton picked up his girlfriend, Judy McDonald, and the two fled Shenandoah County to avoid Eaton's scheduled court appearance the following week on unrelated burglary and larceny charges.

Late that night, the couple was pulled over by a highway patrolman, State Master Trooper Jerry Hines, who suspected that Judy, the driver, was intoxicated. Twenty-five minutes later, another state trooper found Hines' police cruiser with its motor running and the lights still flashing. Hines lay dead, face down in a pool of blood, shot in the neck and chest. From the description of the car and license number that Hines had taken down before he was slain, police quickly located Eaton and Judy, but when confronted, Eaton led police on a high speed chase that reached speeds in excess of 100 mph. The chase ended when Eaton crashed into a street light. Before police could take the pair into custody, Eaton shot Judy in the left temple and then shot himself in the head. Eaton survived, Judy did not.

At Eaton's trial, a fellow inmate testified that Eaton admitted responsibility for the murder of the state trooper, but joked that he could blame it on Judy because she was dead. Two other inmates testified that Eaton had fashioned a shank (a weapon) out of a shower curtain rod and wire, that he intended to use to overpower a guard and escape. The jury found that Eaton posed a future danger to society based upon the following evidence: four unprovoked and seemingly irrational murders within a span of 24 hours, Eaton's jokes about his crime spree to other inmates, and the fact that, while incarcerated, Eaton fashioned a deadly weapon with which he intended to overpower a guard and escape.

6. **Danny King – Executed 7/23/98**

Danny King murdered Carolyn Rogers, a real estate agent, during the commission of armed robbery by beating, strangling, stabbing and stomping her to death. *See King v. Commonwealth*, 243 Va. 353 (1992). [CA 1548-58]. King also claimed that the murder was a “contract killing” set up while he was in prison for a prior offense. King was supposed to take \$1,000 from Mrs. Rogers’ checking account as his payment.

King and his wife, Becky, with whom he had entered a bigamous marriage, stole a van from a used car lot in Chesterfield County. A few days later, they drove the stolen van to the Kings Chase area and wrote down the names and phone numbers of real estate agents displayed on the vacant houses. King instructed Becky to call Mrs. Rogers and to make an appointment to see a house. When the victim arrived at the house she gave King and Becky a tour of the house, ending in the basement. Becky left the house to get a cigarette from the van. King then “took his fist and hit [Mrs. Rogers on] the left side of her face.” King continued striking her, choked her, and threw her against the basement wall. As Mrs. Rogers fell to the floor, King grabbed her by the throat and “squeezed very, very hard”, and threw her to the floor. Mrs. Rogers was semi-conscious and moaning as began to drag her across the floor. Thinking that King planned to rape her, Mrs. Rogers grabbed his groin. King removed a knife from his shoe and thrust in an upward motion into her chest.

King and Becky left Mrs. Rogers car at a nearby mall after wiping it down for fingerprints. Then they cashed checks forged on Mrs. Rogers account and pawned her stolen ring. Co-workers later found Mrs. Rogers in the basement, face down in a pool of blood.

The autopsy performed on Mrs. Rogers revealed that she had been stabbed twice in the chest, one thrust cutting all the way through the chest and terminating just below the skin. Bruises on the back of Mrs. Rogers head indicated that she had been stomped in the head at least six times by someone wearing boots exactly like those that King wore. Other bruises on her body indicated that she had been "slammed" into a board, wall, or the floor. Deep scratches on her throat were consistent with choking. The victim's earring and ring had been forcibly removed.

At the sentencing phase, the jury found both the vileness and future dangerousness aggravating factors. The Virginia Supreme Court found the evidence sufficient to support both the conviction and the sentence. The Court made special note that there was no doubt that King was the "trigger man" in the murder of Carolyn Rogers, and that King, rather than Becky, had inflicted the "fatal wound."

