CAPITAL CASE
EXECUTION SCHEDULED
FOR AUGUST 5, 1997

In re THOMAS M. THOMPSON)
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PETITION FOR EXECUTIVE CLEMENCY DIRECTED TO THE HONORABLE PETE WILSON GOVERNOR OF STATE OF CALIFORNIA

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I.

INTRODUCTION

The power of clemency exists because the people recognize that, no matter how careful the attempt, the courts do not in every case achieve justice. The people have given the Governor the power and the responsibility to do justice in those cases, not through the application of a rule of law, but through the exercise of common sense, compassion, and conscience. From 1941 to 1974, the governors of California granted clemency 41 times, basing their decisions on a number of factors. These have included a lack of prior criminal record or history of violence, honorable service in the armed forces, good education and employment records, newly discovered evidence not presented to the jury that casts doubt on the fairness of the process, recommendations for clemency by jurors who sat on the case, doubts about the defendant's guilt of the capital offense, doubts about the adequacy of the legal representation afforded the defendant at trial, and the petitioner's good adjustment to life in prison.

Tom Thompson's petition is unique because it presents a compelling case as to every one of these factors. If clemency exists because the people intended it to be exercised in the appropriate case this is that case. It would be difficult to construct one more worthy.

Mr. Thompson has no previous criminal record or history of violence. He graduated from high school and earned 67 units of credit with a B average from Santa Ana City College and California State University at Fullerton. He was honorably discharged from the United States Army and received three promotions and four letters of commendation for exceptional service from his commanding officers. He held a number of responsible jobs, including one as the photographer for the Santa Ana Fire Department. He has been a model prisoner on death row. Guards at San Quentin have stated that he is respectful of authority and has "exceptional relationships with guards and inmates." He is credited by one guard with preventing the murder of a correctional officer, and one of the guards said of him, "If anyone could be salvaged from death row, it would be Tom Thompson." While in prison, Mr. Thompson developed a relationship with a woman and married her. Mr. Thompson has taught himself to paint, and as can be seen from the photographs of his work which are attached (Exhibit 25), has become an accomplished painter.

Richard A. Gadbois, Jr., the United States District Judge who presided over a three-day evidentiary hearing during Mr. Thompson's federal habeas corpus proceeding, vacated the rape conviction and rape special circumstance finding, as well as the death penalty, finding that Mr. Thompson's constitutional right to the effective assistance of counsel had been violated. This highly respected former California state

criminal trial judge appointed by President Reagan, in the final paragraph of his order, stated:

> "Before concluding, the Court wishes to express its view that the ends of justice would not be served by retrying Petitioner on the rape charges. While the Court found that Petitioner's remaining claims do not rise to the level of constitutional error, many of them nevertheless leave the Court with an unsettling feeling. The disparate convictions and sentences of Thompson and Leitch, for example, while legally permissible, are troubling to this Court given the intensity of public perceptions in these cases and the deficiency of certainty regarding relative culpabilties. These concerns should be carefully considered by the State when deciding if society would be best served by retrying these charges, now almost fourteen years old . . .."

Judge Gadbois formed these views even though he did not have available to him startling new evidence of Mr. Thompson's innocence of the rape. We have recently learned that in January, 1995, Mr. Thompson's co-defendant, David Leitch, testified at his parole hearing, attended by a representative of the Orange County

District Attorney's Office, that he had returned to his apartment only an hour or so before Ms. Fleischli died, had walked through the unlocked door and had seen Mr. Thompson and Ms. Fleischli having consensual intercourse. This testimony not only negates the prosecution's rape case and its proffered motive for murder, it also places Mr. Leitch, by his own admission, in the apartment while Ms. Fleischli was alive. Despite the pendency of the federal habeas corpus action, the State did not reveal this information to Mr. Thompson's attorneys.

Further, Mr. Leitch recently stated that he had given the same information to his defense attorney in 1982 and that the information had been known to the police and the prosecutors at that time. Ronald Kreber, then Mr. Leitch's defense attorney and now a judge of the Orange County Municipal Court, confirmed that Mr. Leitch had given that version of the facts in 1982. Mr. Owens, one of the Orange County Sheriffs detectives who had been responsible for investigating the case, recently confirmed that he had been aware of that version of the facts at the time of Mr. Thompson's trial. Nevertheless, neither Mr. Thompson's, the jury, nor any court, had an opportunity to consider that evidence. Coupled with the evidence presented by Mr. Thompson at the federal evidentiary hearing which convinced Judge Gadbois to overturn the rape conviction (the only special circumstance), this new evidence both

points Mr. Thompson's innocence and renders the functioning of the judicial process in this case untrustworthy.

Having reviewed the evidence presented at the evidentiary hearing, but not yet the newly discovered evidence, two of the trial jurors who voted to sentence Mr. Thompson to death now have doubts regarding the case and believe that his death sentence should be reduced to life without the possibility of parole.

Although both the prosecutor and the trial judge who prosecuted and presided at both trials have stated that only Leitch had a motive to kill Ms. Fleischli and that he was the motivating factor behind the murder, yet Mr. Leitch is parole-eligible while Mr. Thompson has an August 5 execution date.

Seven former prosecutors, including Donald Heller, the principal draftsperson of the California death penalty statute; Peter Hughes, Chairman of the Board of Trustees of the University of San Diego; Curt Livesay, who as the chief deputy district attorney for Los Angeles County reviewed more than 1,000 capital cases to decide whether to seek the death penalty; M. James Lorenz, the former United States Attorney for the Southern District of California; Richard Gilbert, a retired judge of Placer County and former District Attorney of Yolo County; Wayne Ordos, former Executive Director of the California Fair Political Practices Commission; and Steve White, the former Executive Director of the California District Attorneys Association,

former Chief Assistant Attorney General of California, and former District Attorney of Sacramento County, all urged the United States Supreme Court to grant a writ of certiorari in this case.

While they "believe in the imposition of the death penalty in an appropriate case, where the death sentence is the product of fair and reliable proceedings," in this case, they concluded that "there are many disturbing aspects to the convictions and death sentence rendered and upheld in Thompson's case that leave us with little confidence that the death penalty is appropriate in this case." These former prosecutors, who collectively have evaluated or tried thousands of capital cases, all of whom believe in the imposition of the death penalty in the appropriate case, concluded:

> In short, this is a case where it appears that our adversarial system has not produced a fair and reliable result, which leaves us, as it did District Judge Gadbois, with 'an unsettling feeling.'"

II.

THE ROLE OF EXECUTIVE CLEMENCY IN CALIFORNIA CAPITAL CASES

-- "Clemency involves a search for answers that goes beyond judicial fact-finding. . . ." Janice Rogers Brown, *The Quality of Mercy*, 40 U.C.L.A. L.Rev. 327, 335 (1992).

-- "Any capital sentencing scheme may occasionally produce aberrational outcomes." *Pulley v. Harris*, 465 U.S. 37, 54 (1984).