The Court cited King's lengthy record of violent crimes to support a finding of future dangerousness. King had convictions for contributing to the delinquency of a minor, bigamy, carrying a loaded concealed semi-automatic pistol, bank robbery, abduction of a bank manager at gunpoint, and the use of a firearm to commit robbery. Additional stolen property charges had been nolle prossed. King had violated his parole on several occasions, including instances of assault and destruction of property. King was involved in other unadjudicated criminal activity, such as conspiring to rob a Chesterfield County bank using a fake bomb and a .22 caliber pistol, running a prescription drug ring from prison, and threatening his legal wife with a pistol and destroying her property. The Virginia Supreme Court found that King's role as "triggerman" in the murder and his lengthy history of violent crimes warranted the

disparity between his capital sentence and Becky's sentence of five consecutive twelve month sentences.

7. Lance Chandler – Executed 8/20/98

Lance Chandler shot and killed William Dix, the cashier at a Mother Hubbard's convenience store, at point blank range in the course of robbing the store. *See Chandler v. Commonwealth*, 249 Va. 270 (1995). [CA 1559-67]. Chandler and two other men entered the store intending to steal some beer and rob the cash register. Chandler knew the cashier to be "a little slow," and believed that the man would comply easily with his demands. However, when Chandler demanded that Dix open the cash register, Dix moved a little too slowly. Chandler pointed the gun at Dix, closed his eyes, and said "boom, boom" as he pulled the trigger. The gun did not go off the first time. Chandler fired a second time and the bullet entered Dix's head through his upper lip. Chandler and his accomplices fled the store carrying a case of beer. The gunshot wound bruised Dix's spinal cord, paralyzing the muscles necessary for breathing.

The jury found Chandler guilty of capital murder and recommended a death sentence based on future dangerousness. This finding was supported by Chandler's prior record of juvenile offenses for breaking and entering, disorderly conduct, and assault and battery, and adult convictions for disorderly conduct, robbery, and use of a firearm in the commission of a robbery. The robbery and firearm convictions had occurred just six months before Dix's murder. While incarcerated on those prior offenses, Chandler had been charged with an assault on another inmate, resulting in his segregation from the rest of the inmate population. The jury also heard testimony from a deputy sheriff that Chandler promised to act like the "baddest man" in Halifax County and that he would

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kill, in a slow and painful way, anyone that tried to hurt him. One of Chandler's co-conspirators further testified that Chandler boasted that he would wear the used shell casing of the bullet that killed Dix on a chain around his neck and that he would kill any of his friends who tried to tell the police about the murder.

8. Johnile Dubois – Executed 8/31/98

Johnile Dubois killed Philip Council, an employee at a convenience store in Portsmouth, by shooting him in the chest at point blank range. *See Dubois v. Commonwealth*, 246 Va. 260 (1993). [CA 1568-72]. Dubois and three other men entered the convenience store where three employees were working. Dubois was the ringleader and the only man with a gun. Dubois first fired the gun toward Shari Watson, who was working in the back of the store. The shot barely missed her head. One of Dubois' accomplices ordered the other two employees to open the cash register. Council, frightened and suffering from mental and neurological difficulties, could not open the drawer fast enough, so Dubois' partners leaped over the counter and started beating him. Dubois then shot Council in the chest at point blank range and took about \$400 from the cash register. Dubois pled guilty and received a capital sentence for Council's murder.

The trial court based the sentence on its finding that Dubois posed a future danger to society. Dubois' prior convictions included grand larceny, assault, possession of a firearm after conviction of a felony, and two probation violations. He also had been convicted of grand larceny and given a two year suspended sentence. Dubois' probation had been revoked twice, and while out on probation the third time he was arrested on charges of assault, robbery, attempted robbery, and use of a firearm during the commission of a robbery, but the last three charges were nolle prossed. In addition,

Dubois told his parole officer that he had been involved in an attempted murder in Boston.

At the time of his arrest for Council's murder, Dubois was making his living selling drugs, a way of life that earned him up to \$2,500 per month. The forensic report also weighed against Dubois. His examining doctor reported that Dubois had increasingly turned to anti-social and asocial activities, that he had aggressive tendencies, that he was not amenable to counseling or treatment, and that he would continue to be a "danger to others by virtue of his way of life."