-- "Executive clemency has provided the `fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

The constitutional authority to grant clemency entrusts the Executive with the indispensable role of "preventing miscarriages of justice where the judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993). As Chief Justice Rehnquist has stated, "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera*, 506 U.S. at 415. Clemency, "a check entrusted to the executive for special cases" (*Ex Parte Grosman*, 267 U.S. 87, 120 (1925)), allows for fallibility to be replaced with fairness.

Justice Janice Rogers Brown has written that "[t]he clemency process is an exercise of common sense and compassion rather than a rule of law," and mercy is

properly left to the conscience of the executive unbound by court decisions. *Brown, op. cit.* at 328. This is only right, because the traditional judicial concern is with error, not outcome. Because of the constraints of the rules that reviewing courts must use in measuring legal error, the judiciary cannot always achieve a just result. For example, evidence adjudged to have been presented untimely will go judicially unheeded, even if such evidence points to a defendant's innocence. Clemency, in contrast, has served as the "traditional remedy" for claims of new evidence, such as those presented here. *Herrera*, 506 U.S. at 416. In *Carriger v. Stewart*, 95 F.3d 755, 761, (9th Cir. 1996), the court recognized that even when doubts regarding guilt do not satisfy the exceedingly high standard required for relief by the courts, the Executive is free to consider the weight of the evidence. "That the evidence against [the petitioner] is not overwhelming might well be considered by the governor in exercising his power of executive clemency."

Additionally, the Executive is not bound by the sometimes narrow legal principles limiting the factors that courts may consider in reviewing capital sentences. For example, the settled rule is that California courts cannot perform an intercase proportionality review to determine if the penalty imposed in a particular capital case is disproportionate to the penalty imposed in other capital cases. *See Pulley v. Harris, supra*, 465 U.S. at 50-53; *People v. Marshall*, 13 Cal. 4th 799, 854 (1996). Thus,

proportionality with respect to other cases, a very important consideration in Thompson's case, can be achieved only within the clemency process. In addition, California courts do not engage in an intracase proportionality review to evaluate the defendant's sentence in comparison to that received by co-defendants culpable for the same offense. *See People v. Sanchez*, 12 Cal. 4th 1, 84-85 (1996); *People v. Arias*, 13 Cal. 4th 92, 193 (1996). Again, proportionality with regard to the sentence of the codefendant Leitch is a very important consideration in Thompson's case, and can be addressed only in the context of the clemency decision.

In this regard, it is fundamentally unfair that one defendant be escorted into the death chamber, while another equally or more culpable defendant is eligible for parole. In such instances, the Executive may exercise his power to grant clemency, not out of sympathy for a defendant, but so that it may not be said that the State failed in meting out even-handed justice. Clemency is a way of bringing law, justice, and mercy into harmony.

Clemency is an integral part of California's system of capital punishment, which serves a purpose other than simply certifying that no legal error has occurred. Courts, both federal and state, have recognized that the clemency authority will scrutinize and evaluate cases on grounds beyond those considered by the courts. *See, e.g., Herrera*, 506 U.S. AT 411-417; *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976);

People v. Superior Court, 190 Cal. 624, 625 (1923); *People v. Mooney*, 176 Cal. 105, 109 (1917). Over the years, California governors have generally done just that in appropriate cases. *See Brown, op. cit.* at 328.

EXECUTIONS AND COMMUTATIONS OF
SENTENCES OF DEATH: CALIFORNIA, 1941-PRESENT

GOVERNOR	EXECUTIONS[1/]	COMMUTATIONS[2/]
Culbert Olson (1941-1942)	19	3
Earl Warren (1943-1953)	82	8
Goodwin Knight (1953-1958)	41	6
Edmund G. Brown, Sr. (1959-1966)	35	23
Ronald Reagan (1967-1974)	1	1
Pete Wilson (1990-present)[3/]	4	0
	182	41

1/ The figures for executions are taken from William J. Bowers, "Executions in America" (1974), pp. 226-231.

2/ The figures for commutations of death sentences are taken from the appendix to the Governor's 1979 Executive Clemency Report to the Legislature.

3/ There were no executions or commutations of death sentences during the terms of Governors Deukmejian or Edmund G. Brown, Jr.

Thus, in the last fifty years, the Governors of California commuted death sentences in approximately 18 percent of the capital clemency cases that they have reviewed.

In granting clemency in these capital cases, California governors have cited and relied on a number of factors each one of which is present in Mr. Thompson's case:

1. Affirmative aspects of the inmate's background, character or history suggesting the aberrational nature of the offense as an event in the inmate's life or the inmate's capacity for rehabilitation, or otherwise suggesting the appropriateness of granting mercy to the inmate, including (a) lack of prior criminal record,[4/] (b) no prior history of violence,[5/] (c) honorable service in the armed forces,[6/] (d) a good work record,[7/] and (e) educational accomplishment.[8/] Mr. Thompson had no criminal record

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4/ Commutation Decrees: Charles James Golston, May 2, 1963; Charles Evan Turville, Jr., November 5, 1959; Edward Simon Wein, June 4, 1959; John Russel Crooker, Jr., January 14, 1959; Ewell Danielly, June 1, 1949; Jack D. Green, January 4, 1934. See also Report of Clemency Secretary Arthur L. Alarcon dated February 5, 1962 re Bertrand Joseph Howk, Jr., at p. 9 (Howk's death sentence was commuted on February 12, 1962).

5/ Commutation Decrees: Charles James Golston, May 2, 1963; Stanley William Fitzgerald, April 23, 1962.

6/ Commutation Decrees: Charles Evans Turville, Jr., November 5, 1959; Edward Simon Wein, June 4, 1959; John Russel Crooker, Jr., January 14, 1959; Ewell Danielly, June 1, 1949.

7/ Commutation Decree, Robert L. Mason, August 19, 1960.

(continued...)

or history of violence, was honorably discharged from the United States Army, held a number of responsible jobs, and earned a college education.

2. Information that may have materially affected the jury's sentencing decision that was never presented to the jury such as newly discovered evidence,[9/] or evidence that was available at the time of trial but never produced in court.[10/] Here important evidence went undiscovered by Mr. Thompson's trial counsel while other critical evidence was suppressed by the prosecution.

3. Doubt as to the inmate's guilt of the capital offense including doubts based on the trial record,[11/] on newly discovered evidence,[12/] or on evidence

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[7/](...continued)

[8/] Commutation Decree, John Russel Crooker, January 14, 1959.

[9/] Press release issued by Governor's Office on June 29, 1967 explaining commutation on that date of death sentence of Calvin Thomas; Commutation Decrees: William Lee Harrison, October 3, 1963; Charles James Golston, May 2, 1963; Bertrand J. Howk, Jr., February 12, 1962; Vernon Atchley, August 22, 1961; Allen Ellis, July 17, 1929.

[10/] Commutation Decrees: Clarence Edward Ashley, June 17, 1963; Ewell Danielly, June 1, 1949; Alfred Harrison, February 15, 1934.