9. Kenneth Stewart, Jr. – Executed 9/23/98

Kenneth Stewart murdered his wife, Cynthia Stewart, and his five-month-old son, Jonathon Stewart, by shooting them at point blank range. *Stewart v. Commonwealth*, 245 Va. 222 (1993). [CA 1573-88]. Stewart and his wife had separated after Jonathon's birth, and Stewart was living in a trailer with a friend while his wife and son remained at her parents' house. A couple of weeks before the murders, Stewart complained to his roommate about the restrictions placed upon his visits with Jonathon and remarked, "I just ought to go ahead and kill it and get it over with, just solve this problem." On a Sunday afternoon, Stewart armed himself with a .25 caliber semi-automatic pistol and went to visit his son. During that visit Stewart claimed that his wife rejected his request to reconcile, so he shot her twice in the head. Then Stewart went downstairs and killed his five-month-old son by firing two shots into the side of his head, just above his ear, at a range of no more than an inch or two. Stewart carried Jonathon's body upstairs and lay it in his mother's arms.

Next, Stewart secured the apartment. He put the family dogs out on the porch so they could not get out. He turned off the kitchen stove, turned on the answering machine, locked up the house, and took his wife's car, heading for New York. Stewart later called friends back in Bedford County and admitted that he had killed his wife and child.

The jury returned findings of both vileness and future dangerousness. Factors supporting the vileness aggravator included the deliberate, execution-style manner in which Stewart killed his wife and five-month-old child by placing a gun directly to their heads, his careful arrangement of the bodies, and the methodical way in which he secured the house. Stewart's prior criminal record and the finding by Dr. Cantor, the Commonwealth's forensic clinical psychiatrist, that Stewart demonstrated the possibility for future dangerousness provided ample support for a finding of future dangerousness.

10. Dwayne Wright – Executed 10/14/98

Dwayne Wright murdered Saba Tekle in the course of armed robbery and attempted rape. *See Wright v. Commonwealth*, 248 Va. 485 (1994). [CA 1589-90]. Wright confessed to following Tekle from the highway in order to rape her. While holding Tekle at gunpoint, Wright had demanded that she remove her clothing because he wanted to "have sex" with her in a wooded area behind her apartment building. In response to Wright's threats, Tekle removed her shoes and underpants. When Tekle resisted and fled, Wright chased her into the apartment complex to the bottom of her apartment steps, where he fired two shots up the steps at her. One of those shots hit Tekle in the back, traveled past the right lung and exited through her neck, perforating her jugular vein. Tekle's body also had abrasions on her right knee and forehead. Tekle's underpants, shoes, coat, and pocketbook were found on the sidewalk outside her

apartment building. Wright stole the Nissan that Tekle had been driving to make his getaway. Wright left behind the Buick, also stolen, that he had driven to follow Tekle to her apartment.

The jury recommended the death penalty based upon a finding of future dangerousness. Evidence at Wright's trial revealed that he was convicted previously of the first degree murder of Reginald Turman in Prince George's County and for the use of a firearm. Wright received a life sentence plus twenty years for these crimes. Wright had also confessed to murdering a second man, Odell Thomas, after Thomas stole Wright's beeper and a gold chain. Wright had also pleaded guilty to attempted first-degree murder and use of a handgun in Prince George's County. Wright received another sentence of life imprisonment plus twenty years for those offenses. Wright's own expert witness testified that fighting was a "way of life" for him and that Wright had a long history of violence. Furthermore, the Commonwealth's forensic psychologist testified that there was a "high probability" that Wright would commit acts in the future that were criminal, violent, and a danger to society.

11. Ronald Fitzgerald – Executed 10/21/98

Ronald Fitzgerald was convicted and sentenced to death on two counts of capital murder, one for the murder of Coy White and the other for the murder of Hugh Morrison, a cab driver. *See Fitzgerald v. Commonwealth*, 249 Va. 299 (1995). [CA 1591-96]. Fitzgerald broke into the home of Coy White, his girlfriend's uncle, intending to commit rape and armed robbery. Fitzgerald first entered the bedroom of White's thirteen-year-old daughter, Claudia, took off her clothing, fondled her and waited for her father to return home. When Coy White arrived, Fitzgerald ordered him to lay down on the floor.