[11/] Commutation Decrees: Harry Langdon, October 8, 1959; Edward Simon Wein, June 4, 1959.

[12/] Press release issued by Governor's Office on July 18, 1958 announcing Governor Knight's intention to commute the death sentence of Remmel Wayne Brice (sentence commuted on August 8, 1958).

(continued...)

available as of the time of trial but never presented to the jury.[13] There is considerable doubt as to Mr. Thompson's culpability of capital murder.

4. Recommendations of participants in the inmate's trial such as a member of the sentencing jury recommending clemency.[14] Two of Mr. Thompson's jurors now recommend clemency. (Exhibit 28).

5. Doubts as to the fairness of the inmate's trial and/or the adequacy of his legal representation.[15] Mr. Thompson's trial was unfair both because the prosecution pursued inconsistent theories against him and his codefendant and suppressed material exculpatory evidence and also because of his trial's counsel's ineffective assistance.

6. Intra-case sentencing disparity, the disparity between the sentence imposed on the condemned inmate and that imposed on equally or more culpable

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[12](...continued)

[13] Commutation Decree, Clarence Edward Ashley, June 17, 1963.

[14] Commutation Decrees: William Lee Harrison, October 3, 1963 (Governor Brown); Edward Wesley Brown, May 14, 1947 (Governor Warren).

[15] Commutation Decrees: Clarence Edward Ashley, June 17, 1963; Jack D. Green, January 4, 1934.

codefendant(s).[16] Here the disparity could not be more extreme. Mr. Thompson faces death while Mr. Leitch is eligible for parole.

7. Inter-case sentencing disparity, the disparity imposed on a condemned inmate and that imposed on others who had committed comparable crimes[17]. The California Supreme Court has decided seven capital cases in which the defendant had been convicted of first degree murder with a rape special circumstance. Thomas Thompson is the only one of the seven to have no prior arrest or prior violent activity. *See People v. Brown*, 40 Cal. 3d 512, 220 Cal. Rptr. 637, 709 P.2d 440; *People v. Ghent*, 43 Cal. 3d 739, 239 Cal. Rptr. 82, 739 P.2d 1250 (1987); *People v. Payton*, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526, 839 P.2d 1035 (1992); *People v. Rowland*, 4 Cal. 4th 238, 14 Cal. Rptr. 377, 841 P.2d 897 (1992); *People v. Clark*, 5 Cal. 4th 950, 22 Cal. Rptr. 689, 857 P.2d 1099 (1993); *People v. Berryman*, 6 Cal. 4th 1048, 25 Cal. Rptr. 867, 864 P.2d 40 (1993).

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[16] Commutation Decrees: Norman Arthur Whitehorn, December 2, 1963; Charles Evan Turville, Jr., November 5, 1959; Alfred Harrison, February 15, 1934.

[17] Commutation Decree, Edward Wesley Brown, May 14, 1947.

8. The inmate's good adjustment to prison life and the fact that he has presented no custodial problems and is unlikely to do so in the future.[18/] Mr. Thompson's adjustment to prison life has been extraordinary and constructive.

These factors have been considered as well by other state executives whose decision have accorded due weight both to lingering doubt about a defendant's guilt and to the proportionality of the defendant's sentence compared to that of an equally or more culpable codefendant, two important considerations in Mr. Thompson's case. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 300 (1993).

In an imperfect, overloaded, and increasingly rigid system of criminal justice, the extrajudicial corrective of executive clemency, mandated by the people, provides a safety valve for the system. *See Herrera*, 506 U.S. at 415. Clemency permits the Governor to go beyond the narrow confines of the judicial process, and to consider what Justice Cardozo has described as "anything that is pertinent that may move the mind to doubt or the heart to charity." *Andrews v. Gardiner*, 121 N.E. 341, 343 (1918). As the final procedural step in a capital case, clemency review serves a special protective function in ensuring that the decision to take an inmate's life is the

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18/ Commutation Decrees: Ernest Leroy Jacobson, December 5, 1966; Norman Whitehorn, December 2, 1963; William Lee Harrison, October 3, 1963; Clarence Edward Ashley, June 17, 1963; Charles James Golston, May 12, 1963.

right one. *See Woodward v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1187 (6th Cir. 1997), noting "the integral part played by clemency in every state's death penalty scheme."

Possessing the final authority over executions, the Executive is given both the power and the flexibility to protect the integrity of the judicial system which otherwise would sometimes permit a grievously unjust result. As Edmund Burke recognized: "Mercy is not a thing opposed to justice. It is an essential part of it . . . ." Choosing whether another is to live or die is a daunting responsibility. As long as the Governor is entrusted with the clemency prerogative, "the decision to allow a life to be extinguished will be a very hard thing to do. It should be." *Brown, op. cit.* at 337.

III.

THOMAS M. THOMPSON

A. Early Life

Tom Thompson was born in Chicago, Illinois on March 20, 1955. He is 42 years old. His parents, Jerry and Ingeborg Thompson, divorced when Tom was five years old. About a year later, Tom's mother met and married Ed Lochrie, a decorated former Marine officer and national sales manager for Simoniz. Mr. and Mrs. Lochrie, Tom, and his sister Nancy, who was born on March 20, 1956, moved to New York

where Mr. Lochrie held positions in the sales departments of major corporations. Tom attended kindergarten through fourth grade in New York, where he also attended Sunday school at the family church.

In 1966, the Lochries, who now included Lisa, Tom's new sister, moved to Orange, California, to the home where Mrs. Lochrie still resides. Tom completed the fifth through the ninth grades at local schools and attended Villa Park High School through the tenth and eleventh grades, where he was in the high school band and worked at three jobs to earn spending money.

Tom decided to live with his natural father during his senior year in high school. He graduated from Elgin High School in Elgin, Illinois in 1973. (Exhibit 1). During his senior year, he worked at Dominic's Market to earn his spending money. After graduation, Tom returned to Orange, where he worked in a service station as a mechanic. Two photographs of Mr. Thompson, as a young boy and as a young adult, are attached. (Exhibits 2 and 3).

B. <u>Service In The United States Army</u>

In 1973, at the age of 19, Mr. Thompson joined the army. During his two years of active duty, he was promoted three times from private to specialist fourth class. During his advanced individual training at Fort Sill, Oklahoma, he was commended for his outstanding performance of duty. (Exhibit 4). While on active

duty, he also served at Fort Ord and, for seventeen months, with the Seventh Army in Germany. He received three letters of commendation from two commanding officers who commended his outstanding performance and who noted that he was a "diligent, imaginative and competent worker" who "could be trusted to accomplish complex tasks superbly." (Exhibits 5, 6 and 7). His enlisted evaluation report, completed in 1976, described him as "an outstanding soldier." He was given the highest possible rating for his personal behavior and his ability to work with others, and both his first sergeant and company commander stated that if they had had the authority they would have promoted him immediately. (Exhibit 8). During his service, he earned the National Defense Service Medal and an M-16 rifle marksman badge. (Exhibit 9). Mr. Thompson was relieved from active duty in March, 1976 and transferred to the United States Army Reserve from which he received a honorable discharge in March, 1980. (Exhibits 10 and 11).

C. **Post-Service Education And Employment**

After his discharge, Mr. Thompson returned to California where he enrolled at Santa Ana College in the fall of 1976. He successfully completed 64 units of study with a cumulative B average. His courses included three photography courses and a two-dimensional design course. During this time, he began developing his skills as a photographer. Examples of his photographs are attached as Exhibits 12, 13 and

14. He took additional course work at California State University at Fullerton, including a commercial photography class in which he received a grade of A.

In 1977, Mr. Thompson was employed by the City of Santa Ana as an equipment maintenance employee. In September, 1978, he transferred to the Santa Ana Fire Department as a photo lab technician and photographer for the city fire department. There, he received good performance reviews, was commended for his very good attitude, and was recommended for a merit step increase. (Exhibit 15) In February, 1980, Mr. Thompson resigned from the fire department to accept a job as a materials supervisor for Fluor Engineers Inc. in Saudi Arabia. Laid off in a staff reduction, he returned to California and was supporting himself with odd jobs when he met David Leitch and moved into his apartment in 1981.

D. Mr. Thompson's Extraordinary And Positive Adjustment To Prison Life

In his more than 12 years on death row at San Quentin, Mr. Thompson's adjustment to the rigors and discipline of incarceration has been excellent. He was active in the Veterans' Group at San Quentin and participated in the group's efforts to raise money for the Muscular Dystrophy Association. (Exhibit 16). From December, 1984 to December, 1986, when the program was terminated, he was assigned to the Condemned Workers Program, where "he performed his duties in an excellent manner which contributed to the orderly operation of Donner Section where he was assigned as

a Block Worker" and "need[ed] no supervision in making sure things get done, [and] [was] always ready to assist the other workers in their tasks." (Exhibit 17). Following the termination of the worker program, Mr. Thompson continued for almost two years to volunteer to clean showers on the prison tier, where "he [did] an exceptional job with the minimal tools available" and "demonstrated an excellent attitude." (Exhibits 18, 19 and 20). This work, as well as his service as the volunteer telephone coordinator, helped the tier officer "run a timely and harmonious tier." (Exhibit 21). Thompson has had an excellent disciplinary record. He has never been charged with an infraction involving correctional officers, civilian staff, weapons, or contraband. Incidents with other inmates resulted from other inmates attacking Thompson. (Exhibits 22, 23 and 24).

One correctional officer, a 14-year veteran at San Quentin, states that of the couple of hundred death row inmates he has known, Thomas Thompson is one of only two that the officer would testify for. That officer describes Mr. Thompson's intervention to prevent the murder of a prison guard and notes that "Tom always had a calming effect on the tier" and "was always respectful toward staff." The officer concludes that Mr. Thompson "is in a class by himself" and "[i]f anyone could be salvaged from Death Row it would be Tom Thompson." (Exhibit 26).

Another correctional officer with 10 years service at San Quention had similar strong feelings about Mr. Thompson. He states that Mr. Thompson was "the best worker I had," "has an exceptional relationship with guards and inmates," and "is respectful of authority." The officer recounts a 1988 incident where Mr. Thompson warned him of a possible personal safety situation, and concludes that Mr. Thompson "is the only inmate behind bars I would trust with my life." (Exhibit 27).

IV

THE CAPITAL OFFENSE

A. Unresolved Questions

Because this is not a judicial proceeding, the Governor is free to consider, as other governors have in the past, information which may have materially affected the jury's sentencing decision but which was never presented to the jury, either because it was not available or because the defendant's counsel was ineffective. Both of those situations exist in this case. Mr. Thompson's trial lawyer failed to investigate or present critical defense evidence that would have rebutted the medical/ forensic evidence and jailhouse informant testimony that formed the core of the prosecution's case against Mr. Thompson. Because of that evidence, the Honorable Richard A. Gadbois, Jr., appointed to the United States District Court by President Reagan, found

that Mr. Thompson had been deprived of his constitutional right to the effective assistance of counsel, and vacated his rape conviction, rape special circumstance finding and death sentence. Judge Gadbois, a well-respected former California state court trial judge who had been recognized as the criminal courts trial judge of the year by the Los Angeles County Bar Association, concluded, "The prosecution did not present strong evidence that Fleischli was raped or that Thompson was the perpetrator of the rape. What evidence was presented was problematic and vulnerable to attack."

Perhaps even more important to these proceedings was Judge Gadbois' concluding thought at the end of his 100-page written opinion:

> "Before concluding, the Court wishes to express its view that the ends of justice would not be served by retrying Petitioner on the rape charges. While the Court has found that Petitioner's remaining claims do not rise to the level of constitutional error, many of them nevertheless leave the Court with a unsettling feeling. The disparate convictions and sentences of Thompson and Leitch, for example, while legally permissible, are troubling to this Court, given the intensity of public perceptions in these cases and the deficiency of certainty regarding relative culpabilties.

> These concerns should be carefully considered by the State when deciding if society would best be served by retrying these charges, now almost fourteen years old, and perhaps sparking in another decade or more of judicial review."

Opinion at 101.

While the Ninth Circuit Court of Appeals reversed Judge Gadbois, none of the three judges on the panel was ever a California state judge, and their decision rested on the erroneous view that a jury could have returned a verdict against Mr. Thompson notwithstanding the ineffective assistance rendered by his attorney. The Court did not directly address Judge Gadbois' findings that the prosecution's evidence could have been and should have been discredited at trial.

In an unprecedented brief filed with the United States Supreme Court, seven former prosecutors, including the draftsman of the California death penalty statute, disagreed and noted that, although they "generally believe in the imposition of the death penalty in an appropriate case, where the death sentence is the product of fair and reliable proceedings . . . there are many disturbing aspects to the convictions and death sentence rendered and upheld in Thompson's case that leave us with little confidence that the death penalty is appropriate in this case." Amicus Brief at 2.

These prosecutors who included Richard Gilbert, a retired judge of

Placer County Superior Court and former district attorney of Yolo County, Donald Heller, Peter Hughes, the chairman of the Board of Trustees of the University of San Diego and a former assistant United States attorney, Curt Livesay, the former chief deputy district attorney for Los Angeles County who reviewed more than 1,000 capital cases to determine whether the death penalty should be sought, James Lorenz, a former deputy district attorney for San Diego County and the former United States attorney for the Southern District of California, Wayne Ordos, the former executive director of the California Fair Political Practices Commission, and Steve White, the former executive director of the California District Attorneys Association, former Chief Assistant Attorney General, and former district attorney of Sacramento County. These ex-prosecutors severely criticized the prosecutors's tactics, including the indiscriminate use of informants and the pursuit of inconsistent theories at the two trials. They stated that they had "serious questions regarding Thompson's culpability," that there was "no clearcut evidence reliably establishing that defendant Thompson was the murderer," and that they believe that there are "substantial, unresolved doubts about Thompson's role and relative culpability." They emphasized that there was "no definitive evidence reliably establishing that a rape occurred." Both Mr. Livesay and Mr. White, who during his six years as district attorney in Sacramento County made the decision whether to seek the death penalty in each capital eligible case, stated that they would

not have authorized seeking the death penalty in this case. The former prosecutors concluded that they agreed with Judge Gadbois that the case left them with "an unsettling feeling."