As White was laying down, Fitzgerald shot him in the neck. The bullet severed White's spinal cord, killing him.

Fitzgerald ordered Claudia at gunpoint to take her father's wallet and car keys from the body. Then Fitzgerald took Claudia in her father's car to a wooded area and raped her inside the car. After raping her, Fitzgerald locked her in the trunk. Claudia eventually freed herself by using a hammer that she found in the trunk.

Later that morning, Fitzgerald flagged down Morrison, a taxi driver that he knew, and asked for a ride. Morrison's body was later discovered lying in a creek, shot three times in the head and chest. That same morning, Fitzgerald drove the stolen cab to Tiffany Lovelace's house. Lovelace was the girlfriend of one of Fitzgerald's friends. Fitzgerald entered the house and threatened Lovelace with a pistol, telling her that he planned to rape her to avenge the rape of his own girlfriend. Fitzgerald took Lovelace and her children to a motel and raped Lovelace in the bathroom. Fitzgerald finally ended his crime spree by attempting to take his own life. The jury recommended death sentences based upon findings of both future dangerousness and vileness.

12. **Kenneth Wilson – Executed 11/17/98**

Kenneth Wilson murdered Jacqueline Stephens by stabbing her to death, during the course of attempted rape. *See Wilson v. Commonwealth*, 249 Va. 95 (1995). [CA 1597-1604]. Wilson was also convicted of grand larceny, two counts of malicious wounding, and three counts of abduction. Based upon predicates of vileness and future dangerousness, the jury recommended the death penalty.

At 3:00 A.M. Wilson entered Jacqueline Stephens' home, where she lived with her twelve-year-old daughter Altomika. Altomika had a fourteen-year-old friend

spending the night. Wilson was a cousin of Altomika's father. Wilson proceeded to terrorize Ms. Stephens and the girls by threatening them with a knife. Wilson forced the victim into the bedroom at knifepoint. When he emerged naked from the bedroom, he tied Altomika to her mother's bed. Then he ordered Altomika's friend to take off her clothes, and he tied her to her bed. Wilson blindfolded the girls and started stabbing and cutting them. He stabbed Altomika in the throat and twisted the knife. Ms. Stephens, who had been ordered by Wilson to remain in the shower, came out when she heard the girls' screams. She confronted Wilson. As soon as Wilson left the room, the two girls locked the bedroom door and pushed a dresser against it, but Wilson ordered the girls to unlock the door and threatened to kill Ms. Stephens if they did not obey. Wilson tied up the girls again, and blindfolded and gagged them with dirty socks and underwear.

Wilson pretended to leave the house, but then came back and tried to scare the girls by playing with the knife in front of their faces. He demanded that Ms. Stephens hand over her car keys. Then he killed her.

When the police arrived, they found Ms. Stephens tied to her bed, arms and legs spread apart and covered with blood and semen. Two knives, one badly bent, were found on the floor at the foot of the bed. The medical examiner found at least ten knife wounds, including two stab wounds to the chest and several longitudinal cuts on the throat, none of which would have rendered the victim unconscious during the attack.

In 1984 Wilson had broken into another woman's home at night while she was sleeping and stabbed her repeatedly. Wilson was convicted of unlawful wounding and burglary for that offense, and sentenced to five and ten years respectively. Wilson was on parole for these crimes at the time that he killed Ms. Stephens. Wilson's prior

criminal history also included a conviction for possession of marijuana with intent to distribute and a conviction for burglary.

13. Kevin Cardwell – Executed 12/03/98

Kevin Cardwell executed fifteen-year-old Anthony Brown in a field behind a shopping center by stabbing him in the throat and shooting him twice in the back of the head. *See Cardwell v. Commonwealth*, 248 Va. 501 (1994). [CA 1605-14]. Brown was carrying drugs that Cardwell wanted. Cardwell told friends of his intention to either knock out or kill Brown, and several friends backed out of the plan at that time. As Brown was being driven to the site of his execution, he pleaded with Cardwell to spare his life, but Cardwell just told him to “shut up.” Cardwell took Brown out in the field and stabbed his throat with a steak knife. Then Cardwell stated, “I’m going to shoot him, and he’s going to die.” The autopsy on Brown showed two gunshot wounds to the back of the head. Cardwell threw the knife and gun into the dumpster behind his apartment. Brown’s decomposed body was found behind the shopping mall two months later.