Even the trial prosecutor in these two cases acknowledged, after the two trials had been completed, that he did not know what role Mr. Thompson had played in the crime. He stated to Mr. Leitch's jury that "there is nothing that excludes either Thompson or Leitch" and "we can't tell you exactly what it was that Mr. Leitch did when he got back to the apartment and we can't tell you exactly what Mr. Thompson did either." Leitch RT 2501.

To this extraordinarily high degree of uncertainty on which to base the execution of a fellow human being, one must now add the recently discovered evidence that when David Leitch returned to the apartment on the night Fleischli was killed, he saw Thompson and Fleischli engaged in consensual intercourse. This critical evidence undermines the prosecution's theory that Thompson raped Fleischli and then killed her to conceal the rape, and corroborates Thompson's version of events.

Although the prosecution was aware that Leitch witnessed consensual intercourse, not rape, between Thompson and Fleischli, this information was never heard by Thompson's jury because it was suppressed by the State. Leitch's trial lawyer, now a municipal court judge, confirms that Leitch maintained at the time of trial

that he saw Thompson and Fleischli engaged in consensual intercourse, and one of the Orange County Sheriff's investigating officers acknowledges that he was aware of this information prior to trial.

This new evidence, added to the evidence presented in the federal proceedings, which effectively undermined major aspects of the prosecutions's case, establishes that Thompson did not rape Ms. Fleischli, that he is innocent of capital murder, which is based solely on the rape, and, because it removes the only motive offered by the prosecution for the murder of Fleischli by Thompson (i.e., to prevent her from reporting the rape), casts grave doubt on Thompson's guilt for the murder as well.

B. The Evidence Regarding The Culpability Of Mr. Thompson and Mr. Leitch

Thomas Thompson was 26 years old and had no criminal record when he was arrested for the murder of Ginger Fleischli. David Leitch, his roommate and co-defendant, not only had a violent criminal history, but had in the past had threatened to kill Ms. Fleischli, his ex-girlfriend.

Thomas Thompson was tried first. The prosecutor's stated theory was that Mr. Thompson had raped Ms. Fleischli and then killed her to cover up the rape, and that Leitch's involvement was limited to helping dispose of the body. The primary witnesses against the Mr. Thompson were Leitch's ex-wife (whom the state court later

referred for prosecution for perjury), Leitch's best friend, and two jailhouse informants (both of whom, it was later proven, lied at trial about their history as informants).[19/]

At Mr. Thompson's trial, the prosecutor vigorously tried to exclude, and then disparaged the importance of, the testimony of witnesses presented by the defense, that Leitch had the motive and violent disposition for, and was the probable perpetrator of, the murder. However, as these defense witnesses concluded their testimony in the defense's case, the prosecutor served them with subpoenas to appear as prosecution witnesses at Leitch's trial, at which the prosecutor urged the importance of their testimony to show that Leitch had the motive for and was guilty of murder.[20/]

19/ The two jailhouse informants testified at trial that the Mr. Thompson had admitted to raping and killing Ms. Fleischli. However, at the preliminary hearing, at a time when Mr. Thompson and Leitch were still joined as defendants, the prosecutor had presented the testimony of three other jailhouse informants who testified that Mr. Thompson had told them that Leitch, who had wanted Ms. Fleischli dead, had hired Mr. Thompson to help him and had aided and abetted the commission of the crime, and that ~~the~~ Mr. Thompson had had consensual sex with Ms. Fleischli beforehand. At the conclusion of the preliminary hearing, the municipal court judge found that there was insufficient evidence to bind Mr. Thompson over on the rape charge and the rape-murder special circumstance. After the preliminary hearing and after it was determined that the co-defendants would be tried separately, the prosecutor abandoned the first three informants, and "found" two new ones (one of whom had been Leitch's cellmate) who provided the nexus between ~~the~~ Mr. Thompson and the alleged rape that was essential to the prosecution's new theory against Mr. Thompson.

20/ At his subsequent deposition, the prosecutor acknowledged that it was always his view that Leitch had the motive for the murder. Jacobs Deposition, pp. 194, (continued...)

In his closing argument at Leitch's trial, the prosecutor repudiated the rape-murder theory that he had presented at Mr. Thompson's trial and argued that the theory was ludicrous:

> "So we have to ask ourselves, why would Mr. Thompson murder Ms. Fleischli alone in an apartment where he lived with no transportation, no means to move the body and wait for Mr. Leitch to come home to be an A-1 witness to the murder of his ex-girlfriend? Is that reasonable or logical? Do you think that's what happened?"

Leitch RT 2564. The prosecutor contradicted his previous theory of the case that Mr. Thompson had acted alone by informing the jury that, "[t]here's nothing that excludes either Thompson or Leitch" and "we can't tell you exactly what it was that Mr. Leitch did when he got back to the apartment and we can't tell you exactly what Mr. Thompson did either." Leitch RT 2510.

In a stark about-face from Mr. Thompson's trial, the prosecutor urged upon the jury the wealth of evidence that Leitch was responsible for the murder:

> "And when Miss Fleischli came out, we know that she was wrapped up in Mr. Leitch's blanket, his sleeping bag, and tied up with his rope, and she's been stabbed five times in the ear with his knife, the fishing knife returned to his dresser drawer a few days before, which he later lied to the police about owning, and which he, himself, probably threw into the ocean that night. [¶] So

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[20]/(...continued)
164–65, 175.

> Ms. Fleischli's body was carried to his car . . . and that footprint that you saw by Miss Fleischli's feet, that was made by Mr. Leitch."

Leitch RT 2510-2511.

The prosecutor subsequently informed Leitch's probation officer that Leitch was the "motivating force" behind the murder who had bound and gagged and may have stabbed Ms. Fleischli. The trial judge stated that "[o]nly Leitch had a motive" and that he "manipulated Thompson to help him do the killing." *Id.* Thus, Mr. Thompson was convicted and sentenced to death based on a solo rape-murder theory that both the prosecutor and the trial judge subsequently disavowed.

At Mr. Thompson's trial, the evidence offered by the prosecution to prove the rape necessary to render him eligible for the death penalty consisted almost entirely of medical and forensic evidence regarding the condition of the decedent's body and of the testimony of two jailhouse informants that Mr. Thompson had confessed to rape.

The medical examiner, Dr. Richards, testified that there were bruises on Ms. Fleischli's hands, wrists, left elbow, and ankles (RT 1618-22, 1625, 1765-66) which were caused by "the application of force" and "heavy handling" immediately prior to her death, and which suggested that she had been restrained and raped. RT 1618-22, 1625, 1635-36, 1765-66. Although Dr. Richards acknowledged that there

was "no anatomic evidence of rape" in the sense of vaginal injury (RT 1624, 1637) he testified that there is no vaginal injury in most rape cases (RT 1629-34, 1766) and that bruises to other parts of the body are a more certain indicator of rape. RT 1635-36. Sheriff's deputy Coder bolstered this theory by testifying that an injury to Ms. Fleischli's right wrist had been caused by a handcuff (RT 1748-49) which permitted the jury to infer that Mr. Thompson, not his co-defendant, was guilty because he had at one time possessed handcuffs. RT 1694-97.

The prosecutor relied heavily on this evidence and argued to the jury that the bruises proved that Ms. Fleischli had been bound and raped before she was stabbed. RT 2559-60, 2633-36. He pointed to Dr. Richards' testimony to urge that "bruises to other parts of the body, to the wrist, to the ankles, such as we have here are even more important [than the absence of vaginal bruising] . . . in determining what happened to the victim." RT 2633. The prosecutor also argued that it was clear from Mr. Thompson's possession of handcuffs and from Deputy Coder's testimony that the right wrist had been injured by handcuffs -- which the prosecutor pointed out was "uncontradicted" by Mr. Thompson's counsel -- that Mr. Thompson, not his co-defendant, was the perpetrator. RT 2634-36, 2467. Furthermore, the jury was instructed by the trial court to consider the "presence of bruising and contusions to the

wrist, hands, and ankles" and a "cut on her wrist" as evidence of rape. CT 1600; RT 2671-74.

As the district court found, the evidence that a rape had occurred was not substantial, may not have been credible, and was certainly open to attack. App., *infra*, 79a, 81a, 101a. Mr. Thompson demonstrated at the evidentiary hearing that Dr. Richards' testimony that there were numerous injuries to the hands, arms, and legs, which occurred close to or at the time of death, was not true. Dr. Richard's own autopsy documents showed that there were no injuries to the lower extremities that had occurred near the time of death; there was only a single injury to each of the upper extremities that could have occurred either at or near the time of death, and as to those it could not be determined whether they had occurred before or after death; and there was, in the words of the coroner's own autopsy report, "remarkably little in the way of trauma" to the body. *Id.* at 75a-77a.

In addition, the injury to the right wrist, which the prosecution presented as an uncontroverted handcuff injury,[21] was open to serious challenge. According to the expert testimony of the pathologist presented at the evidentiary hearing, the injury was inconsistent with injuries associated with handcuffs. *Id.* at 77a. Such expert

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[21] Even the State's *Strickland* expert admitted that the handcuff evidence was used in a "very, very, vivid way" and that defense counsel should have done something to impeach it. EH 321, 331.

testimony, if presented at trial, would have rebutted the otherwise uncontroverted lay opinion of a sheriff's deputy that the injury had been caused by handcuffs.

Finally, Ms. Fleischli was found wearing jeans that were fully zipped and belted, but unbuttoned. RT 1504. According to the expert testimony presented at the evidentiary hearing, if the victim had engaged in intercourse and she or another had then put on her jeans before she douched or washed, there would have been semen drainage in the crotch of her jeans. That none was found by the state criminalist suggested that she had douched or washed, which was consistent with the consensual sexual intercourse testified to by Mr. Thompson and inconsistent with the rape charged by the prosecution. App., *infra*, 77a.

The primary evidence that linked Mr. Thompson to the alleged rape came from two jailhouse informants. Edward Fink testified that while in jail with Mr. Thompson, Mr. Thompson told him that he "wanted to screw" Fleischli, but she refused, so he "took it," and then killed her because he did not want any witnesses. *Id.* at 81a. Similarly, John Del Frate testified that while in jail with Mr. Thompson, he told Del Frate that he had raped a woman named Ginger and killed her after she said she was going to report the rape. *Id.* at 92a-93a.

The district court found that trial counsel should have obtained and presented available evidence of numerous past instances in which Fink had received

benefits for informing, and of his receipt of benefits from the district attorney in return for his testimony against Mr. Thompson. *Id.* at 85a-87a. This evidence established that, contrary to Fink's trial testimony, for ten years before testifying against Mr. Thompson, Fink had engaged in a pattern of providing information to law enforcement in return for favors.

There was evidence -- not presented to the jury -- to demonstrate that Fink's *modus operandi* was to provide his assistance first and to collect his favors later, allowing him to testify in cases in which he had yet to receive benefits for his assistance. There was also evidence -- not presented to the jury -- that Fink followed exactly this pattern in Mr. Thompson's case. Fink testified that he was in jail on a parole violation when he first informed the State's investigators about Mr. Thompson's alleged confession, and that he did so only because the facts of the case upset him. He claimed to have asked for nothing in return, and that he had shortly thereafter been released from custody, not because of his assistance in Mr. Thompson's case, but because "the Parole Board found my [parole] violation unfounded." RT 1840-1841. The district court found that Mr. Thompson's trial counsel could have rebutted Fink's testimony by demonstrating that Fink used his initial informing against Mr. Thompson to secure his release from custody and that, in fact, within a two-month span, Fink, in attempts to obtain his release from jail and assistance at his parole hearings, had

informed on two other inmates in addition to Mr. Thompson, stating that all three had confessed to murder. *Id.* at 85a-88a.

At the time of Mr. Thompson's trial, Fink was again in custody, serving time on his parole violation. He testified that all he had asked for in return for his testimony was to serve his remaining twenty-nine days at a state prison. *Id.* at 82a. However, consistent with his *modus operandi*, and contrary to his testimony, Fink asked for and received benefits from Mr. Thompson's prosecutor *after* Mr. Thompson's trial. On August 30, 1984, at Fink's request, the prosecutor wrote to the Board of Prison Terms that "Fink's testimony [against Mr. Thompson] was a crucial part of the People's case" and requested that Fink be released from custody prior to Christmas. EH Exh. 4 at 16. The prosecutor also went to the trouble of testifying on Fink's behalf at Fink's 1984 parole revocation hearing. EH Exh. 4 at 15, 17-18.

Because trial counsel did not present evidence of the numerous benefits Fink had received from law enforcement in return for his cooperation in this and other cases, the prosecutor was able to argue forcefully and repeatedly that, even though Fink was "no Boy Scout," he had asked for and would receive nothing in return for his testimony against Mr. Thompson (RT 2565) and therefore had no reason to lie. RT 2637.