The jury’s finding of future dangerousness was supported by Cardwell’s lengthy history of violence and his involvement in drug dealing. Cardwell was convicted in Lynchburg in 1992 for possession of marijuana with intent to distribute. Cardwell’s girlfriend testified that he never had a job. Instead, he made his money selling cocaine. This girlfriend also testified that Cardwell often got drunk and threatened people. On one occasion Cardwell got upset over a debt and began waving a gun around, firing into the living room of his girlfriend’s apartment as he left. Cardwell once beat a man, who was pinned to the ground and could not fight back, so badly that he had to go to the hospital. Cardwell had encouraged a group to burglarize a local grocery store, threatened to kill a

young woman at a night club, threatened an officer, attacked a former girlfriend with a baseball bat, shot a man in the foot who owed Cardwell money, beaten a man with a beer bottle, and been expelled from school for fighting. The jury also found the vileness predicate based upon the facts of the crime and the execution-style killing.

14. Mark Sheppard – Executed 1/20/99

Mark Sheppard murdered Richard and Rebecca Rosenbluth at their home in Chesterfield County, with the help of his partner and friend in the cocaine trade, Andre Graham. *See Sheppard v. Commonwealth*, 250 Va. 379 (1995). [CA 1615-25]. Sheppard and Graham had been supplying the Rosenbluths with cocaine. They shot the pair over unpaid drug debts or in anticipation of the day when the couple could not longer pay to support their habit. Mr. Rosenbluth was shot twice, once through the eye at close range and once through the nose. Both wounds were lethal, both issued from Sheppard's gun. Mrs Rosenbluth was shot four times in the head and neck, two times with Sheppard's gun and two times with Graham's gun. All four of her wounds were potentially lethal. Following the murders, Sheppard and Graham stole the victims' cars, stereo equipment, jewelry, credit cards, and other personal items. The jury found both the vileness and future dangerousness predicates, based upon Sheppard's record and the aggravated nature of the crime.

15. Tony Fry – Executed 2/04/99

Tony Fry killed Leland Jacobs, a car salesman, in order to rob him and to steal a new car. *See Fry v. Commonwealth*, 250 Va. 413 (1995). [CA 1626-30]. Fry and his friend, Brad Hinson, had plotted the night before to steal a new car from a car dealership on the pretense of taking it for a test drive. They planned to kill whatever salesperson

assisted them. Hinson and Fry left with Jacobs on a test drive in a Ford Explorer. Hinson and Fry stopped the car on the pretense of checking the spare tire. As Jacobs walked toward the rear of the car, Fry pointed out an owl to him and then shot him in the back. Jacobs started to run away and Fry fired several more shots at him. Jacobs begged not to be killed, but Fry kept shooting. Finally, his body riddled with bullets, Jacobs begged Fry to "go ahead and finish me off," because he was in so much pain. Fry fired the last shot at close range into Jacobs's face. According to the medical examiner, Jacobs died as a result of eleven gunshot wounds to the head, chest, and abdomen. Three of the eleven shots were to Jacob's head, four were fired into his chest, one into his abdomen, and three into his back. The medical examiner also found a large scrape on the back of Jacobs' head, consistent with having been dragged (alive) by the Ford Explorer. Fry admitted that he was the triggerman and that he and Hinson had tied Jacobs' necktie to the bumper of the vehicle and dragged the body down the dirt road.

At the penalty phase, the Commonwealth introduced evidence that Fry had broken into and stolen property from three churches and a fire department. Fry also admitted to setting fire to two residences, vandalizing automobiles, and activating ten to twelve false fire alarms. The police officer who arrested Fry had initially been searching for him in connection with arson charges. Fry also admitted that he and a friend had dug up a gravesite to see what a dead person looked like. The jury returned a finding of vileness as the predicate for the death sentence.