In addition to the evidence about Fink, there was powerful impeachment evidence regarding informant Del Frate that was available to but not presented by trial counsel. Del Frate, contrary to his testimony, had a long history as a police informant, and had received benefits for informing. App., *infra*, 96a. In addition, trial counsel could have presented evidence that Del Frate had a reputation for dishonesty, was considered an unreliable informant, and had lied to Mr. Thompson's jury about the extent of his criminal record. *Id.* at 96a-97a. Finally, trial counsel could have shown that it was not Mr. Thompson who was the source of Del Frate's "knowledge" of the facts about the case (as Del Frate claimed), but rather newspaper articles about the case that were available to Del Frate. [22/]

Because of trial counsel's failure to present readily available evidence to the contrary, the prosecutor was able to get away with falsely telling the jury that Del Frate "hasn't been an informant before." RT 2565.

[22/] Del Frate had told the prosecution that Mr. Thompson told Del Frate that he had stabbed the victim in the neck, chest and "upper torso," in addition to the head. In fact, Ms. Fleischli had only been stabbed in the head, but newspaper accounts, available to Del Frate, had erroneously reported that she had been stabbed in the neck, the chest, and "the upper torso." CT 468-470. Similarly, Del Frate testified that Mr. Thompson told him that he and Leitch put Ms. Fleischli's body "in a shallow grave," a unique turn of phrase that was initially found in police reports and reported in the newspaper. CT 468-475.

The district court had "extreme doubts as to the veracity of Fink's testimony" and found that there was "surely a reasonable probability that had the jury learned the full extent of Fink's informant background, it would have disregarded his testimony. App., *infra*, 91a. The district court found that trial counsel's failure to impeach Del Frate with his informant history added to the cumulative impact of trial counsel's ineffectiveness in defending against the rape charge. *Id.* at 98a.

In addition, at Mr. Thompson's trial, the prosecutor argued that he alone had first raped and then killed Ms. Fleischli to cover up the rape. At Leitch's subsequent trial, the same prosecutor, before the same judge, argued that Leitch had the sole motive and the opportunity to commit the murder, and that he was equally or more culpable than Mr. Thompson. At Leitch's trial, the prosecutor presented Mr. Thompson as significantly less guilty and less culpable than he had at Mr. Thompson's own trial. Refuting any of the theory he had presented at Mr. Thompson's trial, the prosecutor subsequently informed Leitch's probation officer that Leitch was the "motivating force" behind the murder, that Leitch had the motive, that he had bound and gagged Ms. Fleischli and that he may have stabbed her with his knife.

Indeed, at Leitch's trial, the prosecutor sarcastically repudiated his argument against Mr. Thompson at his trial:

> So we have to ask ourselves, why would Mr. Thompson murder Ms. Fleischli alone in an apartment where he lived with no transportation, no means to move the body and wait for Mr. Leitch to come home to be an aide - one witness to the murder of his ex-girlfriend? Is that reasonable or logical? Do you think that is what happened?"

The prosecutor also told Leitch's jury:

> "Who has the motive? Mr. Leitch . . . . and his was the only motive or reason for her demise . . . . It's really the only motive we have in this case, and people have killed for less."

Leitch RT 2563, 2570, 2513.

The prosecutor continued,

> "All the evidence we have incriminates Mr. Leitch, at best equally, and more so than Mr. Thompson."

Leitch RT 2505.

> "You think Mr. Thompson did all this by himself and waiting [sic] for this good guy [Leitch] to come home so he could see him standing over his dead ex-girlfriend . . . ? No, it didn't happen that way."

Leitch RT 2564.

The only reason Mr. Thompson faces execution is because he is convicted, not just of murder, but also of the special circumstance that the murder occurred during his commission of rape. If the prosecution had proceeded at his trial on the same theory that he sponsored at the preliminary hearing at Leitch's trial - that Leitch wanted Ms. Fleischli dead and Mr. Thompson assisted him in killing her - Mr. Thompson would not have been found guilty of capital rape-murder. The prosecution's theory at Leitch's trial, even though it did not totally exonerate Mr. Thompson, made him innocent of capital murder and would have resulted in his conviction of, at most, non-capital first degree murder or second degree murder.

V.

DISPARITY IN SENTENCE

The prosecutor's position, following the convictions of Mr. Thompson and David Leitch, is that Leitch was the "motivating force" behind the murder. The trial judge who presided over both trials believes that "only Leitch had the motive" and "he manipulated Thompson to help him do the killing." Yet, Leitch, sentenced to 15 years to life, is now eligible for parole and waits only for Board of Prison Terms action to be released from prison, while Tom Thompson will be executed on August 5. Such a fundamental disparity in sentence for codefendants found guilty for same crime is

grossly unfair. The Governor can at least allow Mr. Thompson to live on in prison after Leitch walks free from custody.

In addition to the intra-case disparity, there is a great inter-case disparity in sentence. Most of the people on Death Row in Mr. Thompson's position had a history of crime or violent activity prior to the capital offense. Mr. Thompson, on the other hand, had never even been arrested before.

Inter-case sentencing disparity, the disparity imposed on a condemned inmate and that imposed on others who had committed comparable crimes[23/]. The California Supreme Court has decided seven capital cases in which the defendant had been convicted of first degree murder with a rape special circumstance. Thomas Thompson is the only one of the seven to have no prior arrest or prior violent activity. *See People v. Brown*, 40 Cal. 3d 512, 220 Cal. Rptr. 637, 709 P.2d 440; *People v. Ghent*, 43 Cal. 3d 739, 239 Cal. Rptr. 82, 739 P.2d 1250 (1987); *People v. Payton*, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526, 839 P.2d 1035 (1992); *People v. Rowland*, 4 Cal. 4th 238, 14 Cal. Rptr. 377, 841 P.2d 897 (1992); *People v. Clark*, 5 Cal. 4th 950, 22 Cal. Rptr. 689, 857 P.2d 1099 (1993); *People v. Berryman*, 6 Cal. 4th 1048, 25 Cal. Rptr. 867, 864 P.2d 40 (1993).

23/ Commutation Decree, Edward Wesley Brown, May 14, 1947.

Defense investigators have compiled a list of the eighty-seven death row inmates in California who were found guilty of a single special circumstance (other than multiple murder or a prior murder) and who have filed an appellant's opening brief as part of their automatic appeal to the California Supreme Court. Defense investigators reviewed the appellant's opening briefs, the respondent's briefs (if filed), and the California Supreme Court opinion (if issued), and in some cases interviewed current and/or past counsel for these inmates. From the pool of eighty-seven cases, investigators found only two cases (in addition to that of Mr. Thompson) where the defendant had no prior criminal record.[24/] Thus, Mr. Thompson is among the three percent of this pool of death row inmates with no prior criminal record.[25/]

24/ "No prior criminal record" means no arrests, juvenile adjudicated crimes, adult convictions, or prior unadjudicated crimes testified to during the capital trial.

25/ The other two with no prior record are an inmate found guilty of first degree murder with special circumstance of murdering a witness to a crime, first degree residential robbery, forcible rape, and sodomy by use of force, and an inmate found guilty of one court of murder with a robbery special circumstance, one count of attempted murder, and two counts of robbery.

VI

CONCLUSION

The power of clemency has been given to the Governor by the people to assure that justice is done. The factors in favor of exercising that power in this case are compelling. It is respectfully requested that clemency be granted and that Mr. Thompson's sentence be commuted to life in prison without the possibility of parole.

Dated: July 10, 1997

QUIN DENVIR

ANDREW S. LOVE
LAW OFFICES OF COFFIN & LOVE

GREGORY A. LONG
SHEPPARD, MULLIN, RICHTER & HAMPTON

GREGORY A. LONG

Attorneys for THOMAS A. THOMPSON

DECLARATION OF SCOTT POWELL

I, Scott Powell, do hereby declare:

1. I have been employed as a Correctional Officer for the California Department of Corrections for 14 years. I am also an ex-Marine.

2. I began working at San Quentin Prison in 1983. In 1997, I transferred to the California State Prison in Lancaster.

3. In 1986, I met Tom Thompson when I was assigned to Carson Section as a Search and Escort Officer. I later became a tier officer for the 5th tier of Carson Section where Thompson was housed.

4. Tom Thompson prevented the murder of a correctional officer the year Rose Bird and two other justices were removed from the California Supreme Court. During a telephone call between an inmate and civilian (which was intercepted by an officer) the inmate discussed his plan to kill a guard so that he could delay his execution by picking up another case. When Tom discovered this plan he intervened and stopped the hit.

5. Times were very tense on Death Row when the complexion of the court changed and Tom Thompson was instrumental in keeping a lid on the tier.

6. Tom always had a calming effect on the tier. He kept a cool head, never lost his temper and was always respectful toward staff.

7. Inmates and guards respect Tom Thompson. He is in a class by himself. He has no prior criminal history. If anyone could be salvaged from Death Row it would be Tom Thompson.

8. Tom is intelligent and humorous. He has an excellent rapport with inmates and staff.

9. Tom was also an excellent, reliable worker. He got up everyday , went to work and never complained. At one time he was assigned to do janitorial work in Donner Section, a section used as a dumping ground for the worst of the worst. It was run down with no ventilation, poor lighting and infiltrated with rats, wild cats and birds.

10.. Tom is well informed and pays attention to what is going on in the world. I would often stand in front of his cell and talk to him. He would make me a cup of International coffee and without his asking, I would give him a cold coke to drink. He always gave me back the metal can.

11. Tom was in the Armed Service and involved in Veteran activities at San Quentin. He has a deep respect for the military.

EXHIBIT 26

12. I testified on behalf of Skip Farmer during the retrial of his Penalty Phase in Riverside County. The jury in that case sentenced Skip to Life Without the Possibility of Parole. Having known a couple hundred death row inmates, Tom and Skip are the only two I would ever testify for.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 day of July, 1997, at San Bernardino County.

Scott Powell

SCOTT POWELL

DECLARATION OF SCOTT HIXSON

I, Scott Hixson, do hereby declare:

1. I have been employed as a Correctional Officer for the California Department of Corrections since 1985. I am also a member of the Armed Forces and will retire from the Army in two years.

2. I began working as a guard at San Quentin Prison in 1985 and remained at that institution until 1995 when I transferred to the California Rehabilitation Center at Norco.

3. I met Tom Thompson in 1985 when he was part of a six man work crew I was assigned to supervise at San Quentin. The crew worked in Donner Section which was the lock up Unit that took the overflow of inmates from the Adjustment Center. The inmates from the A.C. were very difficult and caused problems for the staff. Without being a snitch, Tom would let me know when trouble was brewing. I would then let the rest of the staff know and the trouble would be quashed.

4. Tom worked as a janitor, clerk and had various other assignments. As a janitor he cleaned out showers that were used by 150 -300 people a day. He also cleaned out holding cages and helped prepare food carts which he cleaned up after inmates were fed. He was the best worker I had. He had initiative and was a perfectionist. He left no job undone. He picked up the slack for other inmates. I could rely on him to supervise the crew for me. Tom and I were both disappointed when work privileges for inmates were revoked.

5. Tom has exceptional relationships with guards and inmates. He is respectful of authority and has never been given a write up for disrespecting a guard. He is on a first name basis with everyone on the row and is the only inmate I allowed to call me by my first name.

6. Tom Thompson is an extraordinary person with a special personality. . He has a calm, collect manner, and deals with others rationally. He is a complex and interesting individual. When you look at Tom and talk to him you like him. You like him for who he is not out of sympathy for where he is. He is very artistic and the best painter on the row.

7. In the summer of 1988, Tom looked out for my safety. He warned me about the possibility of trouble in East Block. I gave this information to my supervisor and was kept out of that area of the prison.

8. I had daily contact with Tom for 2-3 years. During that time I developed a strong bond with him. He is the only inmate behind bars I would trust with my life.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 6 day of July, 1997, at Crestline, California.

SCOTT HIXSON

EXHIBIT 27

STATEMENT OF THOMPSON TRIAL JURORS

We, the undersigned, hereby state:

1. We were jurors in the 1982-1983 Thomas M. Thompson trial, both guilt and penalty phases. Based on the testimony and evidence presented at the trial, we found Thompson guilty of murder, rape, and found the special circumstance of murder during commission of the rape to be true. After hearing evidence at the penalty phase, we voted in favor of death.

2. During Thompson's trial, the prosecutor argued that Thompson had acted alone in raping and killing Ginger Fleischli, and that he had killed her to keep her from telling anyone that he had raped her. In determining that Thompson should be sentenced to death we believed we understood Thompson's role in the killing: that he acted alone and that his roommate, David Leitch, may have assisted in disposing of the body.

3. We have been informed that Leitch was tried after Thompson's trial by the same prosecutor, and that he was convicted of second degree murder, receiving a 15-to-life sentence. We have been told that the prosecutor told the Leitch jury that Leitch had the motive to kill Ms. Fleischli and participated in her murder.

4. The evidence that Thompson raped Ms. Fleischli played a significant role in our decision that Thompson should get the death penalty. Our belief that Thompson raped Ms. Fleischli was based in large part on the coroner's testimony about bruises, the testimony of the deputy sheriff regarding a wrist injury caused by handcuffs, and the testimony of the two informants, Fink and Del Frate. We have been informed that some or all of this evidence was challenged at a hearing in federal court. We are aware that the federal judge found that Thompson's lawyer, Ron Brower, should have challenged this evidence at Thompson's trial, and that the federal appellate court found that Brower's failure to do so would not have made a difference in the outcome of the case.

5. Given that, at best, the prosecutor is uncertain as to what Thompson did and what Leitch did on the night Ms. Fleischli was killed, and that we now have some doubt as to whether Thompson in fact raped Ms. Fleischli, we now believe it is wrong to execute someone when it is not known what role they actually played in the killing. We therefore believe that Thompson's death sentence should be reduced to life without possibility of parole.

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Marian H. Davis

MARIAN H. DAVIS

DATED: 3/25/97

Byron H. Robbins Jr.

BYRON H. ROBBINS, JR.

EXHIBIT 28