16. George Quesinberry – Executed 3/07/99

George Quesinberry, the man most recently executed in Virginia, killed Thomas Haynes, the owner of Tri-City Electric, in the course of robbing the company of \$200 in

coins, plus a roll of stamps. See *Quesinberry v. Commonwealth*, 241 Va. 364 (1991). [CA 1631-41]. Haynes surprised Quesinberry and an accomplice who had broken into the Tri-City Electric facility. Quesinberry ordered his accomplice to shoot Haynes, who was unarmed and had made no aggressive movements toward them. When his accomplice did not shoot, Quesinberry started shooting. He chased Haynes through the building, shooting him twice in the back. The first shot severed Haynes spine and paralyzed him. Haynes fell to the ground. Quesinberry delivered the second shot with the muzzle pressed against Haynes back. As Quesinberry was leaving the premises, he saw Haynes move a little, and struck him twice in the skull with the butt of the gun, leaving a curved impression in Haynes' skull. Haynes survived the night and died the next morning. Quesinberry's accomplice turned himself into the police and named Quesinberry as Haynes' murderer.

Quesinberry had a criminal history of robbery, grand larceny, stolen property, and breaking and entering. He also had a history of illegal drug use. He had absconded from probation at the time that he committed the murder. Based upon his criminal record, the jury found that Quesinberry posed a future danger to society. The jury also found the vileness predicate based upon the aggravated nature of the assault on Haynes.

David Fisher is different from everyone else that has been executed during Governor Gilmore's time in office. David has never killed. Even setting this fact aside, the circumstances surrounding the murder of David Wilkey pale in comparison to the circumstances involved in the sixteen other cases cited above. This was not a multiple murder. The victim was not tortured. The victim did not suffer a horrible, protracted

death. Testimony from the medical examiner who performed the autopsy on Wilkey confirmed that Wilkey died very quickly, if not instantly, from the gunshot wound. [CA 17, 27, 28, Testimony of Dr. Oxley]. Nor were the victim's final minutes of life wracked with fear as he stared down the barrel of a loaded gun. The victim was not a family member, nor was he shot at point blank range. Why then, was David included in this lineup of Virginia's worst criminals? Even if David hired Mulligan, as the jury found, this fact alone cannot justify assigning David to this terrible group of men marked for death, when Robin Radcliff, also an alleged hirer, counts the days until she is eligible for parole.

David finds himself facing imminent execution because of what he said on the Fisher-Steadham tapes and because he had a bad attorney at trial. David's tough talk and graphic claims of other murders are terrifying to hear, but they are nothing but words. The prosecution took great advantage of these words, and constructed an argument upon which the jury based its finding of future dangerousness. However, unlike Lance Chandler, or Ronald Fitzgerald, or Kevin Cardwell, or Dwayne Wright there is no evidence to show that David ever followed through on any of those threats or boasts.

The taking of any life is a terrible event, but some are more terrible than others. Some deserve stronger punishment than others. If David Fisher was involved in Wilkey's death, he will be amply punished by a life sentence with whatever conditions the Governor might elect.

FURTHER CONSIDERATIONS:
IF SENTENCED TO LIVE IN PRISON, DAVID WOULD POSE NO
DANGER TO INMATES OR CORRECTIONS OFFICERS

If the Governor were to commute David's death sentence to a sentence of life in prison, the Governor can be assured that David would not pose a danger to other inmates or corrections officers. In his thirteen years of incarceration since he was arrested for this offense, David has maintained an excellent disciplinary record, with no signs of violent behavior and only a few minor infractions. [CA 1642-63]. When confronted with a problem concerning the conditions of his incarceration, David is far more likely to consult his attorneys to determine what his rights are under the law. For example, one of the incident reports in David's file concerns David's unwillingness to have his blood drawn for a DNA sample. David immediately phoned his attorneys to inquire whether he could legally oppose the blood sample. When informed that he could not, David willingly submitted. Even while incarcerated in Bedford County awaiting his trial, a member of the Bedford Sheriff's Department described David as a "model inmate." David's record in Bedford was completely clean; and, in the officer's own words, David was very "warm" and "outgoing," "well-mannered," "willing to obey anything that was asked of him to do, without any problem," and "a very pleasant person" to come into contact with on a daily basis.⁷ [CA 1785-89, 728, Testimony of George Anderson, Disciplinary Record Letter].

⁷ David also demonstrated compliance with law enforcement in testifying as a key witness for the Department of Justice's Chicago Strike Force, in its case against Christ Bambulas. Sheldon Davidson, the prosecutor in that case, signed an affidavit on David's behalf nine years ago, attesting to David's cooperation and non-violent history. [CA 556-60]. When contacted recently, Mr. Davidson still remembered David and agreed to sign a second affidavit reaffirming his prior statements and lending his support to David's clemency petition. [CA 1709-10].

Footnote continued on next page

David's age is also a strong indicator that he will not pose a risk to others if incarcerated for the rest of his natural life. David is fifty-seven years old. Current data shows that the one factor most consistently associated with criminal behavior is age. *See* Jason Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 *Elder L.J.* 173, 197 (1996). Criminal behavior in males begins at age fourteen and peaks by age twenty-one. Recidivism rates are highest between ages eighteen and twenty-two. For offenders over forty-five, the recidivism rate drops dramatically. *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 *J. Crim.L. & Criminology* 395, 437 (1997). As Judge Posner has observed, "Crime is a young man's game." *United States v. Jackson*, 835 F.2d 1195, 1199 (7th Cir. 1988) (Posner, J. concurring). [CA 1799-1803]. The correlation between age and violence is stronger still. Juveniles and young adults represent, by far, the largest group of violent offenders. David is not a young man, and his disciplinary record clearly demonstrates that he has adjusted positively and peacefully to life in prison.

CONCLUSION

There are many reasons to support granting clemency to David Lee Fisher and to commute his death sentence to a sentence of life in prison or to grant a new sentencing hearing. Bobby Mulligan's recent affidavit admits that much of his testimony consisted of lies and fabrications, raising disturbing questions about David's actual guilt and the

Footnote continued from previous page

In addition, David's supervisor in the Federal Witness Protection Program signed an affidavit stating that while in the program, David never sought any special favors, and, in fact, requested that the standard government assistance checks be discontinued once he was able to obtain employment. [CA 561-64].

fairness of David's trial. Mulligan's affidavit also raises questions about the adequacy of the judicial review in David's case, given the unquestioning faith that reviewing courts placed in Mulligan's reliability.

Bertha Thomas' affidavit plainly admits that David's jury was rendered non-impartial by an improper communication with her husband. This juror interference was undeniably prejudicial, since Ms. Thomas changed her vote because her husband told her to do so. Had Ms. Thomas voted her conscience, the jury could not have recommended a death sentence unanimously, and under Virginia law, the trial judge would have been required to impose a life sentence.

Due to the egregious errors of David's trial counsel, the jury was forced to make its decisions based upon an extremely distorted and highly inaccurate picture of David. The jury believed that David presented a "future danger" because his trial attorney did not provide them with the available facts to prove the opposite. Furthermore, due to trial counsel's fundamental ignorance about the importance of the sentencing phase in a capital trial, the jury was deprived of hearing evidence from over thirty mitigation witnesses that would have provided a radically different picture of David as a human being. The jury was misled to believe that David was a monster, and they treated him accordingly. In reality, David is a kind, loving person who has positively influenced many lives.

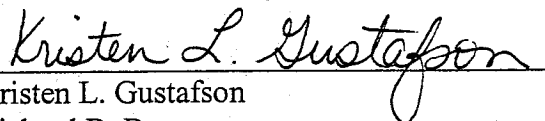
Finally, David's sentence is disproportionate when compared to the sentence of Bobby Mulligan, the triggerman; when compared to others convicted of murder for hire as "hirers;" and when compared to the sixteen men executed under Governor Gilmore's administration. If he is guilty, David deserves to be punished, but he does not deserve to

die. Nor is death necessary to protect society from this fifty-seven year old man with no prior history of violent crimes, and an almost spotless disciplinary record for the last thirteen years of his incarceration.

David's family and friends pray that you will consider this petition carefully and show mercy for David Fisher by commuting his death sentence to a sentence of life.

Respectfully submitted,

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